

SUPREME COURT OF THE UNITED STATES  
NO. 141, ORIGINAL

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

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for HEARING before HONORABLE MICHAEL A. MELLOY, SPECIAL MASTER, held REMOTELY via Zoom, on OCTOBER 6, 2021, commencing at 11:02 a.m.;

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1                   **JUDGE MELLOY:** All right. We're ready  
2 to resume the cross-examination, but before I do that,  
3 I did realize that I failed to indicate whether the  
4 exhibits that the United States had used yesterday  
5 were going to be admitted. As I understand it, they  
6 are all A exhibits and would be admitted for  
7 demonstrative purposes only. None of them are  
8 substantive exhibits. So unless there's any  
9 objection, the -- let me take that back. United  
10 States did use Joint Exhibit 439, which is the  
11 operating -- excuse me -- the 1906 Convention, and I  
12 think that's already in evidence, but if it isn't,  
13 it's certainly admitted, 439. And then the Spener  
14 Exhibits 1 through 6 will be admitted. As far as the  
15 cross-examination exhibits, there's only one of them,  
16 which is an A exhibit. Again, that's just 439, which  
17 I just admitted. So none of the cross-examination  
18 exhibits will be admitted unless further foundation or  
19 relevance and so on are established. So any question  
20 about that?

21                   **MS. THOMPSON:** Your Honor, just one  
22 question --

23                   **MS. KLAHN:** Question about that -- go  
24 ahead, Lisa. I'm sorry.

25                   **MS. THOMPSON:** Thank you, Sarah.

1           Your Honor, I just wanted to ask about  
2 New Mexico 2304. That one was discussed yesterday,  
3 and my understanding was there was no objection. I  
4 had just failed at the very end when we ended  
5 yesterday to go ahead and move for admission on that  
6 one.

7           **JUDGE MELLOY:** Any objection?

8           **MS. NAJJAR:** No objection from the  
9 United States.

10          **JUDGE MELLOY:** All right. Exhibit 234  
11 -- is it 234 or 2340?

12          **MS. THOMPSON:** 2304.

13          **JUDGE MELLOY:** 2304 is admitted.

14          **MS. THOMPSON:** Thank you.

15          **JUDGE MELLOY:** All right. Then -- go  
16 ahead.

17          **MS. KLAHN:** I just had a question of  
18 clarification on the cross-examination protocol you  
19 described yesterday at the end of the day from my  
20 team. What we understand is that the new process  
21 going forward will be for New Mexico to give Texas or  
22 the United States a list of cross-examination exhibits  
23 it currently knows it's going to use as of the day  
24 that we would send out our binders of witness --  
25 direct witness exhibits to the Special Master, and

1 that if there were subsequent cross exhibits from the  
2 U.S. or Texas that New Mexico identified that would be  
3 on their responsibility to provide them to you. My  
4 question is -- assuming we understood that correctly,  
5 my question is whether we could ask for 24 hours for  
6 New Mexico to give us their list 24 hours ahead of  
7 time, and the reason is, you know, if there's three or  
8 four exhibits, it's not a hardship to pull those and  
9 compile them into the witness binder quickly, but  
10 we've seen so far that there have been more than three  
11 or four, at least for Michelle Estrada-Lopez so if  
12 we'd had to compile those the same day we were sending  
13 out the FedEx to -- to your office, that would have  
14 been difficult to accomplish. So we're just asking  
15 for just a cushion in order to get that done.

16 **JUDGE MELLOY:** I think that's  
17 reasonable. Do you have any objection, Ms. Thompson?

18 **MS. THOMPSON:** No, I don't think. I  
19 just want to understand to make sure we're clear. So  
20 this would be after we follow the current protocol of  
21 cross-examination list four days before the witness,  
22 then Texas would have 24 hours thereafter to print and  
23 send out; is that right?

24 **JUDGE MELLOY:** No. What I'm saying --  
25 what I'm saying is you're going to know before you get

1 Texas or U.S. exhibit lists what you're going to use  
2 for cross-examination. I mean, you're going to know  
3 most of those documents. You don't need their -- you  
4 don't need their list to know what you're going to use  
5 for cross-examination, so what I want you to do is the  
6 same day they exchange the list, which is five days  
7 ahead of time, is that day for you to give them your  
8 list of cross-examination exhibits and then that'll  
9 give Texas and United States 24 hours to compile the  
10 binders and send them out. So the binders will go out  
11 four days ahead of time. You give the  
12 cross-examination list exhibits five days ahead of  
13 time, and if you supplement after that, then it's your  
14 responsibility to get them to me.

15 **MS. THOMPSON:** Understood. Thank you,  
16 Your Honor.

17 **JUDGE MELLOY:** Any question about that?

18 **MS. NAJJAR:** Yes, Your Honor. Just to  
19 clarify, does that mean the United States is only  
20 printing out the United States exhibits or both?

21 **JUDGE MELLOY:** Whoever is putting the  
22 binder together will print them out.

23 **MS. KLAHN:** It would only be U.S. or  
24 Texas exhibits, not New Mexico exhibits. Those would  
25 still be --



1                   **JUDGE MELLOY:** Correct.

2                   **MS. KLAHN:** Because you have the New  
3 Mexico exhibits already, correct?

4                   **JUDGE MELLOY:** Correct. Correct. Only  
5 the U.S. or Texas exhibits. Like, for Esslinger, I  
6 think it's just one exhibit, but I know for others,  
7 certainly for Ms. Lopez-Estrada, it was a very  
8 voluminous amount, so -- but -- but, no, just the  
9 Texas and U.S. exhibits.

10                   **MS. KLAHN:** So that means tomorrow --  
11 normally, today we would have sent you the --  
12 Mr. Reyes -- Jesus Reyes' exhibits, but we can expect  
13 to get New Mexico's cross exhibits that they identify  
14 that are Texas or U.S. exhibits today and then we  
15 would print those out and -- but we'll send them to  
16 you a day late basically because right now we're  
17 sending them five days before we anticipate. We'll be  
18 sending them tomorrow, that'll be four days before.  
19 That's okay?

20                   **JUDGE MELLOY:** That's fine. Just make  
21 sure it's by overnight mail, because we won't have  
22 mail delivery on Monday.

23                   **MS. KLAHN:** Right. Okay.

24                   **JUDGE MELLOY:** Or FedEx delivery.

25                   **MS. KLAHN:** Okay.

1                   **JUDGE MELLOY:** All right.

2                   **MS. KLAHN:** Thank you, Your Honor.

3                   **JUDGE MELLOY:** Any other questions about  
4 that?

5                                   (No response.)

6                   **JUDGE MELLOY:** All right. Then,  
7 Ms. Spener, I think you need to turn your mic on, and  
8 I would just remind you that you're still under oath.  
9 Ms. Thompson, you may begin.

10                   **MS. THOMPSON:** Thank you, Your Honor.  
11 Just one quick clarification before I start the  
12 cross-examination again is you asked yesterday for us  
13 to clarify an exhibit. There was a discrepancy, I  
14 understood, between U.S. Exhibit 380 and New Mexico  
15 2265. It's our understanding that US-380 was admitted  
16 incorrectly marked. The error was on our end and that  
17 we, you know, inadvertently marked New Mexico 2265,  
18 but that has not been admitted yet.

19                   **JUDGE MELLOY:** Okay. So for -- so -- so  
20 380 -- is that a Texas or U.S. exhibit?

21                   **MS. THOMPSON:** U.S. Excuse me. US-380.

22                   **JUDGE MELLOY:** Okay. US-380 is in  
23 evidence. New Mexico 2265 is not?

24                   **MS. THOMPSON:** Correct.

25                   **JUDGE MELLOY:** All right. Okay. The

1 record will so reflect. Okay. Have you had -- just  
2 to follow the complete thought on that, have you had a  
3 chance to look at the other exhibits where it was  
4 indicated that Texas or -- or United States and New  
5 Mexico had -- had identical exhibits with different  
6 exhibit numbers to make sure they are, in fact, the  
7 same?

8 **MS. THOMPSON:** We did, Your Honor, and  
9 we believe that was the only one that had any error in  
10 it.

11 **JUDGE MELLOY:** Okay. All right. Very  
12 good. All right. Thank you. You may proceed.

13 SALLY SPENER,  
14 having been previously duly sworn, testified further  
15 as follows:

16 FURTHER CROSS-EXAMINATION

17 BY MS. THOMPSON:

18 Q. All right. Good morning, Ms. Spener.

19 A. Good morning.

20 Q. So we are going to just pick right up from  
21 yesterday. Yesterday, we were discussing Mexico's  
22 allocation pursuant to the Convention, and just to  
23 confirm, Reclamation calculates Mexico's allocation  
24 each year; that's not calculated by IBWC, right?

25 A. We receive the calculation from Reclamation.

1           Q.    To your knowledge, has the U.S. IBWC ever  
2 protested Reclamation's determination as to the amount  
3 of water allocated to Mexico?

4           A.    I don't know.

5           Q.    During your time with IBWC, though, do you  
6 recall at any time any protests from IBWC?

7           A.    I don't recall any.

8           Q.    And yesterday, you mentioned in one of your  
9 answers, you refer to the D1 and D2 curves. Is it  
10 your understanding Mexico's allocation is based on the  
11 D1 curve, correct?

12          A.    So I have a general understanding of the  
13 process. I rely on the technical guidance from our  
14 water accounting division when it gets into the  
15 specifics of the spreadsheets and that sort of thing.

16          Q.    But do you agree, though, that Mexico's  
17 allocation has historically been based on the D1  
18 curve?

19          A.    So I don't know historically how that has  
20 been handled over time.

21          Q.    What about since your time at IBWC?

22          A.    So as I indicated, I work with our water  
23 accounting division, which deals with the issues on  
24 the spreadsheet and reviews the issues on the  
25 spreadsheet because that is their area of expertise.

1 Q. Well, to your knowledge, Ms. Spener, have --  
2 has the IBWC ever protested the use of D1 curve to  
3 calculate the allocation to Mexico?

4 A. I don't know.

5 Q. But you don't recall any protest that you  
6 know of?

7 A. I don't recall.

8 MS. NAJJAR: Objection; asked and  
9 answered.

10 JUDGE MELLOY: Go ahead. You may  
11 answer.

12 A. I don't recall.

13 Q. (BY MS. THOMPSON) Ms. Spener, since the  
14 treaty was signed, in what years has the U.S. not been  
15 in compliance with the Convention of 1906?

16 MS. NAJJAR: Objection; calls for a  
17 legal conclusion.

18 MS. THOMPSON: Your Honor, this witness  
19 is representing IBWC and has given opinions about  
20 allocations to Mexico in the Convention of 1906.

21 MS. NAJJAR: To clarify, she is a  
22 witness who is employed by IBWC testifying as a  
23 percipient witness in her capacity as a foreign  
24 affairs officer.

25 MS. THOMPSON: Oh, you're on mute, Your

1 Honor.

2 **JUDGE MELLOY:** As I understand the  
3 question, you're asking for compliance issue, and to  
4 me, that's a legal conclusion. If -- if what you're  
5 asking is how many years Mexico got less than 60,000  
6 acre-feet, that's certainly a question you can ask  
7 her, but the fact that Mexico may have gotten less  
8 than 60,000 acre-feet does not necessarily mean they  
9 weren't in compliance with the Convention, so I'm  
10 going to sustain the objection.

11 **Q. (BY MS. THOMPSON) Ms. Spener, let's turn to**  
12 **New Mexico 832. Ms. Spener, do you recognize this**  
13 **PowerPoint?**

14 A. Yes, I do.

15 **Q. And you prepared the PowerPoint?**

16 A. Yes, I did.

17 **Q. And it was prepared for the Law of the Rio**  
18 **Grande Conference; is that right?**

19 A. Yes.

20 **Q. And the date on it is April 23rd, 2021, so**  
21 **fairly recently, correct?**

22 A. It was April 23rd, 2021.

23 **Q. Did you prepare this and present to the**  
24 **conference as part of your job duties?**

25 A. Yes.

1                   **MS. THOMPSON:** Your Honor, I move to  
2 admit New Mexico Exhibit 832, please.

3                   **JUDGE MELLOY:** Any objection?

4                   **MS. NAJJAR:** Yes, Your Honor. To the  
5 extent that certain aspects of this PowerPoint are  
6 irrelevant, we would -- we have a 401 or 403  
7 objection. I'm just not sure how counsel for New  
8 Mexico intends to use it so I would like to preserve  
9 our objections until we see how it's used.

10                  **JUDGE MELLOY:** All right. Why don't you  
11 go ahead, Ms. Thompson, and we'll see what the  
12 relevance is and whether or not the objection on  
13 relevance is -- is meritorious. Go ahead.

14                  **MS. THOMPSON:** Sure.

15                  **Q. (BY MS. THOMPSON)** So, Ms. Spener, in this  
16 presentation, you're describing the two treaties,  
17 Treaty of 1944 and the Convention of 1906; is that  
18 right?

19                  **A.** The presentation discusses recent  
20 developments in Rio Grande management at the  
21 U.S./Mexico border.

22                  **Q.** And if we turn to slide 35, the header on  
23 this one is, "Convention of 1906," correct?

24                  **A.** Yes.

25                  **Q.** And on this slide, it states that IBWC has

1 monthly meetings with stakeholders, and I assume those  
2 stakeholders would include Reclamation and the  
3 irrigation districts; is that right?

4 A. Yes.

5 Q. And during those meetings, the third bullet  
6 down, it references, "Water delivery schedules are  
7 coordinated." Are those coordinated during those  
8 monthly meetings?

9 A. Yes.

10 Q. Do you ever have occasion to attend those  
11 meetings?

12 A. Yes.

13 Q. So would you agree that there's ongoing  
14 communications between the Bureau of Reclamation and  
15 IBWC throughout the irrigation year?

16 A. Yes.

17 Q. And then in Slide 36, again, we're still  
18 under the header of Convention of 1906. You described  
19 that reductions to Mexico and U.S. have periodically  
20 occurred; is that right?

21 A. Yes.

22 Q. And then you state in the second bullet down  
23 that from 2011 to 2020 ranged from 6 to 100 percent.  
24 Would you describe what you mean there?

25 A. Yes.



1 Q. Oh, I'm sorry, Ms. Spener. It maybe didn't  
2 come through. I was asking if you would describe what  
3 you mean by that bullet.

4 A. Yes, I can describe that. From 2011 to 2020,  
5 there were Rio Grande water deliveries to Mexico under  
6 the Convention of 1906, and the amount of water that  
7 was delivered to Mexico ranged from 6 percent of a  
8 full supply of 60,000 acre-feet or a full treaty  
9 allotment of 60,000 acre-feet to 100 percent of the  
10 60,000 acre-foot allotment under the Convention of  
11 1906.

12 Q. And then you state, "Only two full  
13 allocations in the last decade." Again, the full  
14 allocation, I assume you mean there the 60,000  
15 acre-feet, right?

16 A. Yes.

17 Q. And does Mexico ever get more than its treaty  
18 allotment of the 60,000 acre-feet?

19 A. The allotment is never above 60,000  
20 acre-feet, and the allocation is never above 60,000  
21 acre-feet.

22 Q. Do you know if the districts under those same  
23 years where Mexico gets its full allocation, if they  
24 ever receive more than their full allocation?

25 MS. NAJJAR: Objection; foundation.

1                   **JUDGE MELLOY:** Overruled. She can  
2 answer.

3           A. I don't know.

4           **Q. (BY MS. THOMPSON)** If, in fact, Reclamation  
5 released more than a full allocation in a particular  
6 year to the U.S. lands, but Mexico remains capped at  
7 the 60,000 acre-feet, would that mean that the  
8 deliveries for that year were no longer in proportion  
9 to each other?

10          A. That is a hypothetical question so it would  
11 be difficult to answer that without a specific  
12 context, if at all.

13          **Q. You've never considered that context as part**  
14 **of your job duties?**

15          A. The context of -- what was the question  
16 again?

17          **Q. If hypothetically the U.S. districts received**  
18 **more than a full allocation in a particular year, but**  
19 **Mexico is capped at 60,000 acre-feet under its full**  
20 **allocation, if, in fact, that would mean for that**  
21 **year, there was no longer proportional deliveries?**

22          A. The Convention of 1906 provides for an annual  
23 delivery to Mexico of 60,000 acre-feet. It is only  
24 when there are exceptions to that, that a proportional  
25 reduction would apply.

1 Q. So is it your testimony that if the districts  
2 receive more than their full allocation and Mexico is  
3 capped at 60, that's not a violation of the  
4 Convention?

5 MS. NAJJAR: Objection; calls for a  
6 legal conclusion; misstates testimony.

7 JUDGE MELLOY: Overruled.

8 A. Mexico is entitled to receive 60,000  
9 acre-feet per year under the Convention of 1906 and  
10 does not have a right to more than that.

11 Q. (BY MS. THOMPSON) Back to the slide that we  
12 were looking at before, Slide 36, do you recall  
13 specifically which two years the Mexico allocation  
14 was, as you call it, a full allocation?

15 A. I don't recall.

16 Q. I'm going to ask to pull up U.S. Exhibit 61,  
17 please, and turn to Page 16.

18 MS. THOMPSON: And, Your Honor, I'm not  
19 going to ask to admit this entire exhibit. I'm just  
20 going to use this as a demonstrative, please.

21 Q. (BY MS. THOMPSON) Ms. Spener, looking at this  
22 exhibit in front of you, the title is, "Historical  
23 Mexico Allocations." Do you see that?

24 A. Yes.

25 Q. And then do you see there in the bottom, the

1 logo -- do you recognize that logo as the Bureau of  
2 Reclamation logo?

3 A. Yes.

4 Q. And then the last decade here, I think from  
5 your presentation before, was referring to 2011 to  
6 2020, excuse me; is that right?

7 A. I don't recall. I'd have to see the slide  
8 again.

9 Q. I believe the presentation was in 2021, so  
10 when you were referring back to the last decade, would  
11 that generally make sense?

12 A. 2021. I'd have to probably count on my -- my  
13 fingers the ten years, but it would be approximately  
14 that time frame.

15 Q. Okay. It's okay. It was just asking  
16 generally. So on this graph here, would you agree  
17 then that it looks like 2019 and 2017 are those two  
18 years of full allocation because that bar line goes  
19 all the way to the 60,000 acre-feet in those two  
20 years?

21 A. So it's difficult to tell on this what the  
22 specific years are since they're not all indicated,  
23 but it does show two years in that period where it  
24 goes up to the 60,000 acre-foot line.

25 Q. And would that indicate to you if it goes up

1 to the 60,000 acre-foot line that those are, in fact,  
2 the full allocation years?

3 A. Yes.

4 Q. Okay. And then looking back then just by  
5 reference, does it appear to you that from 1979  
6 through 2002, those graph lines also go all the way up  
7 to the 60,000 acre-foot full allocation for Mexico in  
8 those years?

9 A. Again, it's difficult to tell as I'm looking  
10 at this chart right now the precise years when that  
11 occurred, but generally within that time frame that  
12 you've described, yes, it shows the bar lines up to  
13 the 60,000 acre-foot mark.

14 Q. And then we'll have to eyeball this last  
15 question. This is the last one, though, on this  
16 graph. If you could zoom in around 2003, 2004, 2005  
17 time period -- give us one second. Our exhibit is  
18 locked up just for a moment. If you can follow 2003,  
19 that number, and Ms. Ferguson could maybe draw a line  
20 straight down for me, but does it indicate to you that  
21 2003 and 2004, since they don't go all the way up to  
22 the -- the top, that those are, for Mexico, less than  
23 a full allocation year, correct?

24 A. Yes.

25 Q. And then 2005 appears to be another full

1 allocation year; is that right?

2 A. Yes. Assuming that's 2005. Again, it's a  
3 little difficult since that specific year is not  
4 marked.

5 Q. Sure. Ms. Spener, do you have any  
6 information based on your years at IBWC to have any  
7 reason to believe that this graph from Bureau of  
8 Reclamation is inaccurate?

9 A. I don't have any basis on which to make that  
10 determination.

11 Q. And then let's go back then to the slide  
12 presentation, Slide 38. On this page, you mentioned  
13 what we had heard from you yesterday that -- or, no,  
14 excuse me. Starting on the first bullet there, I'll  
15 just go ahead and read it. It says, "Since 1941,  
16 State Department has authorized U.S. IBWC to diverge  
17 from this schedule, based on Mexico's request, via  
18 diplomatic notes." When you say "this schedule," what  
19 are you referring to there?

20 A. I am referring to the schedule in the  
21 Convention of 1906.

22 Q. And then the next bullet says, "In 2012,  
23 Mexico requested deliveries earlier than the U.S.  
24 entities." Why is it that for this presentation,  
25 you're calling out 2012 here?

1           A.     In 2012, Mexico requested deliveries earlier  
2 than U.S. entities.

3           **Q.     And is it your recollection that the U.S.**  
4 **districts were upset by that early release to Mexico?**

5           A.     The -- I would -- I would not characterize  
6 this as an early release to Mexico, so I -- I don't  
7 agree with your -- the basis of your question so that  
8 makes it difficult to respond.

9           **Q.     Do you recall that the 2012 release to**  
10 **Mexico, that there was concerns raised about it by the**  
11 **U.S. districts?**

12          A.     Yes.

13          **Q.     Do you recall whether or not those concerns**  
14 **related to the increased conveyance losses due to the**  
15 **release to Mexico occurring before the release to the**  
16 **U.S. districts?**

17          A.     I recall that there was a concern about  
18 perceived conveyance losses if the deliveries to  
19 Mexico commenced prior to deliveries in the United  
20 States.

21          **Q.     And then the last bullet here, you mentioned**  
22 **that the U.S. commissioner implemented a compromise,**  
23 **delivering later than Mexico requested, but earlier**  
24 **than U.S. requested. Would that have been a request**  
25 **from the U.S. water districts?**

1           A.     Would what have been a request from the U.S.  
2 water districts?

3           Q.     When you refer to "U.S. requested." I'm just  
4 trying to clarify, when you say "U.S. requested," is  
5 that -- are you referring to requests from the water  
6 districts?

7           A.     I am referring, generally, to a request for  
8 deliveries in the United States.

9           Q.     And does that request come from Reclamation  
10 or the water districts?

11          A.     I believe that there were -- there was  
12 information that was communicated to the U.S. Section  
13 about the preliminary plans for the districts to take  
14 delivery of water in accordance with a certain  
15 proposed schedule in 2012.

16          Q.     Do you agree that the timing of deliveries to  
17 Mexico can increase conveyance losses? Excuse me.  
18 Let me rephrase that.

19                   Do you agree that the timing of deliveries to  
20 Mexico can impact conveyance losses?

21          A.     Yes.

22          Q.     And on slide 43, I'll just mention briefly  
23 that I have to say there's a great question on this  
24 page that you posed to law students. The first bullet  
25 here kind of illuminates that issue, which is, "Your



1 client is the El Paso irrigation district, where  
2 farmers have switched to a lucrative new crop used to  
3 produce the annual COVID booster vaccine. This crop  
4 only needs irrigation in August. Mexico wants its  
5 water deliveries February through November in  
6 accordance with the treaty schedule, with the U.S.  
7 charged all conveyance losses. What do you advise  
8 your client?"

9 MS. NAJJAR: Objection; relevance; calls  
10 for speculation.

11 JUDGE MELLOY: Are you asking a question  
12 or are you just reading what's in the exhibit?

13 MS. THOMPSON: I was just reading what's  
14 in the exhibit, and I was not going to ask for a legal  
15 conclusion on that question.

16 JUDGE MELLOY: All right. Then let's  
17 move on.

18 Q. (BY MS. THOMPSON) The only reason I mention  
19 that, Ms. Spener, is because it does illuminate --  
20 because it's a good question, and it illuminates  
21 questions that arise with scheduling deliveries to  
22 Mexico. Do you agree --

23 MS. NAJJAR: Again, objection;  
24 relevance; testifying -- Counsel is testifying.

25 JUDGE MELLOY: First of all, let Ms.

1 Thompson finish the question, and then you can  
2 interject your objection.

3 **MS. NAJJAR:** Apologies.

4 **JUDGE MELLOY:** Restate your question,  
5 Ms. Thompson, and then you can make your objection,  
6 Ms. Najjar.

7 **MS. THOMPSON:** Sure. Thank you, Your  
8 Honor.

9 **Q. (BY MS. THOMPSON)** The only reason I mention  
10 that question, Ms. Spener, is because it does  
11 illuminate -- it's a good question. It illuminates  
12 questions that may arise related to scheduling  
13 deliveries to Mexico. Do you agree?

14 **MS. NAJJAR:** Objection; Counsel is  
15 testifying; relevance; calls for speculation.

16 **MS. THOMPSON:** Your Honor, she posed  
17 this question in a presentation about conveyance --  
18 dealing with conveyance losses, and I was merely  
19 saying that it illuminates that question that has  
20 arisen.

21 **JUDGE MELLOY:** Well, I think she's  
22 already testified that -- that the timing of  
23 deliveries to Mexico can affect conveyance loss, so I  
24 think -- I think we pretty well covered that subject  
25 so we'll move along.

1                   **MS. THOMPSON:** Okay. Thank you, Your  
2 Honor.

3           **Q. (BY MS. THOMPSON)** Now, Ms. Spener, if we  
4 could turn now to New Mexico Exhibit 58.

5                   **MS. THOMPSON:** Sorry, Your Honor. I'd  
6 move to admit the last exhibit we just covered for the  
7 PowerPoint presentation, New Mexico 832.

8                   **MS. NAJJAR:** Excuse me. Ms. Thompson,  
9 which exhibit did you mention? You said New Mexico 58  
10 or did you mean US-58?

11                   **MS. THOMPSON:** What I just moved to  
12 admit, it was for New Mexico 832. It's the exhibit we  
13 just covered through the PowerPoint presentation.

14                   **MS. NAJJAR:** Right. Sorry. I was -- I  
15 was looking at the document on the screen, and it  
16 wasn't identified as a cross-examination exhibit list.

17                   **JUDGE MELLOY:** Well, let's -- let's  
18 cover 832 first, and then we'll talk about this  
19 exhibit. Do you have a continuing objection to 832,  
20 Ms. Najjar?

21                   **MS. NAJJAR:** No, Your Honor.

22                   **JUDGE MELLOY:** 832 is admitted. I was  
23 looking -- what's the next exhibit you're going to --

24                   **MS. THOMPSON:** US-58.

25                   **JUDGE MELLOY:** US-58? Did you identify

1 that as a cross-examination exhibit? I think you did.  
2 Go ahead. I have it in my binder.

