

NO. 141 Original

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In The  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS  
v.  
STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF JULY 24, 2020, REMOTE  
STATUS HEARING BEFORE HONORABLE MICHAEL A. MELLOY,  
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111  
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401,  
beginning at 11:01 a.m.

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1                   **JUDGE MELLOY:** Good morning, everyone.  
2 Thank you for getting on this morning. For the  
3 record, this is Supreme Court Original No. 141, State  
4 of Texas versus State of New Mexico and State of  
5 Colorado with United States as intervenor. Let's  
6 start the proceedings by taking a roll of the  
7 appearances. For Texas, who do we have on -- online?

8                   **MR. SOMACH:** Yes, Your Honor. This is  
9 Stuart Somach. I am the counsel of record for the  
10 State of Texas. Also on -- on the call is Theresa  
11 Barfield, Robert Hoffman, Rich Deitchman of my firm,  
12 and then Priscilla Hubenak of the State Attorney  
13 General's Office, and Mr. Pat Gordon, the Rio Grande  
14 commissioner for Texas.

15                   **JUDGE MELLOY:** Okay. And for New  
16 Mexico?

17                   **MR. WECHSLER:** Good morning, Your Honor.  
18 Jeff Wechsler from Montgomery & Andrews. We also have  
19 Cholla Khoury, who's the assistant attorney general  
20 for New Mexico; Marcus Rael and Luis Robles from  
21 Robles, Rael & Anaya; Lisa Thompson and Michael Kopp  
22 from Trout Raley; John Draper from Draper & Draper;  
23 the state engineer and commissioner for New Mexico,  
24 John D'Antonio; Arianne Singer, the ISC general  
25 counsel; and Shelly Dalrymple.

1                   **JUDGE MELLOY:** Okay. And then for  
2 Colorado?

3                   **MR. HARTMAN:** Good morning, Your Honor.  
4 Preston Hartman for the State of Colorado. We have no  
5 other participants.

6                   **JUDGE MELLOY:** I'm sorry. I didn't hear  
7 the last part of that.

8                   **MR. HARTMAN:** I said we have no other  
9 participants.

10                  **JUDGE MELLOY:** Okay. Then for United  
11 States?

12                  **MR. DUBOIS:** Good morning, Your Honor.  
13 This is James Dubois for the United States. Also on  
14 the line are Lee Leininger, Judy Coleman, and Dave  
15 Gehlert from Department of Justice and Shelly Randel  
16 and Chris Rich from the Office of the Solicitor.

17                  **JUDGE MELLOY:** Okay. And then  
18 Albuquerque-Bernalillo County Water Utility Authority?

19                  **MR. BROCKMANN:** Good morning, Your  
20 Honor. It's Jim Brockmann appearing on behalf of the  
21 Albuquerque-Bernalillo County Water Utility Authority.

22                  **JUDGE MELLOY:** All right. City of El  
23 Paso?

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



1 is on, also.

2 **JUDGE MELLOY:** All right. City of Las  
3 Cruces?

4 **MR. STEIN:** Good morning, Your Honor.  
5 This is Jay Stein on behalf of the City of Las Cruces.

6 **JUDGE MELLOY:** El Paso County Water  
7 Improvement District No. 1?

8 **MS. O'BRIEN:** Good morning, Your Honor.  
9 Maria O'Brien, counsel for El Paso County Water  
10 Improvement District No. 1, and counsel Renea Hicks is  
11 also on today, as well we also have the district  
12 engineer, Dr. Al Blair and the district general  
13 manager, Jesus Reyes.

14 **JUDGE MELLOY:** All right. Elephant  
15 Butte Irrigation District?

16 **MS. BARNCASTLE:** Good morning, Your  
17 Honor. This is Samantha Barncastle for the Elephant  
18 Butte Irrigation District, and my client, Gary  
19 Esslinger, the manager of the district, may be joining  
20 us here in a few minutes.

21 **JUDGE MELLOY:** All right. Hudspeth  
22 County Conservation Reclamation District No. 1? No  
23 one for them?

24 New Mexico pecan growers?

25 **MS. DAVIDSON:** Good morning, Your Honor.

1 Tessa Davidson on behalf of the pecan growers.

2 **JUDGE MELLOY:** New Mexico State  
3 University?

4 **MR. UTTON:** Your Honor, good morning.  
5 This is John Utton on behalf of NMSU.

6 **JUDGE MELLOY:** And I assume there's  
7 nobody on for the State of Kansas.

8 **MR. SOMACH:** Your Honor, I -- for the  
9 State of Texas, Sarah Klahn from Somach, Simmons &  
10 Dunn, my firm, is also on.

11 **JUDGE MELLOY:** All right. Well, it  
12 turns out we have a fair number of things to talk  
13 about this morning, so let's get started. We'll start  
14 with the -- the mediation. I don't really want to get  
15 involved in the mediation, either the contract or how  
16 the mediator goes about his business. I know that Ms.  
17 O'Brien had raised the concern that as to what role  
18 the two water districts would play in the mediation.  
19 I -- I think it's a little premature to start talking  
20 about that issue until the mediation at least gets  
21 started. Like I say, I really don't want to get too  
22 involved in that because that's one of the reasons we  
23 have a separate mediator. Do you want to speak to  
24 that, Ms. O'Brien?

25 **MS. O'BRIEN:** Yes, Your Honor. Thank

1 you. Yes, we raised it -- as you know, we've raised  
2 it a few times before. Basically, we believe that  
3 both districts, certainly the district I speak for,  
4 needs to be involved from the get-go, given the unique  
5 interest of the districts in this -- in this case. We  
6 feel that it would be both expedient and necessary to  
7 have them involved from the get-go, and Your Honor had  
8 indicated that you were going to defer to the mediator  
9 and the parties with regard to that involvement, and  
10 then the -- the letter from the mediator indicated  
11 that he was going to look to Your Honor for guidance  
12 on that issue. So as we stated in our letter, we feel  
13 we're just in a bit of limbo, and we would like to  
14 have clarity on that issue to the extent that, again,  
15 we believe we need to be involved, and we want to  
16 understand the process by which that's going to  
17 proceed.

18 **JUDGE MELLOY:** All right. Well, I'll --  
19 I'll visit with the mediator just to make sure that he  
20 at least touches base with the two of you, but beyond  
21 that, I guess I'm not too -- too inclined, as I said  
22 before, to tell the mediator how to go about the  
23 mediation or the sequence of how -- how he's going to  
24 do his work. It does bring up one other issue. I did  
25 get an e-mail from -- from the mediator's judicial

1 assistant this week asking if the mediator should be  
2 on this call. I indicated I didn't think so, and I --  
3 and I'm not sure it's appropriate to have the mediator  
4 on these substantive hearings, but if anybody thinks  
5 that there is some value to having him participate, I  
6 guess speak up. Otherwise, I'm going to tell him I  
7 don't think it's necessary. He obviously can look at  
8 the transcript if he wants to see what was discussed,  
9 but does anybody see -- see a reason why we would want  
10 to have the mediator on -- on the -- on the calls? I  
11 mean, I think that's the idea of having somebody  
12 outside the process. So unless, you know, somebody  
13 has a different view going forward, you're certainly  
14 free to file something to that effect. Unless I hear  
15 otherwise, I'm going to tell the mediator that his  
16 participation in any further hearings or status  
17 conferences I don't think is -- is necessary.

18 Is there anything else about the  
19 mediation we need to talk about? All right. If not,  
20 then let's -- let's talk -- let's move to the  
21 discovery, and that, of course, is an area where there  
22 are quite a few issues that have come up. I guess the  
23 first one, and I -- I want to get the views of -- of  
24 particularly Texas and New Mexico on this issue of  
25 whether replies are really true replies or whether

1 they're, in fact, substantial supplementation, or  
2 whether they're, in fact, whole new opinions with  
3 whole new experts and -- and -- and go beyond the  
4 bounds of either supplementation of reply.

5 Mr. Wechsler, you're the one who's kind of championed  
6 this issue. Tell me what your view is, and also  
7 include in it your thoughts about Mr. Somach's  
8 response, which is essentially you did the same thing  
9 to them in your reply. So why don't you speak to  
10 those issues?

11 **MR. WECHSLER:** Happy to. Given the  
12 history here with both Texas and the United States  
13 filing new substantive opinions under the title of  
14 supplemental reports, that's what raised our concern.  
15 We understood that there was a logical schedule that  
16 was set out. Texas provided -- Texas and the United  
17 States provided their reports in May of last year.  
18 New Mexico then went next in the fall of 2019. Texas  
19 and the United States were given a rebuttal  
20 opportunity in December of 2019 and then New Mexico  
21 got its rebuttal in June with the modeling reports  
22 in -- in July. As to whether or not there was some  
23 sort of abuse by New Mexico, I certainly don't think  
24 so, Your Honor. The -- the supplemental reports that  
25 I think Texas is referring to, there were three.

1 There was Dana Hoag, one from Peggy Barroll, and one  
2 from Estevan Lopez, and all of those opinions -- those  
3 supplemental opinions related directly to the  
4 modeling. And so it wasn't possible for those experts  
5 to do those supplemental opinions in June when they  
6 first did their -- their reports. So -- so we look at  
7 all of those reports that were filed in July as  
8 modeling opinions. And as to what -- what we're  
9 requesting, we're simply requesting really that the  
10 parties be held to what we understand to be the Rules  
11 of Civil Procedure under the Federal Rules, and that  
12 is that supplemental reports are truly that. They're  
13 supplemental to opinions that have already been  
14 expressed. We understand there is an obligation from  
15 experts to update/supplement, if you will, their  
16 opinions that have already been expressed, but that  
17 means actually updating what the original opinion was  
18 based on new information and so that's really what --  
19 what our view is and what we're requesting, and we did  
20 file a motion as we weren't quite clear on what the  
21 parties' views on this were and we wanted to get  
22 guidance or at least start the conversation with the  
23 other parties so that, you know, our hope is that  
24 there will be a deadline certain for filing  
25 supplemental reports and that the supplemental reports

1 will be limited, as I said, in the way that the -- the  
2 Federal Rules of Civil Procedure and -- and the case  
3 law contemplate.

4 **JUDGE MELLOY:** Would you anticipate,  
5 Mr. Wechsler, that if a supplemental report is filed  
6 by whatever deadline, that opposing counsel would then  
7 have the right to depose that person again, re-depose  
8 them?

9 **MR. WECHSLER:** I think that that's fair,  
10 Your Honor. I think that if the way that we view the  
11 Rule is actually what occurs, I think that the nature  
12 of those depositions may be somewhat limited in that  
13 if you're -- let's say you get new information or data  
14 about return flows and someone goes back -- or  
15 utilizing the same methodology, they're simply  
16 updating those new numbers, could a deposition occur  
17 on that? Certainly it could about the source of the  
18 data and that sort of thing, but it shouldn't be new  
19 substantive opinions. And we haven't resisted -- you  
20 know, Texas has asked for the supplemental depositions  
21 of -- of Dr. Barroll, Mr. Lopez, and Dr. Hoag, and we  
22 have not resisted. Yes, we agree.

23 **JUDGE MELLOY:** Would you anticipate  
24 filing supplemental disclosures.

25 **MR. WECHSLER:** We do not anticipate

1 filing supplemental disclosures. The one caveat is we  
2 are anticipating a fair amount of written discovery  
3 and production at the end of August. Some of that  
4 data will have, we hope, some low information and so  
5 just as I said, the only thing we would reserve the  
6 right to is basically updating our numbers if we get,  
7 for example, better information about where water was  
8 during certain years.

9 **JUDGE MELLOY:** What's your position  
10 about all this, Mr. Somach?

11 **MR. SOMACH:** Well, let me -- I don't  
12 know that it's dramatically different from what  
13 Mr. Wechsler said. The perspective is a little bit  
14 different and so maybe I should give you some context  
15 for -- for what I'm going to say. You know, we -- we  
16 received, on June 15th, nine surrebuttal reports, and  
17 then July 15th, we received another eight surrebuttal  
18 reports, plus the supplemental reports that  
19 Mr. Wechsler referred to so we had a total of, like,  
20 17 plus surrebuttal reports that have been served on  
21 us in the last week to a month. We're going through  
22 those things as quickly as we can. In fact, after  
23 this status conference, I have a call with the  
24 modelers to try to get an idea of what is in those  
25 reports and then I've read the report part of them,



1 but there's an incredible amount of data, including we  
2 received two hard drives with about 14 terabytes of  
3 data, plus additional data files that were part and  
4 parcel of what was provided to us. So it's -- it's --  
5 a lot of my problem is I don't know if I have a  
6 problem. I don't know if there's a significant issue  
7 because we're still plowing through that material, and  
8 I think I said in the letter, my -- my desire would be  
9 to not file any supplemental reports. But my concern  
10 is heightened, because I think New Mexico has a very  
11 different view of what expert reports have to cover  
12 under the rule, what is permissible for  
13 cross-examination, rebuttal testimony at the time of  
14 trial. And I'll give you an example. In many of --  
15 in a couple, three, four of their reports, their  
16 expert says, well, Texas or the United States didn't  
17 address an issue in our rebuttal report, therefore,  
18 they've admitted it.

19 **JUDGE MELLODY:** Therefore, they've what?

20 **MR. SOMACH:** They've admitted it. And,  
21 you know, we -- when we got that, we were taken back.  
22 We did a little research on the issue, and I don't  
23 think that's the law, but it makes me hyper conscious  
24 of the fact that as we get toward trial, we're liable  
25 to see, you are liable to see a number of trial

1 motions that we'll have to address. I think things  
2 will get -- get interesting. I'd like to try to be as  
3 prepared as we can by making certain that we're  
4 looking at everything and things we believe are  
5 appropriately responded to in surrebuttal reports or  
6 rebuttal reports or supplemental reports are provided  
7 to avoid a discussion later about whether something  
8 was addressed or not addressed. And so that's part of  
9 my -- my trying to be very zealous in terms of looking  
10 at the materials we've been provided to know whether  
11 or not we have to supplement anything.

12           The second part is, you know, this is  
13 just one of the peculiarities of -- that stems from  
14 the process, I guess, is, you know, we're the  
15 plaintiff in this case, and normally, the plaintiff  
16 gets the last word at the time of trial. Normally the  
17 plaintiff gets the -- the last word with respect to  
18 these types of expert reports. Some way, shape, or  
19 form, we've -- that got flipped, and now I've got all  
20 these surrebuttal reports so that New Mexico got the  
21 last word on -- on expert reports. They've taken the  
22 position that if you don't respond to something in  
23 those reports, you've admitted them, and I have no  
24 opportunity under the case management plan to file  
25 anything, you know. So I have to be very zealous and

1 very conscious given their position, given the fact  
2 that as plaintiffs, all of a sudden we don't have the  
3 last word. So I want to make certain I'm careful  
4 about what we're -- what we're going to do. My  
5 proposal would be to have us spend another couple  
6 weeks looking at the material. I have -- as I said, I  
7 have a Zoom meeting with the modeling experts --  
8 excuse me -- this afternoon, and I -- I put them on a  
9 timeline to get me a answer in terms of whether or not  
10 they need to supplement anything by another week out,  
11 and at that point, I can tell you, number one, whether  
12 or not we will have any supplemental reports, and  
13 number two -- and I think this is a significant  
14 issue -- how long it'll take us to prepare those  
15 supplemental reports. I mean, not to belabor a point  
16 I've made before, but, you know, New Mexico, in terms  
17 of when we filed our rebuttal report -- we find this  
18 is, of course, circumstances with the COVID stuff. I  
19 get that. Part of it is circumstances with their  
20 losing their lead attorney and having to -- to start  
21 over again, but they did have six-and-a-half months  
22 and seven-and-a-half months respectively to put these,  
23 what are surrebuttal reports, together. And so I may  
24 need some time. I just don't know how much time -- if  
25 we decide we're going to have a supplemental report,

1 to actually put those reports together. So my thought  
2 was that -- that in two weeks, I can report back to  
3 you, to Mr. Wechsler, to whomever as to whether or not  
4 we'll have supplemental reports, and I can also  
5 provide you with a timeline on how long it will take  
6 us to put those supplemental reports together. We'll  
7 try to do it as quickly as possible certainly. But my  
8 quibble with -- with the motion is that it has a  
9 September 15th date for filing those reports. I don't  
10 know if that's realistic because, number one, I don't  
11 know if we're going to have any supplemental reports,  
12 and I certainly don't know if we're going to have  
13 them, how long it'll take us to put those together.

14 **JUDGE MELLOY:** Well, I'd already pretty  
15 much decided we'd have a hearing again in two weeks  
16 from today so I -- I think let's just plan on doing  
17 that and then you can report back at that point,  
18 Mr. Somach, as to where you are in supplementation,  
19 and if there's a dispute over a deadline, I'll -- I'll  
20 resolve that dispute. But I think everybody agrees, I  
21 think, that we need some kind of a deadline. The  
22 question is what's a realistic deadline. So let's  
23 just plan to reconvene in two weeks, and we'll take up  
24 that issue at that time as to -- as to whether the  
25 September 15th deadline suggested by Mr. Wechsler

1 works or whether there has to be some adjustment of  
2 that.

3 Does anybody else want to be heard on  
4 this or is anybody -- I guess, Mr. Dubois, do you  
5 expect to be filing anything further in terms of  
6 supplementation?

7 **MR. DUBOIS:** I don't think so, Your  
8 Honor, but we're in the same position. We're trying  
9 to digest the 14 terabytes worth of -- of information  
10 and figure out whether there needs to be a  
11 supplement -- further supplementation and how long it  
12 would take. But at this point, I would say probably  
13 not, but I'm not certain. But I think the two-week  
14 timeline for having this discussion again will -- I  
15 should be able to give you more clarity.

16 **JUDGE MELLODY:** And as I understand it,  
17 just to be clear, the only parties that have experts  
18 are Texas, New Mexico, and United States; is that  
19 correct? Does anybody else have an expert? I  
20 assume -- no one is speaking up so I -- the water  
21 districts don't, do you, Ms. O'Brien or Ms.  
22 Barncastle?

23 **MS. O'BRIEN:** Your Honor, we do not  
24 specifically have an expert, per se, but our district  
25 engineer, Dr. Al Blair, is listed as a non-retained

1 expert for both Texas and the United States. So we --  
2 we certainly have some skin in the game.

3 **JUDGE MELLOY:** Okay. All right. Well,  
4 all right. Let's proceed on that basis as to the  
5 supplementation. I haven't given some thought to this  
6 idea. I would like to have the expert reports filed,  
7 and I don't want the backup data. I don't need the  
8 terabytes of data, but I would like the narrative  
9 portions of the -- of the expert reports filed, and I  
10 think probably they can be filed as one -- each party  
11 filed one doc -- one very large document, I guess it  
12 would be. You don't have to file, if you have 20  
13 experts, 20 different filings. One filing with all 20  
14 experts in the filing, and I'll give you a couple  
15 weeks to get those put together and get those on file  
16 before our next hearing.

17 **MR. SOMACH:** Your Honor, can I comment  
18 on that if I -- if I could? You know, I noticed that  
19 that was an opinion theme in Mr. Wechsler's letter.  
20 Let me articulate it this way that filing of expert  
21 reports, I think, is inappropriate. That wasn't the  
22 purpose that the expert reports were put together for.  
23 You know, we're entitled to put on expert testimony.  
24 You are, after all, the trier of fact in this case.  
25 So what you'll see are materials related to expert

1 testimony that is not the expert testimony itself, and  
2 I have no problems with providing summaries of -- of  
3 what's in the expert reports. I think I've even  
4 indicated to you, I -- I don't have any problem with  
5 providing the expert report as long as we're allowed  
6 to cover the expert report with summaries that will  
7 better describe than the way an expert report is laid  
8 out what it is that the expert is going to testify to.  
9 After you first raised this issue, I had some  
10 concern -- I voiced concern before. It's not that  
11 I've voiced this concern before, but as subsequent to  
12 that, of course, New Mexico put together their --  
13 their -- their rebuttal reports, their surrebuttal  
14 reports, and in some of those surrebuttal reports are  
15 PowerPoint presentations clearly put together in -- in  
16 anticipation that you would, in fact, request expert  
17 reports to be filed. So they've had an opportunity in  
18 that last filing, and those -- those PowerPoints don't  
19 just cover what's in the rebuttal reports. They go  
20 all the way back to the original reports. What I'm  
21 objecting to here, number one, is gaming of the  
22 process in a way so that they're able to put on what  
23 is more like trial testimony as part of those expert  
24 reports while we're stuck with a traditional expert  
25 report, which is never intended to be utilized as

1 trial testimony. I would not be concerned if there  
2 was a jury or if there was some other trier of fact,  
3 but you are the trier of fact, and you're going to get  
4 these -- these expert reports put together for an  
5 entirely different purpose. Again, I did look at a  
6 great deal of case law on the issue of providing  
7 expert reports as -- as you suggest, and -- and at a  
8 minimum, I'd like to at least brief you on -- brief  
9 the issue before we do this and then if you decide  
10 that -- that you still, nonetheless want it, we will,  
11 of course, provide it to you, but I want an  
12 opportunity to do what New Mexico had an opportunity  
13 to do, and that is to cover those materials with  
14 something that would be more like trial testimony.

15 **JUDGE MELLODY:** So, Wechsler, you look  
16 like you're anxious to say something.

17 **MR. WECHSLER:** Well, I -- I am. I do  
18 want to make clear, the PowerPoints that were attached  
19 to two of the experts had nothing to do with your --  
20 the suggestion that you made that you might want to  
21 see those expert reports. Rule 26 requires all  
22 materials that are going to be relied upon for  
23 testimony from an expert to be included and for those  
24 two experts, we were attempting to comply with the  
25 rule because those experts expressed some interest in



1 having PowerPoints as part of their live testimony and  
2 we, therefore, thought it was fair to attach that to  
3 the expert reports so that Texas saw that  
4 demonstrative, had an opportunity to ask questions  
5 about it so that it's not being introduced for the  
6 first time at trial. It's a little surprising to me  
7 to hear Texas suggest that they don't want the expert  
8 information, which is at the heart of this case, to be  
9 seen by you. We certainly think that you're  
10 sophisticated and experienced enough to understand the  
11 difference between expert trial testimony and -- and  
12 expert reports, and -- and last, I would simply point  
13 out that you, as the Special Master, provide an  
14 incredibly important role, but ultimately, the trier  
15 of fact in this case is the Supreme Court and -- and  
16 they will make the decision as to all the facts and --  
17 and law.

