

SUPREME COURT OF THE UNITED STATES  
NO. 141, ORIGINAL

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

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for HEARING  
before HONORABLE MICHAEL A. MELLOY, SPECIAL MASTER,  
held REMOTELY via Zoom, on NOVEMBER 1, 2021,  
commencing at 11:00 a.m.;

Proceedings reported by Certified Shorthand  
Reporter and Machine Shorthand/Computer-Aided  
Transcription.

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1                   **JUDGE MELLOY:** This is in Original  
2                   Action Texas versus New Mexico and Colorado with  
3                   United States as intervenor. Let me ask the parties  
4                   who are going to be appearing this morning to enter  
5                   their appearances. For Texas, Ms. Klahn?

6                   **MS. KLAHN:** Good morning, Your Honor.  
7                   Sarah Klahn.

8                   **JUDGE MELLOY:** And for New Mexico?

9                   **MR. WECHSLER:** Good morning. Jeff  
10                  Wechsler.

11                  **JUDGE MELLOY:** Colorado?

12                  **MR. WALLACE:** Good morning, Your Honor.  
13                  Chad Wallace.

14                  **JUDGE MELLOY:** And for the United  
15                  States?

16                  **MR. LEININGER:** Good morning, Your  
17                  Honor. Lee Leininger for the United States.

18                  **JUDGE MELLOY:** All right. Well, I think  
19                  we left off when we broke the other day with  
20                  Mr. Schmidt-Petersen, and I believe you were doing the  
21                  examination at the time, Mr. Leininger; is that  
22                  correct?

23                  **MS. KLAHN:** Actually, it was Ms. Klahn.

24                  **JUDGE MELLOY:** I'm sorry. Ms. Klahn.  
25                  Ms. Klahn, are you ready to proceed?

1                   **MS. KLAHN:** Yes, sir.

2                   **JUDGE MELLOY:** You may proceed. Oh, let  
3 me first -- before you do that, let me just remind the  
4 witness that you still are under oath and that the  
5 same admonitions about documents being available to  
6 you or any electronic transmissions still apply to  
7 this continued proceeding. Do you understand, sir?

8                   **THE WITNESS:** I do, Your Honor.

9                   **JUDGE MELLOY:** All right. Then you may  
10 proceed, Ms. Klahn.

11                   **MS. KLAHN:** Thank you.

12                               **ROLF SCHMIDT-PETERSEN,**  
13 having been previously duly sworn, testified further  
14 as follows:

15                               **FURTHER CROSS-EXAMINATION**

16                   **BY MS. KLAHN:**

17                   **Q.** Good morning, Mr. Schmidt-Petersen.

18                   **A.** Good morning.

19                   **Q.** When we were together on October 21st, do you  
20 recall telling me that counsel had asked you to  
21 prepare for testimony in five -- on five items?

22                   **A.** I don't recall you making that request. I do  
23 recall Mr. Wechsler asking me that.

24                   **Q.** And was one of the items that you were asked  
25 to prepare on Stream System 104, the offer of judgment

1     **for the United States?**

2           A.     I was designated to talk about New Mexico's  
3     involvement in the Rio Grande Project and our  
4     understanding of that, and I believe in coordination  
5     with Texas and United States.

6           Q.     And do you recall in your testimony -- or in  
7     your deposition, rather, that you -- well, let me take  
8     a step back. So do you also recall during your  
9     testimony last time we were together, you testified  
10    that you were familiar with the offer of judgment that  
11    New Mexico made in Stream System 104?

12          A.     Maybe I can ask for a clarification. Are you  
13    talking about -- I was involved in the discussions  
14    with the United States over the U.S. right, which is  
15    104, the --

16          Q.     Correct.

17          A.     -- would have been ultimately through the  
18    lawyers and so I -- I'm not sure about that piece  
19    specifically.

20          Q.     However, you did testify on Page 90 of the  
21    draft, I believe, about your understanding of the  
22    Project operations that led to the state making the  
23    offer it did in Stream System 104?

24          A.     Yes. I believe I testified that I had been  
25    involved in that and had some experience in that

1     regard, yes.

2           Q.     My reason for asking you that is that your --  
3     this was the lead up to being -- you being asked that  
4     whether or not you knew how the Project would have  
5     been protected from impairment or interference in New  
6     Mexico. Do you recall that question from  
7     Mr. Wechsler?

8           A.     I do -- I do recall that from Mr. Wechsler,  
9     yes.

10          Q.     Okay. But during your deposition, you also  
11     had some exchange with Mr. Leininger about the  
12     historical background of the Project operations  
13     leading to the offer of judgment in Stream System 104,  
14     and your testimony in your deposition was that you  
15     didn't have any recollection of the historical  
16     materials related to that. Do you recall that?

17          A.     No. We could look through the deposition. I  
18     do know that it had a number of exchanges with  
19     Mr. Leininger in regard to that issue.

20          Q.     Let's -- let's play, if we could --

21                   MS. KLAHN: Your Honor, I'd like to  
22     impeach the witness on his deposition testimony using  
23     his deposition testimony, and we'd be looking at  
24     Volume 1, Page 142, Line 19, through 144, Line 8.

25                   And rather than having me read all that,



1 Mr. Berns, could you put up the -- the video, please?

2 (The video was played.)

3 **MR. WECHSLER:** So, Your Honor, I'm going  
4 to object as improper impeachment. I didn't hear  
5 Mr. Schmidt-Petersen give any answer that was in any  
6 way inconsistent with that. We just listened to about  
7 two minutes of testimony that seemed entirely  
8 consistent with Mr. Schmidt-Petersen's testimony --  
9 live testimony in the trial, and -- and you're not  
10 allowed to just read in sections of a deposition.  
11 It's hearsay unless it's specifically to directly  
12 impeach a specific statement made by the witness, and  
13 it has to be directly contrary, and none of that was.

14 **MS. KLAHN:** Your Honor --

15 **JUDGE MELLOY:** Go ahead, Ms. Klahn.

16 **MS. KLAHN:** My position is that we spent  
17 two long days trying to get Mr. Schmidt-Petersen to  
18 answer questions during the deposition. He reminded  
19 us an numerous occasions that he had a day job. He  
20 wasn't much involved in the litigation, that he had  
21 looked at some project documents. He couldn't  
22 remember what they were. He talked to some Project  
23 operations people from the Bureau. He couldn't  
24 remember very much about those conversations, and he  
25 did mention at one point this offer of judgment when

1 Mr. Leininger asked him what offer of judgment, what  
2 are you talking about. He said, Well, I don't really  
3 remember. Did you review it for the deposition? No,  
4 I did not. The point here is Mr. Schmidt-Petersen  
5 showed up at his testimony having been asked to  
6 prepare in areas where he was unprepared during his  
7 deposition, and he's a fact witness. And the whole  
8 point of a deposition is to find out what a witness  
9 knows. So if after the deposition, he had more  
10 preparation, we weren't informed of that, and for him  
11 to show up here with basically an opinion about what  
12 the offer of judgment, based on his review of the  
13 offer of judgment to the United States and the  
14 adjudication means as far as what the United States  
15 project should do to protect itself from an  
16 impairment, that's something we should have been able  
17 to inquire into during the deposition.

18 **MR. WECHSLER:** So, Your Honor, if I may  
19 respond, the -- Ms. Klahn is mistaken.  
20 Mr. Schmidt-Petersen was not designated to talk about  
21 Stream System 104. That was Mr. Longworth, who was  
22 designated as part of the 30(b)(6) to testify to that  
23 subject. What we just heard was background about, you  
24 know, Mr. Schmidt-Petersen, do you have background  
25 about the project, and he answered as he did last week

1 that, yes, in fact, he has extensive background on  
2 those operations. The -- the -- this question about  
3 104 was purely a lead up to show some foundation, but  
4 he has ample foundation for the testimony that he  
5 gave. And, again, the rule is quite clear on  
6 impeachment. It must be directly impeaching live  
7 testimony that he gives today, so if Ms. Klahn wants  
8 to ask Mr. Schmidt-Petersen questions and he says  
9 something inconsistent, then she's welcome to read a  
10 portion of the deposition that is inconsistent, but  
11 that's not what I just heard.

12 **JUDGE MELLOY:** Well, I'm going to -- I'm  
13 going to overrule the objection, but I give it  
14 whatever weight I think is appropriate. I guess I'm  
15 not surprised that a witness would continue their  
16 preparation for testimony particularly when it's  
17 highlighted what the areas are going to be, so I guess  
18 I'm not overly shocked by the fact this witness may  
19 have done some further preparation and that his state  
20 of knowledge did not remain static from the time of  
21 his deposition to his trial testimony, but -- but I'll  
22 -- go ahead, Ms. Klahn. You may continue your exam.

23 **MS. KLAHN:** Thank you.

24 **Q. (BY MS. KLAHN)** So, Mr. Schmidt-Petersen,  
25 **let's switch gears. You've worked for the ISC for**

1 almost 21 years; is that correct?

2 A. Ms. Klahn, it's actually 22 years.

3 Q. Oh, okay. And then until 2017, your work  
4 exclusively involved the Rio Grande Basin; is that  
5 correct?

6 A. Not exclusively the Rio Grande Basin, but  
7 primarily, yes.

8 Q. Okay. And since 2017, you've either been  
9 involved with other river basins such as when you were  
10 Colorado river coordinator or you've been the ISC  
11 director and basically responsible for all the river  
12 basins in the state; is that right?

13 A. Yes. I believe that is correct, as a general  
14 framework, yeah.

15 Q. In -- so in 1999, let's go back to the year  
16 you started when you were hired by Norm Gaume to be  
17 the Rio Grande Basin Coordinator. I think that's what  
18 you told us; is that right?

19 A. That's correct.

20 Q. And your testimony on October 21st was that  
21 you were hired as Rio Grande Basin Coordinator to do  
22 projects assigned by the engineer advisor and my  
23 manager; do you recall that?

24 A. I recall that general testimony, yes.

25 Q. Okay. And then in 2003, you got into the

1 position of being the Rio Grande Basin Manager,  
2 correct?

3 A. That's correct. In that time period, we  
4 moved from relatively small group of people and -- and  
5 essentially hired more staff and a new office and so I  
6 moved up in classifications through that process.