3 Q. (BY MS. THOMPSON) Ms. Spener, do you  
4 recognize this memorandum?

5 A. Yes.

6 Q. And this is a memorandum that you wrote; is  
7 that right?

8 A. Yes.

9 Q. And the date is February 5th, 2013, correct?

10 A. Yes.

11 Q. And your initials show up next to your name  
12 on this exhibit; is that right?

13 A. Yes.

14 Q. And this is an official record of the U.S.  
15 IBWC, correct?

16 A. Yes.

17 MS. THOMPSON: Your Honor, I move to  
18 admit New Mexico Exhibit 58, please -- excuse me --  
19 US-58.

20 MS. NAJJAR: No objection.

21 Q. (BY MS. THOMPSON) Ms. Spener, looking --

22 JUDGE MELLOY: Just hold on a second.  
23 Just hold on a second. All right. Exhibit United  
24 States 58 is admitted.

25 MS. THOMPSON: Thank you, Your Honor.

1 Q. (BY MS. THOMPSON) Ms. Spener, looking at the  
2 first paragraph in this exhibit, would you please  
3 review that paragraph and then describe for me the --  
4 the purpose that you state you -- the purpose for this  
5 memorandum?

6 A. So the last sentence, I think, is pretty  
7 clear in stating, "The purpose of this memo is to  
8 recap the historical record regarding how the delivery  
9 schedule of the Convention of 1906 has been viewed and  
10 applied by the U.S. Section of the International  
11 Boundary and Water Commission and the U.S. Department  
12 of State, and to suggest strategies to mitigate future  
13 controversies."

14 Q. And based on the first sentence, it  
15 mentions, "During 2012, controversy arose over the  
16 scheduling of Rio Grande water deliveries." Is that  
17 the same water delivery that you had mentioned before  
18 we talked about in your PowerPoint presentation?

19 A. It relates to the 2012 water deliveries, and  
20 the PowerPoint presentation mentioned 2012, yes.

21 Q. And then on Page 2 of this memo up at the  
22 first -- first full paragraph, I'm going to read a  
23 part of this paragraph into the record here. "U.S.  
24 irrigators, with support of their state officials,  
25 argue the treaty requires such concurrent deliveries,

1 citing this language from the treaty, quote,  
2 deliveries to Mexico shall be distributed through the  
3 year in the same proportions as the water supply  
4 proposed to be furnished from said irrigation system  
5 to lands in the United States in the vicinity of El  
6 Paso, Texas. Therefore, the U.S. irrigators argue  
7 deliveries to Mexico should not precede those to lands  
8 in the United States in the vicinity of El Paso,  
9 Texas." Did I read that correctly?

10 A. Yes.

11 Q. And do you believe that's a correct summary  
12 of what the U.S. irrigators were arguing?

13 A. I believe it is a correct summary of what at  
14 least some of the U.S. irrigators in the Rio Grande  
15 Project believed or -- or stated as their position.

16 Q. And you mention in here, also, that there was  
17 support from state officials. Do you recall who you  
18 were referring to there?

19 A. I know that there were entities from state  
20 agencies and elected officials who had communicated  
21 their support for this position.

22 Q. And if we could look at New Mexico Exhibit  
23 312. Ms. Spener, this is a letter from -- if you look  
24 at the second page, from the Governor Rick Perry,  
25 governor of Texas, to the then-current president,

1 Barack Obama dated April 16th, 2012. It's regarding  
2 the International Boundary and Water Commission water  
3 releases to Mexico. Do you agree with that summary so  
4 far of the letter?

5 A. Yes.

6 Q. Have you seen this letter before, Ms. Spener?

7 A. Yes.

8 Q. And on the second paragraph down, it  
9 states, "This release of water to Mexico, which began  
10 April 1st, 2012, is projected conservatively to result  
11 in a loss of at least 25,000 acre-feet of water to the  
12 El Paso and Elephant Butte water districts, with well  
13 documented projections that the water loss could  
14 double that amount by the time the transfer is  
15 complete." Did I read that correctly?

16 A. Yes.

17 Q. Did the IBWC do its own calculation of  
18 possible conveyance losses related to that early  
19 release to Mexico?

20 A. I don't know.

21 Q. And then the next sentence says, "To put this  
22 in perspective, 50,000 acre-feet is nearly half the  
23 water the City of El Paso normally uses in a single  
24 year. IBWC obviously gave little, if any,  
25 consideration to the fact that Texas is experiencing

1 the worst one-year drought in its history and that  
2 Mexico is already more than 60,000 acre-feet behind in  
3 water deliveries to Texas it is required to make to  
4 the Rio Grande under terms of the 1944 Treaty." Do  
5 you recall, Ms. Spener, if there were other similar  
6 letters like this raising concerns about conveyance  
7 losses as a result of deliveries to Mexico?

8 A. I -- I'm not sure.

9 Q. You don't recall any other letters?

10 A. I -- I recall that there were letters  
11 received about issues associated with Rio Grande water  
12 deliveries in 2012.

13 MS. THOMPSON: Your Honor, based on the  
14 testimony we had today, I'm going to go ahead and move  
15 for admission of New Mexico 312.

16 MS. NAJJAR: No objection.

17 JUDGE MELLOY: Any objection? Sorry.  
18 All right. Exhibit 312 is admitted.

19 Q. (BY MS. THOMPSON) And then if we could go  
20 back then to the memorandum we were looking at before,  
21 which was U.S. Exhibit 58, please. On the second  
22 page, there's a header, "Conclusions Based on Review  
23 of Historical Record." Do you see that section?

24 A. Yes.

25 Q. The second bullet down states, "Conveyance



1 losses for delivery to Mexico are borne by the United  
2 States." Would you describe what you mean by "borne  
3 by the United States"?

4 A. I mean that as the Convention of 1906 states,  
5 the U.S. is to assure delivery to Mexico at the  
6 Acequia Madre of 60,000 acre-feet.

7 Q. When you say they were "borne by the U.S.,"  
8 does that mean those conveyance losses are deducted  
9 from water storage that's allocated to the U.S.  
10 districts?

11 A. So that is a water accounting question, I  
12 believe, but I do know that the conveyance losses are  
13 not deducted from the 60,000 acre-feet that Mexico  
14 receives during a full allocation year to Mexico.

15 Q. And then if we look over to the next page,  
16 Page 3 of the memo, the first full bullet, it states  
17 there that -- and this is, again, under your  
18 conclusions that, "During the 1940s and '50s, the U.S.  
19 government expressed concern that modification of the  
20 treaty schedule meant that Mexico could utilize water  
21 that happened to be in river at times when deliveries  
22 were not being made to Mexico under the modified  
23 schedule. Presumably, this problem was rectified in  
24 the 1990s with the construction of the Rio Grande  
25 American Canal Extension, which was constructed in

1 part to prevent unauthorized withdrawals from Mexico."

2 Did I read that correctly?

3 A. No, you did not.

4 Q. Okay. Where did I make an error?

5 A. You said "withdrawals from Mexico," and it  
6 states, "Withdrawals by Mexico."

7 Q. Thank you. Was there anything else that's  
8 incorrect?

9 A. No.

10 Q. Thank you. When you state here in the second  
11 sentence, "Presumably this problem," what do you mean  
12 by -- what are you referring to as the "problem"?

13 A. I am referring to that Mexico could utilize  
14 water that happened to be in the river at times when  
15 deliveries were not being made to Mexico under the  
16 modified schedule.

17 Q. And which section of the river are you  
18 referring to?

19 A. I am referring to the section of the river,  
20 the international reach of the river.

21 Q. Do you mean between the American Dam down the  
22 Fort Quitman?

23 A. I am referring to the international reach of  
24 the river.

25 Q. Can you describe for me what you mean by

1 that?

2 A. The Rio Grande forms the boundary between the  
3 United States and Mexico, and that is what I would  
4 consider to be the international reach of the river.

5 Q. Does that reach include the section from  
6 American Canal down to Fort Quitman?

7 A. No, it does not.

8 Q. Does it include the reach from the  
9 International Dam down to Fort Quitman?

10 A. Yes.

11 Q. Then when you say the problem was rectified  
12 with construction of the American Canal Extension, the  
13 American Canal Extension was completed in 1999; is  
14 that right?

15 A. I don't know.

16 Q. You say in your memo here that it was "in the  
17 '90s," right?

18 A. Yes.

19 Q. The last bullet on Page 5 of the memo  
20 states, "In 2012, the Mexican Commissioner requested  
21 water deliveries beginning March 26th. U.S.  
22 Commissioner agreed to initiate deliveries on April  
23 5th. In reaching this decision, he considered  
24 concerns expressed by the U.S. irrigators over  
25 Mexico's request to take delivery earlier than U.S.

1 irrigators, who planned to come online in May, a  
2 sediment obstruction in the Rio Grande channel in New  
3 Mexico that needed to be removed to facilitate  
4 deliveries, and the authority granted to the U.S.  
5 Commissioner by diplomatic note to modify the delivery  
6 schedule." Did I get that one right?

7 A. Yes.

8 Q. Thank you. What was meant here when you  
9 say, "A sediment obstruction in the Rio Grande channel  
10 in New Mexico"?

11 A. Exactly what it says.

12 Q. Do you recall where in New Mexico that  
13 sediment obstruction was occurring?

14 A. No.

15 Q. Do you recall how long the sediment  
16 obstruction was in place?

17 A. No.

18 Q. Do you recall -- do you have any recollection  
19 about what you refer to there as a sediment  
20 obstruction?

21 A. No.

22 Q. Does a sediment obstruction potentially  
23 affect conveyance losses?

24 A. That's a hypothetical, so it would be  
25 difficult because there could be a whole range of

1 different types of sediment obstructions.

2 **Q. So just hypothetically, though, could a**  
3 **sediment obstruction impact conveyance losses?**

4 A. So that's hypothetical and -- and without  
5 having more information, it would be difficult to  
6 answer that question.

7 **Q. So is it your testimony you don't know if a**  
8 **sediment obstruction could impact conveyance losses?**

9 A. It is my testimony that the hypothetical  
10 question does not provide enough information to give  
11 an adequate response.

12 **Q. Ms. Spener, would you agree then that based**  
13 **on your historical evaluations, your time at IBWC,**  
14 **that both the timing of deliveries and potentially**  
15 **sediment could impact conveyance losses?**

16 A. Yes.

17 **Q. And then if we continue on with issues on**  
18 **sedimentation, my understanding is that IBWC has**  
19 **responsibilities to maintain the Rio Grande channel**  
20 **from Percha Dam to the American Dam. Is that a**  
21 **correct statement?**

22 A. The U.S. Section of the International  
23 Boundary and Water Commission is responsible for  
24 operating and maintaining the Rio Grande Canalization  
25 Project, which covers the Rio Grande from Percha Dam

1 down to El Paso.

2 **Q. Do those responsibilities for channel**  
3 **maintenance include duties related to flood control,**  
4 **as well as assuring deliveries to Mexico?**

5 **MS. NAJJAR:** Objection, Your Honor;  
6 relevance to the extent this goes to dismissed  
7 Counterclaim 8. The United States would just like to  
8 put a standing objection to that line of questioning.

9 **MS. THOMPSON:** Your Honor, if I may.

10 **JUDGE MELLOY:** I'm going to overrule the  
11 objection. Go ahead.

12 A. Could you please ask the question again?

13 **Q. (BY MS. THOMPSON) Do those responsibilities**  
14 **for channel maintenance include duties related to**  
15 **flood control as well as assuring deliveries to**  
16 **Mexico?**

17 A. The U.S. Section of the International  
18 Boundary and Water Commission operates and maintains  
19 the Rio Grande Canalization Project so that we can  
20 meet our obligations to deliver water to Mexico and  
21 fulfill our flood control responsibilities.

22 **Q. If we could look at New Mexico Exhibit 278,**  
23 **please. Ms. Spener, the document that I just pulled**  
24 **up for New Mexico 278 is titled a, "Capital Project**  
25 **Plan." Could you describe for me what a capital**

1 project plan is for IBWC?

2 A. I am not familiar with this document, so I --  
3 I'm not sure what it entails.

4 Q. Does it appear to be an official record,  
5 though, of the IBWC?

6 A. Yes.

7 Q. In your 22 years with IBWC, have you ever had  
8 to respond to inquiries related to channel maintenance  
9 concerns?

10 A. Yes.

11 Q. And have you ever had to respond to issues  
12 related to sedimentation related to the Rio Grande  
13 Canalization Project?

14 A. Yes.

15 Q. Are you generally familiar that IBWC does  
16 perform some sedimentation removal associated with the  
17 Rio Grande Canalization Project?

18 A. Yes.

19 Q. And you attend the IBWC commission meetings,  
20 and the commissioners of those meetings presumably  
21 discuss expenditures, correct, related to any type of  
22 -- excuse me -- expenditures related to channel  
23 maintenance; is that right?

24 A. That is not necessarily the case, no.

25 Q. Do they on occasion, though, discuss topics

1 related to channel maintenance?

2 A. Yes.

3 MS. THOMPSON: Your Honor, I seek to  
4 move entry for New Mexico 0278, and just on some  
5 general questions on the Rio Grande Canalization  
6 Project stated -- related to duties of the IBWC.

7 JUDGE MELLOY: Any objection?

8 MS. NAJJAR: Yes, Your Honor.  
9 Foundation. Ms. Spener testified that she's not  
10 familiar with this document.

11 JUDGE MELLOY: Well, it is -- but she  
12 also testified it is part of the records of the  
13 Commission so I'll admit the exhibit. 278 is  
14 admitted.

15 Q. (BY MS. THOMPSON) So if we turn to Page 6 of  
16 the exhibit, please. Do you see the section on Page 6  
17 states, "Background and History"?

18 A. Yes.

19 Q. And you referred to earlier the Rio Grande  
20 Canalization Project. I'm going to -- related to  
21 that, that project, I'm going to look and refer you to  
22 specific statements here in this background and  
23 history. The beginning of this section, it  
24 states, "The U.S. IBWC faces many challenges in  
25 operating the Rio Grande Canalization Project" --



1 which is referred to here as RGCP -- "by the most part  
2 is the ongoing sediment delivery from the tributary  
3 arroyos from Percha Dam all the way to Fort Quitman,  
4 Texas has historically been among the most  
5 significant." Did I read that correct?

6 A. Yes.

7 Q. The next sentence states, "Depositing  
8 sediment in the river can result in sediment plugs,  
9 island formation with vegetation, and aggradation that  
10 prevents draining of irrigation return flow that could  
11 result in increased water-surface elevations and can  
12 impact directly levee freeboard and flood conditions."  
13 Did I read that one correctly?

14 A. Yes.

15 Q. I'm going to skip one sentence there  
16 referring to a specific site and go to the next  
17 sentence. "The sedimentation along the Rio Grande  
18 Canalization Project affects the delivery of water to  
19 U.S. and Mexican stakeholders through a reduced  
20 channel and drain return efficiencies." Did I read  
21 that correctly?

22 A. Yes.

23 Q. Does IBWC continue to have sedimentation  
24 removal projects throughout this section of the river  
25 from Percha Dam down to the American Canal?

1           A.    What do you mean by "continue"?

2           **Q.    Are there continued operations where they**  
3 **remove sedimentation?**

4           A.    I'm not sure I understand the question.  
5 Could you restate it, please?

6           **Q.    Sure.  Does the U.S. IBWC continue to perform**  
7 **channel maintenance between Percha Dam and the**  
8 **American Canal?**

9           A.    I don't know.

10          **Q.    Then on Page 7, there's a map.  Does this map**  
11 **show the full extent of the Rio Grande Canalization**  
12 **Project?**

13          A.    Can you zoom in some more?  The labels are  
14 really tiny, and I really can't see.  So that is not a  
15 map of the Rio Grande Canalization Project.

16          **Q.    Does this show the extend of the Rio Grande**  
17 **Canalization Project?**

18          A.    No, it does not.

19          **Q.    And what is it excluding?**

20          A.    There is nothing on this map that indicates  
21 to me what the extent is of the Rio Grande  
22 Canalization Project.

23          **Q.    If we could go back then to the Page 7.**  
24 **Right above the map, there's some text that might help**  
25 **illuminate this area.  It says, "The Rio Grande**

1 Canalization Project extends a detachment of 105.6  
2 miles along the Rio Grande from Percha Diversion Dam,  
3 located 2 miles below Caballo Dam to the American Dam  
4 and from there a distance of approximately 91 miles of  
5 reach from El Paso Texas-Cuidad Juarez, Chihuahua to  
6 Fort Quitman, Texas." Is that a correct description  
7 of the extent of the canalization project?

8 A. No.

9 MS. NAJJAR: Objection, Your Honor.  
10 This witness has testified that she is not familiar.  
11 Additionally, the document speaks for itself.

12 JUDGE MELLOY: Well, I'm going to  
13 sustain. I think there may be a problem with the word  
14 of extent. I think -- are you -- are you asking, Ms.  
15 Thompson, if this shows the geography of the project  
16 or are you asking if it shows what actually is being  
17 done, because I think the witness is answering it as  
18 what is being done as part of the canalization  
19 project, not the geography of the project. But maybe  
20 -- why don't you clarify?

21 MS. THOMPSON: Sure, Your Honor. Thank  
22 you. I was just referring to the geography of the  
23 project from Percha Dam to American Canal.

24 Q. (BY MS. THOMPSON) Is -- did I get that one  
25 right, Ms. Spener?

1           A.    I'm sorry.  Could you ask the question again,  
2 please?

3           Q.    Sure.  I was just trying to determine and  
4 confirm that the map that is labeled map of nine  
5 problem areas from Tetra Tech study, that that is  
6 showing the extent -- the geographic extent, I should  
7 say, of the Rio Grande Canalization Project?

8           A.    So it is -- it appears to be a map of a  
9 segment of the Rio Grande, and the Rio Grande  
10 Canalization Project is in that segment, but I don't  
11 see anything in the map that indicates that that's the  
12 Rio Grande Canalization Project.

13          Q.    Okay.

14          A.    It's just a map of the Rio Grande.

15          Q.    Sure.  Let's move onto U.S. Exhibit 444.  Ms.  
16 Spener, this document is entitled, "River Management  
17 Plan"; is that right?

18          A.    No.

19          Q.    So is the document titled, "U.S. IBWC Rio  
20 Grande Canalization Project River Management Plan"?

21          A.    Yes, I believe so.

22          Q.    And is this an official record of the U.S.  
23 IBWC?

24          A.    Yes.

25          Q.    Do you know, Ms. Spener, if the River

1 Management Plan, if this has been adopted by the U.S.  
2 IBWC?

3 A. Yes.

4 MS. THOMPSON: Your Honor, at this time,  
5 I'd like to submit New Mexico's Exhibit 24 -- excuse  
6 me -- U.S. Exhibit 444.

7 JUDGE MELLOY: Any objection?

8 MS. NAJJAR: No objection.

9 JUDGE MELLOY: All right. U.S. Exhibit  
10 444 is admitted.

11 Q. (BY MS. THOMPSON) If we could turn to Page  
12 71, please. This is Part 4, "Channel Maintenance  
13 Plan." Partway through the second paragraph under  
14 Section 4.1, "Introduction and Authority," there's a  
15 statement that sayings, "The Rio Grande Canalization  
16 Project, RGCP, was constructed between 1938 and 1943,  
17 as authorized by the Act of Congress approved June  
18 4th, 1936, quote, to facilitate compliance with the  
19 Convention between the United States and Mexico  
20 concluded May 21st, 1906, providing for the equitable  
21 division of the waters of the Rio Grande and to  
22 properly regulate and control, to the fullest extent  
23 possible, the water supply for use in the two  
24 countries as provided by treaty." Did I read that  
25 correctly?

1 A. Yes.

2 Q. Do you believe that's a correct statement,  
3 Ms. Spener?

4 A. I don't know.

5 Q. Do you have any reason to believe it's not a  
6 correct statement?

7 A. I don't know.

8 Q. On the next page, Page 72, the second  
9 sentence in the second paragraph states, "U.S. IBWC  
10 must maintain the Rio Grande Canalization Project  
11 channel as stipulated in 22 U.S.C. 277b, which states  
12 that the U.S. IBWC may make improvements to the Rio  
13 Grande Canalization Projects and that such  
14 improvements may include all such works as be needed  
15 to stabilize the Rio Grande between Percha and  
16 American Dam." Is that a correct statement, Ms.  
17 Spener?

18 A. I don't know.

19 Q. And over -- the last question on this  
20 document -- on Page 74, there's a section on this page  
21 called, "Delivery Efficiencies." Do you see that  
22 area?

23 A. Yes.

24 Q. Could you read that section for me?

25 A. Yes, I could.

1           **Q.    Please go ahead.**

2           A.    "Delivery Efficiency. Article 3 of the  
3 Convention states that the U.S. assumes the whole cost  
4 of storing, measuring, conveying, and delivering water  
5 to Mexico. Therefore, it is the obligation of the  
6 U.S. to ensure that water charged to U.S. will be  
7 conveyed efficiently along the RGCP. Additionally,  
8 the 1935 Engineering Report states that the project  
9 will protect U.S. lands in New Mexico and Texas,  
10 quote, from a threatened shortage of water, end quote.  
11 Therefore, efficient conveyance becomes especially  
12 important during low flow and drought periods."

13           **Q.    Ms. Spener, do you agree with the last**  
14 **statement there that "efficient conveyance becomes**  
15 **especially important during low flow and drought**  
16 **periods"?**

17           A.    Yes.

18           **Q.    If we could move on to New Mexico Exhibit**  
19 **2487, please. Ms. Spener, this is a letter dated**  
20 **April 13, 2018, and it's sent to Mr. Edward Drusina.**  
21 **Was Mr. Drusina the commissioner -- the prior**  
22 **commissioner during your time with IBWC?**

23           A.    No.

24           **Q.    When was Mr. Drusina the commissioner for**  
25 **IBWC?**

1           A.    He was commissioner for the IBWC from  
2 approximately January of 2010, to May of 2018.

3           **Q.    And what was your role with IBWC during this**  
4 **time?**

5           A.    For part of the time -- could you please tell  
6 me what you mean by my role?

7           **Q.    Your title.**

8           A.    What does that mean? My -- do you mean my  
9 job title?

10          **Q.    Yes. Thank you.**

11          A.    Yes. So I had two job titles during the  
12 period, Public Affairs Officer, and then, also, my  
13 current position, which can be referred to as either  
14 U.S. Secretary or Foreign Affairs Officer.

15          **Q.    And since this letter is sent to Mr. Drusina,**  
16 **the commissioner of IBWC, is this an official record**  
17 **at the IBWC?**

18          A.    It should be, yes.

19                   **MS. THOMPSON:** Your Honor, I move to  
20 admit New Mexico 2487, please.

21                   **JUDGE MELLOY:** Any objection?

22                   **MS. NAJJAR:** No objection.

23                   **JUDGE MELLOY:** 2487 is admitted.

24          **Q.    (BY MS. THOMPSON) Ms. Spener, this is a**  
25 **letter from a member of Congress, Steve Pearce, again,**



1 to Commissioner Drusina, and he states in the first  
2 paragraph -- excuse me -- the second paragraph, his  
3 concerns about sediment buildup in the river system.

4 Do you see that paragraph?

5 A. Yes.

6 Q. And in your time with IBWC, have you received  
7 other letters also raising issues with concerns  
8 related to sediment buildup in the river system?

9 A. When you say "have you received," could you  
10 please clarify that?

11 Q. Sure. IBWC. Do you know whether or not IBWC  
12 has received letters -- similar-type letters?

13 A. Yes.

14 Q. The second sentence in the second paragraph  
15 states that, "Lack of maintenance results in a buildup  
16 of sediment in the channel and an elevated river bed  
17 that substantially reduces water delivery and surface  
18 water supply by increasing seepage, preventing drain  
19 return flows, and creating dangerous conditions for  
20 potential flooding." To your knowledge, has IBWC  
21 investigated the concerns raised in this letter?

22 A. I'm not aware of any investigation, no.

23 Q. If we can then move back -- we're done with  
24 that letter then. We can move back to the Convention,  
25 which is Joint Exhibit 439, please. I want to take a

1 look at Article 4, please. Ms. Spener, in this  
2 particular article, kind of midway through, it  
3 states, "Mexico waives any and all claims to water of  
4 the Rio Grande for any purpose whatever between the  
5 head of the present Mexican Canal and Fort Quitman,  
6 Texas." Do you agree with that statement?

7 JUDGE MELLOY: Why don't you move on  
8 with the question? I mean, the statement is what the  
9 statement says. What's your question?

10 Q. (BY MS. THOMPSON) So the Mexican Canal is the  
11 Acequia Madre; is that correct, Ms. Spener?

12 A. I'm not certain of that, no. I don't know.

13 Q. Based on this article, do you have any  
14 understanding about what this prevents Mexico from  
15 claiming in this section?

16 MS. NAJJAR: Objection, Your Honor, to  
17 the extent this goes to a dismissed counterclaim, the  
18 United States objects to its relevance.

19 JUDGE MELLOY: I'll overrule the  
20 objection.

21 A. Could you ask the question again, please?

22 Q. (BY MS. THOMPSON) Sure. Based on this  
23 article, do you have any understanding about what this  
24 prevents Mexico from claiming in this particular  
25 section of the river?

1 A. Yes.

2 Q. And what is that?

3 A. As indicated in this article, it states that,  
4 "Mexico waives any and all claims to the waters of the  
5 Rio Grande for any purpose whatever between the head  
6 of the present Mexican Canal and Fort Quitman, Texas."

7 Q. Do you agree, Ms. Spener, that means they  
8 couldn't divert or take water within that section?

9 A. I believe what it means is exactly what it  
10 says, that, "Mexico waives any and all claims to the  
11 waters of the Rio Grande for any purpose whatever  
12 between the head of the present Mexican Canal and Fort  
13 Quitman, Texas."

14 Q. And if Mexico was taking water in that  
15 section, would that be a violation of the Convention?

16 MS. NAJJAR: Objection; calls for a  
17 legal conclusion.

18 MS. THOMPSON: I'm just asking if she  
19 knows.

20 JUDGE MELLOY: The witness may answer.

21 A. So before making a statement about whether  
22 there is a treaty violation, that would involve  
23 careful consideration and discussion with the U.S.  
24 Department of State and the U.S. Section of the IB WC.

25 Q. (BY MS. THOMPSON) Would it be IBWC's

1 responsibility to enforce this particular article  
2 against Mexico?

3 MS. NAJJAR: Objection, Your Honor,  
4 again, any evidence presented as to actions or  
5 inactions of the United States in its dealings with  
6 Mexico was dismissed in a counterclaim, and United  
7 States objects to its relevance here.