18           Finally, I'm quite familiar with the  
19 case law in providing expert reports to judges and  
20 decision makers, and the case law, by my reading,  
21 certainly allows that.

22           **JUDGE MELLOY:** All right. Well, since  
23 you've requested an opportunity to break from  
24 Mr. Somach, I'll give you that chance. How much time  
25 do you want to submit something?

1                   **MR. SOMACH:** We can submit something  
2 within a week, Your Honor, so a week from today.

3                   **JUDGE MELLOY:** All right. Then I'll  
4 give New Mexico until the following Thursday to  
5 respond, and hopefully we can talk about this in two  
6 weeks from today. And let's keep it fairly brief. I  
7 don't think we need more than probably 15 pages, if  
8 even that much, on the issue. All right?

9                   **MS. O'BRIEN:** Your Honor, if I may -- if  
10 I may just add one brief comment on this. As I noted  
11 earlier, Dr. Al Blair is a non-retained expert for  
12 both the United States and Texas, and in that  
13 capacity, as you know, under the Federal Rules, there  
14 is no required, and there was no expert report, per  
15 se, certainly to the extent of other experts in this  
16 case, yet Dr. Blair's testimony and opinions are  
17 central to the issues that are before you. So I would  
18 just add that it does create a complexity and concern  
19 with regard to the submission of expert reports that  
20 we don't believe would present the entirety of the  
21 opinions that are -- are available and germane to the  
22 case. Dr. Blair was deposed for three days in which  
23 he discussed his opinions, and there have been  
24 certainly some written disclosures that support those,  
25 but there is no comprehensive expert report as there

1 is not one required.

2           **JUDGE MELLOY:** Well, I understand that.  
3 And I also understand that just because there's a  
4 report prepared does not necessarily mean that  
5 testimonies is even admissible. There may be Daubert  
6 problems with a particular expert. There may be all  
7 kinds of other problems. The fact there's a report  
8 does not automatically make that testimony admissible  
9 or relevant, and so those are all issues that will  
10 have to be sorted out either before trial or through a  
11 Daubert process or -- or at trial when he actually  
12 testifies. So I understand that just because someone  
13 prepared a report doesn't mean that it's either  
14 admissible or particularly relevant or one that has a  
15 lot of weight to it. Those are all issues that'll  
16 have to be sorted out as we go forward.

17           **MS. O'BRIEN:** Thank you, Your Honor.

18           **JUDGE MELLOY:** All right. I received  
19 yesterday evening from New Mexico their motion to  
20 amend the trial management order, and I've had a  
21 chance to review it briefly, but I will -- nothing  
22 close to studying it, Mr. Wechsler, and I don't -- as  
23 I understand it, you're not necessarily asking that we  
24 take up the substance of that motion today, but rather  
25 just to set a briefing schedule on it? Is that -- am

1 I understanding you correctly on that?

2 **MR. WECHSLER:** Yes, you are.

3 **JUDGE MELLOY:** And -- and as I  
4 understand it, the -- the gravamen of the dispute here  
5 is the fact that you believe that for one of a better  
6 term, there is a document dump by the United States,  
7 and -- and that you need additional time to review --  
8 how many documents?

9 **MR. WECHSLER:** Well, I think it's almost  
10 30,000 so far, but we understand there's more to come.

11 **JUDGE MELLOY:** I guess I asked  
12 Mr. Dubois about this. Why -- why so many documents  
13 at such a late date, and why can't you still -- I  
14 mean, why -- we're almost to the end of discovery, and  
15 you're producing this many documents?

16 **MR. DUBOIS:** Your Honor, as I think  
17 that -- I've only had a chance to glance at  
18 Mr. Wechsler's pleading myself, but as -- as the  
19 e-mail history shows, we've been trying to work  
20 through this for some time. The first -- as -- as a  
21 starting point, remember, the -- from IBWC standpoint,  
22 as far as the kinds of operational documents,  
23 diversion records, all that kind of stuff, we've  
24 produced 14,000 documents months and months ago. This  
25 is all ESI stuff. The ESI listing of terms was, I

1 think, 300 and some or 400 terms. When we pulled up  
2 through IBWC's records, we got over a half a million  
3 documents. We then tried to work with the state to  
4 cut it down to something we actually had it under  
5 10,000 documents to look at. And we were rebuffed and  
6 told no, we want all of the stuff that produces --  
7 what basically produces hits from the ESI document  
8 list. And so having told them that that's going to  
9 produce a ton of documents, we've got a different way  
10 of doing things to try and make something that is  
11 going to be more meaningful for the case, and we were  
12 told no. We want the documents. And so we started  
13 producing the documents as requested and, now, they're  
14 complaining because we gave them what they demanded to  
15 have. I will concede that getting things from IBWC  
16 has been slower than we would have liked, but, but our  
17 attempts to cull that down to a smaller number were  
18 rebuffed, and we're still trying to work with them,  
19 and we're willing to work with them. But the other  
20 thing you have to consider, Your Honor, is this is  
21 IBWC. You have dismissed the claim regarding channel  
22 maintenance that is against IBWC. This isn't even  
23 meaningful to this case as it currently stands after  
24 your dismissal of their claims. So, I mean, that's  
25 where we are. We don't have a fast gallop this

1 morning, because we didn't get it until last night  
2 either. I don't have any real problem with the notion  
3 of depositions at a time, and obviously we need some  
4 opportunity to respond to this motion because we think  
5 that 90 days for some additional dispositive brief  
6 regarding claims that have been dismissed already is  
7 unrealistic and -- and unwarranted.

8 **JUDGE MELLOY:** Well, let me just say  
9 this. I was looking -- I had a calendar out. Now, I  
10 can't find it. But anyway, can you respond to the  
11 motion by next Friday and if Mr. Wechsler wants to  
12 reply -- reply before our hearing two weeks from today  
13 so we can resolve this issue when we get back in two  
14 weeks.

15 **MR. DUBOIS:** Yes, Your Honor.

16 **JUDGE MELLOY:** So I'll give you until  
17 next Friday. If you think you need to reply,  
18 Mr. Wechsler, do it by the following Wednesday. I  
19 don't have the -- I thought I had a calendar here. I  
20 don't have the exact dates in front of me, but I'll  
21 get it out in an order.

22 **MR. WECHSLER:** I understand.

23 **JUDGE MELLOY:** Then we'll take it up at  
24 the hearing in two weeks. By the way, as an aside, to  
25 show my -- confess my technical inadequacy, does

1 anybody know how to get rid of that chime that keeps  
2 coming on or do you hear that, as well? Do you hear a  
3 chime every -- when things kind of go from -- is that  
4 -- or is that on my screen?

5 **MR. WECHSLER:** We hear it.

6 **MR. DUBOIS:** I think that's on your  
7 screen. I'm not hearing it, but that may just be  
8 hearing loss at my age.

9 **MR. WECHSLER:** I think it's from your  
10 e-mail so you have to turn off the sound for the  
11 notifications on your e-mail or --

12 **JUDGE MELLODY:** Oh, okay. All right.  
13 Okay. Thank you. I will do that and make sure it's  
14 done before the next one. Okay. Thank you.

15 On my list of things that were brought  
16 up, Ms. O'Brien has, again, raised the issue of  
17 whether we should set a separate briefing schedule for  
18 the apportionment issue. My thought on that, and I  
19 want you to respond, Ms. O'Brien, is that you already  
20 have an October 15th dispositive motion deadline,  
21 which I think is fairly aggressive given the way  
22 discovery is proceeding. What I would -- what I would  
23 suggest we do is leave that as part of a dispositive  
24 motion submission, and I assume that that will be  
25 something the parties will be submitting as part of

1 the dispositive motions. But I would -- would suggest  
2 to you that subject to reviewing the motions, that I  
3 would endeavor to rule as quickly as possible on that  
4 issue. I don't -- there's nothing that requires me  
5 to -- if -- if, for instance, there's ten issues  
6 raised on the dispositive motion that I have to rule  
7 on all ten issues simultaneously. I could -- I can, I  
8 believe, enter an order on that portion of the summary  
9 judgment motion as quickly as possible, and I would --  
10 I would pledge to you I would do that unless it's so  
11 intertwined with everything else and I can't separate  
12 it out. But to the extent it can be separated out, I  
13 would -- I would endeavor to get a ruling out as  
14 quickly as possible on that issue. I think to put the  
15 parties to the burden with everything else that's  
16 going onto do it earlier seems to me a little  
17 unrealistic, particularly given the fact it's a fairly  
18 pretty aggressive schedule as it is. If anybody wants  
19 to speak to that, I'll let you do so, but that's sort  
20 of my -- my thought on it.

21 Do you want to add anything, Ms.  
22 O'Brien?

23 **MS. O'BRIEN:** Your Honor, thank you.  
24 Your comments are -- are very helpful and certainly  
25 when we first started talking about this, we were much



1 further away from October 15th than we are now. That  
2 said, I -- I just do raise the issue that there may be  
3 some dispositive motions that the parties and others  
4 are contemplating filing that would be better informed  
5 and/or rely on the determination of the threshold  
6 issue of the measure of the entitlements from and  
7 below Elephant Butte. So, you know, deferring to Your  
8 Honor, obviously, of course in terms of case  
9 management, but there -- there may be issues in terms  
10 of the ability or the efficiency of filing certain  
11 motions on October 15th without the determination of  
12 what I think we at least all agree is a threshold  
13 legal issue.

14 **JUDGE MELLOY:** What's your position on  
15 New Mexico's apportionment below Elephant Butte?

16 **MS. O'BRIEN:** Your Honor, I -- we  
17 believe that the entitlements from and below Elephant  
18 Butte are determined by the allocations of water  
19 through and in the project as determined by  
20 Reclamation law and the contracts providing for  
21 allocations of water thereunder.

22 **JUDGE MELLOY:** And so you're basically  
23 aligned with Texas, if I understand Texas' position,  
24 that New Mexico has no separate apportionment aside  
25 from what the -- the water districts are entitled to

1 under the contracts than the Reclamation law?

2 **MS. O'BRIEN:** Your Honor. I think that  
3 without getting into the nuances about whether one  
4 provides what New Mexico is entitled to from and below  
5 Elephant Butte without calling it an apportionment or  
6 allocation may not be necessary to wrestle to the  
7 ground today. What I would say is that it is no more  
8 and no less than EBID's allocation to and from the  
9 project as determined by the contracts relating to the  
10 project and entered into under Reclamation law,  
11 including the operating agreement.

12 **JUDGE MELLOY:** Well, obviously it is --  
13 it is an important issue. Does anybody else believe  
14 that they can't -- or that they will be seriously  
15 handicapped in filing dispositive motions if that  
16 issue isn't resolved ahead of time?

17 **MR. WECHSLER:** Your Honor --

18 **MR. SOMACH:** Your Honor -- go ahead,  
19 Jeff.

20 **MR. WECHSLER:** Well, I was going to say,  
21 my instinct is that your original thought of having  
22 these part of the October 15th deadline makes the most  
23 sense. It is a very aggressive discovery schedule.  
24 There's very few days in between depositions, for  
25 example, and so I think all of us are in the process

1 of either preparing someone for a deposition,  
2 preparing to take a deposition, and that's an  
3 aggressive process. Because it's such an important  
4 issue, I think it's important that we have sufficient  
5 time to really process all of the discovery that we've  
6 gathered in order to put the best possible arguments  
7 in front of you, and I -- I think doing that on  
8 October 15th makes the most sense.

9 **JUDGE MELLOY:** Mr. Somach, you wanted to  
10 speak?

11 **MR. SOMACH:** No. I -- I agree with what  
12 Mr. Wechsler said. I think it -- it makes little  
13 sense to have a dispositive motion before dispositive  
14 motions are filed. I'd like to do it all at once. I  
15 think it -- it will relate to a lot of the other  
16 issues and that seeing the totality of the dispositive  
17 motions will assist you in being able to address any  
18 one of the issues raised in those motions, including  
19 this one.

20 **JUDGE MELLOY:** All right. Well, I'm  
21 going to leave it the way I -- I've indicated, and  
22 we'll go from there.

23 Next on my list is, Mr. Wechsler, you  
24 requested a clarification of Paragraph 3.5 of the case  
25 management plan and feel that the two water districts

1 are abusing their privilege, so to speak, at  
2 deposition to -- to question witnesses. I think one  
3 statement you made in -- in your pleading of that  
4 regard, I'm not sure that Ms. Barncastle would agree  
5 with, which is that you represent the interest of  
6 the -- of the Elephant Butte Water District, but do  
7 you want to speak to that issue?

8 **MR. WECHSLER:** I do. And I don't mean,  
9 Your Honor, to be suggesting that the districts have  
10 been abusing the part of the discovery process that's  
11 been laid out. I think that the process is somewhat  
12 unclear and -- and I also, just to quickly respond to  
13 your -- your point, I think my point when we say we  
14 represent EBID, certainly they have another -- their  
15 own board. They act independently of the State of New  
16 Mexico. We understand they have a different position  
17 in this litigation. However, all of EBID's members  
18 are New Mexico citizens. The water is used in New  
19 Mexico, and New Mexico's Compact interest and New  
20 Mexico speaks on behalf of all of its Compact users.  
21 So -- so as to that paragraph, really, I -- I have two  
22 points. The first one is we think that that paragraph  
23 should be adjusted and then if you don't adjust it, we  
24 think that you should at least give some guidance. So  
25 speaking first about the adjustment, I mean, according

1 to the United States Supreme Court, the states alone  
2 possess what they have called the, quote, core state  
3 prerogative to control water within their own  
4 boundaries, and, therefore, a state in its sovereign  
5 capacity represents the interest of its citizens in an  
6 original action, the disposition of which binds the  
7 citizens. And those quotes come from the Tarrant case  
8 and the South Carolina case. New Mexico represents  
9 the Compact interests of all of its citizens,  
10 including, as I mentioned, the -- the farmers and  
11 water users within EBID, the interest of El Paso No. 1  
12 and all of its water users. In fact, in discovery,  
13 Texas witnesses have made clear that among the  
14 interests, that they're -- the state is intent on  
15 protecting is the water -- the 43 percent of the  
16 project supply that EP No. 1 is entitled to. And so  
17 the only unique interest that EP No. 1 has derived  
18 directly from the contract it has with Reclamation,  
19 but in this case, you have made clear that this case  
20 is about the rights of the states under the Compact  
21 and about whether each state is receiving its share of  
22 water below Elephant Butte under the Compact, where  
23 that water is going, how much water is being used. As  
24 part of that direction from you, you dismissed New  
25 Mexico's counterclaim, Counterclaim No. 2 related to

1 the facial validity of the operating agreement.  
2 You've made clear that that facial validity is not an  
3 issue in this case, and it follows that the amici  
4 districts, those contract interests, those unique  
5 contract interests are not directly implicated. What  
6 is implicated is the total apportionment of water  
7 between the states, but because all water users within  
8 each state share their state's apportionment, that's  
9 an issue that's equally shared by all water users,  
10 equally of concern to any of the amici, not just the  
11 districts. It's not a unique issue to the districts.  
12 And we, therefore, think that Paragraph 3.5 should be  
13 changed, and that in light of your orders on the  
14 operating agreement, the current posture of the case,  
15 that the amici districts should be treated like all  
16 other amici, and if there is a compelling reason for a  
17 particular deposition for them to participate, then  
18 they should seek leave from you. That's the normal  
19 posture. And particularly, it's the normal posture of  
20 an amici, even ones with significant interest in  
21 intrastate water disputes.

22           So moving onto Point No. 2, and that is  
23 if you disagree with me and you're not inclined to  
24 change that provision of Paragraph 3.5, we would like  
25 from you some clarification as to what that means.

1 And -- and that is, as we described in our status  
2 letter, Paragraph 3.5 states only that the districts  
3 may participate when, quote, 2008 operating agreement  
4 is the subject of the deposition, but the operating  
5 agreement currently provide -- governs project  
6 operations. Project operations, that covers a lot of  
7 ground, and what's more, the Court has stated that the  
8 downstream contracts are implicitly incorporated into  
9 the Compact and that the project is inextricably  
10 intertwined with the Compact and so that brings in a  
11 whole new set of issues, at least under a broad  
12 reading of Paragraph 3.5, and so the questioning from  
13 the districts has ranged broadly to cover a number of  
14 questions and issues that are only loosely tied in our  
15 view to the 2008 operating agreement. I don't mean to  
16 suggest that that's an abuse, because I don't think  
17 that we've gotten clear direction from you, but from  
18 our perspective to make matters worse, the questions  
19 from the districts have also been duplicative of the  
20 subjects that were covered by either Texas or the  
21 United States, and in some cases both, and we don't  
22 think that it was the intent of Paragraph 3.5 to allow  
23 four different parties instead of the two actual  
24 parties to ask the same questions of the New Mexico  
25 deponents and so we would appreciate guidance and,

1 again, our first answer is we think that you should  
2 simply change Paragraph 3.5. If you're not interested  
3 in doing that, then we would ask that those questions  
4 under that paragraph be limited to non-repetitive  
5 questions specifically about the provisions of the  
6 2008 operating agreement itself.

7 **JUDGE MELLOY:** All right. Ms. O'Brien  
8 or Ms. Barncastle, I believe you want to respond?

9 **MS. BARNCASTLE:** Your Honor, this is  
10 Samantha Barncastle, and I'm going to jump ahead of  
11 Maria here for just a moment because I'm limited in  
12 time that I have for the room that I'm in today, so I  
13 apologize in advance to Ms. O'Brien. I have to go  
14 ahead and jump ahead. I agree, Your Honor, that you  
15 are correct, that EBID does disagree with the State of  
16 New Mexico here. New Mexico's argument regarding  
17 limiting the district's participation at depositions  
18 going forward is based on their theory of Compact  
19 administration that may turn out to be incorrect.  
20 EBID and others have maintained they're incorrect, and  
21 it's actually an ultimate issue in this case,  
22 specifically the issue being whether and to what  
23 extent New Mexico has any control or authority below  
24 the reservoir or alternatively put who has what  
25 authority below Elephant Butte Reservoir remains an



1 outstanding issue in this case, with EBID maintaining  
2 all along that it has the statutorily authorized  
3 rights to negotiate contracts such as the operating  
4 agreement, despite the State of New Mexico's alleged  
5 concerns. So even though New Mexico maintains it has  
6 ultimate authority, it's unclear who in New Mexico  
7 they're referring to when they say New Mexico. Is it  
8 the attorney general, the governor, the Office of the  
9 State Engineer, some other entity? We have maintained  
10 that we know that they do not mean EBID, but EBID is  
11 the political subdivision of the state with statutory  
12 responsibility and rights related to project water and  
13 project infrastructure ownership. New Mexico's  
14 continually sought to ignore EBID's statutory  
15 authority, which differs drastically from the Office  
16 of the State Engineer within the Rio Grande project,  
17 and we believe it's been an effort to silence our  
18 Board and its members. New Mexico's legal position is  
19 not only contrary to EBID's. It's, in many ways, an  
20 attack on EBID's legal authority, and we -- you know,  
21 as an aside, Your Honor, we intend to address this  
22 issue in briefing regarding dispositive motions coming  
23 up beginning October 15th. You know, while New Mexico  
24 shares a confidentiality agreement with other New  
25 Mexico amici in this case, it facilitates information

1 in sharing among those parties and entities, EBID has  
2 consistently been denied access to participation on  
3 the New Mexico side, despite the ability -- or -- or  
4 the claims by New Mexico that New Mexico represents  
5 EBID's interests. And we maintain that the primary  
6 reason for this position is that New Mexico did not  
7 negotiate the Rio Grande Compact on behalf of water  
8 users below the reservoir and, instead, they sought to  
9 negotiate against the interest of the senior Rio  
10 Grande project water users when the Compact was  
11 negotiated. And New Mexico continues to forward their  
12 legal theories that are contrary to EBID's statutory  
13 authority, and as long as they are doing that, they  
14 cannot be said to be representing EBID's interests.  
15 So denying us the ability to participate in these  
16 depositions moving forward denies EBID's members a  
17 meaningful position in this case. We have a board of  
18 directors that's elected by its membership, and they  
19 have been elected over the last several years, the  
20 Board has never -- not one single person has changed  
21 in terms of an election issue, where a board member  
22 might potentially be unseated, and so those elected  
23 officials have unwaveringly determined consistently  
24 since the beginning of this case that New Mexico is  
25 not advancing EBID's interests. So to say that EBID

1 should be treated like all other amici is just  
2 completely an intent to silence the EBID membership  
3 and its position in this case. How realistically,  
4 would we be able, Your Honor, to seek leave of the  
5 Court when -- to participate in these depositions when  
6 sometimes it's not clear what the deposition is going  
7 to cover, and it's -- often these depositions are  
8 being noticed with only days before the deposition  
9 actually occurs. Additionally, New Mexico wants  
10 clarity regarding the current case management order in  
11 the meaning of the language in that order. EBID  
12 and -- and the El Paso County Water Improvement  
13 District No. 1, Your Honor, you'll recall, raised this  
14 exact issue a few weeks ago, four weeks ago, I believe  
15 it was, in our last status conference, when we asked  
16 Your Honor what issues really are left in play and  
17 what issues really are still relevant given that the  
18 counterclaims against the operating agreement are no  
19 longer live, but there are potentially issues related  
20 to the operating agreement that remain relevant for  
21 discovery, and Your Honor instructed us that that was  
22 not going to be taken up at that time and that if we  
23 needed to, a motion could be filed, but this is  
24 basically New Mexico saying the same thing EBID and EP  
25 No. 1 had been struggling with all along. How do we

1 know what issues are live and what we can get into in  
2 these depositions without really getting clarity on  
3 what that means? So, Your Honor, I would say at this  
4 point in time this late in the game, and I believe Ms.  
5 O'Brien will address exactly how often her -- she has  
6 questioned witnesses, but I can tell you that from my  
7 purposes, Your Honor, my questions have been limited  
8 to one witness and one -- a total of one hour of  
9 questions in the three years we've been involved in  
10 discovery. So I can't say that New Mexico has been  
11 completely overrun by the fact that we've been  
12 participating given that it's only been one deposition  
13 and one hour of questions, but, Your Honor, we look to  
14 you for direction on these issues. We disagree that  
15 there's -- there's a need for a change in the case  
16 management order, and we oppose what New Mexico is  
17 requesting today.