7 Q. And I understand that -- I understand there's  
8 more to my questions in terms of what you might like  
9 to say, but if I ask you a yes-or-no question, it's  
10 okay to say yes or no. I'm not -- really just trying  
11 to set the stage for some questions that are coming,  
12 so it'll move things along a little bit, I think, if  
13 you just -- if you hear a yes-or-no question, if you  
14 can answer it that way. Okay?

15 So is -- during the time that you were the --  
16 after 2003, when you were the Rio Grande Basin  
17 Manager, I think you testified that that was when you  
18 started to understand how -- or become familiar with  
19 how the accounting was done with the Compact  
20 commission; is that correct?

21 A. I believe I indicated I became more involved  
22 in the accounting. I'd been involved prior to that.

23 Q. How -- and that was because you were  
24 assisting the engineer advisor, correct?

25 A. Correct. All the way through that time

1 period. Just a different engineer advisor in 2003.

2 Q. I'm focusing now on the accounting piece of  
3 this. Accounting is a primary role of all of the  
4 engineer advisors in the Compact Commission, isn't it?

5 A. Drafting and putting the data together for  
6 accounting and providing numbers to the Compact  
7 commission, yes.

8 Q. And when you say account drafting and putting  
9 the data together," I mean, a lot of that data  
10 actually comes from the Bureau of Reclamation, isn't  
11 that right?

12 A. The data comes from multiple different  
13 sources. All -- all the states, USGS, Bureau of  
14 Reclamation, U.S. Army Corps of Engineers, a number of  
15 different parties.

16 Q. Okay. And you've come to understand during  
17 your many, many years working with the Rio Grande  
18 Compact Commission in one way or another, that the  
19 annual meeting of the Rio Grande Compact Commission  
20 occurs once a year, correct?

21 A. The regular meeting occurs once a year, yes.

22 Q. Usually in March or April, correct?

23 A. That's correct.

24 Q. And it's typical in the minutes of -- or the  
25 transcript, of course, that would be reflected but

1 certainly in the minutes, it's typical for individuals  
2 who are involved in the Rio Grande Compact Commission  
3 to be identified, correct?

4 A. I'm not sure I understand that question. Is  
5 it that the -- the court reporter notes individuals  
6 who are present?

7 Q. Uh-huh. Yes.

8 A. Yes, that's correct.

9 Q. Yes. And the individuals that are formally  
10 involved in the Rio Grande Compact Commission for New  
11 Mexico are the engineer advisor and the Compact  
12 Commissioner, correct?

13 A. No.

14 Q. Okay.

15 A. There's also a legal advisor that would be at  
16 the meeting with each Compact commissioner.

17 Q. Thank you. Now, prior to becoming the  
18 engineer advisor, which I think you did in 2009; is  
19 that right? Was it 2009?

20 A. That's correct.

21 Q. You often attended Rio Grande Compact  
22 Commission meetings; isn't that right?

23 A. I would have attended many of them. May not  
24 have attended ones that were out of state, depending  
25 on travel restrictions.

1           Q.    Okay.  And I think you also testified with  
2   Mr. Wechsler on direct that the contents, now, not the  
3   substance, but the contents of commission reports are  
4   typically the same every year, correct?  In other  
5   words, the types of information that's included in the  
6   report, it doesn't vary very much from year to year,  
7   correct?

8           A.    I would say not entirely.  The general  
9   categories of -- of information are very similar in  
10  most years.  The specifics can be different, depending  
11  on the conditions.

12          Q.    Okay.  Thank you for that clarification.  
13  When you became engineer advisor in 2009, would you  
14  describe your role as an advisor to the commissioner?

15          A.    So as the engineer advisor, you have more  
16  specific engagements with each of the other engineer  
17  advisors and you do provide recommendations to your  
18  commissioner specifically.  I think those are some of  
19  the more specific additional duties that occur.

20          Q.    And I think you testified on direct that  
21  engineering advisors have a number of significant  
22  responsibilities with Rio Grande Compact accounting  
23  and administration.  Do you recall that?

24          A.    I'm not sure I recall it, but, yes, that's  
25  true.



1           Q.    And in your role as engineer advisor, it was  
2   important to understand the accounting for the Rio  
3   Grande Compact and for the San Juan-Chama Project,  
4   correct?

5           A.    Yes.   Very much so.

6           Q.    So I want to ask you about some of your  
7   statements during your direct testimony related to all  
8   of this experience.  You testified on Page 107 of the  
9   rough draft that in answer -- the question that you  
10  were asked is, "Do the federal agencies report to the  
11  engineer advisors every year?"  Do you recall that  
12  question?

13          A.    I do, and I believe I said yes.

14          Q.    Well, your answer was a little unclear to me.  
15  It seemed to suggest to me that the Compact requires  
16  the federal agencies to report to the engineer  
17  advisors, but that's not what you meant, was it?

18          A.    I don't have that language directly in front  
19  of me, but in my experience, the Bureau of Reclamation  
20  and the U.S. Army Corps of Engineers, Fish and  
21  Wildlife Service and the Bureau of Indian Affairs have  
22  provided reports in every engineer advisor meeting  
23  that I've been at, and IBWC and a couple others have  
24  -- have provided reports at different times.

25          Q.    Right.  And I'm not suggesting that your

1 memories are inconsistent with the facts. What I'm  
2 more getting at is the idea that the Compact engineer  
3 advisors, isn't the language that's used in the annual  
4 reports the engineer's advisors request and receive  
5 the participation of the federal agencies? Do you  
6 recall that language?

7 A. I recall that language generally from letters  
8 that we put together and get sent to each of the  
9 federal agencies that we're making a request of.

10 Q. Well, let's go ahead and put up Joint Exhibit  
11 391.

12 MS. KLAHN: And, Your Honor, this one's  
13 already admitted.

14 And, Justin, I believe -- I don't know  
15 why I'm getting an echo. Are other people hearing  
16 that?

17 JUDGE MELLOY: Yes.

18 MR. WECHSLER: Yes.

19 MS. KLAHN: Should we try it again?  
20 There. Could we go to Page 5, Justin?

21 Q. (BY MS. KLAHN) And at the bottom, I'll direct  
22 your attention, Mr. Schmidt-Petersen, to the left-hand  
23 column to the last sentence. "The engineers Advisors  
24 met in Santa Fe from February 20th through February  
25 22nd to prepare the 2001 Compact water accounting and

1 to discuss continuing and new issues in preparation  
2 for the 2002 meeting of the Rio Grande Compact  
3 Commission." And then the language I asked you  
4 about, "The engineer advisors requested and received  
5 the participation of" --

6 (Conversation off record due to audio  
7 interruption.)

8 Q. (BY MS. KLAHN) So, Mr. Schmidt-Petersen, the  
9 second sentence there has the language I was asking  
10 you about, "The engineer advisors requested and  
11 received the participation of," and then it lists the  
12 federal agencies that were at the meeting in 2002 to  
13 prepare the 2001 Compact water accounting. Does that  
14 refresh your recollection about this language showing  
15 up in the annual reports?

16 A. I see that language there. I think that's  
17 pretty consistent with the process that we've used  
18 while I've been involved.

19 Q. Okay. Thank you. I think you mentioned  
20 this, also, and it's clear from this --

21 MS. KLAHN: Justin, you can take 391  
22 down. Thanks.

23 Q. (BY MS. KLAHN) It's clear from the discussion  
24 we've had that the engineer advisors do the accounting  
25 the year after, and they do it once, correct? So it's

1       once a year, but it's a year late; is that right?

2           A.     If I understand your question correctly, we  
3       do the accounting for the previous calendar year in  
4       the then-current calendar year.

5           Q.     Okay. Okay. And it's true, isn't it, that  
6       there's no Compact accounting below Elephant Butte?

7           A.     No. That's not quite correct. There --  
8       there is the table that has the Project storage  
9       calculations in it, and that includes Caballo  
10      Reservoir and the Caballo release.

11          Q.     Okay. So below Caballo, there's no Compact  
12      accounting, correct?

13          A.     Below Caballo, there is no specific gage in  
14      that regard, so it's not reported and accounted.

15          Q.     Okay. Now, I think you testified during  
16      direct that you had experience administering other  
17      interstate Compacts. Do you recall that?

18          A.     Yes.

19          Q.     But as interstate stream -- as ISC director,  
20      you don't have any experience administering the Rio  
21      Grande Compact because the interstate stream  
22      commission director is not involved with any of the  
23      administrative tasks related to the Rio Grande  
24      Compact, correct?

25          A.     No. That's incorrect. The Page Pegram

1 reports to me, so we do have discussions or reports  
2 actually now handed to me so if there are issues that  
3 are going on in the Rio Grande, I will be involved  
4 with them. Ultimately, however, the decision or the  
5 information goes to the New Mexico Compact  
6 Commissioner. It's not that there's just one pathway.

7 Q. All right. Now, you also testified on direct  
8 that the Rio Grande Project, quote, provides water to  
9 New Mexico citizens, and I just wanted to clarify.  
10 Isn't it true that the Rio Grande Project only  
11 provides water to New Mexico citizens who own property  
12 in EBID?

13 A. I would say it's correct that the Rio Grande  
14 Project delivers to EBID farmers by New Mexico  
15 citizens. I -- I think in part of that, wasn't I  
16 talking about the aspect of the ISC responsibility to  
17 protect New Mexico's waters and our citizens? That's  
18 at least what I was thinking.

19 Q. On Page 82 of the rough draft, you were asked  
20 by Mr. Wechsler whether the Rio Grande Compact has  
21 ever been administered in a way that is consistent  
22 with, quote, the 1938 condition. Do you recall that?

23 A. Yes, I do.

24 Q. And I think your answer included a lot of  
25 details about conditions that have changed below

1 Elephant Butte and Caballo. Do you recall that? Just  
2 yes or no, do you recall that?

3 A. Yes, I recall that testimony.

4 Q. Now, as far as changed conditions, isn't it  
5 also true that one of the conditions that has changed  
6 in New Mexico below Elephant Butte and Caballo is the  
7 adjudication court's 2011 determination that  
8 authorized farmers to divert up to 5.5 acre-feet per  
9 acre from a combination of groundwater and surface  
10 water?

11 A. I would agree that's one of the documentation  
12 issues of -- of change. I don't know that that's a  
13 change from, you know, that was due at that point in  
14 time or a historical one, but it's certainly a change  
15 in the system that's reflected with numbers.