8 JUDGE MELLOY: You may answer.

9 A. Could you ask the question again, please?

10 Q. (BY MS. THOMPSON) Would it be IBWC's  
11 responsibility to enforce this particular article  
12 against Mexico?

13 A. This particular article does not state that  
14 there is a particular enforcement mechanism.

15 Q. And so is it your testimony then that IBWC  
16 would not have a responsibility to enforce this  
17 article for or against Mexico?

18 MS. NAJJAR: Your Honor, objection. We  
19 would like to implement a standing objection to this  
20 line of questioning as far as it goes to the actions  
21 or inactions of the United States in its dealings with  
22 Mexico.

23 JUDGE MELLOY: You can have a standing  
24 objection. I'm going to overrule. The witness may  
25 answer.

1 A. That was not my testimony.

2 Q. (BY MS. THOMPSON) So, Ms. Spener, I'm not  
3 sure then that you answered the question. Is -- does  
4 IBWC have a responsibility to enforce this particular  
5 article against Mexico or not?

6 A. The International Boundary and Water  
7 Commission United States and Mexico is responsible for  
8 applying the boundary and water treaties between the  
9 two countries and settling differences that may arise  
10 in their application.

11 Q. Are you aware if during your time at IBWC,  
12 whether or not IBWC has sought to enforce this  
13 particular article against Mexico?

14 A. I don't know.

15 Q. Ms. Spener, just based on your own personal  
16 knowledge, do you know whether or not there are  
17 Mexican wells located adjacent to the section of the  
18 river between American Canal and Fort Quitman?

19 A. I don't know.

20 Q. Do you know whether or not IBWC has ever  
21 investigated whether or not well pumping within the  
22 section or adjacent to the section of the river  
23 between American Canal and Fort Quitman has any  
24 impacts on the surface flows in that section?

25 A. I don't know.

1 Q. Do you know whether or not IBWC is doing any  
2 current investigations on groundwater pumping in  
3 Mexico?

4 A. I am not aware of any current U.S. IBWC  
5 groundwater investigations of -- of groundwater  
6 pumping in Mexico.

7 Q. I'm going to move on to a couple questions  
8 about the 2008 operating agreement. Ms. Spener, you  
9 were with IBWC in 2008, correct?

10 A. Yes.

11 Q. And you reviewed the 2008 operating agreement  
12 for IBWC, is that correct?

13 A. I was one part of a team from the U.S.  
14 Section of the IBWC that reviewed the operating  
15 agreement.

16 Q. And you were reviewing the operating  
17 agreement in order to understand its effects on water  
18 deliveries to Mexico, right?

19 A. I was reviewing the agreement to understand  
20 how it would or would not affect our ability to meet  
21 our treaty obligations to Mexico.

22 Q. And you're qualified to review that operating  
23 agreement for impacts to Mexico because, as the  
24 foreign affairs officer, in applying the boundary and  
25 water treaties between the states, you have expertise

1 in that treaty requirements; is that correct?

2 A. My job as foreign affairs officer is to  
3 understand our rights and obligations under the  
4 treaties and international agreements.

5 Q. But you agree you were qualified, though, to  
6 review the operating agreement, to evaluate it for  
7 impacts to the treaty?

8 A. I was part of an IBWC team that included  
9 water accounting experts that, as a whole, reviewed  
10 the operating agreement.

11 Q. Do you recall during your deposition getting  
12 the question of what qualifications do you hold that  
13 would provide the basis for your analysis on an  
14 operating agreement between Reclamation and the  
15 districts?

16 A. I vaguely remember that, yes. I don't know  
17 that specifically that was the question that was  
18 asked, but I remember the subject coming up.

19 Q. I can pull it up if needed, but would it --  
20 would you agree that your answer then was correct as  
21 it is now, that "because of my role as the foreign  
22 affairs officer in applying the boundary and water  
23 treaties between the two countries, I do have  
24 expertise in the treaty requirements"; is that a  
25 correct statement?

1 A. Yes.

2 Q. And during IBWC's review of the 2008  
3 operating agreement, one area discussed within your  
4 team was the carryover provision in particular; is  
5 that right?

6 A. Yes. That was one of the provisions that we  
7 looked at.

8 Q. If we could turn to New Mexico Exhibit 2338,  
9 please. Ms. Spener, this exhibit, New Mexico 2338,  
10 again is a letter sent from the U.S. Section of IBWC  
11 to Mr. Bert Cortez at the Bureau of Reclamation on  
12 March 5th, 2008; is that correct?

13 A. I'm sorry. Could you state that again,  
14 please?

15 Q. Sure. New Mexico 2338 is a letter sent from  
16 the U.S. Section of IBWC to Mr. Bert Cortez at the  
17 Bureau of Reclamation on March 5th, 2008; is that  
18 correct?

19 A. Yes.

20 Q. And this would, again, be an official record  
21 of the U.S. IBWC, correct?

22 A. Yes.

23 Q. And on the second page, it's signed by  
24 Alfredo Riera, the principal engineer at the IBWC.  
25 Was Mr. Riera part of the team you mentioned before



1 that evaluated the 2008 operating agreement?

2 A. I don't recall.

3 Q. Do you recall your involvement in preparation  
4 of this letter?

5 A. I do not.

6 Q. Were you involved with the preparation of  
7 this letter?

8 A. I do not recall that I was.

9 Q. If we could look at New Mexico Impeachment  
10 Exhibit 2496, please. Ms. Spener, do you see New  
11 Mexico Exhibit 2496 on the screen?

12 A. Yes, I do. I don't believe that I was made  
13 aware that this was an exhibit in this trial that was  
14 going to be brought up for cross-examination.

15 Q. This is an impeachment exhibit, Ms. Spener  
16 and so, therefore, was not provided, but the date on  
17 here is March 3rd through the 7th, 2008; is that  
18 correct?

19 A. Yes.

20 Q. And if you look --

21 A. Well, that's -- I'm sorry. That's not the  
22 date of the memo, no.

23 Q. Sure. Under the subject, that's the date  
24 listed, correct?

25 A. Yes.

1 Q. And in the fifth bullet down -- excuse me.  
2 Let me say that this is a -- at the top, it  
3 says, "Recap of Activities," at the top of the  
4 memorandum, and it's from you to the current  
5 commissioner at that time; is that right?

6 A. Yes.

7 Q. And the fifth bullet down, could you read  
8 that bullet for me?

9 A. "Coordinated with staff and Reclamation to  
10 finalize letter to Reclamation expressing U.S. IBWC  
11 understanding of the 2008 Operating Agreement for the  
12 Rio Grande Project. Reclamation reviewed the draft  
13 letter and had no objections to it being finalized."

14 Q. Ms. Spener, based on the date of this  
15 memorandum of March 3rd to the 7th and the date of the  
16 letter being March 5th, does that indicate to you that  
17 you were involved in working on this particular  
18 letter?

19 A. Yes.

20 Q. We can take that off.

21 MS. THOMPSON: I move to admit New  
22 Mexico Exhibit 2338.

23 JUDGE MELLOY: Any objection?

24 MS. NAJJAR: No objection.

25 JUDGE MELLOY: 2338 is admitted.

1           Q.     (BY MS. THOMPSON) Ms. Spener, if we look down  
2 on this letter, it states that in the second  
3 paragraph, it says, "Based on our recent meetings and  
4 discussions, I want to state the USIBWC understanding  
5 of the agreement as it relates to application of the  
6 Convention of 1906," and then it lists a number of  
7 bullets. I take from that, that this is just  
8 memorializing a meeting that IBWC had with Reclamation  
9 to discuss the 2008 Operating Agreement; is that  
10 correct?

11           A.     I don't know.

12           Q.     Okay. Under the first bullet, there's a  
13 statement here in the second sentence that, "In  
14 determining the proportional reduction applicable to  
15 Mexico, the total amount of water delivered to U.S.  
16 lands during the year includes carryover water will be  
17 considered." Do you see that statement?

18           A.     Yes.

19           Q.     Do you recall why IBWC was concerned with the  
20 carryover provisions in the 2008 Operating Agreement?

21           A.     Yes.

22           Q.     Can you explain that for me?

23           A.     We wanted to make sure that the carryover  
24 provisions, as well as other provisions of the  
25 operating agreement would not affect our ability to

1 meet our obligations to Mexico under the Convention of  
2 1906.

3 Q. And then in response to that letter, New  
4 Mexico Exhibit 2271 -- we may have to, just to confirm  
5 this, flip back and forth a little bit, but under New  
6 Mexico Exhibit 2271, this is a response letter, it  
7 appears, from Bureau of Reclamation dated April 15,  
8 2008, back to Mr. Riera, and the subject is, "2008  
9 Operating Agreement." If you could just take a moment  
10 to look over this, there's a number of bullets listed  
11 and responses to those bullets, and I just want to  
12 confirm that you agree those bullets are from the  
13 original IBWC letter we just looked at, and these are  
14 just responses to each specific bullet from Bureau of  
15 Reclamation?

16 A. So I would need to review the two letters  
17 side by side to state that conclusively, but that is  
18 my general understanding of the letter from  
19 Reclamation.

20 Q. Sure. And because this went to the principal  
21 engineer at the I BWC, this, too, would be an official  
22 record of the IBWC; is that right?

23 A. Yes.

24 MS. THOMPSON: I move to admit New  
25 Mexico 2271, please.

1 JUDGE MELLOY: Any objection?

2 MS. NAJJAR: No objection.

3 JUDGE MELLOY: 2271 is admitted.

4 Q. (BY MS. THOMPSON) Looking at the first page  
5 under that first bullet, there's Italicized comments,  
6 and I should say right above that, right before the  
7 first bullet, there's a statement, "To answer your  
8 specific questions in your letter of March 5th, 2008,  
9 please refer to the following." So I'm just looking  
10 at that first bullet and then the Italicized response  
11 below that, and it states here in the response  
12 that, "The total amount of water used for determining  
13 the water delivered to the United States land during a  
14 year will include both the current-year allocation and  
15 any carryover water applied to lands." So, Ms.  
16 Spener, is it your understanding that if, in fact, EP1  
17 is deciding to carry over part of its water during the  
18 year, that Mexico -- because EP1 is carrying over and  
19 not having it delivered, that that would curtail  
20 deliveries to Mexico at that time?

21 A. So that's a hypothetical question, so that  
22 would be difficult for me to answer. In addition to  
23 which I just want to state that this was 13 years ago.  
24 I don't remember being involved in the preparation of  
25 this letter, and I have not delved into the specifics

1 of the operating agreement and how it would be applied  
2 to Mexico since then. I was part of a team that  
3 looked at it 13 years ago, so I don't know that I'm  
4 going to be able to provide substantive answers to  
5 your -- to your questions about the specifics of it  
6 and how it could be implemented or is being  
7 implemented.

8 **Q. There's a section in this letter, also, that**  
9 **talks about, under the second bullet, a benefit to**  
10 **Mexico because when carryover occurs, it gets 11.6**  
11 **percent of that carryover when it gets delivered. Is**  
12 **that your understanding of the allocation to Mexico**  
13 **when the carryover water is delivered?**

14 A. So I think that there are a variety of  
15 circumstances that could occur where that might not  
16 apply, but, again, it's been a long time since I --  
17 I've looked at this, and it would be difficult for me  
18 to -- to state that with -- with certainty.

19 **Q. When you mention, though, that a variety of**  
20 **circumstances, what did you mean? What type of**  
21 **circumstances?**

22 A. So, for example, Mexico -- Mexico's  
23 allocation under the treaty is 60,000 acre-feet.  
24 That's its full allotment, and it does not have a  
25 right to any volume in excess of that, for example.

1           Q.    If it's in a year of reduction, would you  
2 agree, though, that Mexico gets a portion of the  
3 carryover water if it's delivered to U.S. lands?

4           A.    That is my understanding, yes.  And I --  
5 yeah.  And I -- I guess I would -- I'm just not sure  
6 that those are the words that I would use so that  
7 gives me pause.  And, again, that gets into the  
8 details of the water accounting that I haven't looked  
9 at for 13 years, so I -- I guess I'm just -- I'm not  
10 sure, and particularly the way that it's worded may  
11 not be entirely accurate.  I'm just not sure.

12           Q.    If we look at Page 3, the second bullet down,  
13 this bullet says, "In the event the U.S. users have a  
14 balance of carryover water stored in the reservoir up  
15 to a maximum of 538,833 acre-feet, this balance is not  
16 taken into account when determining the total usable  
17 water available for current-year allocation.  Mexico  
18 is only entitled to a portion of that carryover water,  
19 11.3486 percent, when the U.S. users take delivery of  
20 carryover, provided Mexico's total delivery does not  
21 exceed 60,000 acre-feet."  Ms. Spener, based on that  
22 statement there and then the explanation below it, if  
23 you'd like to review it, does this confirm Reclamation  
24 does not consider carryover in storage when allocating  
25 water to Mexico in a particular year?

1           A.    I'm not sure.

2           Q.    Do you know if, in fact, Bureau of  
3 Reclamation only considers carryover for Mexico's  
4 allocation when it's actually delivered?

5           A.    Again, I think this is getting into the  
6 specifics of the Reclamation allocation process, and  
7 that's something I've not looked at for 13 years, so  
8 it would be very difficult for me to respond with  
9 certainty to this line of questioning.

10          Q.    One last question then, and then we'll move  
11 on.  If, in fact, there's carryover at the max amount  
12 of the 538,833 acre-feet, and that's not considered as  
13 part of the evaluation of whether or not Mexico gets a  
14 full allocation, could that, in fact, mean that Mexico  
15 is reduced in a year when there's, in fact, a lot of  
16 water in storage, like, over a million acre-feet of  
17 storage, because that over 500,000 acre-feet is not  
18 considered?

19          A.    That's a hypothetical question, you know,  
20 related to the details of the allocation process, so I  
21 -- I just -- I can't answer that.

22          Q.    Okay.  We'll move on.  I think we're down to  
23 just one last exhibit I want to ask you about, Ms.  
24 Spener, and it's New Mexico 2278, please.  Ms. Spener,  
25 this document is -- appears to be a PowerPoint



1 presentation, and it's labeled, "United States Section  
2 International Boundary and Water Commission,  
3 Commissioner Briefing, August 15th, 2008." Would you  
4 describe for us what a commissioner briefing is?

5 A. I'm not familiar with this document, so I'm  
6 not sure what was intended by whoever prepared this  
7 document.

8 Q. Would this be an official record, though, of  
9 the U.S. IBWC?

10 A. I don't know.

11 Q. The title here, "New Operation Agreement and  
12 Manual," do you know if that's referring to the 2008  
13 Operating Agreement and Manual?

14 A. That's my understanding, but I guess I'm not  
15 sure what the manual is, though.

16 MS. NAJJAR: Objection, Your Honor, to  
17 this line of questioning. Ms. Spener has testified  
18 that there is no foundation.

19 MS. THOMPSON: Your Honor, if I may.

20 JUDGE MELLOY: Go ahead.

21 MS. THOMPSON: I was just going to say  
22 that I was going to ask Ms. Spener a few questions  
23 about it, and if she, you know, hasn't seen it or  
24 doesn't have any understanding of it, then we can move  
25 on, but I just wanted to explore a couple lines.

1 JUDGE MELLODY: Go ahead.

2 Q. (BY MS. THOMPSON) All right. Ms. Spener, if  
3 you turn to Page 004 in this PowerPoint, there's a  
4 reference to, "Old Procedures." Do you see those  
5 primary three bullets there listed?

6 A. Yes.

7 Q. Is your interpretation of the old procedure,  
8 is that the way the operating agreement -- excuse me  
9 -- the way Reclamation operated prior to the operating  
10 agreement?

11 A. I don't know.

12 Q. Okay. And then on the next page, there's a  
13 reference on 005 to, "IBWC addressed concerns with  
14 operation agreement to Reclamation in a letter dated  
15 March 5th," and then there's a response from  
16 Reclamation April 15th, 2008. Does that appear to be  
17 those two letters we just discussed a few minutes ago  
18 of a letter from IBWC and then a response from Bureau  
19 of Reclamation?

20 A. Yes, I would assume so.

21 Q. Then there's the statement on Page -- Page 2  
22 of this PowerPoint, and it says the, "Districts have  
23 developed a new Operation Procedure and Manual." And  
24 the first bullet says, "Parties of agreement want to  
25 push it through." Did you have the same sense around

1 this time of the operating agreement that the parties  
2 were seeking to, quote, push it through?

3 MS. NAJJAR: Objection, Your Honor;  
4 foundation. Ms. Spener has testified that she is not  
5 familiar with this document, and the document speaks  
6 for itself.

7 JUDGE MELLOY: I'm going to sustain that  
8 objection.

9 Q. (BY MS. THOMPSON) If we move then on to Page  
10 6, if you could just look over the 1 through 5 points  
11 for carryover. Ms. Spener, does this appear to be  
12 summarizing some of the carryover points of concern  
13 related -- that IBWC had raised previously?

14 MS. NAJJAR: Objection, Your Honor,  
15 Ms. Spener has testified she's not familiar with this  
16 document. The document speaks for itself.

17 JUDGE MELLOY: I'm going to sustain  
18 that. Let's move on.

19 MS. THOMPSON: Okay.

20 Q. (BY MS. THOMPSON) Ms. Spener, if you're not  
21 familiar then with the document, then we won't ask any  
22 more questions on that one.

23 MS. THOMPSON: I think then with that,  
24 Your Honor, we don't have any additional cross at this  
25 time.

1                   **JUDGE MELLOY:** All right. Thank you,  
2 Ms. Thompson.

3                   Ms. Klahn, do you have any questions?

4                   **MS. KLAHN:** No, Your Honor, I don't.

5                   **JUDGE MELLOY:** Okay. Any redirect?

6                   **MS. NAJJAR:** Yes, Your Honor.

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

8                   **MS. NAJJAR:** Before we proceed with  
9 redirect, would it be possible to get a short  
10 five-minute bathroom break?

11                   **JUDGE MELLOY:** Well --

12                   **MS. NAJJAR:** Or our 20-minute break?

13                   **JUDGE MELLOY:** We'll take our 20-minute  
14 break right now. We'll break until shortly after 1:00  
15 our time. All right?

16                   **MS. NAJJAR:** Thank you.

17   (Recess.)

18                   **JUDGE MELLOY:** All right. Are we ready  
19 to start back up? It's government redirect.

20   REDIRECT EXAMINATION

21 BY MS. NAJJAR:

22                   **Q.** Ms. Spener, I have a couple questions for  
23 you. Does the U.S. IBWC regulate groundwater under  
24 the Convention of 1906?

25                   **A.** No, we do not.

1           **Q.    Why not?**

2           A.    There is no groundwater treaty between the  
3 United States and Mexico and the Convention of 1906  
4 only addresses the surface waters of the Rio Grande.

5           **Q.    If there's no groundwater regulation under**  
6 **the Convention of 1906, does the U.S. IBWC ever**  
7 **regulate or review groundwater pumping or water use in**  
8 **the Juarez Valley region beyond the delivery of**  
9 **surface water to Acequia Madre?**

10          A.    We have conducted trans-boundary aquifer  
11 studies that involve information exchange with Mexico  
12 to be able to characterize and understand the  
13 trans-boundary aquifer in the El Paso-Juarez area. So  
14 it's studies, but not regulation.

15          **Q.    You were asked about when you provided**  
16 **foreign policy guidance over the delivery schedule in**  
17 **2012. In your words and in your opinion, could you**  
18 **please briefly tell me what occurred at that time?**

19          A.    So in 2012, Mexico wanted to take deliveries  
20 under the Convention of 1906 earlier than the El Paso  
21 County Water Improvement District No. 1 wanted to take  
22 deliveries, and the commissioner, the United States  
23 Commissioner, at the time developed a compromise so  
24 that Mexico -- deliveries to Mexico were initiated  
25 later than they had initially requested, and

1 deliveries to the El Paso County Water Improvement  
2 District No. 1 started earlier than they had initially  
3 planned. So it was a compromise.

4 **Q. In your opinion, how, if at all, does**  
5 **modifying the schedule impact either the United States**  
6 **or Mexico?**

7 A. Certainly in its application in recent years  
8 that I'm familiar with, I believe it has benefitted  
9 both countries, and it does so by concentrating the  
10 water deliveries over a shorter period of time. In  
11 the absence of authorization to diverge from the  
12 schedule, Mexico would be receiving water for ten  
13 months out of the year, February through November, and  
14 by being able to modify the schedule and concentrate  
15 the deliveries, I believe it provides for more  
16 efficient deliveries to the benefit of both countries.

17 **Q. Ms. Spener, you were shown a letter that was**  
18 **offered by Governor Perry. What do you think about**  
19 **that letter?**

20 A. Well, I think the letter lacks context and  
21 maybe did not accurately portray the compromise that  
22 was reached in 2012. It also brought in some  
23 completely unrelated issues under the 1944 Water  
24 Treaty that really had no bearing on our deliveries to  
25 Mexico under the Convention of 1906.

1           **Q. Thank you. Ms. Spener, you were asked about**  
2 **the 2008 Operating Agreement. How, if at all, does**  
3 **the carryover provision of the 2008 Operating**  
4 **Agreement affect the United States obligation under**  
5 **the Convention of 1906?**

6           A. So in our review of the operating agreement,  
7 we determined that it did not negatively impact our  
8 ability to fulfill our obligations to Mexico under the  
9 Convention of 1906.

10           **Q. Ms. Spener, you were also asked about channel**  
11 **maintenance and sedimentation. What department or**  
12 **division at the U.S IBWC oversees channel maintenance**  
13 **and sedimentation?**

14           A. The channel maintenance and addressing  
15 sedimentation falls under the operations department,  
16 specifically the operations and maintenance division  
17 personnel performed that work, and some of that work  
18 was also performed via private contractor.

19           **Q. You were also asked about allocation. What**  
20 **department oversees allocation process from U.S. IBWC?**

21           A. The operations department, through our water  
22 accounting division, is the entity that works most  
23 closely with Reclamation regarding the allocations  
24 under the Convention of 1906, and that is also the  
25 department that is responsible for communicating that

1 information with Mexico.

2 Q. Are you employed by the operations  
3 department?

4 A. No, I am not.

5 Q. To your knowledge, has the United States met  
6 its obligations under the Convention of 1906?

7 A. Yes.

8 MS. NAJJAR: Ms. Spener, I don't have  
9 any additional questions for you. Thank you for your  
10 time.

11 THE WITNESS: Thank you.

12 JUDGE MELLOY: Ms. Thompson, do you have  
13 anything further?

14 MS. THOMPSON: I do not, Your Honor.  
15 Thank you.

16 JUDGE MELLOY: All right. Then the  
17 witness is excused. Thank you for your testimony, and  
18 you're free to go, Ms. Spener. Thank you very much.

19 THE WITNESS: Thank you, Your Honor.

20 JUDGE MELLOY: Ms. Klahn, is the United  
21 States ready -- excuse me -- Texas ready to call the  
22 next witness or do you need a few minutes?

23 MR. SOMACH: This is Stuart Somach, Your  
24 Honor. I think we're ready to call the next witness.

25 JUDGE MELLOY: All right. Does anybody



1 need any -- any -- are there going to be any other  
2 changes, either for the United States or for New  
3 Mexico in connection with this witness?

4 **MS. NAJJAR:** Yes, Your Honor.

5 Mr. Dubois will be sitting for the United States.

6 **JUDGE MELLOY:** Okay. And are you going  
7 to be taking this witness, Ms. Thompson?

8 **MS. THOMPSON:** Yes, Your Honor.

9 **JUDGE MELLOY:** Okay. All right. Is  
10 Mr. Dubois available? Is he ready to go?

11 **MS. NAJJAR:** Yes.

12 **MR. DUBOIS:** Yes, Your Honor, I am.

13 **JUDGE MELLOY:** All right then.

14 Mr. Esslinger, would you raise your right hand,  
15 please? Do you swear or affirm that the testimony  
16 you're about to give will be the truth, the whole  
17 truth, and nothing but the truth?

18 **THE WITNESS:** I do.

19 **JUDGE MELLOY:** Would you please state  
20 and spell your name for the record?

21 **THE WITNESS:** My name is Gehrig  
22 Esslinger, G-E-H-R-I-G, E-S-S-L-I-N-G-E-R, and I go by  
23 Gary.

24 **JUDGE MELLOY:** I'm going to ask you just  
25 a couple questions we're asking each of the witnesses.

1 First of all, is there anyone in the room with you?

2 THE WITNESS: No, Your Honor.

3 JUDGE MELLOY: Do you have any materials  
4 with you that you will be referring to during your  
5 testimony?

6 THE WITNESS: I do have a booklet  
7 provided by the State of Texas that has the exhibits.

8 JUDGE MELLOY: Anything other than that?

9 THE WITNESS: No, Your Honor.

10 JUDGE MELLOY: Okay. And I just want to  
11 advise you that during your testimony, you're not  
12 allowed to have access to any type of communication  
13 device, including cellphones, computers, or anything  
14 that would have e-mail, texting, or other  
15 communication capabilities.

16 All right. I think we're ready to go  
17 then. Mr. Somach, you may proceed.

18 MR. SOMACH: Thank you very much, Your  
19 Honor.

20 GEHRIG ESSLINGER,  
21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. SOMACH:

24 Q. Mr. Esslinger, can you summarize your  
25 intended testimony and scope of your intended

1 **testimony for today?**

2 A. I plan on presenting the history of the  
3 Elephant Butte Irrigation District and also provide my  
4 experience as how this district has operated from the  
5 time that I've been manager, as well as the time  
6 before I was manager.

7 **Q. Do you intend to talk about relationship with**  
8 **the Bureau of Reclamation?**

9 A. I intend to talk about the relationship with  
10 the Bureau and other agencies that I deal with on a  
11 daily basis.

12 **Q. Okay. Now, I guess this has -- this has been**  
13 **obvious, but are you employed by the Elephant Butte**  
14 **Irrigation District?**

15 A. Yes, sir, I am employed by the Irrigation  
16 District.

17 **Q. And how long have you been employed by the**  
18 **Elephant Butte Irrigation District?**

19 A. 43 years.

20 **Q. And what is your job at the Elephant Butte**  
21 **Irrigation District?**

22 A. I was appointed by the Board to be the  
23 treasurer/manager of Elephant Butte Irrigation  
24 District.

25 **Q. And what is the role, what is the job of the**

1 **treasurer/manager of the Elephant Butte Irrigation**  
2 **District?**

3 A. I oversee the operations and administration  
4 of the -- of the District, as well as take the  
5 directives from the board of directors to ensure that  
6 the District runs properly and is managed properly.