18 **JUDGE MELLODY:** Ms. O'Brien?

19 **MS. O'BRIEN:** Yes, Your Honor. First as  
20 an initial matter, I would say I think it's completely  
21 irrelevant, Mr. Wechsler's argument, relating to  
22 whether Texas represents EP No. 1 or -- or New Mexico  
23 represents EBID. At this point in time, Your Honor  
24 appropriately considered and determined in the  
25 existing case management order that given the

1 district's status as the beneficiaries of the Rio  
2 Grande project and being parties to Reclamation  
3 contracts, including the operating agreement, that  
4 they do have an enhanced status, and nothing with  
5 regard to dismissal of the counterclaims has changed  
6 that. They remain parties to the contracts, which  
7 although those -- the claims directly challenging the  
8 validity of the contracts, specifically the operating  
9 agreement, were dismissed, the -- the claims and  
10 issues relevant to those contracts to which the  
11 districts are party remain very live issues and indeed  
12 controversies in the case. So New Mexico's request at  
13 this point that we be limited to specific provisions  
14 of the operating agreement, even if we could all  
15 understand what that meant, ignores the fundamental  
16 interrelationship and interplay of the operating  
17 agreement and other Reclamation contracts to which the  
18 districts are parties to all aspects of project and  
19 district operations, including the allocation of water  
20 from and below Elephant -- Elephant Butte. And, Your  
21 Honor, New Mexico has raised a very general, and I  
22 would say indeed theoretical complaint. Mr. Wechsler  
23 himself indicates there has really not been an issue  
24 so I think, you know, Your Honor appropriately, from  
25 the very beginning, entered an order which is

1 continuing to appropriately manage the proceedings in  
2 this case. The participation of EP No. 1 has been  
3 anything but disruptive or repetitive with regard to  
4 its participation in depositions. Adding a little  
5 more context to Ms. Barncastle's statements, there's  
6 been approximately 75 depositions in this case, and  
7 that's not days. That's just depositions. So  
8 multiply that by at least two. EP No. 1 has asked  
9 questions in two of those. They were multiple-day  
10 depositions. In each of those, our questioning  
11 comprised less than an hour of questioning. So we are  
12 efficient, not repetitive, and we are asking questions  
13 that are germane, relevant, and specific to our  
14 interests as -- and, indeed, the Supreme Court has  
15 identified in terms of interests in downstream  
16 contracts and project operations. You know, as -- as  
17 noted, you know, the claims dismissing -- challenging  
18 the operating agreement, the validity of it generally,  
19 as well as other contracts to which the district is  
20 party, the claims relating to the validity of those  
21 have been dismissed, but they remain challenged in  
22 term -- by New Mexico. New Mexico case, in fact, is  
23 centered on challenges to the operating agreement and  
24 related contracts to which EP No. 1 is a party, and  
25 those don't -- those challenges don't stop with the

1 black letter language of the operating agreement. You  
2 know, indeed, New Mexico itself in its most recent  
3 letter to you yesterday recognizes the unique status  
4 of the districts, vis-a-vis the downstream contracts  
5 generally, and the operating agreements specifically.  
6 You know, by way of example, three of New Mexico's  
7 experts do directly and even, you know, after  
8 dismissal of the counterclaims, challenge the  
9 operating agreement. Estevan Lopez indicates that he  
10 believes the operating agreement should be discarded.  
11 Dr. Barroll believes it's without a technical basis.  
12 Spronk Water Engineers models the effect of the  
13 operating agreement on project operations, and Spronk  
14 Engineer relies on all the New Mexico modelers to  
15 provide for the input to Spronk's modeling runs. Fact  
16 witnesses of New Mexico, both in the case and for a  
17 decade before, have indicated policy technical issues  
18 vis-a-vis the operating agreement and have so  
19 testified in this case. So EP No. 1, as an amici,  
20 must be able to continue to probe, and it will do so  
21 efficiently and non-repetitively. It must be able to  
22 retain the right to continue to probe in deposition  
23 the New Mexico witnesses that are challenging -- you  
24 know, not just the operating agreement directly, but,  
25 excuse the pun, but everything that flows from the

1 operating agreement, as well as other contracts to  
2 which the district is party. So we believe there's no  
3 need at this point to amend the case management order.  
4 We believe we have complied with it and have  
5 participated in a way that contributes as opposed to  
6 detracts from the proceedings and certainly our intent  
7 is never to -- to duplicate things or to extend these  
8 lengthy proceedings. Certainly our district perhaps,  
9 and maybe EBID, too, more than anybody, we are the  
10 entities that are most affected by the outcome of this  
11 case. We are interested in resolution and -- but we  
12 need to be able to continue to protect our interests  
13 in the context of depositions and otherwise. Thank  
14 you, Your Honor.

15 **JUDGE MELLOY:** Well, if I understand  
16 what you're saying, Ms. O'Brien and Ms. Barncastle,  
17 and I -- I'll give Mr. Wechsler a chance to respond.  
18 You're saying that out of 75 depositions, you've only  
19 asked questions, in Ms. Barncastle's case, one, and  
20 your case, Ms. O'Brien, two, for a total of about two  
21 or three hours between the two of you? Is that what  
22 you're saying?

23 **MS. O'BRIEN:** To date, that's correct,  
24 Your Honor. And, you know, Mr. Wechsler's indication  
25 that, you know, we're all of a sudden asking



1 questions, well, the reason is that the witnesses that  
2 are most germane to our specific interests are only  
3 now coming up for deposition, and our turn has come  
4 with regard to those witnesses. So, yes, to date,  
5 that is accurate, Your Honor, in terms of how you  
6 described our practical and, you know, participation  
7 in terms of -- of timing. We do anticipate  
8 participation in depositions that are upcoming, that  
9 are on the schedule, but certainly we are not  
10 anticipating any kind of great multiplication of our  
11 efforts to date. We believe it will continue to be  
12 proportional to -- to what it has been to date.

13 **MS. BARNCASTLE:** And, Your Honor, I  
14 would just add to that, that on multiple occasions  
15 where EBID anticipated asking questions, none were  
16 actually asked because the other parties already  
17 covered the subjects that needed to be covered and so  
18 there was no need for us to ask questions up until  
19 now. That may very well be the case moving forward  
20 into these new depositions where EBID anticipates  
21 needing to participate. We have, on multiple  
22 occasions, seen that we may need to participate, but  
23 it doesn't end up panning out that way. So we hardly  
24 agree that one hour in a total of 75 depositions that  
25 span multiple days is anything for cause for concern

1 here.

2 **JUDGE MELLOY:** What's your response,  
3 Mr. Wechsler?

4 **MR. WECHSLER:** Your Honor, I think I  
5 have five points to make here. The first is on -- on  
6 Ms. Barncastle's concept about the proper  
7 interpretation of the Compact, we view this as a  
8 procedural issue. When -- when Ms. Barncastle takes  
9 it to the proper interpretation of the Compact itself,  
10 the Compact neither EBID nor EP No. 1 are parties. It  
11 illustrates the danger of allowing amici, particular  
12 amici, to be a part of the case. Indeed, this is the  
13 exact same argument that EP No. 1 and EBID made in  
14 their motions to intervene. Those were rejected.  
15 They did not seek to bring an exception. The Court  
16 has denied those motions to intervene. And it's  
17 contrary to the Court's teachings. The Court has said  
18 that parties within the state should not be allowed an  
19 intrastate original jurisdiction cases and that that  
20 forum -- the original jurisdiction, quote, should not  
21 be used as a forum in which a state might be  
22 judicially impeached on matters of policy by its own  
23 subjects. That comes from, again, the South Carolina  
24 versus North Carolina case. So you can see the idea  
25 that -- that any one of the amici or any water user

1 within -- within New Mexico would be bringing up  
2 contrary interpretations of the Compact, contrary  
3 issues, that's contrary to the very foundation of  
4 interstate water disputes. EBID, as it has recognized  
5 in this case, is a creature of statute of the State of  
6 New Mexico created by the State of New Mexico, could  
7 be changed at any time. Its interests here are not --

8 **JUDGE MELLOY:** Sorry. Did you say --  
9 excuse me. Are you saying you don't think they should  
10 be an amici at all?

11 **MR. WECHSLER:** I do agree they should be  
12 an amicus, yes. And, in fact, that takes me to my --  
13 my next point, which is the rule of the --

14 **JUDGE MELLOY:** Excuse me. Would you say  
15 you agree they should be?

16 **MR. WECHSLER:** Yes.

17 **JUDGE MELLOY:** Okay.

18 **MR. WECHSLER:** In fact, if you look at  
19 the Black's law dictionary definition of an amicus, it  
20 says means literally friend of the court. A person  
21 with strong interest in or views on the subject matter  
22 of an action but not a party to the action, may  
23 petition the Court for permission to file a brief  
24 ostensibly on behalf of the party. That's the proper  
25 role here of EBID, EP No. 1, the City of El Paso, all

1 of the other amici here. They will not be  
2 participating in trial. They should not be allowed to  
3 be undermining the very positions of the -- the  
4 parties to the Compact. As to Ms. O'Brien's point  
5 that this -- somehow I suggested this was not an  
6 issue, I think I said that I don't -- I wanted to be  
7 clear that I don't think they have been abusing that  
8 provision. I do think it is an issue. I do think  
9 it's a ripe issue. I don't just -- I do disagree -- I  
10 should say I disagree that -- very much that the  
11 questioning of the -- the districts has not been  
12 repetitive. In fact, it's covered many of the same  
13 questions. I didn't attach all of the deposition  
14 transcripts, but we've gone back and looked at each of  
15 the questions they asked, and almost without fail,  
16 those exact same questions or a form of that question  
17 was already asked by either Texas or New Mexico. EP  
18 No. 1 to take, as an example, is very much aligned  
19 with the State of Texas. The interests are being  
20 represented by the State of Texas, and, in fact, to  
21 the extent that they are a project beneficiary, they  
22 also have the United States, who is quite capable of  
23 representing the interest of the project itself.  
24 Again, this case is about where the water is going and  
25 whether the states have received their state

1 appportionment under the Compact. That is a question,  
2 an issue that is of critical importance to all of New  
3 Mexico water users, the pecan growers, the members of  
4 EBID, the City of Las Cruces, CRRUA, New Mexico State  
5 University. Without fail, all of those have the exact  
6 same interests as EBID in ensuring that New Mexico  
7 gets its fair share of water and that that -- it's  
8 then available to be divided up amongst the New Mexico  
9 water users. And so I could not disagree more that  
10 somehow there is a -- a unique interest on behalf of  
11 the -- the two districts who are one of many water  
12 users who the states have to balance the various  
13 interests of. As the Court has made quite clear in  
14 all of its prior --

15 **JUDGE MELLOY:** Well, you -- I guess,  
16 Mr. Wechsler, Ms. Barncastle and Ms. O'Brien make the  
17 argument that we're talking the total of maybe two to  
18 three hours of questions is -- do you disagree with --  
19 that that's the amount that's been done so far?

20 **MR. WECHSLER:** I don't disagree. I  
21 think that has been something that's begun only  
22 recently. We do have a concern it will continue.  
23 There have been indications that there were the intent  
24 to participate in additional depositions.

25 **JUDGE MELLOY:** Well, all right. Does

1 anybody else wish to -- Texas or the United States or  
2 any other party that's participating in these  
3 depositions want to be heard on this issue?

4 **MR. SOMACH:** Let me just comment that on  
5 behalf of Texas haven't found this to be a problem.  
6 Moreover, I will say that both Ms. Barncastle and Ms.  
7 O'Brien, in depositions, prior to the time that  
8 they've asked questions, have -- have talked to us  
9 about it, and -- with an effort to -- to avoid  
10 repetitive questioning, and the United States has been  
11 involved in those discussions with us, also, and so I  
12 think we're working cooperatively as much as we can  
13 with EBID and EP No. 1 to avoid repetitive questions.  
14 There are questions that are not relevant to Texas or  
15 relevant to the United States. I think that that's  
16 the main area that EBID and EP No. 1 have -- have  
17 asked questions on, and under the case management  
18 rule, I think that that's appropriate, and I don't --  
19 I don't believe that they've abused that at all. It  
20 hasn't been a problem from our perspective.

21 **JUDGE MELLOY:** Well, I'm not inclined to  
22 change the order at this time. If you believe there  
23 comes a time, Mr. Wechsler, that they are abusing the  
24 right that's given to them under Section 3.5, I -- I  
25 would appreciate seeing the actual transcript, so I

1 can -- so I can get a sense of what you're talking  
2 about, but I think as to the issue of their role in  
3 the case, that ship has sailed. I mean, they have a  
4 unique interest that's separate and apart from all of  
5 the other amici, and I think that comes from the  
6 Supreme Court decision itself where they talk about  
7 the contracts and the role of the water districts.  
8 And I -- I think it's been a recognition from day one  
9 that EBID and obviously El Paso water district are not  
10 aligned with the State of New Mexico and that the  
11 State of New Mexico, I believe, has indicated some  
12 interest in trying to become more aligned, but the  
13 fact of the matter is at least right now, they're not.  
14 At least that's my understanding. So I'm not really  
15 inclined to make any changes at this point. I think  
16 we talked about this early on. I think everybody  
17 recognized the unique role of the two water districts,  
18 and -- and I'm not really, like I say, inclined to  
19 make any changes until I can see something in writing  
20 that shows that they're abusing the privilege that's  
21 been -- and the unique status under -- under the case  
22 management order, and specifically Section 3.5.

23 **MR. WECHSLER:** Your Honor, are you able  
24 to give any guidance as to what subjects are  
25 appropriate?

1                   **JUDGE MELLOY:** Well, I -- it's always  
2 been my thought, and maybe it was according to the  
3 orders I hoped it would be, that we are not at this  
4 point litigating the validity -- the facial validity  
5 of the operating agreement. It is not my role or I  
6 would anticipate Supreme Court's role in at least this  
7 phase of the proceedings to say that the operating  
8 agreement is or is not valid. Having said that,  
9 however, the operating agreement sort of permeates the  
10 case, though, because it's the agreement, as I  
11 understand, on which current operations are being  
12 conducted, which is certainly something that's  
13 relevant to the case, and it may -- it may affect the  
14 apportionment of any that either state is entitled to.  
15 If the operating agreement results in either Texas or  
16 New Mexico receiving less water than they're entitled  
17 to under the -- under their apportionment, then the  
18 operating agreement is going to have to be modified  
19 because the Compact -- I think everybody -- I think  
20 everybody agrees, maybe not, that the Compact is the  
21 ultimate document that will govern the apportionment  
22 of the water in this case, and if the operating  
23 agreement somehow or the other has the direct or  
24 indirect effect of modifying the apportionment that  
25 each party is entitled to under the Compact, then I



1 believe that the operating agreement probably will  
2 either have to be modified or validated, but that's  
3 not an issue for today. But it's still -- but because  
4 it affects the operation of the -- of the system, it's  
5 obviously relevant to -- to how the system was  
6 currently being operated and the amount of money that  
7 each party's or each state is receiving. I don't  
8 know. Does anybody disagree with that? I mean, I  
9 know you disagree with my ruling on the facial  
10 validity, but, I don't know, does anybody disagree  
11 with that? Ms. O'Brien?

12 **MS. O'BRIEN:** Your Honor, I would just  
13 amplify, actually, a bit of what you said in response  
14 to Mr. Wechsler. I believe what you're saying is we  
15 cannot draw a bright line in terms of what is -- the  
16 districts are -- should be entitled to question on  
17 because, as you say, the operating agreement and  
18 project operations permeates the case. It is -- it's  
19 interrelated, and New Mexico does claim that the  
20 operating agreement, in fact, upends the entitlement  
21 they feel they get from and below Elephant Butte. So  
22 I do not think it is helpful at all to -- I think, as  
23 you're saying, to try to, you know, have a -- an  
24 exclusive list of areas of questioning given the  
25 complexity of the issues and the interplay and

1 interrelation of project operations to district  
2 operations to the claims that are being made by New  
3 Mexico's expert. So, you know, again, Your Honor has,  
4 you know, full discretion, obviously, to -- to manage  
5 the -- the case that you have before you, and I think  
6 you have -- have done so in a way that makes sense and  
7 is, in fact, working. You know, Mr. Wechsler's  
8 statement regarding the role of amici generally  
9 completely inapplicable here and ignore the fact that  
10 in other interstate cases, amici that have unique  
11 interests are somewhat similar to here were given very  
12 active roles, not just in discovery, but also at  
13 trial. And I think what we've done here -- as you  
14 say, the ship has sailed. We have fashioned a -- a  
15 process whereby the districts can participate. We  
16 have done so in a way that is not disruptive, that is  
17 efficient, and we don't believe that any further  
18 definition or explication or change is required at  
19 this point.

20 **MR. BROCKMANN:** Your Honor, if I may,  
21 it's Jim Brockmann. I just want to point out one  
22 countervailing argument, I think, to Ms. O'Brien. In  
23 the -- in the Nebraska versus Wyoming case, there were  
24 probably five or six amici, and all amici were treated  
25 the same, and there was an irrigation district in that

1 case that served lands in both Wyoming and Nebraska.  
2 There were power districts. There were environmental  
3 groups, and all of those amici were treated the same  
4 for purposes of case management. So I do -- I do  
5 disagree, I guess, in that respect, and -- and just  
6 want to echo Mr. Wechsler's argument that the motions  
7 to intervene were denied, and I'll leave it at that.  
8 Thank you.

9 **MR. WECHSLER:** I'll --

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

11 **MR. WECHSLER:** I don't disagree with  
12 your view of the Compact governing the case. What I  
13 would say for that is that's only precisely the  
14 problem. In this case, in these types of cases, the  
15 issue is what are the state's entitlement, what are  
16 the state's apportionment, and -- and what has  
17 happened here is two of the many water users within  
18 the two states that are really in dispute below the  
19 LRG, below Elephant Butte, are given a heightened  
20 status, whereas I don't think that there's any  
21 precedent for that in any prior cases. Having been  
22 involved in a number of original actions, I do not  
23 agree with Ms. O'Brien's statement that some amici  
24 have been given heightened abilities to participate in  
25 discovery and certainly not at trial. Again, these

1 are amici, not parties.

2           **JUDGE MELLOY:** Well, I'm not at this  
3 point going to say anything further. I think we've  
4 talked about it enough. If it gets to a point again  
5 that you feel there really is an abuse, file a motion  
6 with the transcript so I can see what's going on; but  
7 otherwise, I think we've exhausted this issue for  
8 today.

9           That only leaves one item, I believe.  
10 Mr. Somach, in his letter, alluded to -- not allude.  
11 He actually said that he was very concerned that  
12 someone had used their iPhone to basically tape a  
13 video deposition that -- I assume that what's  
14 happening here -- let me go back a second. My -- my  
15 assumption is that some people are participating or  
16 observing the depositions on a Zoom call like this  
17 with -- with -- that they're not necessarily asking  
18 questions, they're just observers; is that -- is that  
19 the problem, Mr. Somach?

20           **MR. SOMACH:** Yes.

21           **JUDGE MELLOY:** And then somebody took  
22 their cellphone and videoed the deposition and then  
23 played it at a meeting that resulted in -- in some  
24 distress. Can you amplify on this, Mr. Somach, a  
25 little bit?

1                   **MR. SOMACH:** Yes. It's my understanding  
2 that it wasn't played at a meeting. It was texted to  
3 various people, and it was an excerpt. It wasn't the  
4 deposition. It was an excerpt. You know, if we were  
5 taking normal depositions, that would never occur. No  
6 one would consent to having a -- a non-party, even a  
7 party for that matter, sit there and -- and cherry  
8 pick questions and answers and then disseminate them  
9 out of the deposition for whatever purpose. I mean,  
10 in a normal, just you and me talking on the street  
11 situation, there are certain rules about recording and  
12 disseminating conversations that -- that exist in an  
13 ethical context, both Texas and New Mexico have  
14 ethical rules that would preclude that type of  
15 recording to be done. Under the Federal Rules in a  
16 deposition, there has to be a notice of parties that  
17 the recording will be done. I just -- this is so  
18 alien to anything I've experienced in my 45 years of  
19 practice that I -- that I -- I don't even -- I didn't  
20 even know -- I don't know exactly how to -- how to  
21 deal with it, and I want -- I want it stopped. I want  
22 the person involved potentially banned from -- from  
23 depositions. I don't believe it was one of the  
24 parties to -- to the deposition that was involved.  
25 I -- I think that person who did it can speak for

1 themselves. It's not up to me to -- but I know of no  
2 justification, either ethical or otherwise -- I'm not  
3 even certain that what happened is legal. It  
4 certainly is not legal in California, and I defended  
5 the deposition in California, let alone ethical. And  
6 I just think it's so out of the norm and -- and  
7 inappropriate that there ought to be some sanction  
8 associated with it. I certainly think it should be  
9 precluded from this -- this point forward. I would  
10 never imagine that anybody would even have to be told  
11 that that's inappropriate.

12 **JUDGE MELLOY:** Are -- are the  
13 depositions, in addition to a written transcript, are  
14 they all being videotaped?

15 **MR. SOMACH:** Yes, they are.

16 **JUDGE MELLOY:** I'm not using the right  
17 terminology, but they're -- they're being -- there is  
18 a video of every deposition?

19 **MR. SOMACH:** That's right. And that  
20 will be an official video like an official transcript.  
21 It hasn't been produced yet for this particular  
22 deposition. You know, there's a lag of considerable  
23 time. The parties in the normal way get to review the  
24 deposition, create an errata and other sheets. They  
25 sign the depositions, and that will happen in due

1 course as appropriate. This is wholly outside of all  
2 of that.

3 **JUDGE MELLOY:** Let me just ask: Who did  
4 it? Do you know?

