

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

FOR THE PLAINTIFF STATE OF TEXAS:

Mr. Stuart L. Somach
SOMACH SIMMONS & DUNN
500 Capitol Mall, Suite 1000
Sacramento, California 95814
(916) 446-7979
ssomach@somachlaw.com

-and-

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

FOR THE DEFENDANT STATE OF NEW MEXICO:

Ms. Lisa M. Thompson
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
(303) 861-1963
lthompson@troutlaw.com

FOR THE DEFENDANT STATE OF COLORADO:

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

1 FOR THE UNITED STATES:

2 Mr. James J. Dubois
U.S. DEPARTMENT OF JUSTICE
3 999 18th Street, Suite 370
Denver, Colorado 80202
4 (303) 844-1375
james.dubois@usdoj.gov

5
-and-

6
Ms. Jennifer A. Najjar
7 U.S. Department of Justice
Post Office Box 7611
8 Washington, DC 20044
(202) 514-3553
9 jennifer.najjar@usdoj.gov

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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 MELLODY: 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 MELLODY: 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 MELLODY: 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 MELLODY: 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.

JUDGE MELLOY: All right. Thank you, Ms. Thompson.

Ms. Klahn, do you have any questions?

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

JUDGE MELLODY: Okay. Any redirect?

MS. NAJJAR: Yes, Your Honor.

JUDGE MELLOY: You may proceed.

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

JUDGE MELLODY: Well --

MS. NAJJAR: Or our 20-minute break?

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

MS. NAJJAR: Thank you.

(Recess.)

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

REDIRECT EXAMINATION

BY MS. NAJJAR:

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

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 EBI D 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 MELLODY: 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

BY MR. DUBOIS:

Q. Mr. Esslinger, you testified that the 2003 drought is still going. Do you remember that?

A. Yes.

Q. How do you think the Project would be doing today without the Operating Agreement?

A. I believe it would be in a much worse shape because we need the -- we needed the cooperation of EP No. 1 and the Bureau in this time of the drought.

Q. So would it be more like 2003 and 2004, before the Operating Agreement?

A. Yes.

MS. THOMPSON: I'm going to object, Your Honor. Some of these relate to expert opinions on hydrology.

MR. DUBOIS: I'm asking for his opinion as the manager of the District.

JUDGE MELLOY: I'll let him answer.
Overruled.

Q. (BY MR. DUBOIS) You testified that EBID was concerned about municipal industrial pumping in 2003 and its depletion of -- in the -- of the surface water supply. Do you recall that testimony?

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 MELLODY: 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.

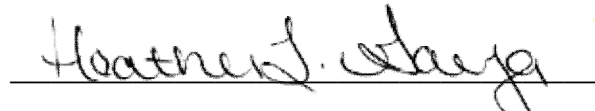
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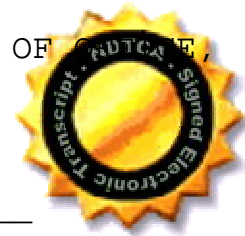
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