16 Q. Let's talk a little bit about your testimony  
17 related to other Compacts. Now, you noted in your  
18 direct testimony with respect to other New Mexico  
19 interstate Compacts that you're involved with that  
20 each Compact is different, correct?

21 A. That's correct.

22 Q. Now, one of the Compacts you touched on was  
23 the La Plata River Compact, and in that testimony, you  
24 -- you describe -- you testified about an e-mail  
25 exchange with Colorado officials letting them know

1 when New Mexico water users want La Plata River water  
2 to be delivered and when New Mexico water users are  
3 through with it, and I believe your testimony was that  
4 you do this to avoid, quote, waste of water. Do you  
5 recall that?

6 A. I remember that as being part of my  
7 testimony, yes.

8 Q. Now, isn't it true that the La Plata River  
9 Compact has a specific provision in it that limits  
10 delivery to New Mexico in this fashion, quote, "The  
11 State of New Mexico shall not at any time be entitled  
12 to receive nor shall the State of Colorado be required  
13 to deliver any water not then necessary for beneficial  
14 use in the state of New Mexico"?

15 A. Are you quite quoting from a specific element  
16 there of the La Plata River Compact?

17 Q. Article 2, Section 3.

18 A. So there's a couple of different parts of the  
19 articles that are there, and, yes, go to the aspect --

20 Q. Is that -- and is that as a provision that  
21 limits delivery to New Mexico, would you agree?

22 A. One of the aspects that actually limits  
23 delivery to New Mexico.

24 Q. The La Plata River Compact -- let's talk  
25 about some differences. The La Plata River Compact

1 does not involve releases from a Bureau of Reclamation  
2 Project, correct?

3 A. That's correct.

4 Q. In fact, with the -- with regard to the Rio  
5 Grande Compact, water in Elephant Butte and Caballo  
6 with the exception of San Juan-Chama water and debit  
7 and credit water, the entire contents of Elephant  
8 Butte are available for allocation to the districts;  
9 isn't that right?

10 A. Can you ask that question again? Do you mean  
11 that usable water in project storage is available for  
12 release?

13 Q. That's the Compact language. I wasn't asking  
14 exactly that question, but that is the Compact  
15 language.

16 A. My apologies.

17 Q. The entire contents of Elephant Butte  
18 reservoir, with the exception of San Juan-Chama water  
19 and debit and credit water, are available for  
20 allocation to the districts, correct?

21 A. No. That's incorrect. There's no debit  
22 water storage in Elephant Butte reservoir.

23 Q. Okay. Ask it again without the debit water.

24 A. Yeah. So at that point in time, it's usable  
25 water available for release from the reservoir.



1           Q.    And it's all available for allocation to the  
2           districts, correct?

3           A.    It's -- yes, for the two districts for  
4           delivery to the farmers, yes.

5           Q.    And EP1, in fact, the district in Texas and  
6           EBID, the district in New Mexico, actually let the  
7           Bureau of Reclamation know when they need water,  
8           correct?

9           A.    I believe that's correct. I don't believe I  
10          testified to that. I believe I testified that we are  
11          not privy to the orders.

12          Q.    And EP1, the district, and EBID, the New  
13          Mexico district, let the Bureau of Reclamation know  
14          when they need water through the water ordering  
15          process, correct?

16          A.    During the irrigation season for the  
17          allotment that they have received, yes -- for the  
18          allocation they've received.

19          Q.    And as the Special Master found in his  
20          summary judgment order, to distribute water below  
21          Elephant Butte, the Rio Grande Compact relies on the  
22          programmatic activities of the Bureau of Reclamation,  
23          correct?

24          A.    Could you say that one more time? I don't  
25          think I got all of that.

1           Q.    As the Special Master found in his summary  
2 judgment order, to distribute water below Elephant  
3 Butte, the Rio Grande Compact relies on the  
4 programmatic activities of the Bureau of Reclamation,  
5 correct?

6           A.    I don't know that I remember all the pieces  
7 of the Special Master's ruling, but, yes, my  
8 understanding is we rely on the Bureau of Reclamation  
9 for the distribution of that water to the districts,  
10 and the districts then to their farmers.

11          Q.    And the release of usable water is based on  
12 irrigation demands. I think you just testified to  
13 that, correct?

14          A.    That is what it's intended to be, yes.

15          Q.    And that release is made both to EBID and to  
16 EP1, correct?

17          A.    To both of those parties, plus the Republic  
18 of Mexico through IBWC.

19          Q.    If water is flowing out of EP1 and being used  
20 by the Hudspeth District consistent with their Warren  
21 Act contract, that is not a waste of water, correct?

22          A.    I don't know I would agree with that.

23          Q.    All right. Let's move on and talk about the  
24 Pecos River Compact. The delivery obligation to New  
25 Mexico in the Pecos Compact is through the state line,

1 correct?

2 A. Yes. At the Red Bluff gage.

3 Q. The New Mexico delivery obligation in the Rio  
4 Grande Compact is to Elephant Butte Reservoir,  
5 correct?

6 A. As modified by the 1948 resolution, that's  
7 correct.

8 Q. I don't think that modified the Compact, did  
9 it? It modified the measuring point.

10 A. With the -- my understanding of that is that  
11 it modified the delivery point, and prior to 1948, the  
12 delivery point was described in the Compact as San  
13 Marcial.

14 Q. So the two Compacts, the Pecos and the Rio  
15 Grande Compact, are different in that regard in terms  
16 of where the delivery obligation is, correct?

17 A. They are.

18 Q. All right. So you also testified that as New  
19 Mexico ISC director, you are responsible for ensuring  
20 that New Mexico complies with its Compacts, correct?

21 A. That's correct.

22 Q. As ISC director, is it your understanding  
23 that the New Mexico obligation in the Rio Grande  
24 Compact to deliver to Elephant Butte includes a duty  
25 to avoid interfering with Project delivery of Texas'

1     **apportionment?**

2           A.     Well, isn't that the whole reason we're in  
3     this trial, right, is what is the baseline in that  
4     regard and -- and then how do we measure that?

5           **Q.     So is it your understanding that there is a**  
6     **duty, but the duty is undefined at this point?**

7           A.     My understanding from the Special Master is,  
8     I believe, almost exactly that, that New Mexico has a  
9     Compact duty below Elephant Butte and -- and that's  
10    what is being determined in this trial.

11          **Q.     As ISC director, you agree, don't you, that**  
12    **the New Mexico duty to, quote, deliver to Elephant**  
13    **Butte necessarily carried with it a duty to relinquish**  
14    **control and dominion over the water so delivered?**

15                  **MR. WECHSLER:**   Object to form.  That's  
16    calling for a legal conclusion.

17                  **JUDGE MELLOY:**   I'll sustain that.

18          **Q.     (BY MS. KLAHN)   Do you agree as ISC director**  
19    **that the term deliver requires New Mexico to avoid**  
20    **interference with Project operations and to --**

21                  **MR. WECHSLER:**   Same objection.

22          **Q.     (BY MS. KLAHN)   -- on New Mexico's laws to**  
23    **protect Texas' Compact apportionment?**

24                  **JUDGE MELLOY:**   Just a second.  Would you  
25    restate the question, Ms. Klahn, because I -- I missed

1 part of it, and then wait until she's done,  
2 Mr. Wechsler.

3 MR. WECHSLER: Understood.

4 Q. (BY MS. KLAHN) You agree as ISC director that  
5 the term deliver, as used in the Compact, requires New  
6 Mexico to avoid interference with Project operations  
7 and to apply New Mexico laws to protect Texas' Compact  
8 apportionment?

9 MR. WECHSLER: Objection; calls for a  
10 legal conclusion.

11 MS. KLAHN: Your Honor, Mr. --  
12 Mr. Schmidt-Petersen gave extensive testimony about  
13 his understanding of the Compact, and he testified at  
14 the start of this series of questions that it's his  
15 responsibility to ensure that New Mexico complies with  
16 its Compacts. Well --

17 JUDGE MELLOY: That's okay. I'm going  
18 to overrule. I do think he has testified quite a bit  
19 about his understanding of the Compact administration  
20 from New Mexico's perspective, so go ahead.

21 A. I would need you to repeat the question. I  
22 apologize.

23 Q. (BY MS. KLAHN) We'll go To round 3. You  
24 agree as ISC director that the term deliver requires  
25 New Mexico to avoid interference with Project

1     **operations and to apply New Mexico's laws to protect**  
2     **Texas' Compact apportionment?**

3         A.     Well, in this instance, I think we're -- when  
4     we're delivering to Elephant Butte, we're delivering  
5     also to New Mexico for New Mexico's portion of the  
6     apportionment under the Rio Grande Compact, and so I  
7     don't think at that point in time, there's just a  
8     simple, you know, handoff that occurs.

9         **Q.     That's not really what I asked you. I asked**  
10     **a question about the delivery -- whether the term**  
11     **deliver requires New Mexico to avoid interference with**  
12     **Project operations and to apply New Mexico's laws to**  
13     **protect Texas' apportionment.**

14         A.     Well, under that in this particular instance,  
15     I would say there's definitely a Compact-related  
16     responsibility for New Mexico, and it's, again, one  
17     that we're in disagreement on amongst the states and  
18     why we're in this litigation. But ultimately, you  
19     know, it's kind of hard to -- to basically say what  
20     that might be in the vacuum that currently exists,  
21     because there's a -- a very significant difference in  
22     opinion about what that New Mexico apportionment is  
23     below the reservoir and what Texas' is. So I would  
24     say at that point in time, no, it depends.

25         **Q.     So as I understand your answer, you agree**

1 that there's a Compact-related responsibility, but  
2 we're in disagreement about what the contours of that  
3 responsibility are; is that fair?

4 A. I believe that's fair.

5 Q. Now, as the ISC director, do you believe that  
6 the indirect or direct capture of Project water not  
7 authorized by Reclamation to an extent that  
8 substantially interferes with project operations would  
9 be in violation of the Compact?

10 A. Do you mean not having a contract with  
11 Reclamation?

12 Q. Yes.

13 A. I don't believe it's necessary for all  
14 parties downstream of Elephant Butte who use water to  
15 have a contract with the United States.