5 **MR. SOMACH:** Yes. And she's on the  
6 phone.

7 **MS. DAVIDSON:** Your Honor, this is Tessa  
8 Davidson and Mr. Somach knows because I reached out to  
9 him yesterday early in the morning to talk to him  
10 about this and to discuss with him the basis for his  
11 accusations. I take accusations of unethical behavior  
12 very, very seriously, and he did not respond to my  
13 request. However, I can report to you what I do know  
14 and what I did during the deposition. As you're  
15 aware, I represent the New Mexico pecan growers, and  
16 I -- that organization has a six-member board and  
17 hundreds of members who irrigate, I think in the tens  
18 of thousands of acres within EBID, and they have been  
19 very involved in monitoring all aspects of this  
20 litigation because they do not believe EBID is  
21 representing their interests in groundwater in New  
22 Mexico and they believe that Texas' claims are putting  
23 their very livelihoods at risk, and they were  
24 especially interested in Pat Gordon's deposition  
25 because as the Texas commissioner on the Compact

1 commission, he has repeatedly claimed to represent  
2 their interests of -- well, to represent the interests  
3 of the EBID farmers at commission meetings, and they  
4 were very eager to receive ongoing reports from me  
5 during the deposition because, frankly, based on their  
6 face-to-face meetings with Mr. Gordon, they expected  
7 his testimony to be very favorable for them and  
8 favorable of their positions. So they asked me to  
9 give them ongoing reports during the deposition, and  
10 during the deposition, I did communicate with them via  
11 phone, via text, via e-mail, and some of those  
12 communications did include some video segments that I  
13 took when I felt that the questioning was getting into  
14 areas of interest for -- for them, the particular  
15 areas of interest for them. We fully anticipated this  
16 testimony being favorable. They were very excited as  
17 being farmers farming on the ground. They weren't  
18 able to attend a virtual deposition. So my only  
19 intent in doing this was to communicate with my  
20 clients, and since the deposition notice indicated  
21 that the deposition was being videotaped and  
22 Mr. Gordon knew it was being videotaped, it never  
23 occurred to me that it would be improper to share  
24 certain segments of the deposition with my clients,  
25 and even during the last several months, this is



1 something that I've seen other attorneys do to  
2 communicate with clients that can't attend virtual  
3 depositions and within the context of videotaped  
4 depositions. I certainly would not set up a video  
5 camera and tape a whole deposition. It's just a  
6 convenient way when your clients are very, very  
7 interested to communicate information, and this  
8 particular deposition was of extreme interest to them.  
9 So I realize this new era of virtual legal practice is  
10 raising issues for us to consider, but after seeing  
11 Mr. Somach's letter, I did review my rules of  
12 professional conduct, and I couldn't find anything  
13 that would indicate my actions were unethical, and I  
14 was also able to briefly do some research on the  
15 Internet yesterday, but I was unable to find anything  
16 instructive. So, Your Honor, I would take any  
17 guidance that you believe is appropriate. I would  
18 have preferred that Mr. Somach, pursuant to the case  
19 management plan, call me and talk about this issue so  
20 we didn't have to address it in such depth with you.  
21 I -- I have no understanding of the basis of the  
22 accusations he has in his letter. I certainly didn't  
23 distribute any information on a wide basis with the  
24 intent to embarrass Commissioner Gordon. So that's  
25 all I have, Your Honor.

1                   **JUDGE MELLOY:** I take it the  
2 Commissioner Gordon's deposition was not as favorable  
3 to your clients as you had anticipated, that's part of  
4 the problem?

5                   **MS. DAVIDSON:** Your Honor, I really  
6 can't speak to communications that I've had with my  
7 clients, but I will tell you that there were  
8 definitely instances of -- of, I guess, contrary  
9 testimony to what they had heard from Mr. Gordon in  
10 face-to-face meetings, and as to their reactions, I'm  
11 sure there's a multitude of reactions on that  
12 information. And, you know, my clients do have and  
13 will have access to the full transcript. I fully  
14 briefed them on all issues and all matters in the  
15 deposition. I -- I have no understanding of  
16 Mr. Somach's accusations, but I do take them very  
17 seriously, Your Honor, and I am -- I am absolutely  
18 willing to adhere to any guidance that you want to  
19 provide in this instance.

20                   **JUDGE MELLOY:** Well --

21                   **MR. DUBOIS:** Your Honor, just for  
22 your -- just for your information -- I'm sorry. This  
23 is Jim Dubois. The -- the realtime transcripts, the  
24 raw transcripts, are basically available the evening  
25 the deposition -- of that deposition day finishes so

1 just going forward, know that -- that that is the  
2 situation is that the raw transcripts, and if -- if  
3 our friend Heather is doing them, they're scary  
4 accurate. They are available that day.

5 **MR. UTTON:** Your Honor, this is John  
6 Utton. Could I just provide, I think, what might be  
7 some helpful insight?

8 **JUDGE MELLOY:** Go ahead.

9 **MR. UTTON:** Following what Mr. Dubois  
10 just said, we do get these realtime rough draft  
11 transcripts, which are actually very accurate, and so  
12 I'm a little confused by how Mr. Somach is looking at  
13 this. For instance, if I got a copy of that  
14 transcript for a full day of deposition and let's say  
15 I wanted to send a couple pages to my client and I  
16 texted them to my client, I don't see how that would  
17 be much different than what Ms. Davidson did. You  
18 know, it's both a videoed deposition and a transcribed  
19 deposition. We're trying to share information with  
20 our clients. I would feel no reluctance to if there  
21 were a couple of pages, written pages from a  
22 deposition and I wanted to share that with my client,  
23 to share that with them. I guess I don't see how that  
24 is different than what she did with -- with a video  
25 part of it. So I -- I don't know what all this fuss

1 is about.

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

3 **MS. BARNCASTLE:** Your Honor, Samantha  
4 Barncastle, very briefly, as the only person living in  
5 this valley and on the ground meeting with these folks  
6 and seeing these folks on a regular basis and having  
7 heard what came from this, what I can say in this  
8 instance is I believe Ms. Davidson 100 percent when  
9 she says she did not intend any ill will here. The  
10 problem being that what happens when certain snippets  
11 are released outside of the full context, especially  
12 when you're able to look at sound bites rather than  
13 reading a transcript, wildfire starts very quickly,  
14 and the situation turns into one where witnesses and  
15 political officials can be potentially intimidated and  
16 otherwise influenced because what ended up happening  
17 here was a very short sound bite was released, and it  
18 was, in my opinion, taken out of context, and what  
19 ended up coming from it was calls to my board members  
20 for about a week straight that were pressuring those  
21 political officials to drastically reverse course  
22 because the idea being that EBID is out to get its own  
23 members now, and that is a significant problem. I  
24 would have had no problem whatsoever if there was the  
25 full transcript provided in context, proper context,

1 but I -- again, I can't stress enough that I believe  
2 Ms. Davidson when she says this was intended for  
3 communications with her client and her client only and  
4 no ill will was intended. The problem is we have to  
5 be very careful about how we're dealing with these  
6 situations on the ground and the consequences of our  
7 clients doing something potentially improper moving  
8 forward beyond our discussion.

9 **MR. WECHSLER:** Your Honor --

10 **JUDGE MELLOY:** Let me just ask a  
11 question. Let's put aside the fact -- I -- I guess I  
12 agree with Mr. Somach. There's something, I think, a  
13 little off putting about using your iPhone to take a  
14 video of a deposition. But putting that aside, and I  
15 guess I address this to both Ms. Barncastle and  
16 Mr. Somach, there's -- there would be nothing  
17 improper, would there, about getting -- sending an --  
18 a transcript excerpt to your client, as Mr. Utton has  
19 suggested, and it's not my job to tell an attorney how  
20 much or how little of a deposition they need to send.  
21 I -- and -- and -- and conversely, I really can't tell  
22 the client that you can't disseminate it to other  
23 members of your association. I guess -- I guess what  
24 are you asking me to do, Ms. Barncastle?

25 **MS. BARNCASTLE:** Well, essentially, Your

1 Honor, I'm -- what I am saying here is I agree with  
2 Ms. Davidson that this is an issue that is not --  
3 nobody has dealt with this before, and we don't  
4 necessarily know how to deal with it. But I  
5 potentially have board members that are going to be  
6 coming back for additional depositions, and they are  
7 now feeling very intimidated by the fact that anybody  
8 can video any small portion of their deposition and  
9 send it out and potentially cause strife among them  
10 and their neighbors when that's taken out of context.  
11 And so I'm -- I'm not necessarily asking for anything.  
12 I think this is more of a warning to the attorneys on  
13 this call that we need to be very careful about what  
14 we -- what situations we create for people who are  
15 living and breathing these issues on the ground. I  
16 have board members who have expressed concern to me  
17 about the fact that while they are aware their  
18 deposition will be recorded, they were under the  
19 impression that that would be for specific limited  
20 uses in a courtroom at a later date and not  
21 necessarily for embarrassment purposes within the  
22 general public starting tomorrow morning.

23 **JUDGE MELLOY:** Well, I think -- I think  
24 as a -- sort of a general proposition, I don't think  
25 anybody should be using their iPhone to video a

1 deposition. We have an official transcript, we have a  
2 realtime transcript, and we have an official video. I  
3 think those should be the only documents or -- and --  
4 or videos that are available. I have -- I have some  
5 hesitancy about telling an attorney, though, as to how  
6 they should communicate or what they should  
7 communicate with their client within the parameters of  
8 those three documents and video. I don't mean to cut  
9 anybody off. Did you want to say something,  
10 Mr. Brockmann? Were you ready to jump in?

11 **MR. WECHSLER:** I think, Your Honor --

12 **JUDGE MELLOY:** Or was it Mr. Wechsler?  
13 Mr. Brockmann and then Mr. Wechsler. Mr. Brockmann,  
14 were you getting ready to say something?

15 **MR. BROCKMANN:** I was, Your Honor, but I  
16 won't take any more time. I think it's about the  
17 substance and -- about the procedure going forward and  
18 not the substance, and I'll leave it at that. Thank  
19 you.

20 **JUDGE MELLOY:** Mr. Wechsler?

21 **MR. WECHSLER:** I only have two different  
22 points that hadn't already been expressed. The first  
23 was, I -- I wanted to just sound a note of caution  
24 that, I mean, New Mexico is a small legal community.  
25 The farming community down there is a small community.

1 We know each other. Many of us are friends, and, I  
2 mean, that leads us to, I think, treat us -- each  
3 other with a certain amount of respect, but, I mean,  
4 since we've been in the case, this is the second time  
5 that I've heard claims of ethical violations, the  
6 first time being when New Mexico was accused of not  
7 negotiating in good faith. I would just urge the  
8 parties to exercise restraint.

9 And then the second thing that I didn't  
10 hear expressed already was that, I mean, to amplify it  
11 a little bit, I -- I feel like I have an obligation to  
12 provide transcripts to my clients, to provide and  
13 to -- to highlight parts that they might have a  
14 particular interest in and so I just wanted to agree  
15 that I don't think that that is a restriction that  
16 Your Honor should be putting on here.

17 **MR. SOMACH:** Your Honor, if I could be  
18 very -- you know, I'm -- there's a lot of -- there's  
19 been a lot said. How I proceed from an ethical or  
20 legal perspective in terms of what was done is an  
21 aside. Okay. I have to evaluate that based upon my  
22 obligations as an attorney to make a determination,  
23 and for that regard, I will do anything else. Okay.  
24 That -- that's the first thing.

25 Secondly, what I am talking about and



1 the reason I raised this issue to you in the context  
2 of this litigation was because I am concerned about  
3 the sanctity of the deposition process. I have always  
4 viewed it as a -- a privilege as part of the judicial  
5 process that we are able to pull citizens off the  
6 street, and we are able to put them under oath and  
7 obligate them to tell the truth in a very intimidating  
8 type of situation away from judges, away from juries  
9 where we have to self-discipline ourselves in the  
10 context of what is going on. I take the -- that  
11 obligation very seriously. When I ask particularly a  
12 non-expert witness, as Mr. Gordon was, he was a  
13 percipient witness called on behalf of New Mexico,  
14 when I prepare that witness, one of the things I say  
15 is that he will be treated fairly. He must answer  
16 truthfully and fully to his best ability, but that his  
17 deposition is important because it's part of the  
18 litigation process. It is part of how we do law and  
19 justice, both in the civil courts as well as the  
20 criminal courts of the United States. This, of  
21 course, is the United States Supreme Court that we  
22 were involved in. My objection and the reason for  
23 bringing this to you is protecting that process. If  
24 every percipient witness I -- I put up knows that his  
25 rights will be induced because one will go outside of

1 the official transcript, one will go outside of the  
2 official video that's being taken and that things will  
3 be pirated and then shipped out, I think that that is  
4 quite a difference in what is appropriate. I am  
5 aghast at Ms. Davidson's view. That is why I did not  
6 call her because I didn't want to have that  
7 conversation with her. I'm surprised by Mr. Utton's  
8 views that this is no different than sending out a  
9 transcript, because I think it is quite different than  
10 that. In the terms of what I'm asking for here is I  
11 would like a rule that says we don't do this in these  
12 depositions anymore. You can communicate with your  
13 clients in a hundred different ways, including taking  
14 the rough transcripts that Mr. Dubois talked about, at  
15 which come out literally an hour after the deposition.  
16 You can mark them up. You can excerpt them. You can  
17 do whatever you want to, as Mr. Wechsler suggests.  
18 What I'm saying is I don't believe that people ought  
19 to be able to pull out their phone because of this  
20 unique situation created by this virus and videotape a  
21 deposition that would never be allowed in a normal and  
22 ordinary circumstance, and that's what I'm talking  
23 about.

24 **JUDGE MELLOY:** Well, I think I've  
25 already indicated I am going to enter an order to that

1 effect, but -- but beyond that, I'm not going to do  
2 anything to -- that says you can or cannot or in what  
3 form or how much or how little the official  
4 transcript, the realtime transcript, or the video is  
5 going to be communicated. That's obviously within the  
6 attorney/client relationship, and -- but I will -- I  
7 will enter an order that there is not to be any type  
8 of either electronic or, I guess, non-electronic  
9 taping or using cellphones or cameras or whatever of  
10 depositions. It has to be within the context of  
11 the -- of the official transcript and the realtime  
12 transcript and -- and, I guess -- I don't know that  
13 there's anything more to say about that. That will be  
14 the order, and I'll put it in writing.

15 All right. Is there anything else we  
16 need to talk about today? If not, then let's plan to  
17 reconvene in two weeks, same time, and --

18 **MR. SOMACH:** Could I ask a question? I  
19 just want to clarify. My understanding is I don't  
20 have to respond to Mr. Wechsler's motion on the  
21 supplemental briefs, but instead will handle that in  
22 the -- at the next status conference?

23 **JUDGE MELLOY:** Yes. And you are going  
24 to report back at that time as to whether, A, you're  
25 going to even have supplemental briefs, and -- and, B,

1 whether you think the September 15 deadline is  
2 reasonable or whether we have to talk about something  
3 else.

4 **MR. SOMACH:** Right. And I'll -- I'll  
5 actually reach out to Mr. Wechsler before that and see  
6 if we can reach an agreement after I -- I do that so  
7 we can report fully back to you.

8 **JUDGE MELLOY:** All right. Okay. Thank  
9 you. I appreciate that. Anything else from anybody?

10 All right. If not, then we'll sign off.  
11 Thanks, everyone.

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

13 **MR. DUBOIS:** Thank you, Your Honor.

14 (The proceedings adjourned at 12:45  
15 p.m.)

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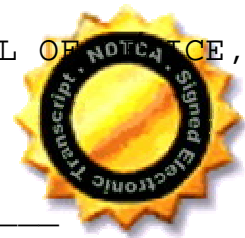
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<b>A</b>				
<b>a.m</b> 1:14	18:1 35:17	<b>agrees</b> 20:20	3:5,11,15 4:7	18:5 44:24
<b>abilities</b> 59:24	41:21 44:5	56:20	4:12,16 5:1	45:24 46:1
<b>ability</b> 33:10	65:20 69:15	<b>ahead</b> 34:16,18	<b>and/or</b> 33:5	<b>approximately</b>
42:3,15 73:16	<b>addressed</b> 18:8	40:10,14,14	<b>Andrews</b> 2:21	46:6
<b>able</b> 21:15 23:22	18:8	59:10 67:8	7:18	<b>area</b> 12:21 54:16
35:17 43:4	<b>adhere</b> 66:18	<b>Al</b> 9:12 21:25	<b>answer</b> 19:9	<b>areas</b> 57:24
47:20,21 48:12	<b>adjourned</b> 76:14	26:11	40:1 73:15	64:14,15
55:23 64:18	<b>adjust</b> 36:23	<b>Albuquerque</b>	<b>answers</b> 61:8	<b>argument</b> 40:16
65:14 68:12	<b>adjusted</b> 36:23	3:8 4:24 5:11	<b>anticipate</b> 15:4	44:21 50:13
73:5,6 74:19	<b>adjustment</b> 21:1	<b>Albuquerque-...</b>	15:23,25 49:7	53:17 58:22
<b>absolutely</b> 66:17	36:25	8:18,21	56:6	59:6
<b>abuse</b> 13:23	<b>administration</b>	<b>alien</b> 61:18	<b>anticipated</b>	<b>arguments</b> 35:6
39:16 60:5	40:19	<b>aligned</b> 33:23	49:15 64:15	<b>Arianne</b> 7:24
<b>abused</b> 54:19	<b>admissible</b> 27:5	52:18 55:10,12	66:3	<b>articulate</b> 22:20
<b>abusing</b> 36:1,10	27:8,14	<b>alleged</b> 41:4	<b>anticipates</b>	<b>aside</b> 30:24
52:7 54:23	<b>admitted</b> 17:18	<b>allocation</b> 34:6,8	49:20	33:24 41:21
55:20	17:20 18:23	45:19	<b>anticipating</b>	69:11,14 72:21
<b>access</b> 42:2	<b>advance</b> 40:13	<b>allocations</b>	16:2 49:10	<b>asked</b> 15:20
66:13	<b>advancing</b> 42:25	33:18,21	<b>anticipation</b>	28:11 43:15
<b>accurate</b> 49:5	<b>affect</b> 56:13	<b>allow</b> 39:22	23:16	46:8 48:19
67:4,11	<b>afternoon</b> 19:8	<b>allowed</b> 23:5	<b>anxious</b> 24:16	49:16 52:15,17
<b>accusations</b>	<b>age</b> 31:8	50:18 52:2	<b>anybody</b> 12:4,9	54:8,17 64:8
63:11,11 65:22	<b>aggressive</b> 31:21	74:21	21:3,4,19 31:1	<b>asking</b> 12:1
66:16	32:18 34:23	<b>allowing</b> 50:11	32:18 34:13	27:23 46:12
<b>accused</b> 72:6	35:3	<b>allows</b> 25:21	48:9 54:1 57:8	48:25 49:15
<b>ACOSTA</b> 5:18	<b>aghost</b> 74:5	<b>allude</b> 60:10	57:10 62:10	60:17 69:24
<b>acres</b> 63:18	<b>ago</b> 28:24 43:14	<b>alluded</b> 60:10	70:7,25 71:9	70:11 74:10
<b>act</b> 36:15	43:14	<b>alternatively</b>	76:9	<b>aspects</b> 45:18
<b>action</b> 37:6	<b>agree</b> 15:22	40:24	<b>anymore</b> 74:12	63:19
51:22,22	33:12 35:11	<b>amend</b> 27:20	<b>anyway</b> 30:10	<b>assist</b> 35:17
<b>actions</b> 59:22	36:4 40:14	48:3	<b>apart</b> 55:4	<b>assistant</b> 7:19
65:13	49:24 51:11,15	<b>amici</b> 38:3,10,15	<b>apologize</b> 40:13	12:1
<b>active</b> 58:12	59:23 69:12	38:16,20 41:25	<b>appearances</b> 7:7	<b>associated</b> 62:8
<b>actual</b> 39:23	70:1 72:14	43:1 47:19	<b>appearing</b> 8:20	<b>association</b>
54:25	<b>agreement</b>	50:11,12,25	<b>apportionment</b>	69:23
<b>add</b> 26:10,18	34:11 38:1,14	51:10 52:1	31:18 33:15,24	<b>assume</b> 10:6
32:21 49:14	39:3,5,15 40:6	55:5 58:8,10	34:5 38:6,8	21:20 31:24
<b>Adding</b> 46:4	41:4,24 43:18	58:24,24 59:3	53:1 56:14,17	60:13
<b>addition</b> 62:13	43:20 45:3,9	59:23 60:1	56:21,24 59:16	<b>assumption</b>
<b>additional</b> 17:3	45:14,17 46:18	<b>amicus</b> 51:12,19	<b>appreciate</b>	60:15
28:7 30:5	46:23 47:1,9	<b>amount</b> 16:2	39:25 54:25	<b>attach</b> 25:2
53:24 70:6	47:10,13,18,24	17:1 53:19	76:9	52:13
<b>Additionally</b>	48:1 56:5,8,9	57:6 72:3	<b>appropriate</b>	<b>attached</b> 24:18
43:9	56:10,15,18,23	<b>amplify</b> 57:13	12:3 54:18	<b>attack</b> 41:20
<b>address</b> 17:17	57:1,17,20	60:24 72:10	55:25 63:1	<b>attempting</b>
	76:6	<b>Anaya</b> 3:7 7:21	65:17 74:4	24:24
	<b>agreements</b> 47:5	<b>and-</b> 2:10,14,24	<b>appropriately</b>	<b>attempts</b> 29:17