7 **Q. If we could put up what's been marked as**  
8 **Esslinger Gary Demo Exhibit No. 1.**

9 **JUDGE MELLOY:** Mr. Somach, let me  
10 interrupt for just a moment here. I failed to  
11 indicate at the outset of this testimony the exhibits  
12 that will be admitted without further foundation or  
13 authenticity -- identification. That would be Texas  
14 Esslinger Demo Exhibit 1 for demonstrative purposes  
15 only, Texas 139, Joint Exhibit 426, Joint Exhibit 444,  
16 Texas 698. Now, I understand you will be also using  
17 exhibits that were introduced by -- with -- with  
18 different numbers on them, including New Mexico 2373,  
19 US-367, and US-511, all of which were admitted under  
20 those numbers previously?

21 **MR. SOMACH:** Yes. That's -- that's  
22 correct, Your Honor.

23 **JUDGE MELLOY:** All right. Okay. You  
24 may proceed.

25 **Q. (BY MR. SOMACH) Are you familiar with what**

1 **has been marked Demonstrative Exhibit No. 1?**

2 A. Yes.

3 **Q. Okay. What is Demonstrative Exhibit No. 1?**

4 A. It's the organizational chart of Elephant  
5 Butte Irrigation District.

6 **Q. Okay. Now, across the top, it says, "Board  
7 of Directors." How many directors are there?**

8 A. There are nine board of directors.

9 **Q. And it's marked under the names of the  
10 current directors precinct. What are precincts?**

11 A. Precincts are the areas in which those board  
12 members represent the farmers of the irrigation  
13 district. The first two precincts, 1 and 2, are in  
14 the Rincon Hatch Valley, and the other nine -- the  
15 other seven, excuse me, are in the Mesilla Valley.

16 **Q. Are board members elected at large or are  
17 they elected by voters within these respective  
18 precincts?**

19 A. They are voted in at large.

20 **Q. Do they have to live within the precinct that  
21 they represent?**

22 A. Yes, they do. You have to be over 21 years  
23 old and -- and own land in that precinct.

24 **Q. Now, below the board of directors is the  
25 treasurer/manager; is that correct?**

1           A.     That's correct.

2           **Q.     Okay.  Do you oversee various departments of**  
3 **the Elephant Butte Irrigation District?**

4           A.     Yes, sir.  I've broken out the departments by  
5 divisions, three divisions.

6           **Q.     Can you describe those divisions and what is**  
7 **done in those divisions?**

8           A.     The Maintenance and Engineering Division is  
9 made up of our maintenance department, our service  
10 department, and where our equipment needs are  
11 necessary, as well as what equipment operators work in  
12 that area.  The Engineering Department is a separate  
13 department where we have our land records, as well as  
14 our engineering design and our software that we  
15 utilize for mapping and identifying parcels of land.

16          **Q.     What about the Water Division?**

17          A.     The Water Division is made up of three areas,  
18 the irrigation system, which is our operation where we  
19 -- where our ditch riders and our assistant water  
20 masters maintain the operation of our canal system.  
21 The Groundwater Department is headed up for -- by our  
22 director there for groundwater resources and  
23 management, and our SCADA System is our IT department,  
24 our hydrology department that maintains the -- the  
25 radiotelemetry and the SCADA supervisory control of

1 our project.

2 **Q. Now, SCADA is an acronym?**

3 A. SCADA is an acronym for supervisory control  
4 and data acquisition.

5 **Q. Does that SCADA system monitor surface water**  
6 **use within the district?**

7 A. It monitors surface water, floodwater,  
8 groundwater, and diversions, as well as monitors  
9 deliveries to farms.

10 **Q. And administration, can you quickly describe**  
11 **what -- what that is about?**

12 A. We have a human resource department that --  
13 and a safety department for our employees to be hired,  
14 and we also have a finance department, as well as a  
15 purchasing agent and an assistant finance officer.

16 **Q. So treasurer/manager oversee all of those**  
17 **departments?**

18 A. Yes, sir.

19 **Q. And is the treasurer/manager the custodian of**  
20 **records for the Elephant Butte Irrigation District?**

21 A. Yes, sir.

22 **Q. Is the treasurer/manager within the district**  
23 **the employee who interacts with outside agencies?**

24 A. Yes, sir. I'm the public affairs  
25 representative for the board of directors and for the

1 district.

2 **Q. And what -- what do you do as the public**  
3 **affairs officer?**

4 A. I interact with the federal agencies that are  
5 represented within the project. I also react --  
6 interact with congressional legislators. I've  
7 testified in Congress before on issues that relate to  
8 EBID. I also interact at the state level with  
9 legislators with the different offices under the  
10 state, state engineer, interstate streams, and I also  
11 cooperate and affiliate myself with the local  
12 counties, city, and civic clubs and that sort of  
13 thing, as well, to represent EBID's position.

14 **Q. Is -- you can take this slide down now.**  
15 **Is EBID a governmental entity?**

16 A. We're -- we're a political subdivision of the  
17 state that occurred in 1916 when the water users  
18 organization was formed, and at that point in time,  
19 the Elephant Butte Irrigation District took over.

20 **Q. What year was that again that the -- the**  
21 **district was formed?**

22 A. 1918.

23 **Q. And are there New Mexico -- you indicated**  
24 **that they're a creature of New Mexico, subunit of New**  
25 **Mexico. Are there statutory provisions that -- that**



1 **facilitated the formation of the irrigation district?**

2 A. Yes, sir. When the district was formed, it  
3 -- the legislator of State of New Mexico introduced a  
4 special district statutes that included irrigation  
5 districts.

6 **Q. And the Elephant Butte Irrigation District**  
7 **was formed under one of these special statutes?**

8 A. Yes, sir.

9 **Q. Are you familiar with those statutes?**

10 A. I'm not -- I'm familiar with them, yes, sir,  
11 but I'm not a lawyer, so I -- if anything comes up  
12 that relates to one of those statutes, I usually defer  
13 to my counsel.

14 **Q. Do you know whether or not those statutes**  
15 **were or are consistent with Reclamation law?**

16 A. Yes, sir, they are.

17 **Q. Can you explain what you mean by consistent**  
18 **with Reclamation law?**

19 A. Well, the Reclamation law was in place in  
20 1902. In 1905, the Rio Grande Project was authorized,  
21 and certainly up until that point of 1918, a water  
22 users organization and Elephant Butte Irrigation  
23 District were dependent upon the Reclamation law that  
24 was in place for a project such as Elephant Butte. We  
25 were the second-largest -- second-largest project

1 built at that time.

2 Q. Do you know what the purposes of the  
3 formation of the Elephant Butte Irrigation District  
4 was when it was formed?

5 A. It was formed as a single-purpose project for  
6 agriculture only.

7 Q. That's -- that's the Rio Grande Project, what  
8 you're talking about?

9 A. Yes, sir.

10 Q. What -- what was Elephant Butte Irrigation  
11 District formed for?

12 A. It was to take over the -- the Water Users  
13 Organization and then begin working with the  
14 Reclamation project -- the Reclamation service to take  
15 over the project.

16 Q. Was -- at this point in time, did -- did the  
17 Elephant Butte Irrigation District operate the  
18 Project?

19 A. No, sir.

20 Q. What did it do with respect to the Project?

21 A. We were primarily a financial institution  
22 collecting the assessment that was sent out to the  
23 farmers who were repaying the contract of the  
24 construction of Elephant Butte and all of its  
25 appurtenances so primarily, the District's function

1 was to collect and deal with the contracts in place  
2 with the Bureau of Reclamation.

3 Q. And who operated and maintained the  
4 Reclamation project in -- at the point of formation of  
5 the District?

6 A. The Bureau of Reclamation.

7 Q. Do you attend all the board meetings of the  
8 Elephant Butte Irrigation District?

9 A. Yes, I do.

10 Q. And I think you said you've been employed by  
11 the Elephant Butte Irrigation District for 43 years.  
12 How long have you been the treasurer/manager of the  
13 Elephant Butte Irrigation District?

14 A. I became the -- about 33 years ago, was 33  
15 years ago.

16 Q. And did you hold any positions with the  
17 Elephant Butte Irrigation District before you became  
18 the treasurer/manager of the District?

19 A. Yes, sir. I was hired in 1978 as an  
20 inventory warehouseman.

21 Q. I want to come back to -- to that in a  
22 moment, but I -- I want to ask you one simple question  
23 -- I hope this is a simple question anyway. The title  
24 is treasurer/manager. I think manager is  
25 self-explanatory, but what do you do as treasurer of

1 **the -- of the District?**

2 A. I oversee the financial department that I  
3 spoke of earlier, and I believe at the time, because  
4 my position was appointed by the Board and I oversaw  
5 the budget, then that's why I became the treasurer.  
6 The other three elected officials are the chairman,  
7 the vice chair, and the secretary, and those are held  
8 by board members.

9 Q. Okay. So you indicated that you had a -- a  
10 position. What year -- do you recall the year that  
11 you were first employed with the District?

12 A. 1978.

13 Q. And, again, what was the title you had at  
14 that point in time?

15 A. Inventory warehouseman.

16 Q. And -- and what did you do as inventory  
17 warehouseman?

18 A. I was hired to take care of the -- or oversee  
19 the transition from the Bureau of Reclamation to the  
20 irrigation district, all facilities, all buildings,  
21 all service shops, equipment, supplies, and materials,  
22 and I was to report that inventory to both -- both  
23 parties.

24 Q. I want to come back to the question of  
25 transition, but briefly, can you explain what you mean

1 by "transition"?

2 A. The Elephant Butte Irrigation District was  
3 taking over the operation and maintenance of the  
4 facilities, the canals and laterals and drains, and  
5 they hired me to begin to take inventory of the -- the  
6 buildings and the equipment and the supplies that were  
7 being transferred or could be transferred from the  
8 United States hands into the hands of a  
9 farmer-operated district.

10 Q. And how long were you in the role you just  
11 described?

12 A. Two years.

13 Q. And did you become the manager -- well, no,  
14 that -- you couldn't have because the math doesn't  
15 work out right. What did you do next?

16 A. Well, once we inventoried and we understood  
17 what we were going to acquire from the Bureau of  
18 Reclamation that we could use, we then realized that  
19 we needed to purchase a lot of the supplies, the  
20 equipment and materials to run the District and so I  
21 was appointed or promoted to purchasing agent for the  
22 District.

23 Q. And what were you purchasing at that point in  
24 time?

25 A. Equipment, office furniture, just about

1 everything that a new company would have to undertake  
2 to get set up for this transition that was taking  
3 place.

4 **Q. What did you do after that?**

5 A. Becoming familiar with what the needs at the  
6 District were from Hatch all the way down to the south  
7 valley. I was very familiar with the needs of the  
8 operations department, and also the maintenance  
9 department, so I was appointed the maintenance chief  
10 of Elephant Butte Irrigation District after about two  
11 years.

12 **Q. And just briefly, what did you do in that**  
13 **role?**

14 A. My job there was to ensure that the canals  
15 operated efficiently and the water that was being  
16 released and diverted into our canal system was  
17 delivered as -- as best it could in -- in -- in an  
18 efficient time and -- and a timely manner, as well as  
19 a very economic manner, as well.

20 **Q. At -- at the time you were the maintenance**  
21 **chief, was -- who operated the Reclamation facilities**  
22 **within the District?**

23 A. Could you repeat that question?

24 **Q. Yeah, sure. During the time you were**  
25 **maintenance chief -- you were talking about a**

1 transition. I'm just trying to understand. Was the  
2 District operating facilities within the district that  
3 you were maintaining?

4 A. Yes.

5 Q. Were these Reclamation facilities?

6 A. Yes.

7 Q. So these were facilities that were related to  
8 the Rio Grande Reclamation Project; is that correct?

9 A. That's correct.

10 Q. Okay. Did you become treasurer/manager after  
11 that job?

12 A. No, sir.

13 Q. Okay. What other job did you hold?

14 A. I was the acting -- or the assistant manager,  
15 along with being the maintenance chief. I had a dual  
16 role for a period of time. But after a while, I was  
17 the assistant manager to the manager.

18 Q. Okay. And what did you do as assistant  
19 manager?

20 A. I was overseeing the operations, the  
21 maintenance, and the general administration  
22 departments for the manager. I dealt with the daily  
23 functions of delivering the water and ensuring that  
24 the -- the system was operating as efficiently as it  
25 could.

1           **Q.    What was the manager doing at this time?**

2           A.    The manager was in -- in a state court  
3 hearing.

4           **Q.    What did that hearing deal with?**

5           A.    It dealt with a lawsuit filed in El Paso  
6 against the State of New Mexico over groundwater  
7 wells.

8           **Q.    And can you tell me what -- what the dispute  
9 was over?  It was over groundwater wells, but could  
10 you be more explicit about what the suit was about?**

11          A.    The City of El Paso Public Service Board  
12 wanted to come into New Mexico and -- and drill 266  
13 wells in the Mesilla Valley and about 60 wells in  
14 Chaparral, New Mexico.  That case went into State  
15 Court.

16          **Q.    And was the District involved in that case?**

17          A.    Not in the beginning, but certainly a few  
18 years into that case, the district was very involved  
19 with that lawsuit.

20          **Q.    Did the district oppose the proposed wells?**

21          A.    Yes.

22          **Q.    And what was the District's concern about  
23 these proposed City of El Paso wells?**

24          A.    Well, the farmers in the valley had the  
25 ability to pump groundwater from the Mesilla Valley



1 and -- or within Mesilla Valley, excuse me, and they  
2 were concerned that this additional well field would  
3 interfere with their ability to pump groundwater in  
4 the future.

5 **Q. Was there any concern about the impact of**  
6 **these El Paso wells on surface water supply?**

7 A. Yes, sir.

8 **Q. What was that concern?**

9 A. That there would be a need to supply more  
10 surface water to the farms in lieu of the pumping that  
11 would be required -- that would be utilized by the  
12 City of El Paso in their pumping operation.

13 **Q. Was there any concern about the direct effect**  
14 **of groundwater pumping on surface water?**

15 A. Yes.

16 **Q. What was that concern?**

17 A. That the -- the surface supply would be  
18 depleted, as well as the groundwater supply for the  
19 farmers in the Mesilla Valley.

20 **Q. Do you know what the result of that lawsuit**  
21 **was?**

22 A. It was finally dismissed in about 1992.

23 **Q. Do you know whether or not the City of El**  
24 **Paso ever constructed these wells?**

25 A. No, they did not.

1           **Q.    Is there a district in Texas that also**  
2 **receives water from the Reclamation project?**

3           A.    Yes.  It's the El Paso County Water  
4 Improvement District No. 1.

5           **Q.    And do you, as treasurer/manager, have to --**  
6 **or do you ever interact with that District?**

7           A.    As manager to manager, I interact with --  
8 with Mr. Chuy Reyes, Jesus Reyes from their district.  
9 Our board has also interacted through meetings, and  
10 certainly from time to time, there is correspondence  
11 exchanged between the two districts.

12          **Q.    When you say the boards meet, are these joint**  
13 **meetings of the two boards of directors?**

14          A.    Well, we have to fall under the -- the open  
15 meetings, and we can only have a quorum, so we usually  
16 attend it in the form of committees, but it is a  
17 representation of their board and our board, yes, sir.

18          **Q.    Now, you were the assistant manager.  When**  
19 **did you become manager?**

20          A.    The manager of Elephant Butte Irrigation  
21 District at the time passed away in 1987, and it was  
22 -- I was acting manager for a while and then I became  
23 the manager in 1988.

24          **Q.    And you've been the manager ever since 1988?**

25          A.    Yes, sir.

1 Q. Okay. Did you have any involvement with EBID  
2 prior to the time you were employed by EBID?

3 A. Yes.

4 Q. What was that involvement?

5 A. I grew up on a farm within EBID, and I worked  
6 the farm with my father.

7 Q. So the farm was in the boundaries of EBID?

8 A. Yes.

9 Q. When you were on the farm -- what -- what  
10 years were those? You know, not to divulge too much  
11 about your age, but what years were those?

12 A. It was between the '60s and the '70s.

13 Q. Okay. In that period of time. To your  
14 recollection, did the Elephant Butte Irrigation  
15 District deliver water to that farm?

16 A. No, sir.

17 Q. Who delivered water to the farm in those --  
18 in those years?

19 A. The Bureau of Reclamation.

20 Q. I want to come back to -- to that in a  
21 moment, but do you have an engineering background?

22 A. No, sir, I don't.

23 Q. Who does the technical engineering for the  
24 Elephant Butte Irrigation District?

25 A. Within the Department of Engineering, we have

1 a professional engineer that handles the design and  
2 engineering functions that are necessary to keep the  
3 -- the -- the District functioning. We also hire an  
4 outside consultant to also deal with the hydrology of  
5 the system in conjunction with our internal engineer.

6 **Q. And who is the consultant that -- that the**  
7 **District has or uses?**

8 A. Dr. Phil King.

9 **Q. Do you know how long he has been the -- a**  
10 **consultant for Elephant Butte Irrigation District?**

11 A. 20 years.

12 **Q. What is your educational background?**

13 A. I have a bachelor of science degree in  
14 business administration. I graduated from Northern  
15 Arizona in 1973.

16 **Q. I want to focus a little bit -- I want to**  
17 **change the focus a little bit and talk about some of**  
18 **the functions of the District. Does EBID have a flood**  
19 **control function?**

20 A. Yes, we do.

21 **Q. And what is EBID's involvement in flood**  
22 **control?**

23 A. In the late '50s, there was still a certain  
24 amount of floodwater entering in below Caballo and  
25 interfering with the farmland and the -- and the

1 safety of the community, so Elephant Butte Irrigation  
2 District entered into sponsorship of 27 dams, flood  
3 control dams, with -- with the soil conservation,  
4 which is now NRCS, the Natural Resource Conservation  
5 Service. And so those flood control dams, the outflow  
6 from those dams that hold water for no less than 96  
7 hours often flow directly into our canal system or our  
8 drainage system, so we become very responsive to the  
9 flood events that happen in the valley.

10 **Q. Does the district ever use any of that**  
11 **floodwater for irrigation?**

12 A. Yes, we have in the past.

13 **Q. Is that accounted for as project water when**  
14 **it's used as floodwater?**

15 A. Not if it's -- if it's intercepted in our  
16 canals and -- and drainage system, but if it hits the  
17 bed of the river, then it's project water.

18 **Q. Okay. So that's -- that's the division of**  
19 **water that's -- that's diverted from the river as**  
20 **project water, but the water you've just described as**  
21 **floodwater, to the extent it gets into your canals,**  
22 **it's not considered project water; is that what you're**  
23 **saying?**

24 A. That's correct.

25 **Q. Okay. Does the District have a role in**

1 **drainage?**

2 A. Yes, we do.

3 **Q. What is drainage?**

4 A. It's the act of trying to reduce the -- the  
5 amount of water that's on the land and drain it to a  
6 place that takes the water off the land.

7 **Q. What is the reason for wanting to drain**  
8 **lands?**

9 A. Well, back in the 1920s, when this project  
10 was being developed, the water table rose, there was  
11 alkaline soil to deal with, and there was a serious  
12 crisis of water logging in the land that was to be  
13 used in the production of agriculture.

14 **Q. What -- what is water logging?**

15 A. Water logging is just, again, the water table  
16 rising to the point that it gets into the root zone of  
17 a plant or a tree, and it kills it. It just -- the  
18 water just sits there so you need some sort of  
19 mechanism to drain that water off the land.

20 **Q. I think you mentioned alkaline soils. What**  
21 **is that?**

22 A. That is another name for salt in the soil  
23 where it -- if it remains in the soil and it's not  
24 leached out of that soil, then the root zone is -- is  
25 harmed by the salt in that soil and you don't get the

1 yield or the production off of the plant that is  
2 growing.

3 **Q. Now, you used a phrase there, leached out of**  
4 **the soil. What does that mean?**

5 A. Well, the process of irrigating here is flood  
6 irrigation at that time. So when the fields were  
7 being flooded, then there is, of course, the plant  
8 takes some up into the atmosphere. There's  
9 evaporation, then there's -- the plant also takes  
10 water from the root zone, and then there's water that  
11 continues down through the -- through the soil, and  
12 that pulls the -- the water and the salts from the  
13 soil and leaches it back into the drains that were cut  
14 at that time.

15 **Q. And what -- what is the EBID role in -- in**  
16 **drainage? What does it physically do?**

17 A. Well, it was the board of directors that went  
18 to the Bureau of Reclamation in the 1920s and said we  
19 need a drainage canal system in this valley that would  
20 do exactly what I described. It would take the -- the  
21 -- the water-logged land, reduce it down to a point  
22 where the farmland would be productive, and it would  
23 pull the salts out of that land, and it would drain it  
24 into these drains for return flow back to the river.

25 **Q. You raise a point I want to talk about, but I**

1 -- did the District construct these drains or did  
2 Reclamation construct these drains?

3 A. The Reclamation constructed the drains under  
4 an agreement to pay the United States back, along with  
5 the construction of Elephant Butte Reservoir and the  
6 facilities below.

7 Q. So this was all caught up in the repayment of  
8 the Project; is that correct?

9 A. That's correct.

10 Q. Okay. So, now, you said that the drains  
11 returned the river where -- the water where?

12 A. The drains return -- because there's an  
13 accumulation of water in these drains, that return  
14 flow goes back to the river where these drains are  
15 then relieving that water from the lands back into the  
16 river, and then from that point, that water can be  
17 used again.

18 Q. So the drainage water becomes part of the  
19 return flows; is that correct?

20 A. Yes. Which becomes project water.

21 Q. Has drainage changed over time within the  
22 District?

23 A. Yes.

24 Q. How has it changed?

25 A. Climate change. Drought has created a huge



1 reason for the drainage system to change over time.

2 **Q. And when you say "change," what are you**  
3 **talking about?**

4 A. There is less water in the drains due to the  
5 fact that you don't have a surface water because of  
6 the -- the reduction in storage and the release to the  
7 farms during those drought periods, and also the point  
8 that we are pumping groundwater now reduces, also, the  
9 amount of return flows to the river.

10 **Q. Groundwater pumping reduces drain flows; is**  
11 **that correct?**

12 A. That's correct.

13 **Q. And what you're talking about in terms of**  
14 **return flows, you're talking about the same thing,**  
15 **aren't you?**

16 A. Yes, sir.

17 **Q. Okay. Let me turn to groundwater development**  
18 **within the District, since you just raised it as**  
19 **affecting drainage. To your knowledge, when did the**  
20 **Elephant Butte Irrigation District begin the**  
21 **exploration of the use of groundwater within the**  
22 **District, if at all?**

23 A. That -- that occurred during the late '40s  
24 when the farmers were concerned and brought it to the  
25 attention of the Board that with the reduction in

1 surface storage based upon the drought, that they were  
2 concerned about whether or not they could use  
3 groundwater as the source of water.

4 **Q. And what did -- what did the -- to your**  
5 **knowledge, what did the Elephant Butte Irrigation**  
6 **District do with respect to this exploration?**

7 A. The board of directors entered into a study  
8 with the United States Geographic Survey.

9 **Q. And what was the purpose of that study to**  
10 **your recollection?**

11 A. It was basically to determine whether or not  
12 groundwater was available for irrigation pumping from  
13 the aquifer below the valleys of Hatch and Mesilla.

14 **Q. Let me see if we can put up Joint Exhibit**  
15 **0444. And you have this in front of you, don't you,**  
16 **Mr. Esslinger?**

17 A. Yes, sir. It's on the screen.

18 **Q. You have a copy of this, also, right?**

19 A. Yes. Yes, sir, I do.

20 **Q. What is Exhibit 0444?**

21 A. It's a letter to the manager at the time,  
22 John Gregg, that a preliminary memorandum of  
23 groundwater supplies for the irrigation district had  
24 been produced by Mr. Conover.

25 **Q. Okay. And if you go to the next page, this**

1 is 001, the letter, and on 002 begins something else.

2 What is -- what is -- what is on 002?

3 A. This is the -- the preliminary report with  
4 the investigation that Mr. Conover did. It's probably  
5 condensed report. It was not the final report.

6 Q. Okay. Well, let's talk about this one first.  
7 Now, I know that you're not a engineer, but as the  
8 treasurer/manager, have you reviewed this document?

9 A. I have reviewed the document.

10 Q. Okay. And describe, again, what the purpose  
11 of this document. What is its purpose or what was its  
12 purpose?

13 A. Again, the farmers were concerned that there  
14 was not going to be sufficient amount of surface water  
15 available to them and so they were looking for another  
16 source of water. The source of water that they wanted  
17 to study was the groundwater beneath the Hatch and  
18 Mesilla Valleys. This study concluded that there  
19 would be the availability of groundwater for -- for  
20 irrigation pumping.

21 Q. And did this report reach any -- this  
22 preliminary report reach any conclusions with respect  
23 to the effect of groundwater pumping on surface water?

24 A. Yes. It -- it had, I recall, around 14  
25 bullets or conclusion points, and certainly there was

1 a concern that if pumping was to the extreme amount,  
2 that it would dry up drains or reduce return flows.

3 Q. Did it make any reference to the effect of  
4 groundwater pumping on the district downstream?

5 A. No.

6 Q. Let me put up what has been marked as Texas  
7 0698. Are you familiar with this document?

8 A. This is the final report of the preliminary  
9 memorandum, yes.

10 Q. To the -- I'm sorry. I interrupted you. Go  
11 ahead.

12 A. It was the final report of the preliminary  
13 memorandum.

14 Q. Did it reach different conclusions than the  
15 preliminary report?

16 A. No. It was just more detailed as to how they  
17 came up with the data and the research that they did  
18 in this study.

19 Q. Do you know what -- let's take that down. Do  
20 you know what conjunctive use is?

21 A. I have a term for it, yes, sir.

22 Q. Okay. What do you understand the term  
23 conjunctive use to mean?

24 A. Well, I look at it as -- as when you have  
25 wetter years and the surface supply is available, then

1 that is considered to me a checking account where you  
2 can draw on it year after year; however, in times of  
3 shortage, when there isn't a surface supply to meet  
4 the needs of the farmers, then they have to depend on  
5 the groundwater supply, which is the savings account  
6 that has been accumulated over time because had not  
7 used their wells.

8 Q. In your understanding of conjunctive use or  
9 the way you've defined conjunctive use, is the  
10 reliance on groundwater predicated upon the ability to  
11 recover groundwater basins once you've used them?

12 A. Yes.

13 Q. Now, did -- has the Elephant Butte Irrigation  
14 District, as an irrigation district, ever applied for  
15 permits to -- to construct wells?

16 A. Yes, we have.

17 Q. Okay. And who did you apply to? Who is the  
18 governmental entity that would grant you the right to  
19 -- to construct wells?

20 A. The Office of the State Engineer.

21 Q. Okay. So does the Elephant Butte Irrigation  
22 District have the ability to unilaterally construct  
23 wells on their own?