16 Q. Okay. Let's move on to talking a little bit  
17 about some of your testimony related to waste. Now,  
18 during your direct testimony, you testified about two  
19 events you described as waste, one in 1996, and one in  
20 2002 were -- there may have been a third one in 1992.  
21 But those -- those were events that you asserted were  
22 evidence of waste out of the bottom of EP1. Do you  
23 recall that?

24 A. Ms. Klahn, I would say specifically for 2002,  
25 absolutely yes. For the 1996, I was looking at

1 Compact documents or similar types of issues arising  
2 amongst the Compact Commission, and that that claim  
3 was made at that time by the State of Colorado.

4 Q. So in your investigation of that 1996 doc --  
5 1996 event, did you look at New Mexico 2362?

6 A. I would have to find it.

7 MS. KLAHN: Could we have that put up,  
8 please, Justin?

9 A. 22?

10 Q. (BY MS. KLAHN) New Mexico 2362.

11 A. This is the letter -- oh, this is Garry  
12 Rowe's response letter in 1996. Yes, I remember this.  
13 Yeah.

14 Q. Okay. Let's -- you reviewed that. Did that  
15 -- did you take a look at Page 4? Let's go to Page 4.  
16 And I'm looking at the next-to-the-last bullet point  
17 there.

18 MS. KLAHN: If you could pull that out,  
19 Justin. Thanks.

20 Q. (BY MS. KLAHN) First of all, if you reviewed  
21 this, would you agree with me that this is a  
22 compilation of documents that Commissioner Salazar  
23 requested regarding the 1996 --

24 A. I have to look at all of the pieces of it. I  
25 think this -- these have the letter and the



1 resolution. I don't think it has -- oh, maybe it has  
2 everything. I'm not quite sure. But it would -- I  
3 remember Commissioner Salazar asked for Reclamation to  
4 --

5 Q. Correct. So this second -- this  
6 next-to-the-last bullet point on Page 4 describes the  
7 Colorado state engineer's concerns, which you  
8 identified in your testimony on October 21st, correct?

9 A. Yeah.

10 MS. KLAHN: And I'd like you to  
11 highlight the last two sentences there, Justin?

12 Q. (BY MS. KLAHN) "Reclamation responded that  
13 the releases were for district irrigation of early  
14 winter crops. Reclamation also stated that there were  
15 no restrictions within the Rio Grande Project  
16 authorizing legislation or existing district contracts  
17 which either prohibit winter irrigation releases or  
18 specify irrigation season dates." Is this statement  
19 one of the reasons why your testimony now, just now,  
20 was that you're not sure if the 1996 event was waste?

21 A. No. I mean, this is clearly a -- what  
22 Reclamation reported as to the response to the state  
23 engineer, but I think, you know, I would refer you to  
24 Page 3 with a summary of events that -- where EP1  
25 conserve release for irrigation would begin January 3

1 deliveries to crops into the City of El Paso public  
2 service board water treatment plant, and -- and it  
3 also goes onto say in here, if I remember, that the  
4 overall efficiency of delivery was something like 20  
5 percent, so I -- I would -- I would tell you --

6 Q. Let me stop you there. I appreciate that you  
7 have more to say. Mr. Wechsler is very capable. I'm  
8 sure he can ask you about it. The -- you made a  
9 comment about the level of efficiency in the district.  
10 There's no efficiency requirement stated in the  
11 Compact, correct?

12 A. That's correct. The Compact itself does not  
13 include that language.

14 Q. Okay. So let's go on and take a look at the  
15 2002 incident, and with regard to that incident, you  
16 testified that Steve Vandiver had come to you and Norm  
17 Gaume regarding operation of the Rio Grande Compact.  
18 Do you recall your testimony on that point?

19 A. You said the Rio Grande Compact? The Rio  
20 Grande Project.

21 Q. I'm sorry. Rio Grande Project. Thank you.

22 A. That's correct.

23 Q. Okay. And you referred, I think, to New  
24 Mexico 685, which was a letter from Mr. Turney, who  
25 was the state engineer at the time of New Mexico, I

1 think, regarding excess amounts of operational waste  
2 running out EP1. Do you recall that?

3 A. I recall that as being one of the letters,  
4 yes.

5 Q. Okay. You also testified about a draft  
6 agenda that you and Mr. Vandiver sent to the Bureau of  
7 Reclamation, and that was New Mexico 2314. Do you  
8 recall that?

9 A. I don't have that in front of me, but yes.

10 Q. Okay. Now, I'd like to -- I'd like to put up  
11 Colorado 220, please. This is another compilation of  
12 documents, but let's take a look first on Page 10.

13 A. Colorado what?

14 Q. 220. I'm sorry. I'll give you a chance to  
15 pull it.

16 A. Thank you.

17 Q. Okay. I'm on Page 10.

18 A. I have to look at where you're at.

19 Q. Oh, you're looking at the screen to see the  
20 --

21 A. I'm just trying to find it. I can't find it  
22 in -- this is a really long set of letters apparently.

23 Q. Should be on Page 10 of Colorado 220,  
24 Mr. Schmidt-Petersen. I've got it --

25 A. Okay. That's at the bottom? Oh, there it

1 is.

2 Q. Yeah. If you look at -- it should be New  
3 Mexico -- it's NM-2 -- sorry. Let me find it again.

4 A. No, I found it.

5 Q. Did you find it? Okay.

6 A. Yeah. I just wasn't sure if -- sorry --  
7 where the -- there's all kinds of page numbers on  
8 here.

9 Q. There are all kinds of page numbers on there.  
10 I agree with that. So if we're on Page 10, what we're  
11 looking at here is a letter from Mr. Bert Cortez. He  
12 -- he was a previous employee of the Bureau of  
13 Reclamation, correct?

14 A. That's correct.

15 Q. And if you look at the first paragraph, he's  
16 referencing a meeting on Friday, August 16th, 2002,  
17 which was the same date as the draft agenda that you  
18 talked about during your direct testimony. Do you  
19 recall that? And we can absolutely put up that draft  
20 agenda if it would help refresh your recollection.

21 A. The only issue that I have there, there was a  
22 lot of different meetings that were going on. I know  
23 that -- that Steve and I had requested a meeting, and  
24 I just wasn't sure if this was the same meeting or  
25 not.

1           Q.    Well, I think we can get to that a little bit  
2 more directly here in a minute.  Let's turn to Page --  
3 first, let's turn to Page 22 in here, and just -- if  
4 you could put up 22 and 23 together.  This, I believe,  
5 is exactly the same letter as New Mexico 685.  Just  
6 take a look at it and see if it --

7           A.    It appears to be.  I -- I don't know that I  
8 know this document overall, but that is in reference  
9 to Tom Turney's letter to Ken Maxey.

10          Q.    Okay.  And then if we go back to Pages 1  
11 through 5, let's maybe put up 1 and 2 together.  So  
12 this is the transmittal letter for, as I understand  
13 it, all of the enclosures back to Mr. Simpson  
14 regarding the incident that you reported on in your  
15 direct testimony, Mr. Schmidt-Petersen.  And I'll draw  
16 your attention to the first paragraph of the letter  
17 where it says, "Please note that the data for the  
18 period June 19th and 20th, 2002, was observing flow  
19 conditions at the Hudspeth County line."  I believe  
20 that's when you testified you went to the Hudspeth and  
21 lower El Paso area with Mr. Vandiver, correct?

22          A.    So, again, I would say that I don't know that  
23 I've ever seen this entire compilation, but I believe  
24 this is the response that Mr. Cortez provided to Hal  
25 Simpson.

1           **Q.     Okay.**

2           **A.     I don't know the entire document, but that --**  
3           **that letter piece.**

4           **Q.     Well, let's go to Page 5.**

5                   **MS. KLAHN:** Where's the CCs, Justin? Is  
6           **that Page 3? Let's go to Page 3. There we go.**

7           **Q.     (BY MS. KLAHN) So you were copied on this,**  
8           **Mr. Schmidt-Petersen?**

9           **A.     I would say I was copied on the specific**  
10          **letter that you're talking about here. I'm not sure**  
11          **about the entire document that we've been going**  
12          **through. I don't --**

13          **Q.     Well, it says -- it says, "W slash ENCL, with**  
14          **enclosures." So my read of that would be that this is**  
15          **a document that you received including all of the**  
16          **attachments?**

17          **A.     I don't know.**

18          **Q.     You did not consider this during your**  
19          **evaluation of the 2002 event, correct?**

20          **A.     My 2002 event, I would have definitely looked**  
21          **at all of the letters that were there, but I can tell**  
22          **you that my eyes-on-the-ground experience were**  
23          **different from what was reported here.**

24          **Q.     That's not what I asked you. When you -- to**  
25          **prepare for your testimony that you gave on October**

1 21st about the 2002 event, this was not one of the  
2 documents you reviewed, correct?

3 A. This entire document, I don't think so. I  
4 know I looked at a number of the letters that you just  
5 talked about, but the overall document, I don't know.

6 MS. KLAHN: Your Honor, this exhibit has  
7 not yet been admitted, and we would offer it at this  
8 time.

9 MR. WECHSLER: Your Honor, we don't mind  
10 parts of it being offered, the parts that  
11 Mr. Schmidt-Petersen can testify to. I would point  
12 the Court to, and perhaps the technician can go to  
13 Page 1, and this is in regards to the -- the  
14 enclosure. You can see in the fourth line there, it  
15 says, "Please find enclosed a one-page table." So  
16 when Mr. Schmidt-Petersen is testifying here that he's  
17 never seen this compilation of documents, our  
18 understanding as to where this came from was the  
19 United States based on the Bates numbers. We don't  
20 know why these documents were compiled the way they  
21 were or if it's a complete set. If there are parts of  
22 the -- the record, certainly Mr. Schmidt-Petersen has  
23 testified he's seen the first letter. We don't have a  
24 problem with that being broken out and admitted, and  
25 perhaps there are other parts, but the entire thing

1 seems inappropriate, and we object on foundation  
2 grounds.

3 **MS. KLAHN:** Your Honor, may I be heard?

4 **JUDGE MELLOY:** You may.