<b>attend</b> 64:18 65:2	48:16 49:13 50:8 53:16 54:6 68:3,4 69:15,24,25	45:1	73:23	50:23,24
<b>attorney</b> 2:16 3:17 7:12,19 19:20 41:8 69:19 71:5 72:22	<b>Barncastle's</b> 46:5 48:19 50:6	<b>beneficiary</b> 52:21	<b>brings</b> 39:10 <b>broad</b> 39:11 <b>broadly</b> 39:13 <b>Broadway</b> 3:22 <b>BROCKMAN</b> 6:2	<b>Caroom</b> 5:17 8:24,25 <b>case</b> 11:5 15:2 18:15,24 22:24 24:6 25:8,15 25:19,20 26:16 26:22 29:11,23 33:8 35:24 37:7,8,19,19 38:3,14 40:21 41:1,25 42:17 42:24 43:3,10 44:15,25 45:12 46:2,6,22 47:16,19 48:3 48:11,19,20 49:19 50:12,24 51:5 52:24 54:17 55:3,21 56:10,13,22 57:18 58:5,23 59:1,4,12,14 65:18 72:4
<b>attorney/client</b> 75:6	<b>Barroll</b> 14:1 15:21 47:11	<b>BERNALILLO</b> 5:11	<b>Brockmann</b> 5:12,13 8:19 8:20 58:20,21 71:10,13,13,15	<b>cases</b> 39:21 50:19 58:10 59:14,21
<b>attorneys</b> 65:1 70:12 77:12	<b>base</b> 11:20	<b>best</b> 35:6 73:16	<b>brought</b> 31:15	<b>cause</b> 49:25 70:9 77:13
<b>August</b> 16:3 77:17	<b>based</b> 14:18 40:18 64:5 72:21	<b>better</b> 16:7 23:7 28:5 33:4	<b>Building</b> 5:19	<b>caution</b> 71:23
<b>Austin</b> 2:17 5:3 5:19	<b>basically</b> 11:2 16:6 29:7 33:22 43:24 60:12 66:24	<b>beyond</b> 11:20 13:3 69:8 75:1	<b>burden</b> 32:15	<b>caveat</b> 16:1
<b>authority</b> 5:11 8:18,21 40:23 40:25 41:6,15 41:20 42:13	<b>basis</b> 22:4 47:11 63:10 65:21,23 68:6	<b>BICKERSTA...</b> 5:18	<b>business</b> 10:16	<b>CEDAR</b> 1:14
<b>authorized</b> 41:2	<b>beginning</b> 1:14 41:23 42:24 45:25	<b>binds</b> 37:6	<b>Butte</b> 5:6 9:15 9:18 33:7,15 33:18 34:5 36:6 37:22 40:25 45:20 57:21 59:19	<b>cellphone</b> 60:22 <b>cellphones</b> 75:9 <b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>automatically</b> 27:8	<b>beginning</b> 1:14 41:23 42:24 45:25	<b>bit</b> 11:13 16:13 57:13 60:25 72:11	<hr/> <b>C</b> <hr/> <b>C</b> 2:1,4 4:14 5:12	<b>cellphones</b> 75:9 <b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>available</b> 26:21 53:8 66:24 67:4 71:4	<b>begun</b> 53:21	<b>bite</b> 68:17	<b>calendar</b> 30:9 30:19	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>Avenue</b> 1:14 3:8	<b>behalf</b> 8:20 9:5 10:1,5 36:20 42:7 51:24 53:10 54:5 73:13 77:11	<b>bites</b> 68:12	<b>California</b> 2:6 62:4,5	<b>caution</b> 71:23 <b>caveat</b> 16:1 <b>CEDAR</b> 1:14 <b>cellphone</b> 60:22 <b>cellphones</b> 75:9 <b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>avoid</b> 18:7 54:9 54:13	<b>behavior</b> 63:11	<b>black</b> 47:1	<b>call</b> 7:10 12:2 16:23 60:16 65:19 70:13 74:6	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>aware</b> 63:15 70:17	<b>belabor</b> 19:15	<b>Black's</b> 51:19	<b>called</b> 37:2 73:13	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<hr/> <b>B</b> <hr/>	<b>believe</b> 11:2,15 18:4 26:20 28:5 32:8 33:17 34:13 40:8 41:17 43:14 44:4 48:2,4 49:11 54:19,22 55:11 57:1,14 58:17 60:9 61:23 63:20,22 65:17 68:8 69:1 74:18	<b>Blair</b> 9:12 21:25 26:11,22	<b>calls</b> 12:10 68:19	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>B</b> 2:4 4:17 75:25	<b>beliefs</b> 47:10 47:11	<b>Blair's</b> 26:16	<b>camera</b> 65:5 <b>cameras</b> 75:9	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>back</b> 15:14 17:21 20:2,17 23:20 30:13 52:14 60:14 70:6 75:24 76:7	<b>beneficiaries</b>	<b>board</b> 36:15 41:18 42:17,20 42:21 63:16 68:19 70:5,16	<b>capable</b> 52:22 <b>capacity</b> 26:13 37:5 77:10	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>backup</b> 22:7		<b>Boulder</b> 2:12	<b>Capitol</b> 2:6	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>balance</b> 53:12		<b>boundaries</b> 37:4	<b>caption</b> 77:6	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>banned</b> 61:22		<b>bounds</b> 13:4	<b>careful</b> 19:3 69:5 70:13	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>Barfield</b> 2:4 7:11		<b>Box</b> 2:16 4:9 5:3 5:13 6:3,8,13	<b>Carolina</b> 37:8	<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
<b>Barncastle</b> 5:7,7 9:16,17 21:22 36:4 40:8,9,10		<b>break</b> 25:23		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>breathing</b> 70:15		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>brief</b> 24:8,8 26:6 26:10 30:5 51:23		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>briefed</b> 66:14		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>briefing</b> 27:25 31:17 41:22		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>briefly</b> 27:21 65:14 68:4		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>briefs</b> 75:21,25		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>bright</b> 57:15		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>bring</b> 11:24 50:15		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3
		<b>bringing</b> 51:1		<b>centered</b> 46:23 <b>central</b> 26:17 <b>certain</b> 14:24 16:8 18:3 19:3 21:13 33:10 61:11 62:3 64:24 68:10 72:3

36:14 48:6,8 49:9 56:12 59:25 62:4,8 65:4,22 <b>CERTIFICA...</b> 77:1 <b>Certification</b> 77:20 <b>Certified</b> 77:3 <b>certify</b> 77:5,9,12 <b>challenge</b> 47:8 <b>challenged</b> 46:21 <b>challenges</b> 46:23 46:25 <b>challenging</b> 45:7 46:17 47:23 <b>championed</b> 13:5 <b>chance</b> 25:24 27:21 28:17 48:17 <b>change</b> 38:24 40:2 44:15 54:22 58:18 <b>changed</b> 38:13 42:20 45:5 51:7 <b>changes</b> 55:15 55:19 <b>channel</b> 29:21 <b>cherry</b> 61:7 <b>chime</b> 31:1,3 <b>Cholla</b> 3:16 7:19 <b>Chris</b> 8:16 <b>Christopher</b> 4:17 <b>CIRCUIT</b> 1:13 <b>circumstance</b> 74:22 <b>circumstances</b> 19:18,19 <b>citizens</b> 36:18 37:5,7,9 73:5 <b>City</b> 4:19 5:16 6:1 8:22,25 9:2 9:5 51:25 53:4	<b>civil</b> 14:11 15:2 73:19 <b>ckhoury@nm...</b> 3:19 <b>claim</b> 29:21 57:19 <b>claimed</b> 64:1 <b>claims</b> 29:24 30:6 42:4 45:7 45:9 46:17,20 58:2 63:22 72:5 <b>clarification</b> 35:24 38:25 <b>clarify</b> 75:19 <b>clarity</b> 11:14 21:15 43:10 44:2 <b>clear</b> 14:20 21:17 24:18 37:13,19 38:2 39:17 43:6 52:7 53:13 <b>clearly</b> 23:15 <b>client</b> 9:18 67:15 67:16,22 69:3 69:3,18,22 71:7 <b>clients</b> 64:20,24 65:2,6 66:3,7 66:12 67:20 69:7 72:12 74:13 <b>close</b> 27:22 <b>Coleman</b> 4:8 8:14 <b>Colorado</b> 1:9 2:12 3:3,20,22 3:23 4:4 7:5 8:2,4 <b>come</b> 12:22 28:10 37:7 49:3 74:15 <b>comes</b> 50:23 54:23 55:5 <b>coming</b> 31:2 41:22 49:3	68:19 70:6 <b>comment</b> 22:17 26:10 54:4 <b>comments</b> 32:24 <b>commission</b> 64:1,3 <b>commissioner</b> 7:14,23 63:25 65:24 66:2 <b>communicate</b> 64:10,19 65:2 65:7 71:6,7 74:12 <b>communicated</b> 75:5 <b>communicatio...</b> 64:12 66:6 69:3 <b>community</b> 71:24,25,25 <b>Compact</b> 36:19 36:20 37:9,20 37:22 39:9,10 40:18 42:7,10 50:7,9,10 51:2 52:4 53:1 56:19,20,25 59:12 63:25 <b>compelling</b> 38:16 <b>complaining</b> 29:14 <b>complaint</b> 45:22 <b>complete</b> 77:7 <b>completely</b> 43:2 44:11,20 58:9 <b>complexity</b> 26:18 57:25 <b>complied</b> 48:4 <b>comply</b> 24:24 <b>comprehensive</b> 26:25 <b>comprise</b> 77:7 <b>comprised</b> 46:11 <b>concede</b> 29:15 <b>concept</b> 50:6 <b>concern</b> 10:17	13:14 17:9 23:10,10,11 26:18 38:10 49:25 53:22 70:16 <b>concerned</b> 24:1 60:11 73:2 <b>concerns</b> 41:5 <b>conduct</b> 65:12 <b>conducted</b> 56:12 <b>conference</b> 16:23 43:15 75:22 <b>conferences</b> 12:17 <b>confess</b> 30:25 <b>confidentiality</b> 41:24 <b>confused</b> 67:12 <b>conscious</b> 17:23 19:1 <b>consent</b> 61:6 <b>consequences</b> 69:6 <b>Conservation</b> 9:22 <b>consider</b> 29:20 65:10 <b>considerable</b> 62:22 <b>considered</b> 44:24 <b>consistently</b> 42:2,23 <b>contemplate</b> 15:3 <b>contemplating</b> 33:4 <b>context</b> 16:14 46:5 48:13 61:13 65:3 68:11,18,25,25 70:10 73:1,10 75:10 <b>continually</b> 41:14 <b>continue</b> 47:20	47:22 48:12 49:11 53:22 <b>continues</b> 42:11 <b>continuing</b> 46:1 <b>contract</b> 10:15 37:18 38:4,5 <b>contracts</b> 33:20 34:1,9 39:8 41:3 45:3,6,8 45:10,17 46:16 46:19,24 47:4 48:1 55:7 <b>contrary</b> 41:19 42:12 50:17 51:2,2,3 66:8 <b>contributes</b> 48:5 <b>control</b> 37:3 40:23 <b>controversies</b> 45:12 <b>convenient</b> 65:6 <b>conversation</b> 14:22 74:7 <b>conversations</b> 61:12 <b>conversely</b> 69:21 <b>cooperatively</b> 54:12 <b>copy</b> 67:13 <b>core</b> 37:2 <b>Corrales</b> 6:8,9 <b>correct</b> 21:19 40:15 48:23 77:7 <b>correctly</b> 28:1 <b>counsel</b> 7:9,25 9:9,10 15:6 77:14 <b>counterclaim</b> 37:25,25 <b>counterclaims</b> 43:18 45:5 47:8 <b>countervailing</b> 58:22 <b>County</b> 4:21
--	--	--	--	---



5:11 8:18,21 9:6,9,22 43:12 <b>couple</b> 17:15 19:5 22:14 67:15,21 <b>course</b> 12:21 19:18 23:12 24:11 33:8 63:1 68:21 73:21 <b>court</b> 1:4 6:16 6:17 7:3 25:15 37:1 39:7 43:5 46:14 50:15,17 51:20,23 53:13 55:6 73:21 77:23 <b>Court's</b> 50:17 56:6 <b>courtroom</b> 70:20 <b>courts</b> 73:19,20 <b>cover</b> 17:11 23:6 23:19 24:13 39:13 43:7 <b>covered</b> 39:20 49:17,17 52:12 <b>covers</b> 39:6 <b>COVID</b> 19:18 <b>create</b> 26:18 62:24 70:14 <b>created</b> 51:6 74:20 <b>creature</b> 51:5 <b>criminal</b> 73:20 <b>critical</b> 53:2 <b>cross-examina...</b> 17:13 <b>CRR</b> 77:19 <b>CRRUA</b> 53:4 <b>Cruces</b> 5:8 6:1 9:3,5 53:4 <b>CSR</b> 77:19 <b>cull</b> 29:17 <b>current</b> 38:14 43:10 56:11 <b>currently</b> 29:23	39:5 57:6 <b>cut</b> 29:4 71:8 <hr/> <b>D</b> <b>D'Antonio</b> 7:24 <b>Dalrymple</b> 7:25 <b>Dana</b> 14:1 <b>danger</b> 50:11 <b>data</b> 15:13,18 16:4 17:1,3,3 22:7,8 <b>date</b> 20:9 28:13 48:23 49:4,11 49:12 70:20 77:20 <b>dates</b> 30:20 <b>Daubert</b> 27:5,11 <b>Dave</b> 8:14 <b>David</b> 4:3 <b>david.gehlert...</b> 4:6 <b>Davidson</b> 6:7,7 9:25 10:1 63:7 63:8 66:5 67:17 68:8 69:2 70:2 <b>Davidson's</b> 74:5 <b>day</b> 55:8 66:25 67:4,14 77:17 <b>days</b> 26:22 30:5 34:24 43:8 46:7 49:25 <b>DC</b> 4:10,14 <b>dcaroom@bic...</b> 5:20 <b>De</b> 2:21 3:13 <b>deadline</b> 14:24 15:6 20:19,21 20:22,25 31:20 34:22 76:1 <b>deal</b> 24:6 61:21 70:4 <b>dealing</b> 69:5 <b>dealt</b> 70:3 <b>decade</b> 47:17 <b>December</b> 13:20 <b>decide</b> 19:25	24:9 <b>decided</b> 20:15 <b>decision</b> 25:16 25:20 55:6 <b>defended</b> 62:4 <b>defer</b> 11:8 <b>deferring</b> 33:7 <b>definitely</b> 66:8 <b>definition</b> 51:19 58:18 <b>Deitchman</b> 2:5 7:11 <b>DELGADO</b> 5:18 <b>demanded</b> 29:14 <b>demonstrative</b> 25:4 <b>denied</b> 42:2 50:16 59:7 <b>denies</b> 42:16 <b>Denver</b> 3:3,23 4:4 <b>denying</b> 42:15 <b>Department</b> 3:22 4:3,9,13 4:18 8:15 <b>deponents</b> 39:25 <b>depose</b> 15:7 <b>deposed</b> 26:22 <b>deposition</b> 15:16 35:1,2 36:2 38:17 39:4 43:6,8 44:12 47:22 49:3 52:13 60:13,22 61:4,9,16,24 62:5,18,22,24 63:14,24 64:5 64:9,10,18,20 64:21,24 65:5 65:8 66:2,15 66:25,25 67:14 67:18,19,22 69:14,20 70:8 70:18 71:1 73:3,17 74:15 74:21	<b>depositions</b> 15:12,20 30:3 34:24 40:17 42:16 43:5,7 44:2 46:4,6,7 46:10 48:13,18 49:8,20,24 53:24 54:3,7 60:16 61:5,23 62:13,25 65:3 65:4 70:6 74:12 75:10 <b>depth</b> 65:20 <b>derived</b> 37:17 <b>describe</b> 23:7 <b>described</b> 39:1 49:6 <b>desire</b> 17:8 <b>despite</b> 41:4 42:3 <b>determination</b> 33:5,11 72:22 <b>determined</b> 33:18,19 34:9 42:23 44:24 <b>detracts</b> 48:6 <b>dictionary</b> 51:19 <b>difference</b> 25:11 74:4 <b>different</b> 12:13 16:12,14 17:11 22:13 24:5 29:9 36:16 39:23 67:17,24 71:21 74:8,9 74:13 <b>differs</b> 41:15 <b>digest</b> 21:9 <b>direct</b> 56:23 <b>direction</b> 37:24 39:17 44:14 <b>directly</b> 14:3 37:18 38:5 45:7 47:7,24 <b>directors</b> 42:18 <b>disagree</b> 38:23 40:15 44:14	52:9,10 53:9 53:18,20 57:8 57:9,10 59:5 59:11 <b>discarded</b> 47:10 <b>disclosures</b> 15:24 16:1 26:24 <b>discovery</b> 12:21 16:2 28:14 31:22 34:23 35:5 36:10 37:12 43:21 44:10 58:12 59:25 <b>discretion</b> 58:4 <b>discuss</b> 63:10 <b>discussed</b> 12:8 26:23 <b>discussion</b> 18:7 21:14 69:8 <b>discussions</b> 54:11 <b>dismissal</b> 29:24 45:5 47:8 <b>dismissed</b> 29:21 30:6 37:24 45:9 46:21 <b>dismissing</b> 46:17 <b>disposition</b> 37:6 <b>dispositive</b> 30:5 31:20,23 32:1 32:6 33:3 34:15 35:13,13 35:16 41:22 <b>dispute</b> 20:19,20 28:4 59:18 <b>disputes</b> 38:21 51:4 <b>disruptive</b> 46:3 58:16 <b>disseminate</b> 61:8 69:22 <b>disseminating</b> 61:12 <b>distress</b> 60:24 <b>distribute</b> 65:23
--	---	---	--	---

<b>district</b> 4:21 5:6 9:7,10,11,12 9:15,18,19,22 11:3 21:24 36:6 43:13 45:19 46:19 48:2,8 55:9 58:1,25	3:12 7:22,22 7:22 <b>drastically</b> 41:15 68:21 <b>draw</b> 57:15 <b>Drawer</b> 3:17 <b>drives</b> 17:2 <b>Dubois</b> 4:2 8:12 8:13 21:4,7 28:12,16 30:15 31:6 66:21,23 67:9 74:14 76:13 <b>due</b> 62:25 <b>dump</b> 28:6 <b>Dunn</b> 2:5,11 10:10 <b>duplicate</b> 48:7 <b>duplicative</b> 39:19	47:12 56:24 75:1 <b>efficiency</b> 33:10 <b>efficient</b> 46:12 58:17 <b>efficiently</b> 47:21 <b>effort</b> 41:17 54:9 <b>efforts</b> 49:11 <b>eight</b> 16:17 <b>either</b> 10:15 13:4 27:10,13 30:2 35:1 39:20 52:17 56:14,15 57:2 62:2 75:8 <b>El</b> 4:21 5:16 8:22,25 9:6,9 37:11 43:12 51:25 55:9 <b>elected</b> 42:18,19 42:22 <b>election</b> 42:21 <b>electronic</b> 75:8 <b>Elephant</b> 5:6 9:14,17 33:7 33:15,17 34:5 36:6 37:22 40:25 45:20,20 57:21 59:19 <b>embarrass</b> 65:24 <b>embarrassment</b> 70:21 <b>employ</b> 77:12 <b>employee</b> 77:10 <b>endeavor</b> 32:3 32:13 <b>ended</b> 68:16,19 <b>engineer</b> 7:23 9:12 21:25 41:9,16 47:14 <b>Engineers</b> 47:12 <b>enhanced</b> 45:4 <b>ensuring</b> 53:6 <b>enter</b> 32:8 74:25 75:7 <b>entered</b> 34:10	45:25 <b>entirely</b> 24:5 <b>entirety</b> 26:20 <b>entities</b> 42:1 48:10 <b>entitled</b> 22:23 33:25 34:4 37:16 56:14,16 56:25 57:16 <b>entitlement</b> 57:20 59:15 <b>entitlements</b> 33:6,17 <b>entity</b> 41:9 <b>environmental</b> 59:2 <b>EP</b> 37:16,17 43:24 44:22 46:2,8,24 47:19 50:10,13 51:25 52:17 54:13,16 <b>equally</b> 38:9,10 <b>era</b> 65:9 <b>errata</b> 62:24 <b>ESI</b> 28:25,25 29:7 <b>especially</b> 63:24 68:11 <b>essentially</b> 13:8 69:25 <b>Esslinger</b> 9:19 <b>Estevan</b> 14:2 47:9 <b>ethical</b> 61:13,14 62:2,5 72:5,19 <b>evaluate</b> 72:21 <b>evening</b> 27:19 66:24 <b>everybody</b> 20:20 55:16 56:19,20 <b>exact</b> 30:20 43:14 50:13 52:16 53:5 <b>exactly</b> 44:5 61:20 <b>example</b> 16:7	17:14 34:25 47:6 52:18 <b>exception</b> 50:15 <b>excerpt</b> 61:3,4 69:18 74:16 <b>excited</b> 64:16 <b>exclusive</b> 57:24 <b>excuse</b> 19:8 47:25 51:9,14 <b>exercise</b> 72:8 <b>exhausted</b> 60:7 <b>exist</b> 61:12 <b>existing</b> 44:25 <b>expect</b> 21:5 <b>expected</b> 64:6 <b>expedient</b> 11:6 <b>experienced</b> 25:10 61:18 <b>expert</b> 17:11,16 18:18,21 21:19 21:24 22:1,6,9 22:20,22,23,25 23:1,3,5,6,7,8 23:16,23,24 24:4,7,21,23 25:3,7,11,12 25:19 26:11,14 26:19,25 27:6 58:3 <b>experts</b> 13:3 14:4,15 19:7 21:17 22:13,14 24:19,24,25 26:15 47:7 <b>Expiration</b> 77:20 <b>explication</b> 58:18 <b>expressed</b> 14:14 14:16 24:25 70:16 71:22 72:10 <b>Expressway</b> 5:19 <b>extend</b> 48:7 <b>extent</b> 11:14 26:15 32:12
	<b>E</b>			
<b>diversion</b> 28:23 <b>divided</b> 53:8 <b>doc</b> 22:11 <b>document</b> 22:11 28:6 29:7 56:21 <b>documents</b> 28:8 28:12,15,22,24 29:3,5,9,12,13 71:3,8 <b>doing</b> 20:16 29:10 35:7 40:3 42:13 64:19 67:3 69:7 <b>Doug</b> 8:25 <b>Douglas</b> 5:17 <b>downstream</b> 39:8 46:15 47:4 <b>Dr</b> 9:12 15:21,21 21:25 26:11,16 26:22 47:11 <b>draft</b> 67:10 <b>dramatically</b> 16:12 <b>Draper</b> 3:12,12	<b>E</b> 2:1,1,1,1 4:8 <b>e-mail</b> 11:25 28:19 31:10,11 64:11 <b>eager</b> 64:4 <b>earlier</b> 26:11 32:16 <b>early</b> 55:16 63:9 <b>EBID</b> 36:14 37:11 40:15,20 41:1,10,10 42:1,25 43:2 43:11,24 44:23 48:9 49:15,20 50:10,13 51:4 51:25 53:4,6 54:13,16 55:9 63:18,20 64:3 68:22 <b>EBID's</b> 34:8 36:17 41:14,19 41:20 42:5,12 42:14,16,25 <b>echo</b> 59:6 <b>effect</b> 12:14			