24 A. They did up until 1980.

25 Q. Okay. Let's go back, and let's talk a little

1 bit about this chronology of -- of time. With respect  
2 to the wells that -- let me ask you: What happened in  
3 1980 that changed that?

4 A. Well, up until that point, the farmer could  
5 manage his farm, and if he felt like he had the  
6 ability to add more land to his farm, that he could  
7 then also drill a well, and he was not inhibited by  
8 anyone to drill a well at that point. And that --  
9 that well that he drilled would be his -- his supply  
10 when -- would be his savings account when there was no  
11 water from his checking account available.

12 Q. So for the history of the district, up until  
13 1980, there was no restriction on the construction of  
14 wells?

15 A. No, sir. There was not.

16 Q. And just -- just to underscore, was -- that  
17 included the period from 1951 through 1978; is that  
18 correct?

19 A. Yes.

20 Q. Okay. When did the Elephant Butte Irrigation  
21 District decide to construct wells?

22 A. In around 19 -- again, the climate changed,  
23 and we've always been proactive as far as the Board  
24 has been to address those climate changes and deal  
25 with the situation so we could supply water to the

1 farmers. So in 19 -- the late 1970s, another drought  
2 was -- was in effect and so, again, Elephant Butte  
3 Irrigation District was looking for a way to -- to  
4 augment with their own well field the supply of  
5 groundwater to farmers that did not have wells or  
6 their wells were down and weren't functioning, and  
7 they needed water from the -- from the District.

8 **Q. Now, you indicated that until 1980, there was**  
9 **no requirement to go to the State. Did -- did you go**  
10 **to the State for these wells?**

11 A. No, sir.

12 **Q. What did you do?**

13 A. We drilled them, and we operated them for one  
14 year. There was a -- there was a -- a -- an actual  
15 well development plan in place, and it included  
16 probably 33 wells from Hatch all the way down to the  
17 south valley, and in the results of that study, five  
18 wells were drilled in the vicinity of the Mesilla Dam  
19 because electricity was available.

20 **Q. And you said you operated them for one year;**  
21 **is that correct?**

22 A. Yes, sir.

23 **Q. Did you continue to operate them?**

24 A. No, sir.

25 **Q. Why not?**

1           A.     Well, the climate changed once more to our  
2 advantage, and we had a -- a -- several years of full  
3 supply and more available to the farmers so wells,  
4 whether they were farmers' wells or these five wells,  
5 were just not used. We had plenty of surface water.

6           **Q.     And are those wells being used now?**

7           A.     No, sir.

8           **Q.     What happened to it?**

9           A.     They were eventually capped, and the result  
10 of them being pumped for a year established what we  
11 believe was a water right for pulling that water out  
12 of -- out of the ground and using it for delivery to  
13 our farmers.

14          **Q.     Okay. But you don't use the wells?**

15          A.     Not today, no, sir.

16          **Q.     Okay. Was the District involved in any other  
17 well construction?**

18          A.     We just supported the well construction of  
19 the farmers, their independent wells on their farms.  
20 We allowed them to pump into our canal system and move  
21 their groundwater around with their surface water.

22          **Q.     Did the ability of farmers to pump wells and  
23 put it into the canal system, did that require any  
24 approvals by, start with the Elephant Butte Irrigation  
25 District, did that require approvals by the District**



1 to allow that to occur?

2 A. Yes. The Board set policies at that time to  
3 help formalize a procedure and a process in which the  
4 farmers could pump into the canal system of the  
5 District.

6 Q. And did it require authorization or approval  
7 from the Bureau of Reclamation?

8 A. Not at that time because EBID had already  
9 taken over the facilities.

10 Q. This was post 1979; is that correct?

11 A. That's correct.

12 Q. And we're going to -- we'll come back to  
13 that. What about the State of New Mexico, did it  
14 require any approval from the State of New Mexico?

15 A. No.

16 Q. Was the utilization of this water or the  
17 pumping of the water and put into -- having it put  
18 into district canals, was that part of a conjunctive  
19 use program, as you defined conjunctive use earlier?

20 A. Yes, sir.

21 Q. Now, what happened in 1980 to change the way  
22 groundwater was developed within EBID?

23 A. Well, when the order came down that the state  
24 engineer had closed the basin, that changed the  
25 dynamics of what a farmer could do independently

1 versus what he could do now under the rules of a  
2 closed basin.

3 **Q. Tell me what a closed basin is.**

4 A. The closed basin, as far as I understand it,  
5 not speaking for the state engineer, is that he  
6 declared that any pumping from that point on, when he  
7 closed the basin, would have to go through a permit  
8 and application process.

9 **Q. Did the state engineer, other than closing**  
10 **the basin, did they implement any other regulations of**  
11 **the groundwater basin?**

12 A. I don't recall.

13 **Q. And does EBID monitor water that's pumped**  
14 **from the ground and put into its facilities?**

15 A. Yes, sir. By policy, the Board, again,  
16 developed a policy that allowed a farmer to pump into  
17 our facility under conditions that the District  
18 provided in the -- in the policy.

19 **Q. And -- and how do they monitor that?**

20 A. We developed a system of metering on the  
21 discharge pipe, which would give us a  
22 cubic-feet-per-second flow that was coming out of  
23 discharge pipe, and then we would also meter the  
24 turnout where the discharge from the well was going on  
25 to the farm so we would know what was being pumped and

1 what was being delivered to the farm.

2 **Q. What year did you do that?**

3 A. This all began probably in -- we started  
4 experimenting with the procedures in the late '90s,  
5 when we were finding that farmers were using their  
6 wells more than they were before, and then by  
7 2000/2003, we were actually experimenting with  
8 different types of metering -- meters to discharge to  
9 measure the water discharge from groundwater.

10 **Q. Does the District report the results of this**  
11 **metering to the State?**

12 A. Over time, we developed a radiotelemetry unit  
13 where the wells that have those units that farmers can  
14 purchase from EBID, the accumulation of the data is  
15 recorded and sent to the state engineer quarterly  
16 through a software program.

17 **Q. Does EBID have control over the farmers' well**  
18 **-- direct control over those wells?**

19 A. No, we don't.

20 **Q. Does EBID regulate those wells, farmer wells?**

21 A. No, we don't.

22 **Q. Does the different -- who does -- if you**  
23 **know, who does monitor -- or who does regulate those**  
24 **farmer wells?**

25 A. Around 2006, the state engineer put out a

1 metering order and also had a team of what I refer to  
2 as water masters that would come down, and they would  
3 ensure that the farmers followed the order and put a  
4 device, a metering device, on their well, as well as  
5 they had these employees that would go around and  
6 inspect the meters to ensure that the recordings were  
7 properly being documented.

8 Q. Does that mean that the state engineer's  
9 office regulates those wells?

10 A. Yes.

11 Q. Let's turn back to the Project and the Bureau  
12 of Reclamation. We've been talking about the  
13 Reclamation Project. I just want to make sure, we're  
14 talking about the Rio Grande Reclamation Project here;  
15 is that correct?

16 A. That's correct.

17 Q. Okay. And I think earlier, you said when you  
18 were on the farm before you went to college, before  
19 you did a bunch of other things and were employed by  
20 the District, it was the Bureau of Reclamation that  
21 delivered water to the farmers, not EBID; do I recall  
22 that correctly?

23 A. That's correct.

24 Q. Okay. Does the Bureau of Reclamation today  
25 still deliver water directly to -- to the farmers in

1 **EBID?**

2 A. No, they don't.

3 **Q. Okay. What changed?**

4 A. The change came in 1979, when we entered --  
5 EBID entered into a contract with the United States  
6 taking over those functions that the Bureau did for 60  
7 years, 70 years, and then the farmers hired their own  
8 ditch riders, hired their own operators to -- to then  
9 perform what the Bureau had done before. So there was  
10 a monumental change in the way that water was  
11 delivered to the farms in 1979.

12 **Q. Okay. Let's take a look at the period of**  
13 **time before 1979.**

14 A. Okay.

15 **Q. Okay. What was the role of the Bureau of**  
16 **Reclamation prior to the '79 contract with respect to**  
17 **the Reclamation project?**

18 A. The role was to take the orders from the  
19 farmers and deliver that water to the farmers from the  
20 release to the head gate of the farm. The orders were  
21 placed by the -- by the farmers in EBID, and they went  
22 to a Bureau officer here in Las Cruces. I believe the  
23 orders placed by the sister district in El Paso went  
24 to an Ysleta office. Those orders were combined, and  
25 then the order from Mexico would then also be added,

1 and the release from Caballo would be made to the  
2 farms directly.

3 **Q. What was the role of the Elephant Butte**  
4 **Irrigation District with respect to this project water**  
5 **prior to 1979?**

6 A. The Board of -- of Elephant Butte was  
7 constantly in contact with the farmers who represented  
8 them, and there was a lot of issues about timing of  
9 the delivery of water from the Bureau or the  
10 maintenance of the canal or the fact that an order was  
11 lost and so there was a lot of discussions between the  
12 Board of Elephant Butte Irrigation District and the  
13 functions of operating the project by the Bureau.

14 **Q. Okay. I want to come back to -- to that, but**  
15 **in terms of a formal role with respect to the**  
16 **Reclamation Project, what did EBID do? What was its**  
17 **-- its role?**

18 A. We just -- at that point, our role was to  
19 collect from the farmers the assessment for the  
20 repayment obligation that we had obligated ourselves  
21 to.

22 **Q. Were the employees of the -- the District in**  
23 **this pre-1979 period, what did -- what were the --**  
24 **what did the employees do?**

25 A. There were only two. They were two tax

1 collectors or tax assessors within the district, and  
2 their main function was a financial function to just  
3 ensure that the contract was paid in a timely way,  
4 based upon the -- the contracts that had been set  
5 forth by the Bureau. The manager was -- was the  
6 interface with the Board and would take calls from the  
7 farmers who were concerned about issues raised and the  
8 way they were getting their water delivered. Beside  
9 that were two maintenance operators who maintained  
10 those flood control dams that I spoke of earlier.

11 **Q. Okay. Let me show you what has been**  
12 **previously admitted as US-367. Can we put that up?**  
13 **Are you familiar with what's been admitted as 367?**

14 A. Yes. I've seen this contract.

15 **Q. What -- what is this? It's a contract, you**  
16 **just said that, but what is this contract about? What**  
17 **does it deal with?**

18 A. Well, this contract was, again, with Elephant  
19 Butte Irrigation District, and it set forth the  
20 obligations of repayment, once again something that  
21 the Bureau -- that the board of directors was always  
22 concerned about. It laid out what would be offered to  
23 the District in the form of operation and maintenance,  
24 and it also extended the period of repayment that the  
25 Board was looking for at the time.

1 Q. I notice it says below -- the other party was  
2 the United States; is that correct?

3 A. Excuse me?

4 Q. The other party to the contract --

5 A. Was, yeah, was the United States.

6 Q. Okay. I notice after the parties, it  
7 says, "For Adjustment of Project Construction Charges  
8 and for Other Purposes." Do you see that?

9 A. Yes.

10 Q. Okay. Was there some prior agreement with  
11 the United States with respect to Project construction  
12 charges and other purposes?

13 A. Yes. I think that was at the time when the  
14 drains were being put in into place and so they had to  
15 begin being included in the adjustment to the  
16 construction charges.

17 Q. So does this agreement provide for the  
18 obligations of the United States to the District and  
19 the obligations of the District to the United States  
20 with respect to the Rio Grande Reclamation Project?

21 A. Yes, it does.

22 Q. Okay. Let me put up what has been -- and --  
23 and let me ask one final question about this exhibit.  
24 The Texas District is not a party to this contract; is  
25 that correct?



1 A. No, it is not.

2 Q. Do you know, as treasurer/manager, whether or  
3 not the Texas District has a similar contract?

4 A. I would think they would.

5 Q. Okay. But you're not certain; is that  
6 correct?

7 A. I'm not certain.

8 Q. Okay. Let's put up what has been marked as  
9 Joint Exhibit 0426, which has also been admitted.  
10 Okay. And I -- I believe this exhibit is only a  
11 couple pages long; is that correct?

12 A. That's correct.

13 Q. Are you familiar with this exhibit -- this  
14 exhibit?

15 A. Yes, I am.

16 Q. What is this?

17 A. Well, the 37 contracts sort of set out what  
18 the parameters were for, what EBID could do within the  
19 irrigation project. I believe that the farmers at the  
20 time were then trying to develop this whole valley for  
21 the agricultural purpose of promoting agriculture here  
22 in this valley and so they wanted a little more  
23 flexibility in -- in the expansion of their farms  
24 within the district, so there was a -- the majority of  
25 what is in this contract is the mutual agreed acreage

1 that each district in the project was able to  
2 increase, and it was a 3 percent.

3 Q. Does this contract provide for how payment --  
4 repayment of the project is to be done vis-a-vis what  
5 -- what repayment by the Elephant Butte Irrigation  
6 District is to do vis-a-vis what the Texas District is  
7 supposed to do?

8 A. That's correct.

9 Q. Okay. And is that where the 57/43 percent  
10 division derives from?

11 A. Yes, sir.

12 Q. Okay. Now, is this a -- a contract only  
13 between EBID and the United States like the 1937  
14 contract you just talked about?

15 A. No. It's a contract between the two  
16 districts and the United States.

17 Q. Okay. So this is a three-party contract?

18 A. Yes.

19 Q. Okay. You can go ahead and take this down.

20 During this period of time, I think you --  
21 you indicated -- I just -- what was the relationship  
22 between the Elephant Butte Irrigation District and the  
23 United States? And here when I talk  
24 about "relationship," I'm referring to did they get  
25 along?

1           A.     Pretty much so, they got along. It was a  
2 governmental entity, and, of course, the farmers would  
3 have preferred a different probably approach, but they  
4 communicated all the time. Board minutes reflect that  
5 the Bureau would come up and visit and actually sit in  
6 the board meetings, and if it was around the time of  
7 the allocation, the Bureau would present itself and --  
8 and be -- be formally on the board agenda. There were  
9 also those times where things got a little different  
10 in what each party expected from each other so those  
11 discussions would come up, as well.

12           **Q.     So there were disputes; is that correct?**

13           A.     That's another way to put it, yes, sir.

14           **Q.     Okay. Were there financial disputes over the**  
15 **repayment of the Project?**

16           A.     That always was the number one dispute. It's  
17 still there today.

18           **Q.     Were there disputes just over how the Bureau**  
19 **of Reclamation was functioning, how they were**  
20 **operating the facilities?**

21           A.     That was true.

22           **Q.     Okay. So let's go now from the point in time**  
23 **when the Bureau was operating the Project to -- when**  
24 **did you say the Project was paid off?**

25           A.     I believe the Project was paid off in 1971,

1 and it took a few years of negotiations to enter into  
2 the '79 contract.

3 Q. Okay. I want to talk about the '79 contract  
4 in a moment, but who operated the Project -- the Rio  
5 Grande Reclamation Project during 1971 to 1979 when  
6 the contract was entered into?

7 A. The Bureau of Reclamation operated the  
8 Project.

9 Q. Okay. And what we're -- now, let's put up  
10 what has been previously admitted as US-511.

11 Mr. Esslinger, are you familiar with this contract?

12 A. Yes, I am.

13 Q. Okay. And -- and what was the purpose of  
14 this contract?

15 A. This contract, again, set forth the  
16 transition from a government-run operation to a  
17 farmer-run operation, as far as the delivery of  
18 surface water to the farmers in the Elephant Butte  
19 Irrigation District, and its -- its records, its --  
20 its equipment, its plants, everything was included in  
21 this at that time so that EBID was -- and the board of  
22 directors was well aware of what they were going to be  
23 facing with this contract as far as takeover.

24 Q. So this -- this contract is the contract that  
25 deals with the -- the transfer of certain facilities

1 and obligations from the government, which is in this  
2 case the United States; is that correct?

3 A. Yes.

4 Q. Okay. To the Elephant Butte Irrigation  
5 District?

6 A. Yes.

7 Q. Okay. Was Elephant Butte Reservoir  
8 transferred to the Elephant Butte Irrigation District?

9 A. No, it wasn't.

10 Q. Was Caballo transferred?

11 A. No, it wasn't.

12 Q. Okay. What facilities retained in the  
13 ownership of -- of the United States?

14 A. Elephant Butte Reservoir and Dam, Caballo  
15 Reservoir and Dam, Percha Diversion Dam in the Hatch  
16 Valley, the Leasburg Diversion Dam in the north valley  
17 of Mesilla, and the Mesilla Diversion Dam in the  
18 central part of the Mesilla Valley.

19 Q. Are -- so what was -- what was transferred to  
20 the Elephant Butte Irrigation District for operation  
21 title? Was it -- was fee title transferred to the  
22 Elephant Butte Irrigation District to the facilities  
23 within the Elephant Butte Irrigation District?

24 A. No, sir, they weren't, not at that time.

25 Q. Okay. When were they -- were they ever

1 transferred?

2 A. They were transferred in 1996.

3 Q. Okay. And that was pursuant to some other  
4 contract; is that correct?

5 A. Yes.

6 Q. Okay. And -- and -- and what happened  
7 preceding the -- did something happen preceding the  
8 1996 contract that related to -- to -- to the transfer  
9 of title?

10 A. Yes, sir. There was -- there was a transfer  
11 of the operation and maintenance of the three  
12 diversion dams to the Elephant Butte Irrigation  
13 District. The '79 contract transferred the canals and  
14 laterals and drains. The 1989 contract transferred  
15 the -- the operation and maintenance of the diversion  
16 dams out of the hands of the Bureau so that EBID could  
17 maintain and function and deliver water from those  
18 diversion dams.

19 Q. And when did -- you indicated that -- that  
20 the Bureau didn't or doesn't deliver water to farmers  
21 directly anymore. When -- when did that change? When  
22 did it -- they stop delivering water to farmers?

23 A. It would probably be the following season of  
24 the '79 contract, which had been 1980 when the  
25 Elephant Butte Irrigation District began delivering

1 water to the farmers.

2 Q. And -- and -- oh, you -- you anticipated my  
3 question. So it was the Elephant Butte Irrigation  
4 District that then began delivering water to farmers?

5 A. Yes.

6 Q. Okay. Prior to this transition period, you  
7 indicated that the Elephant Butte Irrigation District  
8 had limited number of employees; is that accurate?

9 A. That is accurate.

10 Q. So, now, with the transfer, what did the  
11 District do to get itself ready to be able to now take  
12 on this extra obligation?

13 A. Well, they were putting notice -- notice to  
14 hire in the local newspaper. That's where I found out  
15 about it in 1978. They were -- they were putting  
16 things out in the press that were talking about the  
17 transfer that was coming up and that -- that Elephant  
18 Butte was looking for employees.

19 Q. So what happened to the Bureau of Reclamation  
20 employees that were up to this point running the  
21 Project?

22 A. Again, that was part of those negotiations  
23 where severance pay was -- was talked about.  
24 Retirement was talked about. There were, again, to  
25 our -- to our blessing, five operations ditch riders

1 transferred over and began working for EBID. There  
2 was a period of time where the Bureau and EBID shared  
3 the same office here in Las Cruces, so there was a lot  
4 of communication and cooperation by both parties just  
5 to -- to go through that transition, but it was -- it  
6 was at that point that the majority of employees were  
7 hired to take over from what the United States had  
8 been doing.

9 Q. And how many employees does the Elephant  
10 Butte Irrigation District currently have?

11 A. I believe we're less than 80 right now.

12 Q. When you say "less than 80," does that mean  
13 12?

14 A. No. I'm sorry. Probably about 75 employees.

15 Q. Okay. Thank you. Now, you mentioned -- I  
16 think you referred to the Texas district as the sister  
17 district; is that correct?

18 A. That's correct.

19 Q. What's the name of that district?

20 A. The El Paso County Water Improvement District  
21 No. 1.

22 Q. Okay. That's what we, in the litigation,  
23 have called EP No. 1; is that correct?

24 A. That's correct.

25 Q. All right. Does the 1978 -- 1979 contract



1 that's up on the screen, does that contract address  
2 how the Project will be operated to both serve EBID  
3 and EP No. 1?

4 A. Yes. There is -- there is portions of the  
5 contract that speak to the area in the southern part  
6 of the Mesilla Valley, we refer to as 6A/6B, but the  
7 state line just meanders at that point down there. So  
8 there are canals that come -- come from New Mexico and  
9 enter into Texas, and likewise, there are Texas canals  
10 that come into New Mexico. So that issue had to be  
11 addressed, but for that first few years, I believe it  
12 was the Bureau of Reclamation that worked with both  
13 districts to deliver the water in that -- that area.

14 Q. I want to come back to the 6A/6B. Was that a  
15 contract?

16 A. It was entered into a joint powers agreement  
17 between the two districts.

18 Q. Okay. Let's come back to that, but was there  
19 an agreement on how to operate the Project now that  
20 EBID was controlling facilities that Reclamation  
21 otherwise controlled?

22 A. The '79 contract spoke to the way that the  
23 Bureau would -- would deliver the water into Texas at  
24 that time. The -- before the '79 contract, there was  
25 no state line issue. The Bureau would take the order

1 from both districts and deliver to the farms. It  
2 didn't matter which farm was -- whether the farm was  
3 in New Mexico or Texas. But, now, that there was a --  
4 a new contract, the '79 contract, the diversions from  
5 the river would be made differently, and so those  
6 diversions in -- within EBID would have the water in  
7 their canals that would eventually get to the Texas  
8 upper valley and so how that water was distributed  
9 once it was in the canal system and crossing the state  
10 line, the Bureau took that obligation on for a few  
11 years until EBID and -- and EP No. 1 entered into a  
12 contract within themselves.

13 Q. Okay. Let me -- let me kind of unpack some  
14 of that.

15 A. Okay. Sorry. That was long.

16 Q. That's fine. You're doing fine,  
17 Mr. Esslinger.

18 The -- was the -- you're familiar with --  
19 with the -- the operating agreement that was entered  
20 into in 2008; is that correct?

21 A. That's correct.

22 Q. Okay. Was the 1979 agreement or contract you  
23 had with Reclamation, was it an operating agreement?

24 A. It was -- there was an operating agreement  
25 contemplated in the contract, but it didn't take place

1 at the time that the transfer was made in 1979.

2 **Q. Okay. Now, there is a lot of time between**  
3 **1979 and 2008. How did -- how did operations -- how**  
4 **were they coordinated without an operating agreement?**

5 A. Well, for 23 years, the supply of water was  
6 well above 3 acre-feet, and both districts had plenty  
7 of water to be delivered to the farms and so the issue  
8 about having to divide the water between the two  
9 states was, I referred to it as pushed to the back  
10 burner. Everybody was -- was dealing with a lot of  
11 water, and certainly being new, both our district and  
12 the sister district just taking over, it was an  
13 obligation -- it was definitely a hard times to ensure  
14 that our farmers were getting their water when they  
15 wanted it, and also dealing with excess water in the  
16 river that was creating problems, as well, for both  
17 districts, as it went through each diversion. So I'd  
18 have to say that we pushed back the operating  
19 agreement, and the Bureau was setting the allocation  
20 every year, and it was a good allocation and both  
21 districts had plenty of water.

22 **Q. So were there discussions during this period**  
23 **of time from 1979 to 2008 about an operating**  
24 **agreement?**

25 A. Yes. The -- the -- the previous manager

1 would discuss with the manager from EP No. 1 the  
2 operating agreement or the operating plan, and  
3 certainly discussions continued off and on, but,  
4 again, there were so many things going on that it just  
5 did not take the precedent. Also involved during that  
6 time was the El Paso gage that I mentioned earlier.  
7 That took up a considerable amount of EBID time and  
8 effort, as well as the impact that it was having on --  
9 on the fight in Texas.

10 **Q. Did -- did -- now, did -- was there any**  
11 **event, anything that occurred that precipitated the**  
12 **actual negotiation and consummation of the 2008**  
13 **operating agreement?**

14 A. Yes.

15 **Q. What was that?**

16 A. The drought returned. Again, over time, we  
17 were blessed with those 23 years, but it -- it also  
18 gave us the warning in 1999 that things were not going  
19 to continue as they had for the last 23 years so at  
20 that point in time, the Board was heavily involved in  
21 working out and trying to -- to understand what they  
22 would do in the time of a new drought that was -- was  
23 fast approaching. The drought really had an effect on  
24 both districts and the Bureau around 2003 when it hit  
25 home, and we couldn't make the 3 acre-foot allotment

1 to the farmers.

2 **Q. Did -- what was the relationship between the**  
3 **two districts during this later period of time, around**  
4 **2003?**

5 A. The boards were in discussion a lot about the  
6 fact that El Paso Irrigation District was concerned  
7 that they weren't getting their fair share of the  
8 water because of the pumping that was already starting  
9 in -- in -- in our district and everywhere up in -- in  
10 the Mesilla Valley, including Las Cruces and the  
11 mutual domestics, so everybody was pumping here and  
12 they were concerned about the depletion to their  
13 surface water supply that was occurring in the Mesilla  
14 Valley. Likewise, EBID was questioning the Canutillo  
15 well field and the pumping that was done in that  
16 portion of Texas, as well as the third-party contracts  
17 that El Paso had entered in with the public service  
18 board and certainly other things that felt like if we  
19 were going to point the finger one way, then the other  
20 finger could be pointed back the other way.

21 **Q. Do you know what carryover storage is?**

22 A. Yes.

23 **Q. What -- what is carryover storage?**

24 A. Carryover storage was -- was discussed often.  
25 El Paso Water Improvement District entered into a --

1 entered into a conservation program back in the late  
2 '80s that allowed them to concrete line, they -- the  
3 government -- they entered back into a contract with  
4 the government. The government came in and lined and  
5 piped a lot of their canal system in the lower valley,  
6 and they felt like that because of the conservation  
7 efforts they had made to conserve water by being more  
8 efficient with their deliveries to the farmers, that  
9 they were not using all of their allocated water, and  
10 they were leaving water left and so they felt like if  
11 they left it in a lake, they would lose it so they  
12 began talking about carryover. At the same time,  
13 Elephant Butte Irrigation District was not in  
14 agreement that it was necessary to have carryover, and  
15 we were satisfied with the 57/43 split that was  
16 divided at the end of every year, and we were a little  
17 more reluctant to discuss carryover storage, but El  
18 Paso No. 1 continued to bring that issue up.