5 **MS. KLAHN:** The issue of EP1's  
6 operations has been important in this case, and for  
7 Mr. Schmidt-Petersen to give testimony based on review  
8 of one document and a draft agenda is one thing, but  
9 when there are documents on which he's been copied and  
10 there are exhibits in the record or exhibits available  
11 for review -- and we can -- I can go ahead and lay a  
12 little bit more foundation. There are other letters  
13 in here that he was copied on. In fact, he was copied  
14 on almost every single item in this compilation, and  
15 I'm happy to do that if that's what you -- if you --  
16 if that's what you prefer. We believe this is a  
17 business record because it's got to be something that  
18 was kept in the regular course of business by the  
19 Interstate Stream Commission. That was his -- he was  
20 the engineer advisor -- well, he's listed as engineer  
21 advisor, at least. I don't know that he was in 2002.

22 **JUDGE MELLOY:** And, again, this was  
23 Exhibit No.?

24 **MS. KLAHN:** Colorado 220.

25 **JUDGE MELLOY:** Colorado 220. Okay.



1                   **MR. WECHSLER:** I'm certain if we ask  
2 Mr. Schmidt-Petersen parts of these letters were  
3 likely kept by the Interstate Stream Commission in the  
4 normal course of business, but, of course,  
5 Mr. Schmidt-Petersen is not the custodian for U.S.  
6 documents, and that's the problem that we have with  
7 this document is it appears to be some sort of  
8 compilation, which is not kept by the ISC, and we  
9 don't have any way of knowing what it was or why it  
10 was kept that way. But we -- we certainly acknowledge  
11 parts of it can and should be admitted.

12                   **JUDGE MELLOY:** Well, I think based on  
13 the foundation that's been laid so far, all I can have  
14 admitted is the letter itself and maybe the first page  
15 of the table. I think the rest -- the rest of it has  
16 not been authenticated.

17                   **MS. KLAHN:** Maybe I could go through and  
18 do it more systematically, Your Honor. I thought  
19 maybe this was something Mr. Schmidt-Petersen would  
20 have seen. So if you would like me to do that, then I  
21 can -- then we can create the clean record for which  
22 pages have a foundation related to  
23 Mr. Schmidt-Petersen's being copied.

24                   **JUDGE MELLOY:** All right.

25                   **Q. (BY MS. KLAHN)** So, Mr. Schmidt-Petersen,

1 let's look through this. So the letter, which is  
2 Pages 1, 2, and 3, and the -- and according to your  
3 counsel, the attachment, which is the table on Page 5,  
4 take a look at Page 3 of the letter and see that your  
5 name is listed there as one of the CCs. Do you see  
6 that?

7 A. I do.

8 Q. Okay. And as the supervisor, as you're  
9 stated, as your title is there for the Interstate  
10 Stream Commission, would a letter from Mr. Cortez  
11 regarding an incident that you've been involved in  
12 investigating normally be kept in the ordinary course  
13 of business at the Interstate Stream Commission?

14 A. This letter, yes.

15 Q. Okay. Then let's go onto the Page 9 of this,  
16 and let's put up the draft agenda which you testified  
17 about last time, which was New Mexico 2314, I believe.

18 A. I think the exhibit you said was different  
19 from this. They may be the same, though.

20 Q. Let's go to the second page. They are not  
21 the same. This is -- appears to be your request for  
22 presentations by the Bureau of Reclamation staff, and  
23 what I'm seeing on the left appears to be Mr. Cortez's  
24 agenda that he was prepared to provide for the group  
25 at the meeting on August 16th.

1           A.    I have definitely seen the -- the request  
2 presentations by USBR staff. I'm not sure about Bert  
3 Cortez's, but I would -- does it have a CC from me on  
4 it?

5           Q.    It's an attachment to a -- appears to be an  
6 attachment to the letter sent by the Texas Compact  
7 Commissioner on Page 6. Did you attend that meeting  
8 on August 16th, 2002?

9           A.    I'm sure I attended a meeting with Bert  
10 Cortez and Ken Maxey. I can't tell you if they're  
11 exactly the same.

12          Q.    Okay. So at this point, you can't say  
13 whether that -- whether the agenda on the left is the  
14 actual agenda related to the draft agenda on the  
15 right; is that fair?

16          A.    Yes. That's fair.

17          Q.    Okay. Let's go onto Pages 10, 11, and 12.

18          A.    Did you want to skip 6 and 7 or ...

19          Q.    Well, 6 and 7 were letters to -- a letter  
20 from the Texas commissioner to Mr. Simpson and  
21 Mr. Turney, and you are not copied on that so I'm  
22 going with the --

23          A.    Okay.

24          Q.    -- I'm going to assume that you didn't see  
25 that because you weren't copied on it.

1           A.    Yeah, I don't know.

2           Q.    Okay.  Let's look at Pages 10, 11, and 12.  
3   This is another letter from the -- from Bert Cortez.  
4   You are copied on it, if you look on bottom of Page  
5   11.

6           A.    Yes.  I see my name.  Doesn't this also  
7   include his agenda that's on Page 10 or no?  Maybe  
8   not.  No, yeah, the attached agenda with details of  
9   the presentation.  I believe that would be Page 9.

10          Q.    Okay.  So Page 9 goes with Pages 10, 11, and  
11   12, and you were copied on that?

12          A.    That is my understanding from looking at it.

13          Q.    Okay.  So then -- then we would look at Pages  
14   13, 14, and 15, which is another letter from  
15   Mr. Cortez related to the alleged incident, and you're  
16   copied on Page 15 of that letter?

17          A.    I am.

18          Q.    Okay.  And then we can go to Pages 17, 18,  
19   19, 20, and 21.  This is another letter from Bert  
20   Cortez to Mr. Simpson.  If you'll look at Page 21,  
21   you're also copied on that.

22          A.    I see that.

23          Q.    And then we get to Pages 22 through Page 25,  
24   and that is the letter that you testified about on  
25   direct, which was --

1           A.     That's correct.

2           Q.     New Mexico Exhibit 685.  It's the same  
3 letter, right?

4           A.     That's my understanding -- well, none of the  
5 versions here are very legible, but yes.

6           Q.     Yes.  Okay.  And then Pages 26 and 27 is a  
7 letter from Mr. Turney to Mr. Maxey, and you're copied  
8 on that letter?

9           A.     I am.

10          Q.     And I believe the rest of the pages -- so  
11 that means that the only pages we wouldn't admit would  
12 be 28, 29, 30, 31, and 32, as you are not copied on  
13 any of those.  Would you agree with that?

14          A.     That and the -- there was a section -- a  
15 letter in the middle.

16                   JUDGE MELLOY:  Pages 6, 7, and 8, I  
17 don't think were authenticated.

18                   MS. KLAHN:  That's right.  So with that  
19 foundation laid, we would offer -- and I can list all  
20 of it, Pages -- Colorado 220 Pages 1 through 5 being a  
21 letter from Mr. Cortez to Mr. Simpson on September  
22 20th, 2002, Pages 9 through 12 being a letter and  
23 attachment from Mr. Cortez to the commissioners  
24 copying Mr. Schmidt-Petersen dated August 7th, 2002,  
25 Pages 13 through 15 being a letter from Mr. Cortez to

1 Mr. Turney dated August 5th, 2002, a letter from  
2 Mr. Cortez to Mr. Simpson copying Mr. Schmidt-Petersen  
3 dated July 27th, 2002, a letter from Mr. --

4 **JUDGE MELLOY:** Just a second. Just for  
5 the record, I want to make sure the record is correct.  
6 That's Pages 17 through 21, as I understand it.

7 **MS. KLAHN:** Oh, I'm sorry. Thank you,  
8 Your Honor. Yes. Pages 22 through 25 being a July  
9 21st, 2002, letter from Mr. Turney to Mr. Maxey. The  
10 same letter was as -- which is already in the record  
11 as New Mexico 685. That also copied  
12 Mr. Schmidt-Petersen.

13 **JUDGE MELLOY:** Any objection,  
14 Mr. Wechsler?

15 **MR. WECHSLER:** I have no objection to  
16 those letters being admitted, and in the future, Your  
17 Honor, we'll try and work with the other parties to  
18 break these out into separate exhibits so we don't  
19 have to use trial time on this task.

20 **JUDGE MELLOY:** All right. Those  
21 exhibits are admitted. Go ahead with your  
22 examination, Ms. Klahn.

23 **MS. KLAHN:** Thank you.

24 **Q. (BY MS. KLAHN)** Let's go back to Exhibit 391,  
25 please.

1           A.     This is a report of the Compact Commission in  
2     2001?

3           Q.     Correct.

4           A.     Okay.

5           Q.     Would you turn to Page 12, please? The  
6     right-hand side, this is the memorandum of  
7     understanding that you talked about with Mr. Wechsler,  
8     correct?

9           A.     The -- okay. The first resolution that is  
10    the -- oh, excuse me, the memorandum of understanding  
11    that is on Page 18 of the report, but Page 12 of the  
12    exhibit.

13          Q.     Correct.

14          A.     Okay.

15          Q.     Yeah. And we're trying to use the exhibit  
16    references just to be clear.

17          A.     Okay.

18          Q.     That's why I referred to it as Page 12.  
19    Okay. So because this is kind of small and the copy  
20    isn't very good, I'd like to switch over to Texas 543?

21                 MS. KLAHN: Justin, could you put up  
22    Texas 543 just so we can see it's the same document?  
23    543.

24          Q.     (BY MS. KLAHN) Okay. Mr. Schmidt-Petersen,  
25    I'd like to ask you about this memorandum of

1 understanding, but I'd like to use the Texas 543  
2 version because it's a little easier to read. Are you  
3 comfortable that we're looking at the same memorandum  
4 of understanding?

5 A. Well, at least for the first page of it, yes,  
6 but I wouldn't see why they weren't the same.

7 Q. Okay. Thank you.

8 MS. KLAHN: So let's take down 391 then,  
9 Justin, and let's go to Page 4 of Texas 543. And  
10 could you highlight the first bullet point there?

11 Q. (BY MS. KLAHN) So this memorandum of  
12 understanding involves an agreement with the United  
13 States Bureau of Reclamation and the Compact  
14 Commission regarding various accounting and  
15 documentation issues, correct?

16 A. Yes. This is a documentation that is duties,  
17 roles, and responsibilities of each agency for  
18 accounting, reporting, and documentation of the waters  
19 of the Rio Grande Basin.

20 Q. Okay. And in the version we were looking at  
21 in 391, it did not include Table 1, so I wanted to  
22 just draw your attention to Table 1.