40:23 52:21 <b>extreme</b> 65:8	60:5 67:20 72:11 <b>feeling</b> 70:7 <b>felt</b> 64:13 <b>figure</b> 21:10 <b>file</b> 12:14 14:20 17:9 18:24 22:12,15 51:23 60:5 <b>filed</b> 14:7 15:5 19:17 22:6,9 22:10,11 23:17 35:14 43:23 <b>files</b> 17:3 <b>filing</b> 13:13 14:24 15:24 16:1 20:9 21:5 22:13,14,20 23:18 33:4,10 34:15 <b>filings</b> 22:13 <b>Finally</b> 25:18 <b>find</b> 19:17 30:10 65:12,15 <b>finishes</b> 66:25 <b>firm</b> 5:7 6:7 7:11 10:10 77:23 <b>first</b> 12:23 14:6 23:9 25:6 28:20 32:25 36:22,25 40:1 44:19 50:5 71:22 72:6,24 <b>five</b> 50:5 58:24 <b>flipped</b> 18:19 <b>Floor</b> 3:22 <b>flows</b> 15:14 47:25 <b>folks</b> 68:5,6 <b>following</b> 26:4 30:18 67:9 <b>follows</b> 38:3 <b>foregoing</b> 77:6 <b>form</b> 18:19 52:16 75:3 <b>forum</b> 50:20,21 <b>forward</b> 12:13	27:16 40:18 42:11,16 49:19 62:9 67:1 69:8 71:17 <b>found</b> 54:5 <b>foundation</b> 51:3 <b>four</b> 17:15 39:23 43:14 <b>Fourth</b> 4:23 <b>frankly</b> 64:5 <b>free</b> 12:14 <b>Friday</b> 30:11,17 <b>friend</b> 51:20 67:3 <b>friends</b> 72:1 <b>front</b> 30:20 35:7 <b>full</b> 58:4 66:13 67:14 68:11,25 <b>fully</b> 64:15 66:13 73:16 76:7 <b>fundamental</b> 45:15 <b>further</b> 12:16 21:5,11 33:1 58:17 60:3 77:9 <b>fuss</b> 67:25	46:13 49:2 <b>get-go</b> 11:4,7 <b>getting</b> 7:2 29:15 34:3 44:2 64:13 69:17 71:14 <b>give</b> 16:14 17:14 21:15 22:14 25:24 26:4 30:16 36:24 48:17 55:24 64:9 <b>given</b> 11:4 13:11 13:19 19:1,1 22:5 31:21 32:17 43:17 44:12,25 54:24 57:24 58:11 59:19,24 77:16 <b>glance</b> 28:17 <b>go</b> 11:22 13:3 23:19 27:16 31:3 34:18 35:22 40:13 59:10 60:14 67:8 73:25 74:1 <b>goes</b> 10:16 15:14 <b>going</b> 11:8,11,16 11:23 12:6,13 12:15 16:15,21 19:4,25 20:11 20:12 23:8 24:3,22 29:8 29:11 32:16 34:20 35:21 37:23 40:10,18 43:6,22 52:24 56:18 60:3,6 67:1 70:5 71:17 73:10 74:25 75:1,5 75:23,25 <b>good</b> 7:1,17 8:3 8:12,19,24 9:4 9:8,16,25 10:4 72:7	<b>Gordon</b> 7:13 64:6,22 65:24 66:9 73:12 <b>Gordon's</b> 63:24 66:2 <b>gotten</b> 39:17 <b>govern</b> 56:21 <b>governing</b> 59:12 <b>governor</b> 41:8 <b>governs</b> 39:5 <b>Grande</b> 7:13 41:16 42:7,10 45:2 <b>gravamen</b> 28:4 <b>great</b> 24:6 49:10 <b>ground</b> 34:7 39:7 64:17 68:5 69:6 70:15 <b>groundwater</b> 63:21 <b>groups</b> 59:3 <b>growers</b> 6:6 9:24 10:1 53:3 63:15 <b>guess</b> 11:21 12:6 12:22 18:14 21:4 22:11 28:11 53:15 59:5 66:8 67:23 69:11,15 69:23,23 75:8 75:12 <b>guidance</b> 11:11 14:22 36:24 39:25 55:24 65:17 66:18
<hr/> <b>F</b> <hr/> <b>F</b> 6:2 <b>face-to-face</b> 64:6 66:10 <b>facial</b> 38:1,2 56:4 57:9 <b>facilitates</b> 41:25 <b>fact</b> 13:1,2 16:22 17:24 19:1 22:24 23:16 24:2,3 25:15 27:7 28:5 32:17 37:12 44:11 46:22 47:15 51:12,18 52:12,20 55:13 57:20 58:7,9 69:11 70:7,17 <b>facts</b> 25:16 77:5 <b>fail</b> 52:15 53:5 <b>fair</b> 10:12 15:9 16:2 25:2 53:7 <b>fairly</b> 26:6 31:21 32:17 73:15 <b>faith</b> 72:7 <b>fall</b> 13:18 <b>familiar</b> 25:18 <b>far</b> 28:10,22 53:19 <b>farmers</b> 37:10 64:3,17 <b>farming</b> 64:17 71:25 <b>fashioned</b> 58:14 <b>fast</b> 29:25 <b>favorable</b> 64:7,8 64:16 66:2 <b>Fe</b> 2:22 3:13,18 5:14 6:3,13 <b>Federal</b> 14:11 15:2 26:13 61:15 <b>feel</b> 11:6,12 35:25 57:21	<hr/> <b>G</b> <hr/> <b>G</b> 5:17 <b>gallop</b> 29:25 <b>game</b> 22:2 44:4 <b>gaming</b> 23:21 <b>Gary</b> 9:18 <b>Garza</b> 6:17 77:3 77:19 <b>gathered</b> 35:6 <b>Gehlert</b> 4:3 8:15 <b>general</b> 7:19,24 9:12 41:8 45:21 70:22,24 <b>General's</b> 2:16 3:17 7:13 <b>generally</b> 46:18 47:5 58:8 <b>germane</b> 26:21	<hr/> <b>H</b> <hr/> <b>half</b> 29:2 <b>HAND</b> 77:16 <b>handicapped</b> 34:15 <b>handle</b> 75:21 <b>happen</b> 62:25 <b>happened</b> 59:17 62:3		

<b>happening</b> 60:14 68:16	29:20 30:15	<b>ill</b> 68:9 69:4	47:17 55:11	64:14,15 65:8
<b>happens</b> 68:10	32:23 33:8,16	<b>illustrates</b> 50:11	64:20 74:25	72:14
<b>Happy</b> 13:11	34:2,17,18	<b>imagine</b> 62:10	<b>indicates</b> 45:23	<b>interested</b> 40:2
<b>hard</b> 17:2	36:9 40:9,14	<b>impeached</b> 50:22	47:9	48:11 63:24
<b>HARRIS</b> 4:23	41:21 43:4,13	<b>implicated</b> 38:5	<b>indication</b> 48:24	65:7 77:13
<b>Hartman</b> 3:21	43:16,21 44:3	38:6	<b>indications</b> 53:23	<b>interesting</b> 18:2
8:3,4,8	44:7,13,19,23	<b>implicitly</b> 39:8	<b>indirect</b> 56:24	<b>interests</b> 37:9,14
<b>hear</b> 8:6 12:14	45:21,24 48:14	<b>importance</b> 53:2	<b>induced</b> 73:25	38:4,5 42:5,14
25:7 31:2,2,5	48:24 49:5,13	<b>important</b> 25:14	<b>inextricably</b> 39:9	42:25 46:14,15
72:10	50:4 55:23	34:13 35:3,4	<b>influenced</b> 68:16	48:12 49:2
<b>heard</b> 21:3 54:3	57:12 58:3,20	73:17	<b>information</b> 14:18 15:13	51:7 52:19
66:9 68:7 72:5	63:7 65:16,25	<b>impression</b> 70:19	16:4,7 21:9	53:6,13 58:11
<b>hearing</b> 1:13	66:5,17,21	<b>improper</b> 64:23	25:8 41:25	63:21 64:2,2
20:15 22:16	67:5 68:2,3	69:7,17	65:7,23 66:12	<b>INTERIOR</b> 4:13,18
30:12,24 31:7	69:9 70:1	<b>Improvement</b> 4:21 9:7,10	66:22 67:19	<b>Internet</b> 65:15
31:8 77:8,11	71:11,15 72:16	43:12	<b>informed</b> 33:4	<b>interplay</b> 45:16
<b>hearings</b> 12:4,16	72:17 76:12,13	<b>inadequacy</b> 30:25	<b>infrastructure</b> 41:13	57:25
<b>heart</b> 25:8	<b>HONORABLE</b> 1:13	<b>inapplicable</b> 58:9	<b>initial</b> 44:20	<b>interpretation</b> 50:7,9
<b>HEATH</b> 5:18	<b>hope</b> 14:23 16:4	<b>inappropriate</b> 22:21 62:7,11	<b>input</b> 47:15	<b>interpretations</b> 51:2
<b>Heather</b> 6:17	<b>hoped</b> 56:3	<b>inclined</b> 11:21	<b>insight</b> 67:7	<b>interrelated</b> 57:19
67:3 77:3,19	<b>hopedfully</b> 26:5	38:23 54:21	<b>instance</b> 32:5	<b>interrelation</b> 58:1
<b>heather_garza...</b> 6:19	<b>hour</b> 44:8,13	55:15,18	66:19 67:13	<b>interrelations...</b> 45:16
<b>heightened</b> 17:10 59:19,24	46:11 49:24	<b>include</b> 13:7	68:8	<b>interstate</b> 51:4
<b>held</b> 14:10	74:15	64:12	<b>instances</b> 66:8	58:10
<b>helpful</b> 32:24	<b>hours</b> 48:21	<b>included</b> 24:23	<b>instinct</b> 34:21	<b>intertwined</b> 32:11 39:10
57:22 67:7	53:18	<b>including</b> 17:1	<b>instructed</b> 43:21	<b>intervene</b> 50:14
<b>hereto</b> 77:6	<b>Houston</b> 6:18	34:11 35:18	<b>instructive</b> 65:16	50:16 59:7
<b>hesitancy</b> 71:5	77:24	37:10 45:3,19	<b>intend</b> 41:21	<b>intervenor</b> 7:5
<b>Hicks</b> 5:2,2 9:10	<b>Hubenak</b> 2:15	74:13	68:9	<b>intimidated</b> 68:15 70:7
<b>highlight</b> 72:13	7:12	<b>incorporated</b> 39:8	<b>intended</b> 23:25	<b>intimidating</b> 73:7
<b>history</b> 13:12	<b>Hudspeth</b> 9:21	<b>incorrect</b> 40:19	69:2,4	<b>intrastate</b> 38:21
28:19	<b>hundred</b> 74:13	40:20	<b>intent</b> 37:14	50:19
<b>hits</b> 29:7	<b>hundreds</b> 63:17	<b>incredible</b> 17:1	39:22 43:2	<b>introduced</b> 25:5
<b>Hoag</b> 14:1 15:21	<b>hyper</b> 17:23	<b>incredibly</b> 25:14	48:6 53:23	<b>involved</b> 10:15
<b>Hoffman</b> 2:4	<hr/> <b>I</b> <hr/>	<b>independently</b> 36:15	64:19 65:24	10:22 11:4,7
7:11	<b>IBWC</b> 28:21	<b>indicate</b> 65:13	<b>interest</b> 11:5	11:15 44:9
<b>Honor</b> 7:8,17	29:15,21,22	<b>indicated</b> 11:8	24:25 36:5,19	54:11 59:22
8:3,12,20,24	<b>IBWC's</b> 29:2	11:10 12:2	37:5,11,17	61:22,24 63:19
9:4,8,17,25	<b>idea</b> 12:11 16:24	23:4 35:21	38:20 42:9	
10:4,8,25 11:7	22:6 50:24		51:21 52:23	
11:11 13:24	68:22		53:10 55:4,12	
15:10 21:8,23	<b>identified</b> 46:15			
22:17 26:2,9	<b>ignore</b> 41:14			
27:17 28:16	58:9			
	<b>ignores</b> 45:15			

73:22 <b>involvement</b> 11:9 <b>IOWA</b> 1:14 <b>iPhone</b> 60:12 69:13 70:25 <b>irrelevant</b> 44:21 <b>irrigate</b> 63:17 <b>irrigation</b> 5:6 9:15,18 58:25 <b>ISC</b> 7:24 <b>issue</b> 10:20 11:12,14,24 12:24 13:6 17:6,17,22 19:14 20:24 23:9 24:6,9 26:8 30:13 31:16,18 32:4 32:14 33:2,6 33:13 34:13,16 35:4 36:7 38:3 38:9,11 40:21 40:22 41:1,22 42:21 43:14 45:23 50:8 52:6,8,9 53:2 54:3 55:2 57:3 59:15 60:7 65:19 70:2 73:1 <b>issues</b> 12:22 13:10 26:17 27:9,15 32:5,7 33:9 35:16,18 39:11,14 43:16 43:17,19 44:1 44:14 45:10,11 47:17 51:3 57:25 65:10 66:14 70:15 <b>it'll</b> 19:14 20:13 <b>item</b> 60:9	8:13 <b>james.dubois...</b> 4:5 <b>Jay</b> 6:2 9:5 <b>jcbrockmann...</b> 5:15 <b>Jeff</b> 7:18 34:19 <b>Jeffrey</b> 2:20 <b>Jesus</b> 9:13 <b>jfstein@newm...</b> 6:4 <b>Jim</b> 8:20 58:21 66:23 <b>job</b> 69:19 <b>John</b> 3:12 6:12 7:22,24 10:5 67:5 <b>john.draper@...</b> 3:14 <b>john@uttonke...</b> 6:14 <b>joining</b> 9:19 <b>Jr</b> 3:6 <b>JUDGE</b> 1:13 7:1 7:15 8:1,6,10 8:17,22 9:2,6 9:14,21 10:2,6 10:11 11:18 15:4,23 16:9 17:19 20:14 21:16 22:3 24:15 25:22 26:3 27:2,18 28:3,11 30:8 30:16,23 31:12 33:14,22 34:12 35:9,20 40:7 44:18 48:15 50:2 51:8,14 51:17 53:15,25 54:21 56:1 59:10 60:2,21 62:12,16 63:3 66:1,20 67:8 69:10 70:23 71:12,20 74:24 75:23 76:8	<b>judges</b> 25:19 73:8 <b>judgment</b> 32:9 <b>judicial</b> 11:25 73:4 <b>judicially</b> 50:22 <b>Judith</b> 4:8 <b>judith.colema...</b> 4:11 <b>Judy</b> 8:14 <b>July</b> 1:12 13:22 14:7 16:17 <b>jump</b> 40:10,14 71:10 <b>June</b> 13:21 14:5 16:16 <b>juries</b> 73:8 <b>jurisdiction</b> 50:19,20 <b>jury</b> 24:2 <b>justice</b> 4:3,9 8:15 73:19 <b>justification</b> 62:2 <b>jwechsler@m...</b> 2:23	20:11,12 22:18 22:23 26:13 31:1 33:7 41:10,20,23 44:1 45:24 46:16,17 47:2 47:6,7,24 48:24,25 49:6 57:8,9,10,23 58:3,4,7 61:4 61:20,20 62:1 62:22 63:4,13 66:12 67:1,18 67:25 70:4 72:1,18 75:12 <b>knows</b> 63:8 73:24 <b>Kopp</b> 3:1 7:21	4:6 <b>left</b> 43:16 <b>legal</b> 33:13 41:18,20 42:12 62:3,4 65:9 71:24 72:20 <b>Leininger</b> 4:2 8:14 <b>lengthy</b> 48:8 <b>let's</b> 7:5 10:13 12:20,20,20 15:13 20:16,22 22:4 26:6 67:14 69:11 75:16 <b>letter</b> 11:10,12 17:8 22:19 39:2 47:1,3 60:10 65:11,22 <b>liable</b> 17:24,25 <b>light</b> 38:13 <b>liked</b> 29:16 <b>limbo</b> 11:13 <b>limited</b> 15:1,12 40:4,11 44:7 45:13 70:19 <b>limiting</b> 40:17 <b>Lincoln</b> 3:2 <b>line</b> 8:14 57:15 <b>Lisa</b> 3:1 7:21 <b>list</b> 29:8 31:15 35:23 57:24 <b>listed</b> 21:25 <b>listing</b> 28:25 <b>literally</b> 51:20 74:15 <b>litigating</b> 56:4 <b>litigation</b> 36:17 63:20 73:2,18 <b>little</b> 10:19 16:13 17:22 25:6 32:16 35:12 46:4 60:25 67:12 69:13,20 72:11 75:3 <b>live</b> 25:1 43:19
<b>J</b> <b>J</b> 3:6 4:2 <b>James</b> 4:2 5:12		<b>K</b> <b>Kansas</b> 10:7 <b>keep</b> 26:6 <b>keeps</b> 31:1 <b>KERY</b> 6:12 <b>Khoury</b> 3:16 7:19 <b>kin</b> 77:13 <b>kind</b> 13:5 20:21 28:23 31:3 49:10 <b>kinds</b> 27:7 28:22 <b>Klahn</b> 2:11 10:9 <b>knew</b> 64:22 <b>know</b> 10:16 11:1 12:12 14:23 15:20 16:12,15 17:5,6,21 18:10,12,14,25 19:16,24 20:10	<b>L</b> <b>L</b> 2:3 6:17 77:3 77:19 <b>lag</b> 62:22 <b>laid</b> 23:7 36:11 <b>Lake</b> 4:19 <b>lands</b> 59:1 <b>language</b> 43:11 47:1 <b>large</b> 22:11 <b>Las</b> 5:8 6:1 9:2,5 53:4 <b>late</b> 28:13 44:4 <b>law</b> 3:22 5:2,7 6:7 15:3 17:23 24:6 25:17,19 25:20 33:20 34:1,10 51:19 73:18 <b>lead</b> 19:20 <b>leads</b> 72:2 <b>leave</b> 31:23 35:21 38:18 43:4 59:7 71:18 <b>leaves</b> 60:9 <b>Lee</b> 4:2 8:14 <b>lee.leininger@...</b>	



46:9 <b>multiplication</b> 49:10 <b>multiply</b> 46:8 <b>multitude</b> 66:11	13:13,18,20,23 14:18 15:13,16 15:18 17:10 18:20 19:16 21:18 23:12 24:12 26:4 27:19 33:15,24 34:4 36:15,18 36:18,19,19 37:8,24 39:11 39:24 40:16,16 40:23 41:4,5,6 41:7,13,18,23 41:24 42:3,4,4 42:6,11,24 43:9,24 44:10 44:16,22 45:12 45:21 46:22,22 47:2,6,14,16 47:23 49:20 51:1,6,6 52:17 53:2,4,6,8 55:10,11 56:16 57:19 58:2 61:13 63:15,21 65:9 71:24 72:6 73:13	<b>North</b> 50:24 <b>note</b> 71:23 <b>noted</b> 26:10 46:17 <b>notice</b> 61:16 64:20 <b>noticed</b> 22:18 43:8 <b>notifications</b> 31:11 <b>notion</b> 30:2 <b>nuances</b> 34:3 <b>number</b> 10:12 17:25 19:11,13 20:10 23:21 29:17 39:13 59:22 <b>numbers</b> 15:16 16:6 <b>NW</b> 3:8 4:14	30:3 33:8 34:12 55:9 57:5 58:4 75:5 <b>occasions</b> 49:14 49:22 <b>occur</b> 15:16 61:5 <b>occurred</b> 64:23 <b>occurs</b> 15:11 43:9 <b>October</b> 31:20 33:1,11 34:22 35:8 41:23 <b>Office</b> 2:16,16 3:17,17 4:9 5:2 5:3,13 6:3,8,13 7:13 8:16 41:8 41:15 77:16 <b>official</b> 62:20,20 71:1,2 74:1,2 75:3,11 <b>officials</b> 42:23 68:15,21 <b>Oh</b> 31:12 <b>okay</b> 7:15 8:1,10 8:17 22:3 31:12,13,14 51:17 72:21,23 76:8 <b>once</b> 35:14 <b>ones</b> 38:20 <b>ongoing</b> 64:4,9 <b>online</b> 7:7 <b>operated</b> 57:6 <b>operating</b> 34:11 38:1,14 39:3,4 39:15 40:6 41:3 43:18,20 45:3,8,14,16 46:18,23 47:1 47:5,9,10,13 47:18,24 48:1 56:5,7,9,15,18 56:22 57:1,17 57:20 <b>operation</b> 57:4 <b>operational</b> 28:22	<b>operations</b> 39:6 39:6 45:19 46:16 47:13 56:11 57:18 58:1,2 <b>opinion</b> 14:17 22:19 68:18 <b>opinions</b> 13:2,13 14:2,3,5,8,13 14:16 15:19 26:16,21,23 <b>opportunity</b> 13:20 18:24 23:17 24:12,12 25:4,23 30:4 <b>oppose</b> 44:16 <b>opposed</b> 48:5 <b>opposing</b> 15:6 <b>order</b> 27:20 30:21 32:8 35:6 43:10,11 44:16,25 45:25 48:3 54:22 55:22 74:25 75:7,14 <b>orders</b> 38:13 56:3 <b>ordinary</b> 74:22 <b>organization</b> 63:16 <b>original</b> 1:1 7:3 14:17 23:20 34:21 37:6 50:19,20 59:22 <b>ostensibly</b> 51:24 <b>ought</b> 62:7 74:18 <b>outcome</b> 48:10 <b>outside</b> 12:12 63:1 68:11 73:25 74:1 <b>outstanding</b> 41:1 <b>overrun</b> 44:11 <b>ownership</b> 41:13
<hr/> <b>N</b> <hr/> N 2:1 N.W 4:23 <b>narrative</b> 22:8 <b>nature</b> 15:11 <b>Nebraska</b> 58:23 59:1 <b>necessarily</b> 27:4 27:23 60:17 70:4,11,21 <b>necessary</b> 11:6 12:7,17 34:6 <b>need</b> 11:15 12:19 19:10,24 20:21 22:7 26:7 28:7 30:3 30:17 44:15 48:3,12 49:18 49:22 69:20 70:13 75:16 <b>needed</b> 43:23 49:17 <b>needing</b> 49:21 <b>needs</b> 11:4 21:10 <b>negotiate</b> 41:3 42:7,9 <b>negotiated</b> 42:11 <b>negotiating</b> 72:7 <b>neighbors</b> 70:10 <b>neither</b> 50:10 <b>never</b> 23:25 42:20 48:7 61:5 62:10 64:22 74:21 <b>new</b> 1:9 2:19,22 3:8,13,17,18 4:24 5:8,14 6:3 6:6,9,11,13 7:4 7:15,20,23 9:24 10:2 12:24 13:2,3	<b>night</b> 30:1 <b>nine</b> 16:16 <b>NMSU</b> 10:5 <b>non-electronic</b> 75:8 <b>non-expert</b> 73:12 <b>non-party</b> 61:6 <b>non-repetitive</b> 40:4 <b>non-repetitively</b> 47:21 <b>non-retained</b> 21:25 26:11 <b>norm</b> 62:6 <b>normal</b> 38:18,19 61:5,10 62:23 74:21 <b>normally</b> 18:15 18:16	<hr/> <b>O</b> <hr/> O 2:1 <b>O'Brien</b> 4:22 9:8,9 10:17,24 10:25 21:21,23 26:9 27:17 31:16,19 32:22 32:23 33:16 34:2 40:7,13 44:5,18,19 48:16,20,23 53:16 54:7 57:11,12 58:22 <b>O'Brien's</b> 52:4 59:23 <b>oath</b> 73:6 <b>objecting</b> 23:21 <b>objection</b> 73:22 <b>obligate</b> 73:7 <b>obligation</b> 14:14 72:11 73:11 <b>obligations</b> 72:22 <b>observers</b> 60:18 <b>observing</b> 60:16 <b>obviously</b> 12:7		