19 **Q. Did these disputes that you've just described**  
20 **end up in litigation?**

21 A. Yes, they did.

22 **Q. And how was that litigation resolved?**

23 A. Well, the third party that I failed to  
24 mention was the Bureau of Reclamation, and they were  
25 in charge of the release and the allocation to each

1 district during that period of time between 2003 and  
2 2007, and certainly there was times where they would  
3 agree with EBID. There was times that it would agree  
4 with the City of -- with El Paso Irrigation District,  
5 and sometimes they just did things what they felt they  
6 needed to do to get the water delivered to both  
7 districts. So all of that created a lot of animosity,  
8 and it was -- it was -- there were some heated  
9 discussions, I have to admit, but we were able to work  
10 it out, and that's the greatest thing about the  
11 operating agreement is that we were able to work it  
12 out between the -- the -- the owner of the -- the --  
13 our parents, which would be the Bureau of Reclamation,  
14 the two kids fighting, we worked it out. The  
15 operating agreement was that contract that was entered  
16 in. Once that contract was signed, those two lawsuits  
17 between the two districts were dismissed. We didn't  
18 need them anymore.

19 **Q. Let's -- let's talk about how the --**  
20 **functionally, how the 2008 Operating Agreement was**  
21 **arrived at. It -- was it arrived at through**  
22 **negotiations?**

23 A. Yes.

24 **Q. And how were those negotiations conducted?**

25 A. Well, between 2003 and 2007, because we felt

1 like we weren't heard by the Bureau, and the Bureau  
2 felt like they were doing everything they could, we  
3 went to the next step, and we went to our Compact  
4 Commissioner of Texas, Pat Gordon, who represents  
5 Elephant Butte Irrigation District, and we began  
6 talking to him about the issues that were being raised  
7 by EP No. 1 and EBID. He was engaged in -- in trying  
8 to bring the parties together, the Bureau and the two  
9 districts, and he did a very good job, but there was  
10 just things that were happening in 2007 and -- and in  
11 2008 that -- excuse me -- 2006 and 2007 that were just  
12 making it difficult. So Pat Gordon called the meeting  
13 of the two Boards and the Bureau, and we began what we  
14 called the settlement talks or the negotiation talks.

15 **Q. What role did Mr. Gordon play in the**  
16 **settlement talks?**

17 A. He was the mediator. He -- he knew of the  
18 issues of every party because of the past five years  
19 that we brought to him of our concerns so he sat there  
20 and took -- took charge of being the mediator.

21 **Q. Did he take sides?**

22 A. No.

23 **Q. In your opinion, did he take sides?**

24 A. I don't believe so. I believe that he would  
25 take meticulous notes every day of what was said and



1 what was -- what each party's concerns were, and  
2 that's the way he operated.

3 **Q. You participated in these negotiations?**

4 A. I was in one of the groups he -- he divided  
5 into three groups.

6 **Q. What were these three groups? What group  
7 were you in?**

8 A. I was in the management group.

9 **Q. And who else was in the management group?  
10 Who was in the management group for the Bureau of  
11 Reclamation?**

12 A. I believe at that time it was the area  
13 manager and at that time the regional director.

14 **Q. Of the Bureau of Reclamation?**

15 A. Of the Bureau of Reclamation.

16 **Q. Okay. And who was in the management group  
17 from EP No. 1?**

18 A. It was the manager and two representatives of  
19 their board.

20 **Q. Who -- do you recall who the manager was?**

21 A. It was Chuy Jesus Reyes.

22 **Q. Were there other groups? What other groups  
23 were there?**

24 A. There was the management group of EBID.

25 **Q. Right. But -- but you said there was a**

1 management group. Were there other negotiating  
2 groups?

3 A. There was a technical group, and there was a  
4 legal group.

5 Q. Let's focus then on the technical group. Who  
6 was in the technical group representing EBID?

7 A. It was Dr. Phil King. He would use, at  
8 times, our irrigation systems director, James Narvaez,  
9 to develop the data he needed.

10 Q. And who was in the negotiating group for EP  
11 No. 1 -- I mean, the technical group for EP No. 1?

12 A. It was Dr. Al Blair, and oftentimes, I  
13 believe he relied upon Robert Rios, the water master  
14 for EP No. 1.

15 Q. And who was the technical representative in  
16 these negotiations for the Bureau of Reclamation?

17 A. It was Bert Cortez and perhaps some of his  
18 staff would be available.

19 Q. It's not that we don't care about who the  
20 lawyers were, but there was a lawyer group; is that  
21 correct?

22 A. There was a lawyer group.

23 Q. Okay. Probably the most important group;  
24 would you agree? Strike that. Strike that.

25 A. I won't answer that.

1 Q. Let me show you what's been marked as --  
2 previously admitted as New Mexico 2373. Are you  
3 familiar with Exhibit New Mexico 2373?

4 A. Yes, sir.

5 Q. Okay. And what is that exhibit?

6 A. This is the operating agreement that we  
7 finally were able to come into agreement in 2008 after  
8 many years of -- of just delay.

9 Q. And is there a manual, an operating manual,  
10 that accompanies this -- this agreement?

11 A. Yes.

12 Q. Okay. It's a technical document; is that  
13 correct?

14 A. Yes.

15 Q. Okay. Go ahead and take -- take down this  
16 exhibit.

17 Now, you indicated that you went to your  
18 commissioner, Pat Gordon, who is the Texas Rio Grande  
19 Commissioner. Did you go to the New Mexico  
20 commissioner?

21 A. No, sir, we did not.

22 Q. Why not?

23 A. Because we're in Compact Texas. We are  
24 always in Compact Texas, and it was felt like even  
25 though our district is in an island, so to speak, the

1 governor of Texas appoints the Compact commissioner  
2 for Texas, but Pat Gordon did a great job of -- of  
3 representing EBID at Compact commission meetings and  
4 would come often to our board meetings and -- and  
5 bring us up to date on Compact issues. As far as the  
6 Compact commissioner for New Mexico, he wouldn't come  
7 down as often, and certainly was not involved in a lot  
8 of these negotiations that I'm aware of. Perhaps Pat  
9 Gordon was, but I don't know if he was.

10 **Q. Would the State of New Mexico, to your**  
11 **knowledge, ever have any role with respect to the**  
12 **water that EBID obtained from the Bureau of**  
13 **Reclamation?**

14 A. Not in my experience. As manager, we often  
15 just dealt with the Bureau and with the sister  
16 district and with the Compact commissioner of Texas.  
17 The point of delivery for the water that we were using  
18 was the obligation of the Compact commissioner of New  
19 Mexico, and that was the delivery to Elephant Butte.  
20 Well, at one time, San Marcial and eventually to  
21 Elephant Butte. So my interaction with the sister  
22 district and with the Bureau was with our  
23 commissioner, Pat Gordon, at that time. I -- I was --  
24 EBID had been represented before by three or four  
25 commissioners before Pat Gordon, and the same was true

1 then. They would be the ones that interfaced with our  
2 board of directors.

3 Q. Did you have any contact with the State of  
4 New Mexico during the negotiation of the operating  
5 agreement?

6 A. No, sir.

7 Q. Prior to the time that EBID took over a  
8 delivery of water, do you know whether or not the  
9 Bureau of Reclamation delivered water based upon the  
10 New Mexico/Texas state line?

11 A. I believe they did for a period of time.

12 Q. What I mean here is did they deliver certain  
13 water to Texas and certain water to New Mexico or did  
14 they just deliver water to Project lands without  
15 regard to what state the farmers were in?

16 A. The Bureau delivered water to Elephant Butte  
17 so -- so it would be diverted out of the river from  
18 the release that the Bureau made, and we would take  
19 the water from that point and deliver it to our  
20 farmers. Likewise, the water would travel down the  
21 river to the American Canal Dam -- Diversion Dam and  
22 EP No. 1 would pick up the water at that point. Just  
23 a little bit further down would be the International  
24 Dam where Mexico would pick up their water. So the  
25 Bureau was releasing the water, but it was really the

1 diversions in New Mexico and the diversions in Texas  
2 that took the place of the original contract with the  
3 Bureau.

4 **Q. What about with respect to the original**  
5 **contract when the Bureau of Reclamation was delivering**  
6 **water to farmers, did they distinguish between New**  
7 **Mexico farmers and Texas farmers?**

8 A. No, they did not.

9 **Q. What about facilities for the delivery of**  
10 **water, do some facilities that the Bureau constructed**  
11 **and operated prior to the turnover, did they operate**  
12 **without regard to state lines?**

13 A. The Mesilla Dam is the last diversion in --  
14 within New Mexico, and at one point, the Bureau would  
15 deliver water to Texas with -- without regard to the  
16 state line, but just deliver to the farm head gates  
17 off of the Mesilla Dam.

18 **Q. So the facilities serve both lands in New**  
19 **Mexico and lands in Texas; is that what you're saying?**

20 A. That's correct. That's correct.

21 **Q. You mentioned the 6A/6B agreement. Can you**  
22 **describe that agreement?**

23 A. We entered into a joint powers agreement  
24 because we're a governmental entity, and EP No. 1 is a  
25 governmental entity of Texas, and it was just our

1 counsel's way and the counsel from EP No. 1 agreed  
2 that a joint powers agreement would be a simple  
3 mechanism to describe what the role of each district  
4 would play in delivering water across the state line.

5 **Q. And does EBID deliver water to farmers in**  
6 **Texas?**

7 A. Yes.

8 **Q. And does EP No. 1 deliver water to farmers in**  
9 **New Mexico?**

10 A. Yes.

11 **Q. And is that done pursuant to the 6A/6B**  
12 **contract?**

13 A. That's correct.

14 **Q. Okay. Let me put up what has been marked as**  
15 **Texas Exhibit 0139. Is that your picture?**

16 A. That's my picture.

17 **Q. It's a fine picture indeed. What is what has**  
18 **been marked as 0139?**

19 A. It's taken out of a master bulletin that the  
20 New Mexico Water Resource Research put together. They  
21 have a Water Resource Institute Conference every year,  
22 an annual conference, and this was one of the excerpts  
23 from the speakers who spoke at that conference.

24 **Q. Were you one of the speakers?**

25 A. I was one of the speakers.

1           **Q.    And is this a paper that you put together for**  
2 **that conference?**

3           A.    It was an effort put forth by both myself and  
4 our consultant, Dr. Phil King.

5           **Q.    Okay.  And what does this -- in summary**  
6 **fashion, what does this article talk about?**

7           A.    It talks about the -- the operating  
8 agreement.  This -- this conference was in October.  
9 The operating agreement was signed in February of  
10 2008, and so I was asked to just give an overview of  
11 what the operating agreement accomplished, and  
12 certainly that's -- that's what this is all about.

13           **Q.    And does this article, this exhibit,**  
14 **summarize your understanding of the operating**  
15 **agreement?**

16           A.    Yes.

17           **Q.    Does it still accurately reflect your views**  
18 **with respect to the operating agreement?**

19           A.    Yes, it does.

20           **Q.    Okay.  Let me turn just briefly to the second**  
21 **page.  I think it's -- yes.  What is on the second**  
22 **page of this exhibit?**

23           A.    That is my version of a poetic monumental  
24 poem of a period in time that I think was a milestone  
25 for the Rio Grande Project.



1           Q.    Okay.  I -- I refer the Court to  
2   Mr. Esslinger's poetic interpretation.  It might be a  
3   different approach to understanding some of these  
4   issues.  Let me -- let me just ask whether or not -- I  
5   mean, over time, there have been a lot of disputes  
6   between EBID and the Bureau of Reclamation; is that  
7   correct?

8           A.    That's correct.

9           Q.    Okay.  And I think you indicated that those  
10  disputes, to some degree, continue?

11          A.    That's correct.

12          Q.    Okay.  And there was a lot of meetings  
13  between the Bureau of Reclamation and EBID over these  
14  disputes?

15          A.    Yes.  It's -- and, again, the threat is  
16  really just the cost of the Bureau's doing business  
17  with the farmers in Elephant Butte and the budget  
18  concerns that the board of directors had over what  
19  they should be paying for and what they shouldn't be  
20  paying for, and that threat continues today.  It's  
21  just a lot of the disputes have been remedied, and we  
22  are still in very cooperation with the Bureau at this  
23  time.

24          Q.    And have there been written communications  
25  between EBID and Reclamation over these issues?

1           A.    Yes, there has been.

2           **Q.    Okay.  Let me turn to a last topic, and**  
3 **that's the International Water and Boundary**  
4 **Commission, IBWC.  Are you familiar with that agency**  
5 **of the government?**

6           A.    Oh, yes.  We deal with them.

7           **Q.    What kind of dealings have you had with them?**

8           A.    Well, certainly in the early stages of my  
9 dealings with them, our concern had always been for  
10 sediment removal from the river, and up until about  
11 1999, the IBWC would do that regularly.  You could see  
12 them working in the river in the wintertime when there  
13 was no water in the river, and that would be from the  
14 Hatch Valley all the way down to American Dam.  Around  
15 the 2000s, I believe it was IBWC that had to enter  
16 into a draft EIS, and during those period of times,  
17 they were looking at environmental impacts that were  
18 being raised and so river maintenance seemed to slow  
19 down.  There seemed to be more vegetation on the  
20 banks.  Islands started to appear within the river  
21 bed, and certainly after time, those islands would  
22 then produce growth, willows and other vegetation, and  
23 so it became more apparent that the focus of IBWC was  
24 on the environmental side.  They were developing  
25 restoration sites that were required under a record of

1 decision, and also in that record of decision was a  
2 Channel Maintenance Plan, and even though EBID was  
3 involved in a lot of these restoration projects with  
4 IBWC, we were very successful in curtailing the -- the  
5 -- the threat of critical habitat between Caballo and  
6 El Paso for a willow flycatcher, and we were working  
7 with the -- the employees of IBWC to develop a  
8 restoration plan where they could utilize EBID water  
9 to irrigate their restoration sites. All of that was  
10 -- was being done at that time, and EBID board was --  
11 was certainly involved in the discussions. We even  
12 developed policy so that we could deliver that water  
13 to the -- the -- these restoration sites, and the  
14 attention seemed to be focused more -- this is my  
15 opinion -- on the environmental issues, and we would  
16 -- even though we would work with them, and we would  
17 meet with them, we would always hint to them that we  
18 needed the river cleaned out. We needed more  
19 maintenance done. The sediment was rising. When --  
20 when you have slow-moving water that's being released  
21 because you don't have a lot of it during the drought  
22 period, then that water -- the water -- the sediment  
23 seems to settle out. It's not moving fast enough  
24 through a gravity-fed system to scour out the river,  
25 so it needs to actually be maintained by equipment,

1 the mechanical needs to remove the sediment. That was  
2 where we would raise the attention to IBWC that that  
3 -- that effort needed to be improved.

4 **Q. And you've communicated a lot of this in**  
5 **writing, I -- I presume; is that correct?**

6 A. A lot of it was in writing. A lot of them  
7 were in actual meetings with the commissioner at the  
8 time, several commissioners during that period of  
9 time. But certainly, it was something that we  
10 addressed -- we tried to address with them.

11 **Q. And how do things stand now? Have things**  
12 **improved from your perspective?**

13 A. To some degree. The record of decision  
14 outlined areas where they could not mow anymore  
15 because there were critical habitat or a restoration  
16 site. There was areas where they felt like they  
17 needed to leave the vegetation on the banks, and  
18 certainly in some parts on these islands, and to that  
19 point, those islands are creating a problem for us  
20 today. It's -- there's more problems delivering the  
21 water to El Paso and to Mexico because there is --  
22 there is -- these islands are impeding the flow that  
23 normally would go through the system much quicker, and  
24 so I believe there's some river losses. I'm not a  
25 hydrologist, but certainly that is our concern that

1 we're not getting the water that we need to -- to the  
2 country of Mexico and to the sister district in El  
3 Paso.

4 **Q. You have continuing dialogue, though, with**  
5 **IBWC?**

6 A. Yes, we do. And they continue to report to  
7 us their Channel Maintenance Plan and where they're  
8 cleaning and how much they're taking out, and  
9 certainly that is helpful to our -- our Board;  
10 however, it's a little bit too late. We have just a  
11 -- still a lot of sediment in the river, and it's  
12 going to take a -- a bigger effort to get it out of  
13 there.

14 **JUDGE MELLOY:** Mr. Somach, we've been  
15 going for about two hours. I think maybe it's time we  
16 take a little break and give everybody a chance to  
17 stretch, so let's -- let's recess for 20 minutes, then  
18 we'll come back. All right.

19 (Recess.)

20 **JUDGE MELLOY:** Looks like everyone's  
21 back. Shall we get started, Mr. Somach?

22 **MR. SOMACH:** Yes, Your Honor. I just  
23 have a few more questions.

24 **Q. (BY MR. SOMACH) Are you doing okay there,**  
25 **Mr. Esslinger?**

1           A.    Yes, sir.

2           Q.    Okay.  How often has EBID contacted the State  
3 of New Mexico about Compact matters?

4           A.    Not that many times that I can recall.

5           Q.    And are you familiar with litigation that was  
6 initiated by New Mexico challenging the operating  
7 agreement?

8           A.    Yes.

9           Q.    And had -- I think you indicated that New  
10 Mexico had -- well, let me just ask you again:  Had  
11 New Mexico involved itself in EBID's contract water  
12 supply prior to the 2008 Operating Agreement?

13          A.    No.

14          Q.    Had New Mexico, to your knowledge, before the  
15 litigation ever asserted that EBID's Project water  
16 supply belonged to New Mexico?

17          A.    No.

18                   **MR. SOMACH:**  I have no further  
19 questions, Your Honor, on direct.

20                   **JUDGE MELLOY:**  All right.  Ms. Thompson?

21                   **MS. THOMPSON:**  Yes, Your Honor.  Thank  
22 you.

23                                   CROSS-EXAMINATION

24 BY MS. THOMPSON:

25           Q.    Hi, Mr. Esslinger.

1 A. Good afternoon.

2 Q. My name is Lisa Thompson, and I represent the  
3 State of New Mexico in this matter. I'll have a few  
4 follow-up questions for you. Okay?

5 A. Yes, ma'am.

6 Q. Just to confirm a couple statements that I  
7 believe you made in your testimony, you've been  
8 employed with the District, right, since 1979?

9 A. '78.

10 Q. '78. And then you've had more than four  
11 decades of experience with EBID, correct?

12 A. That's correct.

13 Q. And you are the records custodian for the  
14 district, correct?

15 A. Yes, I am.

16 Q. Is it correct that EBID has roughly 6,500 to  
17 8,000 member farmers?

18 A. That's correct.

19 Q. And EBID charges assessments to its members,  
20 correct?

21 A. That's correct.

22 Q. For this past year, the assessments are  
23 charged on a per-acre basis, and they're a bit over  
24 \$90 per acre; is that right?

25 A. They are at \$90.

1 Q. Okay.

2 A. For the first 2 acre-feet.

3 Q. And what is it after that?

4 A. There is nothing after that.

5 Q. That amount is assessed on each acre of land,  
6 right, that receives EBID water?

7 A. That's correct.

8 Q. And so you essentially take that \$90 times  
9 the total acreage for each farmer, right, and that's  
10 their assessment?

11 A. For each farmer, yes.

12 Q. And those assessments cover operation and  
13 maintenance for delivery of the EBID Project supply?

14 A. Yes.

15 Q. And that fee then isn't correlated in any way  
16 to the amount of water that the farmers get; is that  
17 correct?

18 A. No.

19 Q. I want to go back over a little bit of what  
20 you discuss for the district historical operations.  
21 Just to confirm, project -- the Project was operated  
22 by Reclamation from 1916 up to 1978, correct?

23 A. Until 1979, I believe, when the contract was  
24 formally designed. I -- I -- I was involved in 1978  
25 with the transition, but I don't believe -- I believe



1 at the end of that year, the Bureau operated in 1978.

2 Q. During that time, Reclamation released water  
3 from the reservoir and delivered the water all the way  
4 to the farm head gates, correct?

5 A. That's correct.

6 Q. And Reclamation operated the entire project  
7 as a single unit, correct?

8 A. The Rio Grande Project is referred to as a  
9 single-purpose project for agriculture only.

10 Q. Did Reclamation operate it as a single unit  
11 during that time?

12 A. Yes.

13 Q. And during that time, Reclamation allocated  
14 water based on an equal amount per-acre basis; is that  
15 correct?

16 A. That's correct.

17 Q. Then in about 1979, the districts paid off  
18 their debt to the U.S., took over the operations and  
19 maintenance of the project facilities from the river  
20 diversion to the farm head gates, correct?

21 A. That is correct.

22 Q. So by then, Reclamation no longer delivered  
23 to the farms, rather, they're delivering at the river  
24 point of diversion at that time, right?

25 A. That is correct.

1 Q. The article that Mr. Somach had referred you  
2 to, we can pull up if need be, but I think these are  
3 pretty simple statements just to confirm from that  
4 article, but just to confirm, there was a full  
5 allotment of water between 1979 through 2002, correct?

6 A. I can't recall, but it was at least 23 years,  
7 yes. Yes, ma'am.

8 Q. And a full allotment as determined by  
9 Reclamation was approximately 3 feet -- excuse me -- 3  
10 acre-feet per acre, correct?

11 A. That's correct.

12 Q. And during that period, that full allotment  
13 of water would have applied to EBID, EP1, and Mexico,  
14 correct?

15 A. That's correct.

16 Q. And prior to 2008, Reclamation determined the  
17 daily releases from the reservoir to meet the orders  
18 downstream, correct?

19 A. Repeat the question one more time, please.

20 Q. Oh, sure. Prior to 2008, Reclamation  
21 determined the daily releases from the reservoir to  
22 meet the orders that EBID and EP1 made downstream,  
23 correct?

24 A. That's correct.

25 Q. And then after 2008, EBID and EP1 have

1 prepared daily order sheets to agree on the size of  
2 the daily releases from the reservoir, again, to meet  
3 the order from the districts downstream, correct?

4 A. Yes. And it included Mexico -- Mexico's  
5 releases.

6 Q. And those releases are an attempt to get --  
7 to meet the orders downstream, but to avoid waste of  
8 water; would you agree with that?

9 A. I would agree with that.

10 Q. With regard to the Mesilla Dam, EBID diverts  
11 and provides water to, I believe, if I recall from  
12 your deposition, about 17,000 acres within EP1 in the  
13 Mesilla Valley portion of Texas; is that right?

14 A. At one time, the Canutillo reach, which I  
15 referred to, had around 17,000 acres in it that could  
16 be -- that was -- that was irrigable.

17 Q. And EP1 farmers have their own wells for  
18 conjunctive use within that area, correct?

19 A. I believe there was -- there are wells for  
20 those individual farmers down there.

21 Q. And in that same Mesilla Valley portion of  
22 Texas, there's also municipal wells that we refer to  
23 oftentimes as the Canutillo well field; is that right?

24 A. That's correct.

25 Q. And those wells pump municipal supply for use

1     **in Texas, correct?**

2           A.     Yes, they do.

3           **Q.     And is it your understanding that in some**  
4 **years, those Texas municipal wells pump over 20,000**  
5 **acre-feet of water?**

6           A.     I'm not aware of that to be able to testify  
7 to that amount.

8           **Q.     And I understand that EBID measures the water**  
9 **that passes through the Mesilla Dam using realtime**  
10 **telemetry data; is that right?**

11          A.     That's correct. We have that realtime  
12 instrumentation all the way from Caballo down to past  
13 the Mesilla Dam.

14          **Q.     And one of EBID's goals in monitoring and**  
15 **using that telemetry data is to ensure that EP1**  
16 **receives its orders through the Mesilla canal; is that**  
17 **right?**

18          A.     Through the Mesilla Dam?

19          **Q.     Yes. Thank you.**

20          A.     Yes. That, as well as the two diversions  
21 into the east side and west side. They -- they both  
22 have orders that are placed by EP No. 1 into those two  
23 systems, and so we have telemetry that measures what  
24 goes to the -- goes to them and what goes to EBID in  
25 those two canals.

1 Q. I'm going to now pull up New Mexico Exhibit  
2 0517. I'm going to just look back a little bit at the  
3 historical context of the Rio Grande area.

4 Mr. Esslinger, do you recognize this presentation?

5 A. Yes. It's a presentation that I -- I  
6 presented in 2007.

7 Q. And did you -- you were the author on this  
8 presentation, correct?

9 A. A lot of the slides were mine, and a lot of  
10 them came from our consultant engineer, Dr. Phil King.

11 Q. And who is this that you presented -- you  
12 made this presentation to?

13 A. I believe GMDA stands for Groundwater  
14 Management -- I can't recall the acronym completely.

15 Q. That's okay. In making these presentations,  
16 are those part of your ordinary part of your duties as  
17 the manager and treasurer of the District?

18 A. Yes, they are.

19 MS. THOMPSON: New Mexico moves to admit  
20 Exhibit 0517, please, Your Honor.

21 JUDGE MELLOY: Any objection? You're  
22 muted, Mr. Somach.

23 MR. SOMACH: Just a little bit of  
24 technological difficulty. Including the fact that I  
25 don't have it up on my screen, so I can't see it and

1 these binders of cross-examination exhibits are so  
2 voluminous that I -- I just need to -- if you'll give  
3 me a minute just to -- to locate it.

4 **JUDGE MELLOY:** All right. Well, while  
5 he's doing that, why don't you go ahead, Ms. Thompson,  
6 and maybe lay a little more foundation or start your  
7 examination about the exhibit.

8 **MS. THOMPSON:** Sure.

9 **Q.** (BY MS. THOMPSON) Okay. If we could go to  
10 Slide No. 6, please. Mr. Esslinger, this slide is  
11 entitled, "Project Water Supply History in a  
12 Nutshell," correct?

13 **A.** That's correct.

14 **Q.** The slide depicts a graph with the release in  
15 acre-feet of water from Elephant Butte Reservoir on  
16 the Y axis and the year on the X axis; is that  
17 correct?

18 **A.** That's correct.

19 **Q.** And there are four vertical black lines on  
20 the slide breaking the history of the project into  
21 five different periods; is that right?

22 **A.** That's correct.

23 **Q.** The first period is entitled, if you can see  
24 kind of the writing, it says, "1915 to 1937 start-up."  
25 Do you see that?

1 A. Yes. I do.

2 Q. And then the second period goes from 1938 to  
3 1950, and you have it labeled as, "The roaring '40s."  
4 Do you see that?

5 A. Yes.

6 Q. I -- I interpret that to mean that there was  
7 an abundant surface water supply during those roaring  
8 '40s; is that right?

9 A. No.

10 Q. No? How do you interpret it?

11 A. Well, I -- I believe that's -- we were trying  
12 to interpret it as the -- that was when the Compact  
13 came in to play, 1938, and also during that period of  
14 time, there was extraordinary -- there was -- there  
15 was a time of drought occurring in the late '40s.