23 MS. KLAHN: Could we pop over to Table  
24 1, please, Justin? That's on Pages 7 and 8 of this  
25 exhibit.



1           A.     Yes, I see it.

2           Q.     (BY MS. KLAHN)   Okay.   And are you familiar  
3     with this table?

4           A.     Well, with the resolution and the documents  
5     here, the table looks to be the -- the gages and --  
6     and its reservoirs that are looked at specifically for  
7     Rio Grande Compact accounting.

8           Q.     And if we look at the table, you see the left  
9     column is the raw data to be collected, correct?

10          A.     I do.

11          Q.     In the memo column is the type of data,  
12     whether it's discharge or reservoir stage or whatever,  
13     correct?

14          A.     That's correct.

15          Q.     And then the responsible agency is on the  
16     right?

17          A.     That's right.

18          Q.     Is the -- it's true, isn't it, that the New  
19     Mexico Office of the State Engineer is not among the  
20     entities that's responsible for any of these  
21     measurements, correct?

22          A.     Correct that we are not listed on here, but  
23     for many USGS gages in particular, we are for that  
24     gaging through cooperative agreement with USGS.

25          Q.     This bureau -- this MOU relates to what

1     **agency is responsible for collecting the data,**  
2     **however, correct?**

3         A.     This is the agency responsible for providing  
4     it in context with the rules and regulations of the  
5     Rio Grande Compact, so I think if you track back to  
6     those rules, you'll see that this -- all these  
7     different gages are responsibilities of different  
8     states and -- and then there's a responsible party for  
9     collecting that or providing that data.

10        **Q.     Now, you testified that this MOU relates to**  
11     **the entire Rio Grande Basin. Do you recall that**  
12     **testimony?**

13        A.     I believe I -- I -- I testified that this had  
14     to do with the Compact.

15        **Q.     Could you take a look at the second bullet**  
16     **point back on Page 4, please?**

17        A.     Yes. Are you -- yeah, this is the roles and  
18     responsibilities of the Bureau of Reclamation as  
19     related to the Compact accounting and so which one are  
20     you -- oh.

21        **Q.     So the second bullet point is what I'm**  
22     **focusing on here.**

23        A.     Oh, sorry. Gotcha. I'm tracking you now?

24        **Q.     So the roles and responsibilities of the U.S.**  
25     **Bureau of Reclamation, according to the second bullet**

1 point are to prepare the annual water accounting  
2 report for the engineer advisors to the Commission  
3 that provides details on water accounting for the San  
4 Juan-Chama Project, the San Luis Valley Project and  
5 information on the Upper Rio Grande Water Operations  
6 Model, correct?

7 A. That's what it says, yes.

8 Q. Okay. Let's go back to Joint 391. Let's go  
9 to Page 15 of Joint 391. Thank you.

10 A. Okay.

11 Q. All right. So you talked with Mr. Wechsler  
12 about the resolution on Page 15 of Joint 391, and I  
13 think you testified that the states generally agreed  
14 that the federal agencies should follow state law and  
15 operations of their projects. Do you recall that  
16 testimony?

17 A. I do recall, yes.

18 Q. Isn't it true the Rio Grande Compact is also  
19 state law?

20 A. The Rio Grande Compact is state law and  
21 federal law.

22 Q. Let's take a look at Page 16. Pop out the  
23 joint resolution on the left hand side of the page.  
24 So this resolution, if you go down to the, "Now  
25 therefore," see what the commissioners were requesting

1 of the Bureau. "Compact commission hereby requests  
2 that the Bureau of Reclamation work cooperatively with  
3 the engineer advisors to develop procedures for  
4 determining the annual allotments of water supply in  
5 accordance with the Rio Grande Compact." Do you see  
6 that?

7 A. I do.

8 Q. I think you testified that this resolution  
9 was to provide -- quote, to provide our water users  
10 sufficient notice about the water they might actually  
11 get so that they could better plan for that. Do you  
12 recall that testimony?

13 A. No, not specifically. So this is the third  
14 resolution that was there, right, so this is the one  
15 that has to do with operations of the project.

16 JUDGE MELLOY: Excuse me a second,  
17 Ms. Klahn.

18 MS. KLAHN: Yes.

19 JUDGE MELLOY: Heather, I'm not getting  
20 the realtime. Is anyone else having trouble with  
21 that?

22 MS. KLAHN: Yeah, I am, too.

23 MR. WALLACE: Yes, Your Honor.

24 (Discussion off the record.)

25 JUDGE MELLOY: Go ahead, Ms. Klahn.

1 MS. KLAHN: Thank you, Your Honor.

2 Q. (BY MS. KLAHN) Mr. Schmidt-Petersen, this is  
3 a March 21st, 2002, resolution that appears to be a  
4 request by the Compact Commission to develop  
5 procedures for determining the annual allotments of  
6 water supply in accordance with the Rio Grande  
7 Compact. Would you agree?

8 A. Yes, I would.

9 Q. Okay. And your testimony in direct was that  
10 this resolution was in part to provide, and it was --  
11 this is a quote from Page 120 of the rough, "Our water  
12 users sufficient notice about the water they actually  
13 might get so they could better plan for that." You  
14 don't recall that testimony, as you sit here?

15 A. Not specifically, but if that's what's  
16 written there.

17 Q. Okay. And in that understanding that you  
18 don't necessarily remember it, when you use the  
19 phrase "our water users" in that sentence, you were  
20 referring to EBID, correct?

21 A. In this case, it would be EBID and its  
22 farmers, yes.

23 Q. And given your understanding of Project  
24 operations, isn't it true that the State of New Mexico  
25 has never provided notice to EBID regarding the water

1     **that was available to them from the Project?**

2           A.     I'm not sure that I can say never. This  
3     information is reported at, you know, each Compact  
4     meeting that occurs, and we get that information from  
5     the Bureau of Reclamation. Our job is looking at the  
6     overall 57 percent of Project supply.

7           Q.     So this request that the Bureau work with the  
8     engineer advisors to develop procedures for  
9     determining annual allotments was superseded by the  
10    adoption of the 2008 operating agreement, correct?

11          A.     Excuse me. Could you say that one more time?

12          Q.     Sure. Looks like realtime is back up. So  
13    this request that the Bureau work with the engineer  
14    advisors -- this being the resolution that we were  
15    just looking at in Joint 391 -- to develop procedures  
16    for determining annual allotments was superseded by  
17    the adoption of the 2008 operating agreement, correct?

18          A.     I would not agree with that. I think it's  
19    clear that Reclamation and the Districts entered into  
20    that agreement, but I don't know that that relates  
21    directly to this resolution. There were a lot of  
22    things going on at that time period. I think there's  
23    actually -- there's a couple more resolutions in there  
24    that related to the Compact Commission getting a  
25    better handle of the entire basin. I think there's

1 also an URGWOM resolution, and I don't think that was  
2 ended by the 2008 operating agreement.

3 Q. That wasn't what I asked you. I asked you  
4 whether this request reflected in the March 21st,  
5 2002, resolution was superseded by the adoption of the  
6 2008 operating agreement?

7 A. I would tell you that I believe the request  
8 stands to this date.

9 Q. And the -- you're familiar with the fact that  
10 EBID, EP1, the El Paso Water Utility, and Hudspeth all  
11 get their water from the Rio Grande Project under a  
12 federal contract, correct?

13 A. I understand that EP1 and the -- and EBID can  
14 request water and make calls and that Hudspeth has a  
15 Warren Act contract for operational waste.

16 Q. EBID, EP1, and El Paso Water Utility, and  
17 Hudspeth all have different types of contracts with  
18 the Bureau of Reclamation for Project water or  
19 operational waste, correct?

20 A. I believe that's correct.

21 Q. And this is part of the programmatic  
22 distribution of apportioned water in -- from Elephant  
23 Butte and Caballo; isn't that right?

24 A. Well, isn't that the subject of this lawsuit?

25 Q. So it's not your understanding that the

1 contracts would be part of the way that the Bureau  
2 programmatically manages water below Caballo?

3 A. I believe the Bureau of Reclamation  
4 distributes water to those districts for the two  
5 districts as per those, you know, formational  
6 contracts, 1938 contracts, and the operational waste,  
7 the Warren Act contract. This aspect of how future  
8 contracts get put in place and interpreted, I think,  
9 are really part of this litigation so I don't have a  
10 better answer for that.

11 Q. Let's turn to the Compact rules. Let's look  
12 at Joint Exhibit 401. This is previously admitted, I  
13 believe, and we are looking at Page 108. So you  
14 recall your testimony with Mr. Wechsler about the  
15 Compact rules?

16 A. Yes.

17 Q. Let's pop out that first paragraph. Let's  
18 highlight the first five lines. So the sentence there  
19 says, "A Compact, known as the Rio Grande Compact,  
20 between the States of Colorado, New Mexico, and Texas,  
21 having become effective on May 31st, 1939, by consent  
22 of the Congress of the United States, which equitably  
23 apportions the waters of the Rio Grande above Fort  
24 Quitman and permits each State to develop its water  
25 resources at will, subject only to its obligations to



1 deliver water in accordance with the schedules set  
2 forth in the Compact." Now, I want to ask you about  
3 that sentence. As a former engineer advisor, isn't it  
4 fair to say that the Compact rules regarding the  
5 ability of a state to, quote, develop its waters, as  
6 that term is used in that sentence, are qualified by  
7 the New Mexico obligation to deliver water in  
8 accordance with the schedules set forth in Article 4  
9 of the Rio Grande Compact?

10 (Technical difficulties.)

11 JUDGE MELLOY: Heather, are you on?

12 THE REPORTER: Yes. Can y'all hear me  
13 now?

14 JUDGE MELLOY: Are you back on?

15 THE REPORTER: Yes. Can you hear me?

16 JUDGE MELLOY: Yes. Did you drop off at  
17 one point?

18 THE REPORTER: I did. I just had  
19 another little blip. I seem to be having some power  
20 issues this morning.

21 JUDGE MELLOY: Did you get the testimony  
22 that was just given?

23 THE REPORTER: It looks like the last  
24 thing that I heard was the end of Ms. Klahn's  
25 question, "As a former engineer advisor, isn't it fair

1 to say that the Compact rules regarding the ability of  
2 a state to, quote, develop its waters, as that term is  
3 used in that sentence, are qualified by the New Mexico  
4 obligation to deliver water in accordance with the  
5 schedules set forth in Article 4 of the Rio Grande  
6 Compact?"