<b>P</b> 2:1,1	<b>parties</b> 11:9	<b>perspective</b>	<b>positions</b> 52:3	32:18
<b>P.A</b> 4:23 5:13	14:10,23 21:17	16:13 39:18	64:8	<b>primary</b> 42:5
6:2,12	31:25 32:15	54:20 72:20	<b>possess</b> 37:2	<b>prior</b> 53:14 54:7
<b>P.C</b> 3:7	33:3 39:23,24	<b>petition</b> 51:23	<b>possible</b> 14:4	59:21
<b>p.m</b> 76:15	42:1 45:2,6,18	<b>phase</b> 56:7	20:7 32:3,9,14	<b>Priscilla</b> 2:15
<b>pages</b> 26:7 67:15	49:16 50:10,18	<b>phone</b> 63:6	35:6	7:12
67:21,21 77:6	52:4 60:1	64:11 74:19	<b>Post</b> 2:16 3:17	<b>priscilla.hube...</b>
<b>panning</b> 49:23	61:16,24 62:23	<b>pick</b> 61:8	4:9 5:3,13 6:3	2:18
<b>paragraph</b>	72:8 77:10,14	<b>pirated</b> 74:3	6:8,13	<b>privilege</b> 36:1
35:24 36:21,22	<b>parties'</b> 14:21	<b>plaintiff</b> 18:15	<b>posture</b> 38:14	55:20 73:4
38:12,24 39:2	<b>parts</b> 72:13	18:15,17	38:19,19	<b>probably</b> 21:12
39:12,22 40:2	<b>party</b> 22:10	<b>plaintiffs</b> 19:2	<b>potentially</b>	22:10 26:7
40:4	45:11 46:20,24	<b>plan</b> 18:24 20:16	42:22 43:19	57:1 58:24
<b>parameters</b> 71:7	48:2 51:22,24	20:23 35:25	61:22 68:15	<b>probe</b> 47:20,22
<b>parcel</b> 17:4	54:2 56:25	65:19 75:16	69:7 70:5,9	<b>problem</b> 17:5,6
<b>part</b> 8:7 16:25	61:7	<b>play</b> 10:18 43:16	<b>power</b> 59:2	23:4 30:2 54:5
17:3 18:8,12	<b>party's</b> 57:7	<b>played</b> 60:23	<b>PowerPoint</b>	54:20 59:14
19:19 23:23	<b>Paseo</b> 2:21 3:13	61:2	23:15	60:19 66:4
25:1 31:23,25	<b>Paso</b> 4:21 5:16	<b>pleading</b> 28:18	<b>PowerPoints</b>	68:10,23,24
34:22 36:10	8:23,25 9:6,9	36:3	23:18 24:18	69:4
37:24 50:12	37:11 43:12	<b>pledge</b> 32:10	25:1	<b>problems</b> 23:2
66:3 67:25	51:25 55:9	<b>plowing</b> 17:7	<b>practical</b> 49:6	27:6,7
73:4,17,18	<b>Pat</b> 7:13 63:24	<b>plus</b> 16:18,20	<b>practice</b> 61:19	<b>procedural</b> 50:8
<b>participants</b> 8:5	<b>pecan</b> 6:6 9:24	17:3	65:9	<b>procedure</b> 14:11
8:9	10:1 53:3	<b>point</b> 19:11,15	<b>precedent</b> 59:21	15:2 71:17
<b>participate</b> 12:5	63:15	20:17 21:12	<b>precisely</b> 59:13	<b>proceed</b> 11:17
38:17 39:3	<b>peculiarities</b>	25:12 28:21	<b>preclude</b> 61:14	22:4 72:19
42:15 43:5	18:13	36:13,13 38:22	<b>precluded</b> 62:9	<b>proceeding</b>
49:21,22 53:24	<b>Peggy</b> 14:1	44:4,23 45:13	<b>preferred</b> 65:18	31:22
58:15 59:24	<b>people</b> 60:15	48:3 51:13	<b>premature</b>	<b>proceedings</b> 7:6
<b>participated</b>	61:3 70:14	52:4 55:15	10:19	46:1 48:6,8
48:5	74:18	56:4 58:19,21	<b>prepare</b> 19:14	56:7 76:14
<b>participating</b>	<b>Peralta</b> 2:21	60:3,4 62:9	73:14	77:8
44:12 52:2	3:13	<b>points</b> 36:22	<b>prepared</b> 18:3	<b>process</b> 11:16
54:2 60:15	<b>percent</b> 37:15	50:5 71:22	27:4,13	12:12 18:14
<b>participation</b>	68:8	<b>policy</b> 47:17	<b>preparing</b> 35:1	23:22 27:11
12:16 40:17	<b>percipient</b> 73:13	50:22	35:2	34:25 35:3,5
42:2 46:2,4	73:24	<b>political</b> 41:11	<b>prerogative</b> 37:3	36:10,11 58:15
49:6,8	<b>permeates</b> 56:9	68:15,21	<b>present</b> 26:20	73:3,5,18,23
<b>particular</b> 27:6	57:18	<b>portion</b> 32:8	<b>presentations</b>	<b>produce</b> 29:9
38:17 50:11	<b>permissible</b>	70:8	23:15	<b>produced</b> 28:24
62:21 64:14	17:12	<b>portions</b> 22:9	<b>pressuring</b>	62:21
65:8 72:14	<b>permission</b>	<b>position</b> 16:9	68:20	<b>produces</b> 29:6,7
<b>particularly</b>	51:23	18:22 19:1	<b>Preston</b> 3:21 8:4	<b>producing</b> 28:15
12:24 27:14	<b>person</b> 15:7	21:8 33:14,23	<b>preston.hartm...</b>	29:13
32:17 38:19	42:20 51:20	36:16 41:18	3:24	<b>production</b> 16:3
73:11	61:22,25 68:4	42:6,17 43:3	<b>pretty</b> 20:14	<b>professional</b>



65:12	32:14 35:6	73:1	16:17 17:2	<b>relevant</b> 27:9,14
<b>project</b> 33:19	40:24 69:11	<b>raising</b> 65:10	27:18 52:25	43:17,20 45:10
34:9,10 37:16	73:6,24 75:14	<b>Raley</b> 3:2 7:22	<b>receiving</b> 37:21	46:13 54:14,15
39:5,6,9 41:12	<b>putting</b> 63:22	<b>Randel</b> 4:13	56:16 57:7	56:13 57:5
41:13,16 42:10	69:13,14 72:16	8:15	<b>Reclamation</b>	<b>relied</b> 24:22
45:2,18 46:16		<b>ranged</b> 39:13	9:22 33:20	<b>relies</b> 47:14
47:13 52:21,23		<b>RAPIDS</b> 1:14	34:1,10 37:18	<b>reluctance</b> 67:20
57:18 58:1		<b>raw</b> 66:24 67:2	45:2,17	<b>rely</b> 33:5
<b>proper</b> 50:6,9	<b>Q</b>	<b>rdeitchman@...</b>	<b>recognition</b> 55:8	<b>remain</b> 43:20
51:24 68:25	<b>question</b> 20:22	2:9	<b>recognized</b> 51:4	45:6,11 46:21
<b>proportional</b>	36:2 52:16	<b>re-depose</b> 15:7	55:17	<b>remains</b> 40:25
49:12	53:1 57:16	<b>reach</b> 76:5,6	<b>recognizes</b> 47:3	<b>remember</b> 28:21
<b>proposal</b> 19:5	69:11 75:18	<b>reached</b> 63:8	<b>reconvene</b> 20:23	<b>REMOTE</b> 1:12
<b>proposition</b>	<b>questioned</b> 44:6	<b>reactions</b> 66:10	75:17	<b>Renea</b> 5:2,2 9:10
70:24	<b>questioning</b>	66:11	<b>record</b> 7:3,9	<b>repeatedly</b> 64:1
<b>protect</b> 48:12	39:12 46:10,11	<b>read</b> 16:25	<b>recorded</b> 70:18	<b>repetitive</b> 46:3
<b>protecting</b> 37:15	52:11 54:10	<b>reading</b> 25:20	<b>recording</b> 61:11	46:12 52:12
73:23	57:24 64:13	39:12 68:13	61:15,17	54:10,13
<b>provide</b> 20:5	<b>questions</b> 25:4	<b>ready</b> 71:10,14	<b>records</b> 28:23	<b>replies</b> 12:25,25
24:11 25:13	39:14,18,24	<b>real</b> 30:2	29:2	<b>reply</b> 13:4,9
39:5 47:15	40:3,5 44:7,9	<b>realistic</b> 20:10	<b>referred</b> 16:19	30:12,12,17
66:19 67:6	44:13 46:9,12	20:22	<b>referring</b> 13:25	<b>report</b> 15:5
72:12,12	48:19 49:1,15	<b>realistically</b> 43:3	41:7	16:25 17:17
<b>provided</b> 13:16	49:18 52:13,15	<b>realize</b> 65:9	<b>regard</b> 11:9	19:17,25 20:2
13:17 17:4	52:16 53:18	<b>really</b> 10:14,21	26:19 36:4	20:17 23:5,6,7
18:6,10 68:25	54:8,13,14,17	12:25 14:9,18	45:5 46:3 49:4	23:25 26:14,25
<b>provides</b> 34:4	60:18 61:8	35:5 36:21	72:23	27:4,7,13
<b>providing</b> 23:2,5	<b>quibble</b> 20:8	43:16,17 44:2	<b>regarding</b> 29:21	63:13 75:24
24:6 25:19	<b>quickly</b> 16:22	45:23 55:14,18	30:6 40:16	76:7
33:20	20:7 32:3,9,14	59:18 60:5	41:22 43:10	<b>Reporter</b> 6:16
<b>provision</b> 38:24	36:12 68:13	66:5 69:21	58:8	77:4
52:8	<b>quite</b> 12:22	<b>realtime</b> 66:23	<b>Registration</b>	<b>Reporters</b> 6:17
<b>provisions</b> 40:5	14:20 25:18	67:10 71:2	77:23	77:23
45:13	52:22 53:13	75:4,11	<b>regular</b> 68:6	<b>reports</b> 13:14,17
<b>public</b> 70:22	74:4,9	<b>reason</b> 12:9	77:10,12	13:21,24 14:6
<b>pull</b> 73:5 74:19	<b>quote</b> 37:2 39:3	38:16 42:6	<b>rejected</b> 50:14	14:7,12,25,25
<b>pulled</b> 29:1	50:20	49:1 73:1,22	<b>relate</b> 35:15	16:16,18,18,20
<b>pun</b> 47:25	<b>quotes</b> 37:7	<b>reasonable</b> 76:2	<b>related</b> 14:3	16:25 17:9,11
<b>purpose</b> 22:22		<b>reasons</b> 10:22	22:25 37:25	17:15 18:5,6,6
24:5 61:9	<b>R</b>	<b>rebuffed</b> 29:5,18	41:12 43:19	18:18,20,21,23
<b>purposes</b> 44:7	<b>R</b> 2:1,1 4:2 5:7	<b>rebuttal</b> 13:19	46:24	19:12,15,23
59:4 70:21	<b>Rael</b> 3:6,7 7:20	13:21 17:13,17	<b>relating</b> 34:9	20:1,4,6,9,11
<b>pursuant</b> 65:18	7:21	18:6 19:17	44:21 46:20	22:6,9,21,22
<b>put</b> 19:8,22 20:1	<b>raise</b> 33:2	23:13,19	<b>relationship</b>	23:3,13,14,14
20:6,13 22:15	<b>raised</b> 10:17	<b>recall</b> 43:13	75:6	23:17,19,20,24
22:22,23 23:12	11:1,1 13:14	<b>receive</b> 64:4	<b>released</b> 68:11	24:4,7,21 25:3
23:15,22 24:4	23:9 31:16	<b>received</b> 16:16	68:17	25:12,19 26:19
	32:6 35:18			
	43:13 45:21			

64:4,9	<b>restraint</b> 72:8	<b>roles</b> 58:12	49:9	31:17 39:11
<b>represent</b> 36:5	<b>restriction</b> 72:15	<b>roll</b> 7:6	<b>screen</b> 31:4,7	65:4
36:14 63:15	<b>resulted</b> 60:23	<b>room</b> 40:12	<b>se</b> 1:14 21:24	<b>seven-and-a-h...</b>
64:1,2	<b>results</b> 56:15	<b>rough</b> 67:10	26:15	19:22
<b>represented</b>	<b>retain</b> 47:22	74:14	<b>SEAL</b> 77:16	<b>SEVENTH</b> 1:14
52:20	<b>return</b> 15:14	<b>RPR</b> 77:19	<b>second</b> 18:12	<b>shape</b> 18:18
<b>representing</b>	<b>reverse</b> 68:21	<b>rule</b> 15:11 17:12	60:14 72:4,9	<b>share</b> 37:21 38:8
42:14 52:23	<b>review</b> 27:21	24:21,25 32:3	<b>Secondly</b> 72:25	53:7 64:23
63:21	28:7 62:23	32:6 51:13	<b>Section</b> 54:24	67:19,22,23
<b>represents</b> 37:5	65:11	54:18 74:11	55:22	<b>shared</b> 38:9
37:8 42:4	<b>reviewing</b> 32:2	<b>rules</b> 14:10,11	<b>see</b> 12:8,9,9	<b>shares</b> 41:24
44:22,23	<b>Reyes</b> 9:13	15:2 26:13	17:25,25 22:25	<b>sharing</b> 42:1
<b>request</b> 23:16	<b>rhicks@renea...</b>	61:11,14,15	24:21 50:24	<b>sheets</b> 62:24
45:12 63:13	5:4	65:11	55:19 60:6	<b>Shelly</b> 4:13 7:25
<b>requested</b> 25:23	<b>rhoffman@so...</b>	<b>ruling</b> 32:13	67:16,23 76:5	8:15
29:13 35:24	2:8	57:9	<b>seeing</b> 35:16	<b>shelly.randel...</b>
<b>requesting</b> 14:9	<b>Rich</b> 4:17 7:11	<b>runs</b> 47:15	54:25 65:10	4:15
14:9,19 44:17	8:16		68:6	<b>ship</b> 55:3 58:14
<b>required</b> 26:14	<b>Richard</b> 2:5	<b>S</b>	<b>seek</b> 38:18 43:4	<b>shipped</b> 74:3
27:1 58:18	<b>rid</b> 31:1	<b>S</b> 2:1,5 5:19	50:15	<b>short</b> 68:17
<b>requires</b> 24:21	<b>right</b> 8:22 9:2,14	<b>Sacramento</b> 2:6	<b>seen</b> 25:9 49:22	<b>Shorthand</b> 77:4
32:4	9:21 10:11	<b>sailed</b> 55:3	65:1	<b>show</b> 30:25
<b>research</b> 17:22	11:18 12:19	58:14	<b>segments</b> 64:12	<b>shows</b> 28:19
65:14	15:7 16:6 22:3	<b>Salt</b> 4:19	64:24	55:20
<b>reserve</b> 16:5	22:4 25:22	<b>Samantha</b> 5:7	<b>self-discipline</b>	<b>side</b> 42:3
<b>reservoir</b> 40:24	26:3,8 27:18	9:17 40:10	73:9	<b>sign</b> 62:25 76:10
40:25 42:8	31:12 35:20	68:3	<b>send</b> 67:15	<b>significant</b> 17:6
<b>resisted</b> 15:19	40:7 47:22	<b>samantha@h2...</b>	69:20 70:9	19:13 38:20
15:22	53:25 54:24	5:9	<b>sending</b> 69:17	68:23
<b>resolution</b> 48:11	55:13 62:16,19	<b>sanction</b> 62:7	74:8	<b>silence</b> 41:17
<b>resolve</b> 20:20	75:15 76:4,8	<b>sanctity</b> 73:3	<b>senior</b> 42:9	43:2
30:13	76:10	<b>Santa</b> 2:22 3:13	<b>sense</b> 34:23 35:8	<b>similar</b> 58:11
<b>resolved</b> 34:16	<b>rights</b> 37:20	3:18 5:14 6:3	35:13 55:1	<b>Simmons</b> 2:5,11
<b>respect</b> 18:17	41:3,12 73:25	6:13	58:6	10:9
59:5 72:3	<b>Rio</b> 7:13 41:16	<b>Sarah</b> 2:11 10:9	<b>separate</b> 10:23	<b>simply</b> 14:9
<b>respectively</b>	42:7,9 45:1	<b>saw</b> 25:3	31:17 32:11	15:15 25:12
19:22	<b>ripe</b> 52:9	<b>saying</b> 43:24	33:24 55:4	40:2
<b>respond</b> 18:22	<b>risk</b> 63:23	48:16,18,22	<b>separated</b> 32:12	<b>simultaneously</b>
26:5 30:4,10	<b>Road</b> 6:8	51:9 57:14,23	<b>September</b> 20:9	32:7
31:19 36:12	<b>Robert</b> 2:4 7:11	70:1 74:18	20:25 76:1	<b>Singer</b> 7:24
40:8 48:17	<b>Robles</b> 3:7,7	<b>says</b> 17:16 51:20	<b>sequence</b> 11:23	<b>single</b> 42:20
63:12 75:20	7:20,21	68:9 69:2	<b>seriously</b> 34:14	<b>SISK</b> 4:23
<b>responded</b> 18:5	<b>ROEHL</b> 4:23	74:11 75:2	63:12 66:17	<b>sit</b> 61:7
<b>response</b> 13:8	<b>role</b> 10:17 25:14	<b>scary</b> 67:3	73:11	<b>situation</b> 61:11
50:2 57:13	51:25 55:2,7	<b>schedule</b> 13:15	<b>served</b> 16:20	67:2 68:14
<b>responsibility</b>	55:17 56:5,6	27:25 31:17	59:1	73:8 74:20
41:12	58:8	32:18 34:23	<b>set</b> 13:16 27:25	<b>situations</b> 69:6