16 Q. During this time, there is also some -- at  
17 least one big spike, right, do you see that?

18 A. That's correct. It was a spill that -- that  
19 happened in, I believe, 1942, and then after that, it  
20 just started to fall off.

21 Q. Okay. And then there's a period from 1951 to  
22 1978 that you have labeled as, "Drought 1." Do you  
23 see that?

24 A. Yes.

25 Q. During this time period, I understand that

1 you lived with your parents on a farm served by EBID  
2 when you were a child during this period of time; is  
3 that right?

4 A. Yes.

5 Q. And it's my understanding, if I recall from  
6 your deposition, that your father drilled two  
7 groundwater wells, one in 1949, and one in 1951; is  
8 that right?

9 A. That's right.

10 Q. Did your family use groundwater to irrigate  
11 the farm and supplement during the short surface water  
12 supply years?

13 A. Yes, we did, quite often.

14 Q. And do you agree that your father had to  
15 drill those wells to irrigate his farm because the  
16 supply from the Rio Grande Project was insufficient to  
17 maintain a crop during the short supply years?

18 A. That's correct. He often had to supplement  
19 his pumping with what was in the canal system to  
20 deliver to the farm. In other words, I can't recall  
21 the allotments back then to those farms, but if it  
22 wasn't enough to make the crop, then he would have to  
23 use the groundwater to finish out the crop so he could  
24 harvest it.

25 Q. Do you recall whether your neighbors in EBID



1 also put in supplemental wells during those early 1950  
2 short supply periods?

3 A. That was the talk around the dinner table at  
4 night.

5 Q. Is it my understanding -- excuse me.

6 Am I correct to understand that this period  
7 is also the so-called D2 period?

8 A. Yes, it is.

9 Q. And, again, just to confirm, that's from 1951  
10 to 1978, right?

11 A. I believe they may have called it 1952, but  
12 it is in that period, yes.

13 Q. Okay. Returning to the slide then back here,  
14 the next period is 1979 to 2002, which you call, "The  
15 Wet Years," right?

16 A. That's correct.

17 Q. Are these what you referred to earlier as the  
18 23 years that Reclamation made a full allocation to  
19 the farmers in every year?

20 A. That's correct. And oftentimes, more than  
21 that was released.

22 Q. So during that wet period of time, would you  
23 agree that many of the farmers didn't have the need to  
24 use their groundwater wells on a consistent basis at  
25 all during that time?

1 A. That is correct.

2 Q. Then the final period begins, and it's just  
3 going off the page here, in 2003, and that's what  
4 you're labeling as, "Drought 2" on this slide, right?

5 A. That's correct.

6 Q. And do you believe that that drought that  
7 began in 2003 has continued through today?

8 A. Oh, yes.

9 MS. THOMPSON: I'm going to renew my  
10 offer of this exhibit, Your Honor.

11 JUDGE MELLOY: All right. Mr. Somach,  
12 have you had a chance to take a look at it?

13 MR. SOMACH: I have. I've got it now.  
14 No objection.

15 JUDGE MELLOY: All right. The exhibit  
16 is admitted. That's -- let me see again. That's --  
17 is that New Mexico 517; is that right?

18 MS. THOMPSON: Yes, Your Honor.

19 JUDGE MELLOY: Yes. Exhibit 517 -- New  
20 Mexico Exhibit 517 is admitted.

21 Q. (BY MS. THOMPSON) Mr. Esslinger, I want to  
22 ask you a few more questions about EBID's groundwater  
23 use during that first drought period back in the  
24 1950s. Okay?

25 A. Okay.

1           Q.    So let's pull up New Mexico Exhibit 0175,  
2 please. And what I'm going to ask you about now,  
3 Mr. Esslinger, is a series of EBID historical records,  
4 particularly their EBID minutes, and we should open up  
5 the exhibit -- okay. Do you recognize this document  
6 as a compilation of the minutes of the Board of EBID,  
7 and for this one in particular, it's beginning in  
8 1933, Mr. Esslinger?

9           A.    Yes. That -- that is what our board minutes  
10 look like.

11          Q.    And then turning to Page 476, it appears that  
12 this particular compilation ends in December, 1949,  
13 correct?

14          A.    Yes.

15          Q.    And do you agree that these minutes are  
16 generally the period immediately before what you have  
17 described as that first significant period of drought?

18          A.    Yes.

19          Q.    I'll also note that the Bates number at the  
20 bottom of the page indicates that these particular  
21 documents were disclosed by EBID as part of the  
22 discovery process in this case. Does EBID maintain  
23 board minutes -- excuse me -- board minutes in the  
24 ordinary course of its business?

25          A.    Yes, they do.

1           **Q.**    And does EBID maintain a record of its  
2 historical board minutes for each meeting?

3           A.    Yes, we do.

4           **Q.**    And are they generally an accurate account of  
5 the activities of the EBID board?

6           A.    Yes, they are.

7                   **MS. THOMPSON:**   So, Your Honor, I'm going  
8 to move to admit New Mexico Exhibit 0175 into  
9 evidence, please.

10                   **JUDGE MELLOY:**   Any objection?

11                   **MR. SOMACH:**   Is -- is 0175 all of those  
12 minutes? Are these -- I -- I don't know. I believe  
13 these are selective minutes, and I just want to make  
14 sure. They're not independently tabbed per meeting.  
15 They are various -- I just want to understand, it's  
16 this compilation, whatever this compilation is of  
17 minutes, regardless of what may be missing or -- I'm  
18 just trying to understand what's being introduced.

19                   **MS. THOMPSON:**   Sure. So this particular  
20 compilation is the meeting minutes from 1933 to 1949,  
21 so this is that subset.

22                   **MR. SOMACH:**   Okay. And you're -- this  
23 is a complete compilation of those -- that period?

24                   **MS. THOMPSON:**   That's correct, yes.

25                   **MR. SOMACH:**   Okay. All 482 pages?

1                   **MS. THOMPSON:** That's -- those are the  
2 meeting minutes for that period of time.

3                   **MR. SOMACH:** Okay. As, you know --  
4 we'll see what you have to ask him about, but in terms  
5 of the minutes themselves, he's testified that those  
6 are the official minutes so no objection.

7                   **JUDGE MELLOY:** All right. Exhibit 175  
8 is admitted.

9           **Q. (BY MS. THOMPSON)** So if we could turn to Page  
10 340, please. This appears to be the minutes of a  
11 special meeting of the Board held on June 15th, 1946;  
12 is that correct?

13           **A.** Yes.

14           **Q.** And on Page 341, the next page, there's a  
15 section concerning pumping investigation that we'll  
16 highlight here or make bigger anyways. Do you see  
17 that section, Mr. Esslinger?

18           **A.** Yes, I do.

19           **Q.** And in the paragraph beginning with the  
20 number two, it states kind of partway through that  
21 paragraph, "It was moved by Archer and seconded by  
22 Gray that the District start investigations for the  
23 purpose of determining whether or not there is in  
24 existence a groundwater supply that is accessible, is  
25 of proper quality, and that exists in sufficient

1 quantity to justify pumping operations on a large  
2 scale; and that negotiations be started with the U.S.  
3 Geological Survey for the purpose of acquiring  
4 assistance in this matter on a cooperative basis, the  
5 probable cost of same to be estimated and placed  
6 before the Board as promptly as possible." Did I read  
7 that correctly?

8 A. You read it correctly.

9 Q. It continues then that negotiations be  
10 started with the USGS for the purpose of requiring  
11 assistance in this matter; is that right?

12 A. That's correct.

13 Q. And it's your testimony that EBID supported a  
14 USGS study of groundwater resources in the Rio Grande  
15 Project in about the 1940s; is that right?

16 A. Yes.

17 Q. And do you understand that the purpose of  
18 that study was to determine whether groundwater could  
19 be used as a supplemental source of irrigation supply?

20 A. Yes.

21 Q. And so, in other words, it'd be used in  
22 conjunction with the surface water supply, correct?

23 A. That's correct.

24 Q. And then if we could turn to Page 356,  
25 please. This is the -- the minutes from December

1 31st, 1946. Do you see that, Mr. Esslinger?

2 A. I do see that.

3 Q. And then turning to the next page, which  
4 marked at the bottom is 357, there's another entry  
5 concerning pumping. Do you see the pumping section  
6 that's being blown up now?

7 A. Yes.

8 Q. I'm going to just read a part of this in.

9 "The Board was informed the U.S. Geological Survey  
10 has been conducting a preliminary investigation in the  
11 District relating to groundwater supply. All sources  
12 of information have been investigated and analyzed by  
13 representative of the survey. The investigation has  
14 reached the point where it will be necessary to test  
15 wells drilled specifically for irrigation purposes in  
16 order to obtain information concerning the groundwater  
17 supplies and the effect of pumping operations upon  
18 them." Did I read that correctly?

19 A. Yes, you did.

20 Q. And so during this time, it appears that the  
21 Board was well informed that the USGS was beginning  
22 its study about this time; is that right?

23 A. That's correct.

24 Q. And the Board also considered the potential  
25 of drilling a series of wells in the -- in the

1 meantime during this same time; is that right?

2 A. It appears that's what they were discussing.

3 Q. And then if we go over to Page 383, now we're  
4 onto October 10th, 1947. Do you see that there at the  
5 top, Mr. Esslinger?

6 A. Yes, I do.

7 Q. And the second order of business is  
8 discussion of the USGS report. Do you see where it  
9 says "discussion"?

10 A. Can it be --

11 Q. Hang on. Let's find that one real quick.  
12 Hang on one second for me.

13 A. Okay.

14 Q. Apologize for that. Sometimes these are a  
15 little small for my eyes. So here we are, again,  
16 October 10, 1947. It states here, "The principal item  
17 of business was the discussion of the preliminary  
18 report prepared by the U.S. Geological Survey on  
19 groundwater and pumping in the Elephant Butte  
20 Irrigation District. Excerpts from the report were  
21 read to the Board and were discussed in detail." Do  
22 you see that?

23 A. Yes, I do.

24 Q. So at this point, the EBID board had received  
25 some preliminary copies of sections of that study, the



1 **groundwater study, by USGS; is that right?**

2 **MR. SOMACH:** Objection; there's no  
3 foundation with respect to his knowledge of -- of what  
4 occurred back in 1947. The records of the minutes  
5 speak for themselves. I object to the question  
6 because there's been no foundation that Mr. Esslinger  
7 was there in 1947 and -- or that he knows what the  
8 Board was talking about in 1947.

9 **MS. THOMPSON:** Your Honor, may I  
10 respond?

11 **JUDGE MELLOY:** Yes. But let me ask a  
12 question before you do that. Mr. Esslinger testified  
13 on direct about the preliminary report, and I -- I'm  
14 trying to see -- oh, the preliminary report of  
15 September, 1947, is that the correct date?

16 **MS. THOMPSON:** That's correct, Your  
17 Honor.

18 **JUDGE MELLOY:** Okay. All right. Go  
19 ahead, Ms. Thompson. You said you wanted to be heard?

20 **MS. THOMPSON:** Oh, yes, Your Honor.  
21 Thank you. I was just going to respond to Mr. Somach  
22 that, in fact, Texas was the one who asked and  
23 submitted into evidence the Conover report from 1947,  
24 asked Mr. Esslinger about this report. We're  
25 providing some more context and historical perspective

1 through this earlier period of time on that report, as  
2 well as other discussions on pumping.

3 **JUDGE MELLOY:** Well, I -- hold on just a  
4 second. I think it's within the scope in terms of  
5 these minutes are relevant. I do question the point  
6 of -- of asking somebody if you properly read  
7 something. I mean, the minutes say what the minutes  
8 say, and if you want to point them out, that's --

9 **MS. THOMPSON:** You're on mute, Your  
10 Honor.

11 **JUDGE MELLOY:** I was going to say, I  
12 don't know the point of just saying -- reading them  
13 and then asking if you've read correctly. I mean, if  
14 you want to point them out, that's fine, but I don't  
15 know that Mr. Esslinger can add anything beyond what's  
16 already in the minutes. So I'm going to sustain the  
17 objection.

18 **MS. THOMPSON:** So, Your Honor, is the  
19 objection to this particular page then? We're just  
20 giving context to that Conover report, and that's  
21 where I was going to move to next, which has already  
22 been admitted, and then some context thereafter. If I  
23 --

24 **JUDGE MELLOY:** That 's fine. Go ahead.  
25 We'll take the objections as they come.

1 Q. (BY MS. THOMPSON) Okay. So then looking at  
2 Joint Exhibit 444, please, and turning to the second  
3 page, again, this is the Conover report you saw  
4 earlier from 1947, and if you turn to Page 27, this is  
5 the conclusions in the report. Mr. Esslinger, you had  
6 mentioned earlier that you had seen this report and  
7 reviewed it before; is that right?

8 A. That's correct.

9 Q. There's some key conclusions in this report.  
10 I just wanted to ask you: Is it your understanding  
11 that, in fact, EBID understood the effects of  
12 groundwater pumping as early as the 1940s at this time  
13 when the Conover report was prepared?

14 A. Yes. That was the -- probably the first time  
15 they received any kind of understanding of what was  
16 happening to the groundwater and what the results of  
17 pumping would be.

18 Q. Then if we turn to Page 385 of Exhibit New  
19 Mexico 175, these are the minutes from November, 1947.  
20 Do you see that at the top?

21 A. Yes, sir -- yes, ma'am.

22 Q. And then this would be the month right after  
23 the Conover report; is that right?

24 A. That's correct.

25 Q. And then on the next page, there's a section

1 on pumping. Here it says, "The Board was furnished a  
2 list prepared by the Bureau indicating the number and  
3 location of irrigation wells drilled in the District.  
4 The total number of wells reported by the Bureau was  
5 37. After a brief discussion of the pumping  
6 situation, it was deemed advisable to carry the matter  
7 over to January for more extensive discussion." Based  
8 on your history with EBID, long history with EBID and  
9 custodian of the records, was it your understanding  
10 that Bureau of Reclamation was certainly well aware of  
11 wells in EBID at this time?

12 A. I would think that -- that the board of  
13 directors had communicated with the Bureau their  
14 concern of what the allotments would be year to year,  
15 and that directed the focus on groundwater.

16 Q. Is it your understanding, based on, you know,  
17 again, your long history with EBID and understanding  
18 the history of the District, that into the 1950s,  
19 Reclamation encouraged EBID farmers to drill  
20 groundwater wells?

21 A. I believe it was more the farmers that  
22 encouraged the Bureau -- the board of directors to  
23 look into the fact that groundwater pumping was an  
24 alternative that they needed to seek. The board of  
25 directors has always been proactive in trying to find

1 what is best that they can -- they can do to provide  
2 adequate supplies of water, whether it was surface or  
3 groundwater, to the entire project, our district and  
4 -- and certainly I believe that the Bureau was  
5 involved and -- and probably in some cases did  
6 encourage the ability to pump out of the ground. But  
7 I think it was the board of directors who really  
8 focused on the need for another alternative supply of  
9 water.

10 **Q. If we could then turn to New Mexico 176,**  
11 **please.**

12 **MS. THOMPSON:** Your Honor, I just wanted  
13 to double-check. On the last compilation, do I need  
14 to renew my request to -- to enter that -- excuse me  
15 -- the exhibit?

16 **JUDGE MELLOY:** I thought we had admitted  
17 175, but as I understand it -- if I didn't, it is  
18 admitted. 175 is in evidence.

19 **MS. THOMPSON:** Okay.

20 **Q. (BY MS. THOMPSON) Mr. Esslinger, do you**  
21 **recognize this document as another compilation of EBID**  
22 **minutes beginning with December, 1949?**

23 **A. Yes.**

24 **Q. Then turning to Page 605, this compilation**  
25 **ends June, 1958. Give us one second here. So, again,**

1 you see the date here as 1958, right?

2 A. Yes, I do.

3 Q. So this compilation is from 1949 to 1958, and  
4 that would cover the first drought period that we  
5 talked about before; is that right?

6 A. Yes.

7 Q. And, again, just to lay some foundation, do  
8 you agree that EBID's minutes accurately reflect the  
9 Board's activities at this time?

10 A. Yes.

11 MS. THOMPSON: Again, Your Honor, I'd  
12 move to admit New Mexico 176 into evidence.

13 JUDGE MELLOY: Any objection?

14 MR. SOMACH: Is it being offered --  
15 again, I -- I don't understand context. Mr. Esslinger  
16 has authenticated the minutes, and if they're being  
17 introduced for that purpose, I have no -- no  
18 objection.

19 MS. THOMPSON: Okay.

20 JUDGE MELLOY: All right. Exhibit 176  
21 is admitted.

22 Q. (BY MS. THOMPSON) If we could turn to Page  
23 65, please. These are the minutes for February 1951.  
24 Do you see that at the top, Mr. Esslinger?

25 A. Yes.

1 Q. And then at the top, there's a passage  
2 entitled, "Attitude of Bureau of Reclamation." Oh,  
3 excuse me. It's the next page. Thank you. Do you  
4 see that section?

5 A. Yes.

6 Q. And if you want to skim this section, it  
7 concerns a letter from the Project manager to EBID in  
8 which the Project manager states that, "Should the  
9 operation of wells in the Elephant Butte Irrigation  
10 District diminish the volume of drain return flows  
11 available to the project area below El Paso, the  
12 Bureau would feel justified in making up the  
13 deficiencies with stored water." Do you see that?

14 A. I see that.

15 Q. And is it your understanding then that the  
16 passage accurately reflects that Reclamation and the  
17 districts at that time certainly understood a  
18 relationship between drains and groundwater pumping?

19 MR. SOMACH: Objection; no foundation  
20 for his knowledge of what was intended at that point  
21 in time. She's read or paraphrased the passage. It  
22 speaks for itself.

23 MS. THOMPSON: I think Mr. Esslinger has  
24 been with the District for more than 40 years and has  
25 an extensive understanding of the history and is the

1 custodian, frankly, of all these historical documents,  
2 as well, and can certainly be the proper witness to  
3 testify to the District's history over time related to  
4 critical issue of groundwater pumping.

5 **MR. SOMACH:** That's a different question  
6 than the one you asked. You're asking about a very  
7 specific passage and historic notes. There's been no  
8 foundation at all that he has any knowledge about what  
9 was being talked about in these specific minutes in  
10 these specific notes.

11 **JUDGE MELLOY:** Well, I'll let the  
12 witness answer, but why don't you restate your  
13 question so Mr. Esslinger knows exactly what you're  
14 asking?

15 **MS. THOMPSON:** Sure.

16 **Q. (BY MS. THOMPSON)** Based on your understanding  
17 of the history around this time, Mr. Esslinger, of the  
18 District and Reclamation, is it your understanding  
19 that there was, in fact, recognition and understanding  
20 of the relationship between the drain flows in EBID  
21 and groundwater pumping?

22 **A.** I'm sure that the Board knew of that based  
23 upon this -- this remark from the minutes. It also  
24 says that the Bureau -- that EBID was not necessarily  
25 agreeing with the Bureau in the justifications they



1 were making at the time.

2 Q. Then if we go over to Page, let's see, 178,  
3 please. These are minutes from May, 1953. Do you see  
4 that, Mr. Esslinger?

5 A. Yes.

6 Q. And then there's an entry concerning current  
7 water situation. Do you see that?

8 A. Yes.

9 Q. And if you want to skim through there, this  
10 section, there's in the minutes report, receipt of  
11 water announcements from the Project manager  
12 increasing the allotment to 1.5 acre-feet per acre.  
13 Do you see that in this section?

14 A. Yes.

15 Q. And then do you see that the Board also  
16 recommended that persons with wells attempt to make  
17 arrangement with neighbors having wells for the  
18 transfer of water? Do you see that?

19 A. Yes.

20 Q. And what's your understanding then of what it  
21 means to have neighbors having wells for the transfer  
22 of water, Mr. Esslinger?

23 A. Well, my personal experience is that my -- my  
24 father's neighbor did not have a well, and the -- the  
25 neighbor would come to my -- my father and make

1 arrangements for my father to pump water into the  
2 lateral to distribute water to his farm.

3 Q. And then if we could move on then to Exhibit  
4 JT-206.

5 MS. THOMPSON: And this is a joint  
6 exhibit, Your Honor. It's been previously admitted.

7 Q. (BY MS. THOMPSON) So, Mr. Esslinger, I'm  
8 going to represent to you that this is a document  
9 excerpt from the Rio Grande Project histories  
10 maintained by the Bureau of Reclamation in the year  
11 1951, and if we turn to Page 52, this is a water  
12 announcement from August 1st, 1951. Do you see that?

13 A. Yes.

14 Q. And the last paragraph states, "Water users  
15 who have pumps of good capacity that will supply their  
16 needs are requested to arrange for transfer of part of  
17 their unused allotment water to those who are in need  
18 of additional water." Do you see that?

19 A. Yes.

20 Q. And does that description there accord with  
21 your understanding that you just described to the  
22 practice of water transfers in EBID?

23 A. No. I'm not -- I'm not familiar with -- with  
24 what occurred right there by the project manager.

25 Q. Okay. Then let's -- I'm going to turn to a

1 different topic here. Did there come a time that  
2 Reclamation asked EBID to drill a series of  
3 district-owned wells to supplement the Project supply  
4 during the -- that Drought 1 period?

5 A. I can't recall, because I wasn't there so I  
6 -- I can't answer that as far as my knowledge of what  
7 -- who started what. I don't know if it was  
8 Reclamation or if it was the District --

9 Q. Okay.

10 A. -- that initiated the -- the exploration of a  
11 well field. I know that the District spent a lot of  
12 time developing a plan to develop a well field, but I  
13 don't know the particulars about how Bureau of  
14 Reclamation was involved.

15 Q. If we turn to New Mexico 177, please. This,  
16 again, is minutes from 19 -- let's see here --  
17 starting in 1964 -- oh, excuse me, 1965 it looks like  
18 here. If we could turn, though, to Page 382. This  
19 one here is actually started August, 1971. Do you see  
20 that at the top?

21 A. Yes.

22 Q. Then on the next page, there's an entry for  
23 Project wells?

24 A. Yes.

25 Q. The minutes record a presentation by the

1 Project superintendent for the Bureau of Reclamation  
2 concerning a proposal to drill project wells; is that  
3 right?

4 A. Yes. There must've been --

5 MR. DUBOIS: Objection, Your Honor.

6 Ms. Thompson seems to be misstating what  
7 is on the screen here. I do not see anything about a  
8 proposal or who it was by.

9 MS. THOMPSON: I can rephrase.

10 JUDGE MELLOY: Go ahead.

11 MS. THOMPSON: Sure.

12 Q. (BY MS. THOMPSON) So let me just make sure  
13 I'm being accurate here, Mr. Esslinger. It says, "Jim  
14 Kirby, project superintendent of the Bureau of  
15 Reclamation, made a presentation to the Board  
16 regarding project wells. After a long discussion, it  
17 was recommended that our attorney render an opinion to  
18 see if it is necessary for the District to have a vote  
19 for our constituents or not to spend District funds  
20 for five pilot project wells." Did I read that right?

21 A. You did read that right.

22 Q. Do you have any knowledge about what this is  
23 referring to as the five pilot project wells,  
24 Mr. Esslinger?

25 A. I do not have knowledge.

1 Q. Okay. Then let's turn to Page 463. This is  
2 from 1972. Go to Page 468, please. Towards the  
3 bottom of the page, there's another entry  
4 here, "Project Wells." Do you see that?

5 A. Yes.

6 Q. Here, the minutes record that the Board  
7 authorize the Bureau of Reclamation to install five  
8 project wells as soon as possible. Do you see that?

9 A. I see that.

10 Q. Again, just to double-check, that description  
11 of wells, project wells drilled in EBID, you don't  
12 have any knowledge about those particular wells?

13 A. What was the date of these board minutes?

14 Q. This one is 1972?

15 A. There was -- there was discussions, if I  
16 recall, with the Bureau, and whether or not the plan  
17 was orchestrated by the Bureau, I don't know, but EBID  
18 had a -- had instituted or a plan called up for a deep  
19 well program where they were talking more about 35  
20 wells that would reach from the Hatch Valley all the  
21 way down, and -- and they were spread out. Now, my  
22 understanding is that -- that the Bureau knew about  
23 that plan of -- of deep wells and came to the -- I'm  
24 just trying to make sure that these -- these five  
25 wells are part of that project because there were five

1 wells that were eventually drilled, but I -- I don't  
2 know if the two are the same.

3 Q. Okay. Let's move on, but let me double-check  
4 and see.

5 MS. THOMPSON: Your Honor, just to wrap  
6 that up on the meeting minutes then, New Mexico moves  
7 to also admit the last set New Mexico 177, please.

8 JUDGE MELLOY: Any objection?

9 MR. SOMACH: No objection.

10 JUDGE MELLOY: 177 is admitted.

11 Q. (BY MS. THOMPSON) Mr. Esslinger, I'd like to  
12 move now to ask you about EBID's use of groundwater in  
13 the more recent period of drought that we talked about  
14 from 2003 to present. It's my understanding that at  
15 the beginning of this most recent drought, EBID filed  
16 a number of applications with the New Mexico State  
17 Engineer to restart or pump some of the older district  
18 wells. Do -- is that correct?

19 A. Yes. We did have five wells, and, again, I  
20 -- I was confused by your other documents of whether  
21 we were talking the same five wells, but -- but, yes,  
22 we did -- EBID did have five wells that they were  
23 operating.

24 Q. If we could turn to New Mexico 0683.  
25 Mr. Esslinger, do you recognize this -- what's labeled

1 at the top, "Emergency Application for Permit to Use  
2 Supplemental Wells to Supplement Groundwater or  
3 Surface Water"?

4 A. Yes.

5 Q. And are you listed as one of the contact  
6 people on behalf of EBID on this document?

7 A. Yes.

8 Q. And did EBID submit this application to the  
9 New Mexico State Engineer in 2004?

10 A. Yes.

11 Q. So this is both an official record of EBID,  
12 as well as the State of New Mexico Office of the State  
13 Engineer; is that right?

14 A. Yes.

15 MS. THOMPSON: I move to admit New  
16 Mexico 0683, please.

17 MR. SOMACH: No objection.

18 Q. (BY MS. THOMPSON) Looking at --

19 JUDGE MELLOY: Just one second. I want  
20 to make sure I understand. I believe Mr. Esslinger  
21 testified on direct that there were wells drilled and  
22 were only in use for a year and then, I think the word  
23 or term used was that they were capped. Are these --  
24 are we talking about the same well -- wells here, and  
25 are -- and were those wells not used from the one year

1 when they were originally drilled up until the date of  
2 this application? Am I understanding that correctly,  
3 Mr. Esslinger?