7 That's the last thing I heard.

8 **JUDGE MELLOY:** So the witness will have  
9 to restate his answer.

10 A. I believe my answer there was our delivery  
11 into Elephant Butte Reservoir under the 1948  
12 Resolution is subject to the Article 4, as modified by  
13 Article 6 for accounting purposes and for accrued  
14 credits and debits. I didn't say that last part.

15 **Q. (BY MS. KLAHN) So the Compact provides and**  
16 **limits the scope and intent of the rules, correct?**

17 A. I don't know that I understand your question.  
18 The way I understand this section of the rules and  
19 regulations is that subject to our Article 4 delivery  
20 schedule as modified by Article 6, we are able to  
21 develop our water at will, and the same with Colorado.

22 **Q. My question was the Compact is the**  
23 **overarching document? That's the one that controls**  
24 **how you would interpret this in your role as an**  
25 **engineer advisor or as a Compact commissioner,**

1 correct?

2 A. The individual articles of the Compact, yes.

3 Q. And the rules are actually for governing the  
4 commission proceedings; isn't that right?

5 A. No. These are more than that. These are the  
6 -- you know, talks about gaging. It talks about new  
7 depletions. It talks about other ways of dealing  
8 with, I think, reservoir evaporations. So it goes to  
9 the -- the pieces of all the elements of work that are  
10 necessary functionally for the engineer advisors to  
11 both pull together accounting documentation to  
12 administration or provide that information to their  
13 commissioner. So how do you tie all these pieces of  
14 the Compact together to get to both the accounting  
15 that you do once a year and the administration that  
16 could happen any time during the year.

17 Q. Let's go to the last section here.

18 MS. KLAHN: I'd ask you to pull up  
19 Exhibit 616, please, Justin.

20 Q. (BY MS. KLAHN) So this is -- maybe give us the  
21 first page, also, just so we can see what it is. This  
22 is the 2017 Lower Rio Grande Regional Water Plan  
23 report that you talked about with Mr. Wechsler. Do  
24 you recall that?

25 A. I do.

1           Q.    All right.  So let's go to Page 105 where you  
2 testified about some hydrographs.  Okay.  I'm not sure  
3 the -- I'm not sure it's clear from your testimony on  
4 direct so I just want to ask you, the horizontal axis  
5 on these hydrographs is the date, correct?

6           A.    I can't see that one right there, but that's  
7 what normally would be.

8           Q.    Does that help?

9           A.    Yes.

10          Q.    Okay.  And then the numbers on the left are  
11 the elevations?

12          A.    That would be the water elevation or the  
13 piezometric surface.

14          Q.    Of the inside the well, correct?

15          A.    That's correct.

16          Q.    Okay.

17          A.    From land surface.

18          Q.    Okay.  From land surface.  Okay.  So the --  
19 in each hydrograph, if you could pop that back and  
20 just have us on 105 again, each hydrograph is for a  
21 different period of record, isn't it?

22          A.    I'm not sure that every one here is a  
23 different period of record, but I do know that many  
24 wells, you know, in this basin, they all have  
25 different periods of record.

1           Q.    So -- and if we could pull up the lower left  
2 one, which is the one you talked about with  
3 Mr. Wechsler, I think.

4           A.    Wasn't this the one that was objected about?

5           Q.    Yeah. You testified anyway, so I'm asking  
6 you about it now.

7           A.    Okay. Sure.

8           Q.    So the date on the -- the date of the last  
9 measurement for this hydrograph appears to be 2012,  
10 would you agree?

11          A.    It looks like it's somewhere between '12 and  
12 '13.

13          Q.    Okay. And so you gave some testimony about  
14 trends that you had noted over the last ten years, I  
15 believe, so if it's 2012 or '13, the last ten years  
16 that you would be talking about would be back to about  
17 2000 or 2002?

18          A.    That's correct. For these graphics, yes.

19          Q.    So during that time frame, that ten-year time  
20 frame, you noted a drop in the hydrograph from around  
21 -- from the water level around late '90s, early 2000s,  
22 to 2012 or '13, correct?

23          A.    I don't know that we got that far into it,  
24 but, yes, I -- I think I noted that there was a  
25 difference in character of -- of these changes in

1 water level elevation from that time period up to  
2 previous time periods when there were essentially  
3 different available supplies in the Project.

4 Q. And a lower drop than what you testified  
5 about in the 2011 and '12/'13 period occurred in the  
6 1950s, correct?

7 A. In the -- well, yeah, but they're different  
8 here, right. So that 1950s drought was, and for all  
9 that time period that you see in deep part, there was  
10 almost no surface water supply available to the  
11 Project. The -- in 1958/'59, it pops up, there's  
12 really big waters that occurred, and you can see that  
13 the water level elevation comes up very quickly. The  
14 same doesn't happen in 2008 and 2009 that were  
15 otherwise full supply years on the Project. I think  
16 that's the main difference that we noted.

17 Q. Also during that ten-year time period that  
18 you've testified about was the time frame in which the  
19 adjudication court entered its -- or authorized  
20 farmers in EBID to divert up to 5.5 acre-feet per acre  
21 of surface water and groundwater combined, correct?

22 A. I know that that -- that decision was made,  
23 but my understanding, it's a reflection of what they  
24 were already doing.

25 Q. And that was also during the time period when

1 the pecan growers rejected the state's offer of 4.0  
2 acre-feet per acre surface and groundwater combined,  
3 correct?

4 A. I don't know if -- if I recall that. I would  
5 defer that to somebody like John Longworth or -- or  
6 even Ryan Serrano.

7 Q. So I only have one more question for you,  
8 Mr. Schmidt-Petersen, and I'm going to ask you to pull  
9 up New Mexico 805. So this was the handwritten notes  
10 that we had all the --

11 A. Oh, yeah.

12 Q. -- discussion about. My question is that  
13 it's your testimony, isn't it, that these are Mr. Pat  
14 Gordon's notes?

15 A. I don't believe that's the case. I believe  
16 my testimony was that when we came into the Pat  
17 Gordon's conference room in El Paso, that these blue  
18 notes were on an easel and --

19 Q. So --

20 A. -- and said that they were Texas' position.

21 Q. So the -- so the fact that they were in  
22 Mr. Gordon's conference room means that Mr. Gordon  
23 would be a good person to talk to about these,  
24 wouldn't you agree?

25 A. Mr. Gordon, Hermann Settemeyer, Carlos

1 Rubinstein, they were there.

2 MS. KLAHN: Very good. That's all the  
3 questions I have at this time.

4 JUDGE MELLOY: Mr. Leininger, do you  
5 have any questions?

6 MR. LEININGER: Yes, I do, Your Honor.  
7 Thank you.

8 CROSS-EXAMINATION

9 BY MR. LEININGER:

10 Q. Good morning, Mr. Schmidt-Petersen.

11 A. Good morning, Mr. Leininger.

12 Q. Before we begin our questioning, I just want  
13 to circle back to during your testimony, we, as far as  
14 a question with regard to 2011 credit water releases,  
15 and the ruling from the Court was that this is not the  
16 time and place to go into that testimony, but your  
17 counsel, Mr. Wechsler, made offers of proof.

18 MR. LEININGER: I would like to, just  
19 for completeness of the record, Your Honor, add two  
20 more documents to that offer.

21 JUDGE MELLOY: All right. Go ahead.

22 MR. LEININGER: The first one is New  
23 Mexico 2162. We can pull that up on the screen,  
24 please. This is a letter from the reclamation area  
25 manager to the state engineer Mr. D'Antonio regarding



1 this issue, and I would just like to make this as an  
2 offer of proof.

3 **JUDGE MELLOY:** Any objection,  
4 Mr. Wechsler?

5 **MR. WECHSLER:** I have no objection.

6 **JUDGE MELLOY:** All right. He can  
7 consider it as part of the offer.

8 **MR. LEININGER:** We'd also like to pull  
9 up New Mexico 2254. This is a letter from -- a 2018  
10 letter from Pat Gordon, the Texas commissioner, to the  
11 Rio Grande commissioner, and this is also with regard  
12 to the issue of credit water, and we would like to add  
13 this to the offer of proof, too.

14 **JUDGE MELLOY:** Any objection?

15 **MR. WECHSLER:** This one, I object to,  
16 Your Honor. We can see here, this is Commissioner  
17 Gordon attempting to rescind an agreement and  
18 resolution of the Compact Commission. We know from  
19 previous testimony that that's actually not possible.  
20 The Commission acts unanimously. I don't see the  
21 relevance of this document, and if it is admitted,  
22 then I think there needs to be actual testimony on it  
23 so that we can understand it in context.

24 **JUDGE MELLOY:** Well, it's part of the  
25 offer of proof. I'll accept it as really being

1 admitted, so I'll accept -- I'll accept as part of the  
2 offer of proof. Go ahead.

3 MR. LEININGER: Thank you, Your Honor.

4 Q. (BY MR. LEININGER) Mr. Rolf --  
5 Mr. Schmidt-Petersen, sorry, Rolf, let's start with --  
6 I'm beginning to get the echo -- New Mexico 616. And  
7 this is the lower Rio Grande regional water plan dated  
8 March 2017 that you had testified to earlier.

9 MR. LEININGER: This has been admitted,  
10 Your Honor.

11 Q. (BY MR. LEININGER) Let's go to PDF 13 of this  
12 document. You can see at the bottom it's labeled  
13 NM-616-0013.

14 MR. LEININGER: For brevity, Your Honor,  
15 I'll just mention the last few digits on these  
16 documents.

17 Q. (BY MR. LEININGER) So we're on Page 13 here.  
18 Let's pop out the first bullet point about key water  
19 issues. And it states here in the first line, "The  
20 Rio Grande stream system is fully appropriated."  
21 Would you agree that the surface water and the  
22 groundwater that's connected to the surface water is  
23 fully appropriated in the Rio Grande?

24 A. I would say the entire stream system is fully  
25 appropriated, that includes surface and groundwater.

1           Q.     Okay.  So let's go to Page 160 of this  
2 document and go to the third bullet point.  This  
3 confirms, I think, what you just said, which  
4 is, "There are considerable legal limitations on the  
5 development of new surface and groundwater resources,  
6 given that the surface and surface-connected  
7 groundwater supplies are fully appropriated, which  
8 affects the ability of the region to prepare for  
9 shortages by developing new supplies."  So that  
10 confirms your testimony, right?