70:14	68:12,17 71:23	37:2,4,14,21	<b>strong</b> 51:21	21:11
<b>six</b> 58:24	<b>source</b> 15:17	38:8 40:15	<b>struggling</b> 43:25	<b>supplemental</b>
<b>six-and-a-half</b>	<b>South</b> 4:18 5:8	41:4,9,11,16	<b>Stuart</b> 2:3 7:9	13:14,24 14:3
19:21	37:8 50:23	50:18,21 51:5	<b>stuck</b> 23:24	14:5,12,13,25
<b>six-member</b>	<b>sovereign</b> 37:4	51:6 52:19,20	<b>studying</b> 27:22	14:25 15:5,20
63:16	<b>span</b> 49:25	52:25 53:4	<b>stuff</b> 19:18	15:24 16:1,18
<b>skin</b> 22:2	<b>speak</b> 10:23	55:10,11 56:14	28:23,25 29:6	17:9 18:6
<b>sklahn@soma...</b>	11:3 12:6 13:9	57:7 77:4	<b>subdivision</b>	19:12,15,25
2:13	32:19 35:10	<b>state's</b> 38:8	41:11	20:4,6,11
<b>slower</b> 29:16	36:1,7 61:25	59:15,16	<b>subject</b> 32:2	75:21,25
<b>small</b> 70:8 71:24	66:6	<b>stated</b> 11:12	39:4 51:21	<b>supplementati...</b>
71:25	<b>speaking</b> 21:20	39:7 77:5	<b>subjects</b> 39:20	13:1,4 20:18
<b>smaller</b> 29:17	36:25	<b>statement</b> 36:3	49:17 50:23	21:6,11 22:5
<b>smaxwell@bic...</b>	<b>speaks</b> 36:20	58:8 59:23	55:24	<b>supply</b> 37:16
5:21	<b>Special</b> 1:13	<b>statements</b> 46:5	<b>submission</b>	<b>support</b> 26:24
<b>snippets</b> 68:10	25:13	<b>states</b> 1:4,13 4:1	26:19 31:24	<b>Supreme</b> 1:4 7:3
<b>Solicitor</b> 8:16	<b>specific</b> 45:13	7:5 8:11,13	<b>submit</b> 25:25	25:15 37:1
<b>Somach</b> 2:3,5,11	46:13 49:2	13:12,17,19	26:1	46:14 55:6
7:8,9 10:8,9	70:19	17:16 21:18	<b>submitting</b>	56:6 73:21
16:10,11 17:20	<b>specifically</b>	22:1 26:12	31:25	<b>sure</b> 11:19 12:3
20:18 22:17	21:24 40:5,22	28:6 37:1,1,20	<b>subsequent</b>	31:13 36:4
25:24 26:1	45:8 47:5	38:7 39:2,21	23:11	66:11
34:18 35:9,11	55:22	52:22,25 53:12	<b>substance</b> 27:24	<b>surprised</b> 74:7
54:4 60:10,19	<b>spend</b> 19:5	54:1,10,15	71:17,18	<b>surprising</b> 25:6
60:20,24 61:1	<b>SPERLING</b>	59:18 73:20,21	<b>substantial</b> 13:1	<b>surrebuttal</b>
62:15,19 63:5	4:23	<b>status</b> 1:13	<b>substantive</b> 12:4	16:16,17,20
63:8 65:18	<b>Spronk</b> 47:12,13	12:16 16:23	13:13 15:19	18:5,20 19:23
67:12 69:12,16	<b>Spronk's</b> 47:15	39:1 43:15	<b>sudden</b> 19:2	23:13,14
72:17 75:18	<b>ssomach@so...</b>	45:1,4 47:3	48:25	<b>Susan</b> 5:18 8:25
76:4,12	2:7	55:21 59:20	<b>sufficient</b> 35:4	<b>system</b> 57:4,5
<b>Somach's</b> 13:7	<b>standpoint</b>	75:22 77:8,11	<b>suggest</b> 24:7	
65:11 66:16	28:21	<b>statute</b> 51:5	25:7 31:23	<b>T</b>
<b>somebody</b> 12:11	<b>stands</b> 29:23	<b>statutorily</b> 41:2	32:1 39:16	<b>T</b> 2:1 6:7
12:12 60:21	<b>start</b> 7:6 10:13	<b>statutory</b> 41:11	<b>suggested</b> 20:25	<b>take</b> 19:14 20:5
<b>somewhat</b> 15:12	10:19 14:22	41:14 42:12	52:5 69:19	20:13,23 21:12
36:11 58:11	19:20	<b>Stein</b> 5:13 6:2,2	<b>suggesting</b> 36:9	27:24 30:23
<b>sophisticated</b>	<b>started</b> 10:13,21	9:4,5	<b>suggestion</b> 24:20	35:2 52:18
25:10	29:12 32:25	<b>stems</b> 18:13	<b>suggests</b> 74:17	63:11 65:16
<b>sorry</b> 8:6 51:8	<b>starting</b> 28:21	<b>stop</b> 46:25	<b>Suite</b> 2:6,12 3:2	66:1,16 69:13
66:22	70:22	<b>stopped</b> 61:21	3:8 4:4,18 5:8	71:16 73:10
<b>sort</b> 13:23 15:18	<b>starts</b> 68:13	<b>straight</b> 68:20	5:19 6:18	<b>taken</b> 17:21
32:19 56:9	<b>state</b> 1:7,9,9 2:2	<b>street</b> 2:12 3:2	77:24	18:21 43:22
70:24	2:16,19 3:20	4:4,14,18,23	<b>summaries</b> 23:2	68:18 70:10
<b>sorted</b> 27:10,16	4:18 6:11 7:3,4	6:18 61:10	23:6	74:2 77:11
<b>sought</b> 41:14	7:4,10,12,23	73:6	<b>summary</b> 32:8	<b>takes</b> 50:8 51:12
42:8	8:4 10:2,7,9	<b>stress</b> 69:1	<b>supplement</b>	<b>talk</b> 10:12 12:19
<b>sound</b> 31:10	29:3 36:15	<b>strife</b> 70:9	18:11 19:10	12:20 26:5

55:6 63:9	24:23 25:1,11	12:7,11,17	33:12	52:14 66:23,24
65:19 75:16	26:16 27:8	13:23,25 15:9	<b>Thursday</b> 26:4	67:2,11 72:12
76:2	64:7,16 66:9	15:10,11 17:8	<b>tied</b> 39:14	74:14
<b>talked</b> 54:8	<b>Texas</b> 1:7 2:2,16	17:10,23 18:1	<b>time</b> 17:13 18:16	<b>treat</b> 72:2
55:16 60:4	2:17 5:3,19	19:13 20:16,20	19:24,24 20:24	<b>treated</b> 38:15
74:14	6:18 7:4,7,10	20:21 21:7,13	25:6,24 28:7	43:1 58:24
<b>talking</b> 10:19	7:14 10:9	22:10,21 23:3	28:20 30:3	59:3 73:15
32:25 53:17	12:24 13:12,16	25:9 26:7 28:9	34:16 35:5	<b>trial</b> 17:14,24,25
55:1 61:10	13:16,18,25	28:16 29:1	40:12 43:22	18:16 23:23
72:25 74:22	15:20 17:16	30:4,17 31:6,9	44:4,23 51:7	24:1,14 25:6
<b>tape</b> 60:12 65:5	21:18 22:1	31:21 32:14	54:7,22,23	25:11 27:10,11
<b>taping</b> 75:9	25:3,7 26:12	33:12 34:2,25	62:23 71:16	27:20 52:2
<b>Tarrant</b> 37:7	33:23 37:13	35:4,7,12,15	72:4,6 75:17	58:13 59:25
<b>tbarfield@so...</b>	39:20 44:22	36:2,11,13,22	75:24 77:8	<b>tried</b> 29:3
2:8	52:17,19,20	36:24 38:12	<b>timeline</b> 19:9	<b>trier</b> 22:24 24:2
<b>teachings</b> 50:17	54:1,5,14	39:16,22 40:1	20:5 21:14	24:3 25:14
<b>technical</b> 30:25	56:15 61:13	44:20 45:24	<b>times</b> 11:2	<b>Trout</b> 3:2 7:22
47:11,17	63:25 77:4	50:4 51:9 52:6	<b>timing</b> 49:7	<b>true</b> 12:25 77:6
<b>tell</b> 11:22 12:6	<b>Texas'</b> 33:23	52:7,8,8 53:21	<b>title</b> 13:13	77:7
12:15 13:6	63:22	54:12,15,18	<b>today</b> 9:11 20:16	<b>truly</b> 14:12
19:11 44:6	<b>text</b> 64:11	55:2,5,8,15,16	26:2,6 27:24	<b>truth</b> 73:7
66:7 69:19,21	<b>texted</b> 61:2	56:19,19 57:22	30:12 34:7	<b>truthfully</b> 73:16
73:7	67:16	57:22 58:5,13	40:12 44:17	<b>try</b> 16:24 18:2
<b>telling</b> 71:5	<b>thank</b> 7:2 10:25	58:22 59:20	57:3 60:8	20:7 29:10
<b>ten</b> 32:5,7	27:17 31:13,14	60:3,7 61:25	75:16	57:23
<b>tens</b> 63:17	32:23 48:13	62:6,8 63:17	<b>told</b> 29:6,8,12	<b>trying</b> 18:9 21:8
<b>terabytes</b> 17:2	59:8 71:18	67:6 69:12	62:10	28:19 29:18
21:9 22:8	76:8,12,13	70:12,23,23,24	<b>tomorrow</b> 70:22	55:12 67:19
<b>term</b> 28:6 46:22	<b>Thanks</b> 76:11	71:3,11,16	<b>ton</b> 29:9	<b>ttd@tessadavi...</b>
<b>terminology</b>	<b>theme</b> 22:19	72:2,15 74:3,9	<b>total</b> 16:19 38:6	6:10
62:17	<b>theoretical</b>	74:24 76:1	44:8 48:20	<b>turn</b> 31:10 40:19
<b>terms</b> 18:9 19:9	45:22	<b>thinks</b> 12:4	49:24 53:17	49:3
19:16 21:5	<b>theories</b> 42:12	<b>Thompson</b> 3:1	<b>totality</b> 35:16	<b>turns</b> 10:12
28:25 29:1	<b>theory</b> 40:18	7:21	<b>touches</b> 11:20	68:14
33:8,9 42:21	<b>Theresa</b> 2:4	<b>thought</b> 20:1	<b>traditional</b>	<b>two</b> 10:18 11:20
46:15 49:5,7	7:10	22:5 25:2	23:24	17:2 19:13
57:15 72:20	<b>thereunder</b>	30:19 31:18	<b>transcribed</b>	20:2,15,23
74:10	33:21	32:20 34:21	67:18	24:19,24 26:5
<b>Tessa</b> 6:7 10:1	<b>thing</b> 13:8 15:18	56:2	<b>transcript</b> 1:12	30:12,13,24
63:7	16:5 29:20	<b>thoughts</b> 13:7	12:8 54:25	35:25 36:21
<b>testified</b> 47:19	43:24 72:9,24	<b>thousands</b> 63:18	60:6 62:13,20	39:23 46:8,9
<b>testifies</b> 27:12	<b>things</b> 10:12	<b>three</b> 13:25	66:13 67:14	48:20,20,21
<b>testify</b> 23:8	16:22 18:1,4	17:15 26:22	68:13,25 69:18	53:11,17 55:17
<b>testimonies</b> 27:5	29:10,15 31:3	44:9 47:6	71:1,2 74:1,9	59:17,18 71:21
<b>testimony</b> 17:13	31:15 48:7	48:21 53:18	75:4,4,11,12	75:17
22:23 23:1,1	73:14 74:2	71:8	77:7	<b>two-week</b> 21:13
23:23 24:1,14	<b>think</b> 10:19 12:2	<b>threshold</b> 33:5	<b>transcripts</b>	<b>TX</b> 77:24

<b>type</b> 61:14 73:8 75:7	32:17	71:2,8 74:2 75:4	43:9	18:19 28:19,23 29:9 35:5
<b>types</b> 18:18 59:14	<b>unseated</b> 42:22	<b>videoed</b> 60:22 67:18	<b>warning</b> 70:12	39:17 44:9,11 52:14 58:13
<hr/> <b>U</b> <hr/>	<b>unwarranted</b> 30:7	<b>videotaped</b> 74:20	<b>Washington</b> 4:10,14	52:14 58:13 60:3,7 72:4
<b>U.S</b> 4:3,9,13,18	<b>unwaveringly</b> 42:23	<b>videotape</b> 74:20	<b>wasn't</b> 14:4 22:21 61:2,3	<b>Wechsler</b> 2:20 7:17,18 13:5
<b>ultimate</b> 40:21 41:6 56:21	<b>upcoming</b> 49:8	<b>videotaped</b> 62:14 64:21,22 65:3	<b>water</b> 4:21 5:11 8:18,21 9:6,9 10:18 16:7	13:11 15:5,9 15:25 16:13,19
<b>ultimately</b> 25:14	<b>update/supple...</b> 14:15	<b>view</b> 12:13 13:6 14:19 15:10	21:20 33:18,21 33:25 35:25	20:3,25 24:15 24:17 27:22
<b>unable</b> 65:15	<b>updating</b> 14:17 15:16 16:6	17:11 39:15 50:7 59:12 74:5	36:6,18 37:3 37:11,12,15,22 37:23,23 38:6 38:7,9,21	28:2,9 30:11 30:18,22 31:5 31:9 34:17,20 35:12,23 36:8
<b>unclear</b> 36:12 41:6	<b>upends</b> 57:20	<b>viewed</b> 73:4	41:12 42:7,10 43:12 45:19 47:12 50:25	30:18,22 31:5 31:9 34:17,20 35:12,23 36:8
<b>undermining</b> 52:3	<b>urge</b> 72:7	<b>views</b> 12:23 14:21 51:21 74:8	51:4 52:24 53:3,7,9,11 55:7,9,17 56:16,22 59:17	45:22 48:17 50:3,4 51:11 51:16,18 53:16 53:20 54:23 55:23 57:14 59:9,10,11 68:2 69:9
<b>understand</b> 11:16 14:10,14 21:16 25:10 27:2,3,12,23 28:4,10 30:22 33:23 36:16 48:15 56:11	<b>user</b> 50:25	<b>violations</b> 72:5	51:4 52:24 53:3,7,9,11 55:7,9,17 56:16,22 59:17	59:9,10,11 68:2 69:9 71:11,12,13,20 71:21 74:17 76:5
<b>understanding</b> 28:1 55:14 61:1 65:21 66:15 75:19	<b>users</b> 36:20 37:11,12 38:7 38:9 42:8,10 53:3,9,12 59:17	<b>virtual</b> 64:18 65:2,9	<b>way</b> 15:1,10 18:18 22:20 23:7,20,22 29:9 30:24 31:21 35:21 47:6 48:5 49:23 58:6,16 62:23 65:6	<b>Wechsler's</b> 22:19 28:18 44:21 48:24 58:7 59:6 75:20
<b>understood</b> 13:15 45:15	<b>Utah</b> 4:19	<b>virus</b> 74:20	62:23 65:6	<b>Wednesday</b> 30:18
<b>unethical</b> 63:11 65:13	<b>Utility</b> 5:11 8:18 8:21	<b>vis-a-vis</b> 47:4,18	62:23 65:6	<b>week</b> 12:1 16:21 19:10 26:2,2 68:20
<b>unique</b> 11:4 37:17 38:4,11 47:3 53:10 55:4,17,21 58:10 74:20	<b>utilized</b> 23:25	<b>visit</b> 11:19	<b>ways</b> 41:19 74:13	<b>weeks</b> 19:6 20:2 20:15,23 22:15 26:6 30:12,14 30:24 43:14,14 75:17
<b>understood</b> 13:15 45:15	<b>utilizing</b> 15:15	<b>voiced</b> 23:10,11	76:10	<b>weight</b> 27:15
<b>unethical</b> 63:11 65:13	<b>Utton</b> 6:12,12 10:4,5 67:5,6,9 69:18	<hr/> <b>W</b> <hr/>	<b>we'll</b> 10:13 18:1 20:4,6,23 30:23 35:22 76:10	<b>went</b> 13:18
<b>unique</b> 11:4 37:17 38:4,11 47:3 53:10 55:4,17,21 58:10 74:20	<b>Utton's</b> 74:7	<b>W</b> 4:3 6:12	<b>we're</b> 11:13 14:8 14:9,19 16:21 17:7,24 18:3 18:14 19:4,4 19:25 20:11,12 21:8,8 22:23 23:5,24 28:14 29:18,19 48:25 53:17 54:12 67:19 69:5	<b>weren't</b> 14:20 64:17
<b>unethical</b> 63:11 65:13	<hr/> <b>V</b> <hr/>	<b>want</b> 10:14,21 10:23 11:15 12:9,23 19:3 21:3 22:7 24:10,11,18,20 25:7,25 29:6 29:12 31:19 32:21 36:7 40:8 54:3 58:21 59:6 61:21,21,21 66:18 71:9 74:6,17 75:19	<b>we've</b> 11:1 18:10	<b>Weslayan</b> 6:18 77:24
<b>unethical</b> 63:11 65:13	<b>v</b> 1:8 3:21	<b>wanted</b> 14:21 35:9 52:6 67:15,22 71:23 72:14		<b>whatsoever</b>
<b>unethical</b> 63:11 65:13	<b>valid</b> 56:8	<b>wants</b> 12:8 30:11 32:18		
<b>unethical</b> 63:11 65:13	<b>validated</b> 57:2			
<b>unethical</b> 63:11 65:13	<b>validity</b> 38:1,2 45:8 46:18,20 56:4,4 57:10			
<b>unethical</b> 63:11 65:13	<b>valley</b> 68:5			
<b>unethical</b> 63:11 65:13	<b>value</b> 12:5			
<b>unethical</b> 63:11 65:13	<b>various</b> 53:12 61:3			
<b>unethical</b> 63:11 65:13	<b>versus</b> 7:4 50:24 58:23			
<b>unethical</b> 63:11 65:13	<b>video</b> 60:13 62:18,20 64:12 65:4 67:24 69:14 70:8,25			

68:24	60:16	<b>202</b> 4:10,15	<b>512</b> 2:17 5:4,20	6:13
<b>wholly</b> 63:1	<hr/>	<b>2020</b> 1:12 77:17	<b>514-3553</b> 4:10	<b>88005</b> 5:8
<b>wide</b> 65:23	<b>0</b>	<b>20240</b> 4:14	<b>524-5677</b> 4:19	<hr/>
<b>wildfire</b> 68:13	<b>04-30-22</b> 77:20	<b>2033</b> 2:12	<b>52401</b> 1:14	<b>9</b>
<b>willing</b> 29:19	<hr/>	<b>2067</b> 5:13 6:3	<b>570-4591</b> 3:14	<b>90</b> 30:5
66:18	<b>1</b>	<b>208-5432</b> 4:15	<b>575</b> 5:9	<b>916</b> 2:7
<b>wish</b> 54:1	<b>1</b> 4:21 9:7,10,22	<b>223</b> 77:23	<hr/>	<b>95814</b> 2:6
<b>witness</b> 44:8	37:11,16,17	<b>2240</b> 6:8	<b>6</b>	<b>983-3880</b> 5:14
73:12,13,14,24	43:13,25 44:22	<b>235</b> 6:18 77:24	<b>6201</b> 4:18	6:4
<b>witnesses</b> 36:2	46:2,8,24	<b>2386</b> 6:13	<b>636-2377</b> 5:9	<b>986-2637</b> 2:22
37:13 44:6	47:19 50:10,13	<b>24</b> 1:12	<b>699-1445</b> 6:14	<b>999</b> 4:4
47:16,23 49:1	51:25 52:18	<b>242-2228</b> 3:9	<b>6th</b> 77:17	
49:4 68:14	54:13,16	<b>26</b> 24:21	<hr/>	
<b>word</b> 18:16,17	<b>10,000</b> 29:5	<hr/>	<b>7</b>	
18:21 19:3	<b>100</b> 68:8	<b>3</b>	<b>700</b> 3:8	
<b>work</b> 11:24	<b>1000</b> 2:6	<b>3.5</b> 35:24 38:12	<b>720</b> 3:23	
28:19 29:3,18	<b>11:01</b> 1:14	38:24 39:2,12	<b>745-1101</b> 6:19	
29:19	<b>1100</b> 5:8	39:22 40:2	<b>75</b> 46:6 48:18	
<b>working</b> 54:12	<b>111</b> 1:13	54:24 55:22	49:24	
58:7	<b>1120</b> 3:2	<b>30,000</b> 28:10	<b>7611</b> 4:9	
<b>works</b> 21:1	<b>11th</b> 2:12	<b>300</b> 5:19 29:1	<b>77027</b> 6:18	
<b>Worldwide</b> 6:17	<b>12:45</b> 76:14	<b>3000</b> 6:18 77:24	77:24	
77:23	<b>125</b> 4:18	<b>303</b> 2:13 3:3 4:5	<b>78703</b> 5:3	
<b>worse</b> 39:18	<b>12548</b> 2:16	<b>303187</b> 5:3	<b>78711</b> 2:17	
<b>worth</b> 21:9	<b>1300</b> 3:22	<b>325</b> 2:21 3:13	<b>78746</b> 5:19	
<b>wrestle</b> 34:6	<b>14</b> 17:2 21:9	<b>329-4672</b> 3:18	<b>792-3636</b> 6:9	
<b>writing</b> 55:19	<b>14,000</b> 28:24	<b>370</b> 4:4	<b>7th</b> 3:22	
75:14	<b>141</b> 1:1 7:3	<b>3711</b> 5:19	<hr/>	
<b>written</b> 16:2	<b>15</b> 26:7 76:1	<hr/>	<b>8</b>	
26:24 62:13	<b>1508</b> 3:17	<b>4</b>	<b>800</b> 6:19	
67:21	<b>15th</b> 16:16,17	<b>400</b> 29:1	<b>800-745-1101</b>	
<b>Wyoming</b> 58:23	20:9,25 31:20	<b>4206</b> 6:8	77:25	
59:1	33:1,11 34:22	<b>43</b> 37:15	<b>801</b> 4:19	
<hr/>	35:8 41:23	<b>446-7979</b> 2:7	<b>80202</b> 4:4	
<b>X</b>	<b>1600</b> 3:2	<b>449-2834</b> 2:13	<b>80203</b> 3:3,23	
<hr/>	<b>17</b> 16:20	<b>45</b> 61:18	<b>80302</b> 2:12	
<b>Y</b>	<b>1849</b> 4:14	<b>463-2012</b> 2:17	<b>8262</b> 77:20	
<hr/>	<b>18th</b> 4:4	<b>472-8021</b> 5:20	<b>84138</b> 4:19	
<b>year</b> 13:17	<hr/>	<b>480-8231</b> 5:4	<b>844-1375</b> 4:5	
<b>years</b> 16:8 42:19	<b>2</b>	<hr/>	<b>848-1800</b> 4:24	
44:9 61:18	<b>2</b> 37:25 38:22	<b>5</b>	<b>861-1963</b> 3:3	
<b>yesterday</b> 27:19	<b>20</b> 5:8 22:12,13	<b>5</b> 2:12	<b>87048</b> 6:9	
47:3 63:9	22:13	<b>500</b> 2:6 3:8 4:23	<b>87102</b> 3:8	
65:15	<b>20044</b> 4:10	<b>505</b> 2:22 3:9,14	<b>87103</b> 4:24	
<hr/>	<b>2008</b> 39:3,15	3:18 4:24 5:14	<b>87501</b> 2:22 3:13	
<b>Z</b>	40:6	6:4,9,14	3:18	
<b>zealous</b> 18:9,25	<b>2019</b> 13:18,20	<b>508-6281</b> 3:23	<b>87504</b> 5:14 6:3	
<b>Zoom</b> 19:7				