4 THE WITNESS: If I can recall, the --  
5 the events, the five wells were drilled in 1979 and  
6 were used for one year, and they produced an amount of  
7 water from -- a total amount of water from those five  
8 wells. After that, the -- the District experienced  
9 full allotment years, and the wells were not pumped  
10 after that one year. But all of this occurred before  
11 what we referred to as the basin being closed, so  
12 those wells were out there. They hadn't been used.  
13 They had been capped so -- for safety reasons, and  
14 they had not been used. And then in 2003, we were  
15 asking that we could use applied off of those three  
16 wells of groundwater right through the application  
17 that was required after the basin was closed.

18 JUDGE MELLOY: All right. Thank you.

19 Go ahead, Ms. Thompson.

20 MS. THOMPSON: Your Honor, I was -- just  
21 to double-check with you, I think I just offered New  
22 Mexico 0683, and I don't believe there was any  
23 objection.

24 JUDGE MELLOY: I believe you're correct.  
25 New Mexico 683 is admitted.



1 MS. THOMPSON: Thank you.

2 Q. (BY MS. THOMPSON) So then looking at Page 2,  
3 please, Section 5 again describes five wells, and,  
4 Mr. Esslinger, I just wanted to make sure I was clear.  
5 Do you believe these are the same five wells we were  
6 discussing before?

7 A. They are the same, yes.

8 Q. Okay. And then looking at Section 6,  
9 describes an EBID drought contingency plan, and it  
10 also references in this Paragraph 6 a deep well  
11 program. Give me just a second. Let me find the  
12 exact sentence here. So in this paragraph, there is  
13 five lines down, "The employees to implement the deep  
14 well program to access its members/constituents'  
15 groundwater wells for purposes of obtaining and  
16 supplementing surface water supplies to lessen the  
17 effects of the present severe drought. This  
18 Resolution was adopted in furtherance of the EBID  
19 Drought Contingency Plan authorized in 1996, and also  
20 its well drilling program established in the '70s to  
21 supplement the District's water supply in times of  
22 severe shortage." Describe for me what this is  
23 referring to, if you know, again, the deep well  
24 program?

25 A. The deep well program was the program that I

1 was trying to describe to you before that was  
2 confusing to me from your prior questions. The deep  
3 well program was a program where they -- the District  
4 was planning to spread 35 irrigation wells across the  
5 Hatch and the Mesilla Valleys and spread them out so  
6 that they could supplement groundwater to the farmers  
7 in those areas that needed surface groundwater supply.  
8 The Board of Elephant Butte Irrigation District was  
9 very proactive at this time trying to deal with the  
10 drought that was -- that was obvious we were heading  
11 into and formed a drought contingency plan that's made  
12 up of the Water Resource Committee of Elephant Butte.  
13 It was board members who asked that we develop a plan  
14 -- a contingency plan that would look at every  
15 opportunity any way possible that we could supply all  
16 the farmers in Elephant Butte a supply of groundwater,  
17 and so they were -- they were looking into that -- to  
18 that deep well program that we called, and out of that  
19 deep well program, five wells were developed, drilled,  
20 and they ran through one year. So it looks like right  
21 now -- and then they also were including anything from  
22 the prior years where farmers used to share their  
23 groundwater with other neighbors, so they were looking  
24 at every possible way to ensure that all the farmers  
25 in Elephant Butte could -- could get a source of water

1 if we couldn't get it out of the surface supply.

2 Q. Mr. Esslinger, if we could look at Paragraphs  
3 8 and 9. Sorry. If you could go to Page 6, please.  
4 This is an affidavit of Mr. James Salopek, the  
5 president of the Elephant Butte Irrigation District at  
6 this time that was attached to this document, and in  
7 Paragraphs 8 and 9, Mr. Salopek -- if we could go to  
8 Paragraphs 8 and 9, Mr. Salopek recounts Reclamation's  
9 support for a well-drilling program in the '70s. If  
10 you could just skim over those and let us know if that  
11 description he provides here is in accord with your  
12 understanding or knowledge of the history of the  
13 drilling of wells in EBID?

14 A. Yes. He was -- right here, he was speaking  
15 of our deep well program because he mentions the  
16 master plan of 36 wells and where five wells were part  
17 of that master plan.

18 Q. And if we could move onto another exhibit,  
19 New Mexico 0571, please. Mr. Esslinger, do you  
20 recognize this document?

21 A. I recognize the document.

22 Q. And if we turn to Page 2, do you see in the  
23 second sentence, it says, "This document traces the  
24 historical underpinnings that support EBID's proposal  
25 for an offer of judgment that would allow the

1 irrigation district a diversion right that would  
2 encompass the surface water historically used in the  
3 Rio Grande Project, as well as a district right to a  
4 portion of groundwater"? Do you see that?

5 A. Yes.

6 Q. And on Page 38, the very end of the document,  
7 it states that it was submitted on behalf of the  
8 Elephant Butte Irrigation District and its Board on  
9 July 1st, 2008; is that right?

10 A. That's what --

11 Q. Excuse me. July 11th.

12 A. That's what it says.

13 Q. And do you understand this document was  
14 submitted to the Office of the State Engineer as part  
15 of the lower Rio Grande stream adjudication?

16 A. I did not author this document. This  
17 document was -- was presented to the State Engineer.  
18 It was drafted or it was presented from our EBID  
19 counsel at the time and given to them as -- as an  
20 explanation of how we would conjunctively manage our  
21 water within EBID, and it was a proposal, as you said,  
22 for an offer of judgment.

23 Q. And it's an official record of the Elephant  
24 Butte Irrigation District?

25 A. I believe so, yes. It's -- it's here.

1                   **MS. THOMPSON:** Your Honor, I move for  
2 admission of New Mexico 571 into evidence, please.

3                   **JUDGE MELLOY:** Any objection?

4                   **MR. SOMACH:** No objection, Your Honor.

5                   **JUDGE MELLOY:** All right. New Mexico  
6 571 is admitted.

7           **Q. (BY MS. THOMPSON)** So we go back to Page 2.  
8 At the very top, it says, "The farmers of the Elephant  
9 Butte Irrigation District have practiced the  
10 conjunctive management of groundwater and surface  
11 water since the inception of the Rio Grande Project in  
12 1906." Do you think that's an accurate statement,  
13 Mr. Esslinger?

14           **A.** Yes.

15           **Q.** And then beginning on Page 16, there's a  
16 section concerning the development of groundwater  
17 wells in EBID. Actually, I think it's 17. Go down  
18 one more page. Sorry, Mr. Esslinger. This section  
19 here, the title is, "Groundwater Wells," and it's on  
20 Page 17. There's a discussion in here about the  
21 development of groundwater wells within EBID. It goes  
22 on for a few pages here. I'm not going to ask you to  
23 read it, but do you have any reason or any  
24 understanding as to doubt any of the accuracy in this  
25 document that was submitted as part of the offer of

1 judgment for EBID?

2 MR. SOMACH: Objection. He's already  
3 stated that he didn't prepare the document. He's just  
4 authenticated it as a record of EBID, but he indicated  
5 he had no personal knowledge. He didn't -- he wasn't  
6 involved in its preparation. I'm not -- you know,  
7 there's been no foundation that he read it even, so I  
8 object to -- to the question.

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

11 Q. (BY MS. THOMPSON) So we'll move on then to --  
12 let's go to Texas Exhibit 139, please. Just going to  
13 ask you a couple general questions about the operating  
14 agreement. Doesn't necessarily -- we don't have to go  
15 to a particular page of this article, but we could.  
16 The 2008 Operating Agreement, is it your understanding  
17 that it allocates to EP1 water using the D2 curve; is  
18 that correct, Mr. Esslinger?

19 A. Yes.

20 Q. Is it also your understanding that the 2008  
21 Operating Agreement allocation method reduces EBID's  
22 surface water to whatever degree is necessary to  
23 provide that D2 allocation to EP1?

24 A. Yes.

25 Q. Is it also your understanding that the 2008

1     **Operating Agreement grandfathers in groundwater**  
2     **pumping in New Mexico at the levels experienced from**  
3     **1951 to 1978?**

4         A.     Yes.

5         **Q.     Is it your understanding that since the**  
6     **operating agreement, that EBID in most years does get**  
7     **a smaller allocation of water than EP1?**

8         A.     Yes.

9         **Q.     And because of the reduced surface water**  
10    **since the operating agreement, have EBID farmers been**  
11    **more reliant on groundwater?**

12        A.     I think it's a result of the drought and the  
13    timing of the operating agreement. This drought is --  
14    is horrific, and farmers are having to pump, whether  
15    or not the operating agreement was there or not. The  
16    drought is severe enough that I can't determine  
17    whether or not it was all the operating agreement.  
18    It's the drought that was creating the impact on the  
19    farmers' ability to pump and provide waters to the  
20    crops.

21        **Q.     Would you agree, Mr. Esslinger, that a part**  
22    **of the increased pumping would be related to the**  
23    **operating agreement?**

24        A.     Part of that, yes, but not all.

25        **Q.     You mentioned before that the 2008 Operating**

1 Agreement includes a new allowance for carryover; is  
2 that right?

3 A. Carryover is part of the -- is included in  
4 the operating agreement.

5 Q. And prior to implementing the carryover  
6 allowance in the 2008 Operating Agreement, the annual  
7 allocations would reset each year with a new 57/43  
8 allocation of all the usable water; is that correct?

9 A. That's correct.

10 Q. When you mentioned earlier in this article  
11 the -- the poem that you had written, there's a number  
12 of individuals recognized, and you mentioned that the  
13 mediator was Mr. Pat Gordon. Do you recall that there  
14 were also involvement from U.S. attorneys, including  
15 Mr. Leininger and Mr. Rich?

16 A. Yes. They're in my poem. They were there.

17 Q. Is it your understanding that the 2008  
18 Operating Agreement did not intend to alter or amend  
19 or in any way conflict with the provisions of the Rio  
20 Grande Compact?

21 A. Repeat the question, please.

22 Q. Is it your understanding that the Operating  
23 Agreement did not intend to conflict or repeal or  
24 modify the Rio Grande Compact?

25 A. Yes.



1 Q. If we could turn to U.S. Exhibit 0445,  
2 please. Mr. Esslinger, I'm actually going to turn  
3 first to Page 2. It looks like there's a couple  
4 different letters combined in this exhibit, so I'm  
5 just right now only asking you questions about this  
6 particular letter, and in this letter, it appears, if  
7 you could go to the signature, this one here is -- has  
8 your signature block. I don't see a signature on it,  
9 but was -- do you sometimes sign your letters  
10 electronically?

11 A. In this case, it was probably signed, and  
12 this is just a copy.

13 Q. Okay. And then if we go back then to the  
14 first page, it's dated March 31st -- excuse me --  
15 yeah, March 31st, and it's a letter to Elizabeth  
16 Verdecchia at the IBWC, and the first paragraph  
17 mentions that EBID is commenting on the IBWC Draft  
18 River Management Plan, Section 4 Channel Maintenance  
19 Plan; is that right?

20 A. Yes.

21 Q. You further state that, "The maintenance of  
22 the Rio Grande channel is important to our role and  
23 responsibilities as an irrigation district, as we have  
24 discussed previously." Did you send letters on a  
25 fairly regular basis to IBWC related to channel

1 **maintenance, Mr. Esslinger?**

2 A. There could have been a series of letters.  
3 There could have also been face-to-face  
4 communications. The IBWC had developed public forums,  
5 and we would send representatives to those forums,  
6 IBWC forums, and at those forums, we would at times  
7 mention the lack of maintenance, but most of it was  
8 probably through communications and probably a couple  
9 of even some discussions with the Commissioner and his  
10 staff.

11 **Q. You mentioned earlier that you have -- EBID**  
12 **does have concerns with sedimentation in the Rio**  
13 **Grande channel; is that right?**

14 A. That's correct.

15 **Q. And those concerns are still present today;**  
16 **is that right?**

17 A. Sediment has always been a problem for our  
18 district because if you have sediment in the river,  
19 then it -- when we divert it into our canals, then  
20 we're dealing with the maintenance problem ourselves  
21 with trying to remove the sediment. So it's been an  
22 ongoing issue for as long as EBID has had to maintain  
23 the canals and laterals.

24 **MS. THOMPSON:** Your Honor, may I have  
25 just a minute to consult with someone in the room, and

1 then we might be just about done here? Oh, I think  
2 you're on mute, Your Honor.

3 **JUDGE MELLOY:** Go ahead.

4 **MS. THOMPSON:** Okay. Thank you.

5 **JUDGE MELLOY:** Are you ready,  
6 Ms. Thompson?

7 **MS. THOMPSON:** I am. Thank you, Your  
8 Honor. We have no further questions.

9 **JUDGE MELLOY:** Before I turn the witness  
10 back, let me just make sure that we're on the same  
11 wavelength in terms of exhibits. Are there any A  
12 exhibits that I have not admitted of yours that you  
13 want to be admitted? I think some of your A exhibits  
14 were admitted through other parties or maybe you can  
15 double-check that during any redirect and see if  
16 there's anything that I need to admit. All right?

17 **MS. THOMPSON:** Yes, Your Honor.

18 **JUDGE MELLOY:** Okay. Now, let me ask:  
19 Mr. Dubois, do you have any questions?

20 **MR. DUBOIS:** Your Honor, yes, I -- Your  
21 Honor, yes, I do have some questions.

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

23 **MR. DUBOIS:** Thank you.  
24  
25

CROSS-EXAMINATION

1  
2 BY MR. DUBOIS:

3 Q. Mr. Esslinger, you testified that the 2003  
4 drought is still going. Do you remember that?

5 A. Yes.

6 Q. How do you think the Project would be doing  
7 today without the Operating Agreement?

8 A. I believe it would be in a much worse shape  
9 because we need the -- we needed the cooperation of EP  
10 No. 1 and the Bureau in this time of the drought.

11 Q. So would it be more like 2003 and 2004,  
12 before the Operating Agreement?

13 A. Yes.

14 MS. THOMPSON: I'm going to object, Your  
15 Honor. Some of these relate to expert opinions on  
16 hydrology.

17 MR. DUBOIS: I'm asking for his opinion  
18 as the manager of the District.

19 JUDGE MELLOY: I'll let him answer.  
20 Overruled.

21 Q. (BY MR. DUBOIS) You testified that EBID was  
22 concerned about municipal industrial pumping in 2003  
23 and its depletion of -- in the -- of the surface water  
24 supply. Do you recall that testimony?

25 A. Yes.

1           **Q.    And did EBID initiate a comprehensive**  
2 **adjudication for determination of all the rights in**  
3 **the lower Rio Grande Basin in State Court in 1986?**

4           A.    That was the adjudication, yes, we did that.

5           **Q.    Why did EBID file that lawsuit?**

6           A.    We felt it necessary that the state engineer  
7 inventory the water rights of groundwater and surface  
8 within our district. El Paso had just come in and  
9 attempted to take water out of New Mexico and pump it  
10 into Texas, so we felt like it was time for the state  
11 engineer, under his authority, to enter into the  
12 adjudication and take inventory of both ground and  
13 surface water.

14           **Q.    Did EBID file the adjudication in an effort**  
15 **to force the evaluation of the entire supply of the**  
16 **Rio Grande Project, and specifically EBID, so as to**  
17 **protect its interest against proliferation of**  
18 **groundwater development?**

19           A.    I believe that was the intent.

20           **Q.    Okay. I'd like to pull up Texas Exhibit 698,**  
21 **if we can.**

22                   **MR. SOMACH:** We can probably assist here  
23 if you want.

24                   **MR. DUBOIS:** Certainly. Actually, if  
25 you can pull up 698, Stuart, I'd appreciate it.

1                   **MR. SOMACH:** That's the Conover report,  
2 correct?

3                   **MR. DUBOIS:** Correct.

4                   **MR. SOMACH:** Peder, could you do that?

5                   **MR. DUBOIS:** Can you go to Page 139 of  
6 that report? Thank you.

7           **Q. (BY MR. DUBOIS)** And this is just --  
8 **Mr. Esslinger, this is just below the portions that**  
9 **Ms. Thompson was reading into the record. Do you**  
10 **recall that?**

11           **A.** This summary?

12           **Q.** The summary, correct.

13           **A.** Yes.

14           **Q.** And I'll point you to Paragraph 5 of the  
15 **summary.**

16           **A.** Yes.

17           **Q.** Which says that, "Pumping of groundwater will  
18 divert water from the drains and the river. The  
19 drains may practically stop flowing by the end of the  
20 first summer in a dry year if enough pumps are  
21 installed to furnish an adequate supply for all  
22 lands." Do you see that?

23           **A.** Yes.

24           **Q.** So is that one of the conclusions that  
25 **Mr. Conover reached that Ms. Thompson didn't talk**

1 about?

2 A. It was in the preliminary report, and it's  
3 also in this -- this final report, so yes.

4 Q. Okay. So can you highlight, Paragraph 6,  
5 please, Peder?

6 Does Paragraph 6 provide, "If an increased  
7 portion of releases from the reservoir were made up to  
8 the lower district as compensation for the reduction  
9 in flows to the drains, caused by pumping in the  
10 Rincon and Mesilla Valleys, a corresponding reduction  
11 in the diversions to the Elephant Butte Irrigation  
12 District would be necessary." Do you see that?

13 A. Yes.

14 Q. Did I read it correctly?

15 A. Yes.

16 Q. Okay. So isn't that exactly -- isn't this  
17 exactly the problem that led to the 2008 Operating  
18 Agreement?

19 A. It was -- it was part of the reason for the  
20 2008 Operating Agreement. It wasn't all.

21 Q. All right. Thank you. Isn't what is  
22 suggested in Paragraph 6 exactly what the 2008  
23 Operating Agreement effectively accomplished?

24 A. It accomplished that, yes.

25 Q. Thank you. I'd like to go to New Mexico 176,

1 please, and Page 36, please. This is also in the  
2 records of EBID; is that correct? This is 176.

3 JUDGE MELLOY: I believe 176 is already  
4 in evidence.

5 MR. DUBOIS: Yes, it is. Yes, it is,  
6 Your Honor. And I'm just directing to Page 36.

7 Q. (BY MR. DUBOIS) This is a letter received by  
8 EBID; is that correct?

9 A. Could you blow it up? It's pretty fine  
10 print.

11 Q. Certainly. That's much easier for me to  
12 read, as well. Thank you. And this is a letter that  
13 was received in August, 1950 by EBID?

14 A. Yes.

15 Q. All right. And the subject of this letter is  
16 regarding pumping in the valley floor and on the mesas  
17 adjoining; is that correct?

18 A. Yes.

19 Q. And the letter provides in the third  
20 paragraph that, "The question involves the sub-surface  
21 water, which to a large extent, is furnished and  
22 supplemented by irrigation and by the waters of the  
23 river percolating into the soil adjoining it. This  
24 comes from the project waters." Did I read that  
25 correctly?



1           A.    You read it correctly.

2           Q.    All right.  And it concludes that in the  
3 fifth paragraph states, "The trouble is, the  
4 difficulty of proving that the pumping does actually  
5 diminish the water supply of the district, and in my  
6 opinion, it will take considerable engineer  
7 investigation, covering a period of time to determine  
8 what actually is happening."  So this appears that the  
9 question that was being posed is the difficulty under  
10 the system in the 1950s to deal with pumping; is that  
11 correct?

12          A.    That's correct.

13          Q.    And the conclusion of the letter in the  
14 seventh paragraph states, "You can readily see that if  
15 the district should, at this time, attempt to enjoin a  
16 man from pumping, how difficult if not impossible it  
17 would be to prove that the district is being injured."  
18 So that was the -- do you know who Mr. Mechem was?

19          A.    I believe he was the counsel for the Elephant  
20 Butte Irrigation District at the time.

21          Q.    Okay.  Thank you.  And, finally, I'd like to  
22 go to Page 143 of this document.  Can you scroll up  
23 and tell me what the date of -- of this entry is?  I  
24 believe at the top of this page, it shows that this is  
25 minutes of a special meeting of the board of directors

1 from 1952; is that correct?

2 A. That's correct.

3 Q. All right. Let me scroll down to 143 now.  
4 Starting in the section -- starting in the section --  
5 Page 143. There we go. And highlight the part  
6 starting, "The Bureau of Reclamation," the paragraph  
7 below the listing. And this says it's, "Bureau of  
8 Reclamation Report on River Loss Caballo Dam to El  
9 Paso and Irrigation Wells." Do you see that part?

10 A. Yes.

11 Q. It appears to state that, the summary section  
12 of the Bureau of Reclamation report dated July 1,  
13 1952, and entitled, "River loss Caballo Dam to El Paso  
14 and irrigation wells," and the meeting reports  
15 that, "The report was prepared by the Bureau of  
16 Reclamation at the request of the El Paso District,  
17 the main purpose apparently being to attempt to  
18 determine the effect of the operation of irrigation  
19 wells north of El Paso upon the project water supply.  
20 The report covers the year 1951 only." Do you see  
21 that?

22 A. Yes.

23 Q. Did I read that correctly?

24 A. Yes.

25 Q. This section states that the -- and then

1 reading down from there, the sentence starts, "This  
2 section" -- three more lines down starting right there  
3 and then coming down the next few lines. "This  
4 section stated that water pumped from irrigation wells  
5 referred to in the license, quote, may institute a  
6 part of the Rio Grande Project water supply, close  
7 quote, and nothing herein contained shall be construed  
8 as an admission on the part of the United States that  
9 said water is the property of the licensee or, as a  
10 waiver of any right or claim to such water as part of  
11 the Rio Grande Project supply." Do you see that?

12 A. I do.

13 Q. So it appears that at that point, the Bureau  
14 of Reclamation considered that groundwater to be  
15 sourced from the Rio Grande Project and part of the  
16 Rio Grande Project supply at that point; is that  
17 right?

18 A. That was what the report from the Bureau  
19 would say, yes.

20 **MR. DUBOIS:** Thank you. I have nothing  
21 else. Thank you, Your Honor, for allowing me that.

22 **JUDGE MELLOY:** I -- on the last witness,  
23 I failed to give Mr. Wallace a chance to examine. I  
24 assume if he wanted to ask some questions, he'd jump  
25 in, but Mr. Wallace, do you have any questions?

1                   **MR. WALLACE:** No questions. Thank you,  
2 Your Honor.

3                   **MS. THOMPSON:** I have one redirect, Your  
4 Honor, if I may.

5                   **JUDGE MELLOY:** Just a second. This is  
6 Mr. Somach's witness so he gets to redirect. You get  
7 to recross.

8                   **MR. SOMACH:** I'm the one that gets to do  
9 that.

10                  **MS. THOMPSON:** Sorry. One follow-up.

11                  **JUDGE MELLOY:** Mr. Somach.

12                  **MR. SOMACH:** Well, Mr. Dubois'  
13 cross-examination was so comprehensive that I have no  
14 questions to add to his examination.

15                  **JUDGE MELLOY:** Then, Ms. Thompson, you  
16 said you had a question or two?

17                  **MS. THOMPSON:** I just had one follow-up.

18                               FURTHER CROSS-EXAMINATION

19 BY MS. THOMPSON:

20               **Q.** Mr. Esslinger, despite all of the extensive  
21 knowledge that you were just pointed to from the  
22 Conover report and the historical records of EBID of  
23 Reclamation's knowledge of the impact to groundwater  
24 pumpings in the 1950s, did the -- to your knowledge,  
25 did Reclamation object or oppose the use of

1 **groundwater by EBID during that time?**

2 A. No. They never objected to it.

3 **MS. THOMPSON:** No further questions.

4 **JUDGE MELLOY:** Out of curiosity, I have  
5 one question. What happened to the application in  
6 2003 to reopen the five wells? Did the state engineer  
7 approve it.

8 **THE WITNESS:** No.

9 **JUDGE MELLOY:** So they're still not in  
10 operation; is that correct?

11 **THE WITNESS:** They're still not in  
12 operation, and the ground -- the right to that  
13 groundwater could -- could be established in the  
14 future.

15 **JUDGE MELLOY:** Thank you. Anybody have  
16 anything further from this witness? If not, then  
17 you're excused, Mr. Esslinger. Appreciate your  
18 testimony.

19 **THE WITNESS:** Thank you, Your Honor.

20 **JUDGE MELLOY:** Is there anything else we  
21 need to take up? It's obviously a little late to be  
22 starting another witness this evening. Any matters  
23 dealing with exhibits? I guess I did want to be sure  
24 to give you a chance, Ms. Thompson, to double-check  
25 our exhibit list.

1                   **MS. THOMPSON:** Thank you, Your Honor. I  
2 appreciate that. I've been told that there is one  
3 other exhibit that was an A exhibit, New Mexico 2290,  
4 that there was no objection to at all, if that could  
5 be admitted, please.

6                   **JUDGE MELLOY:** What is that exhibit?

7                   **MS. THOMPSON:** It was a letter between  
8 Bureau of Reclamation and I believe the EBID  
9 districts.

10                  **JUDGE MELLOY:** All right. It will be  
11 admitted, 2290, New Mexico 2290 is admitted.

12                  **MS. THOMPSON:** Thank you, Your Honor.

13                  **JUDGE MELLOY:** Is there anything we need  
14 to talk about before we adjourn for the day?

15                  **MR. SOMACH:** Your Honor, I just wanted  
16 to clarify, when you admit these A exhibits where no  
17 witness has testified to it, as I understand your  
18 ruling yesterday, that while you denied Ms. Klahn's  
19 motion to strike, it was without prejudice at the end  
20 of this stage to be able to see whether or not those  
21 exhibits had, in fact, been referred to or utilized by  
22 any party. Is that my -- I just want to make sure I  
23 understood that ruling yesterday.

24                  **JUDGE MELLOY:** Yes. That's correct.  
25 And it may be that an exhibit would be admissible even

1 if it isn't referred to by a party if it's -- if it's  
2 general background information, but -- but, yes, it's  
3 without prejudice moving to have them struck at a  
4 later date.

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

6 **JUDGE MELLOY:** Is there anything else?  
7 If not, then we'll see everybody tomorrow morning.  
8 Thank you, everyone. Oh, who is your next witness,  
9 Mr. Somach, by the way?

10 **MR. SOMACH:** It's actually the United  
11 States witness, I believe. Do I have that right? I  
12 -- yes. Phil King. Dr. King.

13 **JUDGE MELLOY:** Okay. All right. Very  
14 good. All right. See you in the morning. Thank you,  
15 everyone.

16 **MR. SOMACH:** Thank you.

17 (The proceedings adjourned at 4:52 p.m.)  
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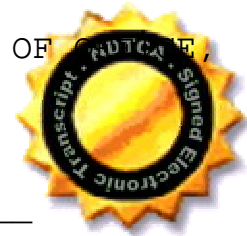
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