11          A.     Yeah, I see that.

12          Q.     Let's go to Page 162.  We looked at -- sorry.  
13 We're having a bit of technical computer problems  
14 freezing up on us.  So we want to go to Page 162,  
15 which is Table 7.1.  There we are.  Here, the -- the  
16 water plan shows a table, which is titled as, "Water  
17 Use and Estimated Availability in the Lower Rio Grande  
18 Water Planning Region."  The top part of the table are  
19 closed basins, right, non-stream connected basins in  
20 the lower Rio Grande?

21          A.     That's my understanding.  And this region,  
22 which encompasses more than just the valley bottom of  
23 the Rio Grande, there are --

24          Q.     That's fine.

25          A.     Yeah.

1           Q.     That's fine. You've answered my question.  
2     Thank you. At the bottom there, we have  
3     stream-connected basins, and these are Rincon and  
4     Mesilla Basins?

5           A.     In looking at this, I -- I'm not sure if  
6     there is any more within that area, but those would be  
7     the larger ones, Rincon and Mesilla.

8           Q.     The water used from groundwater connected to  
9     the Rio Grande, and this is dated 2010, so let's make  
10    sure we have the proper dates on these estimates. The  
11    water used from groundwater connected to the Rio  
12    Grande in 2010 is estimated here, right?

13          A.     That's correct. That would be the water that  
14    was documented as being pumped.

15          Q.     And if you total the stream-connected use of  
16    water, the 155,510 acre-feet from groundwater, plus  
17    the surface water, 271,717, approximately 60 percent  
18    of the stream-connected water used is coming from the  
19    groundwater in 2010, right?

20          A.     In that year, that would be the number the  
21    Office of the State Engineer has, yes.

22          Q.     Let's go to PDF 13. We're going to pop out  
23    the first bullet point, please. And we looked at this  
24    particular bullet point. The last sentence  
25    states, "No mechanism is presently in place to allow

1 transfers of Rio Grande Project water from Elephant  
2 Butte Irrigation District to non-agricultural uses."  
3 Is -- is this referring to municipal and industrial  
4 uses as non-agricultural uses?

5 A. So I didn't write it so I'm not sure what the  
6 -- the steering committee was meaning entirely with  
7 that beyond what they just said. Beyond that, I mean,  
8 I think this relates to the state engineer's  
9 declaration of the basin for groundwater in 1982, and  
10 the requirement for any new using of groundwater to  
11 basically come to the state engineer's office and  
12 apply for a permit.

13 Q. The reference here to non-agricultural uses,  
14 that would be municipal and industrial uses?

15 A. That would be municipal and industrial  
16 purposes. You know, could be also domestics in some  
17 instances, depending on the basin.

18 Q. Okay. This report includes an estimate of  
19 growth in the population of the lower Rio Grande and  
20 New Mexico. Let's go there. Page 14, PDF 14. We  
21 look at the third bullet point, states that the  
22 population of the Lower Rio Grande planning region is  
23 expected to expand from approximately 209,000 in 2010  
24 to almost 350,000 in 2060. I'm not able to hand you a  
25 calculator, Mr. Schmidt-Petersen, but that's almost a

1     70 percent increase in population?

2           A.     It would be -- well, it would be 140,000  
3     people under that estimate, yes.

4           Q.     Let's go to PDF 15 and look at the second  
5     bullet point. Here it says, "Given the growing  
6     population in the region, there is likely to be an  
7     increased municipal and commercial market for water  
8     rights. Transfer of irrigation water rights  
9     associated with the Rio Grande Project into  
10    non-irrigation uses will involve coordination with  
11    USBR and EBID and development of a transfer mechanism  
12    and set of rules for such transfers." And I'll just  
13    stop there. Is this a reference to transfer  
14    agreements between Reclamation, the districts, and  
15    municipal users?

16          A.     I didn't write it, but the way I interpret  
17    this is it was this aspect that in order for new uses  
18    to go forward, they're going to need an offset, and in  
19    order to do an offset using your agricultural water,  
20    they'll have to not just follow the process but  
21    develop one.

22          Q.     All right. So under federal law, if you're  
23    going to make these coordination deals with  
24    Reclamation and EBID, that's accomplished under the  
25    1920 Miscellaneous Purposes Act; is that your

1     **understanding?**

2                   **MR. WECHSLER:** Object to form; calls for  
3     a legal conclusion.

4                   **JUDGE MELLOY:** Well, he's testified  
5     extensively about his understanding of how the project  
6     is administered, so I'm going to let him answer.

7           A.     Well, I think under one specific instance,  
8     the answer would be yes, right, and I know that the  
9     City of Las Cruces attempted to do that, but then with  
10    the operating agreement, they couldn't get the bonding  
11    in place because of a risk for the water, but that  
12    would have been, as I understood it, through a  
13    Miscellaneous Purposes Agreement. I'm not sure that  
14    that's the only way that you could effectuate an  
15    offset.

16           **Q.     (BY MR. LEININGER) So your understanding is**  
17    **that you don't -- you don't know of any other**  
18    **mechanisms that would involve Project irrigation water**  
19    **converting to M&I uses in the 1920 Act; is that**  
20    **correct?**

21           A.     I don't know of any other ones that have been  
22    employed, but I do know of ones that have been  
23    discussed.

24           **Q.     Okay. So the City of El Paso has a number of**  
25    **these 1920 Act contracts, right, to convert Project**

1 water to M&I purposes, correct?

2 A. That's my understanding, yes.

3 Q. As you just testified, the City of Las Cruces  
4 has no 1920 Act contracts, correct?

5 A. That's my understanding, also.

6 Q. Did the City ever attempt to negotiate a 1920  
7 Act contract with EBID and Reclamation?

8 A. I would -- I don't know. I would ask you to  
9 ask them.

10 Q. So you didn't attend any sessions in which  
11 discussions of a 1920 Act conversion contracts were  
12 made?

13 A. I don't know if I did or not. I know that  
14 that subject came up on a number of occasions with  
15 something called a special water users district, and  
16 that that was one element of those discussions, but I  
17 don't know that I was in specific meetings with Las  
18 Cruces and the Bureau of Reclamation in that regard or  
19 EBID.

20 Q. All right. And to the best of your  
21 knowledge, the fact that there is no city of Las  
22 Cruces 1920 Act contract is due to the operating  
23 agreement; is that what I understand from your  
24 testimony?

25 A. No, I don't believe I said that. I said that



1 the -- I believe that the City of Las Cruces indicated  
2 to us that they had purchased lands within Las Cruces  
3 or that EBID, with water rights associated with them,  
4 and they were looking to do a surface water type  
5 project like El Paso, but with the operating agreement  
6 going in place, they weren't able to do that.

7 Q. Okay. Let's go to the next Page 16 of this  
8 water plan, and if we pop out paragraph that  
9 begins "Strategies to Meet Water Demand," and we see  
10 on this page of the 2017 plan is the reference back to  
11 the last regional water plan from 2003, and certain  
12 recommendations and strategies were put forth in 2003,  
13 and this is just a recitation of those  
14 recommendations. You're familiar with that, right?

15 A. I'm familiar with each regional plan having  
16 the strategies, and these look to be the ones from the  
17 -- I don't have any reason to think they're not the  
18 one from the Lower Rio Grande Plan for -- that was put  
19 into the 2017 plan.

20 Q. So in 2003, there was a strategy to purchase,  
21 if you look at the bottom, purchase water rights and  
22 water rights leasing and transfers, and then we also  
23 see in the middle, "Las Cruces sustainable water  
24 project." Do you see what I'm referring to?

25 A. I see the highlighted pieces, yes.

1 Q. Then on the next page, 17, we see the center  
2 of that page, "The steering committee has reviewed" --  
3 there we go. "The steering committee has reviewed  
4 each of the strategies and indicated that most are  
5 still relevant though some are being refocused." So  
6 if we look at the 2003 strategies and compare them to  
7 what was suggested in 2017, and let's see if we can  
8 pull up those pages. These are Pages 17, 18, and 19  
9 from this particular document. And we look at -- and  
10 I think we can enlarge these. And we look at those  
11 which fall below for 2016 purposes -- this is Page 17.

12 A. Let me just -- I have to pull this up.  
13 Sorry. I can't read that.

14 Q. Yeah. I'm sorry. I don't understand why  
15 it's not focused a little better.

16 A. Can you tell me again the number of this one  
17 because there's just a lot of documents.

18 Q. Yes. These are Pages 17. In the upper right  
19 is Page 18, and in the lower right is Page 19 of the  
20 document?

21 A. Right in front of me.

22 Q. Correct. So you have those pages in front of  
23 you?

24 A. I'm pulling them up now. I do. 16 and 17,  
25 correct?

1 Q. Correct.

2 A. Yeah.

3 Q. So strategies in 2017 don't include  
4 purchasing of water rights and water rights leasing  
5 and transfers, that doesn't make them under the 2016  
6 list, correct?

7 A. I'm not seeing where you're at.

8 Q. If you look at the entire list below where  
9 the steering committee reviewed each of the strategies  
10 and indicated what are still relevant at the bottom of  
11 Page 17 and then continue on to Page --

12 A. I think they're different --

13 Q. There you are, continuing onto Page 18 and  
14 19, none of these strategies include purchase water  
15 rights and water rights leasing and transfers,  
16 correct?

17 A. So I would just say they're -- they're not  
18 apples to apples type of issues with regards to the  
19 2003 plan and the 2017, so the strategies that are  
20 here were a major focus of that 2003 planning piece of  
21 it. The specific -- one of the specific requests of  
22 the Interstate Stream Commission to each of the  
23 planning regions was to look at specific projects that  
24 might be implemented really from a state-funding  
25 process and so on. So you see that, you know, the

1 process here some of the water projects were  
2 identified --

3 Q. Mr. Schmidt-Petersen. I'm sorry to interrupt  
4 you, but the question is did purchase water rights for  
5 water rights leasing and transfers, was that included  
6 as one of the strategies in the 2016 letters?

7 MR. WECHSLER: Your Honor, he's  
8 attempting to answer so if Mr. Leininger wants to ask  
9 a question, he's got to be allowed to answer the  
10 question.

11 JUDGE MELLOY: I think he can answer if  
12 it's on the list yes or no.

13 A. They're not listed as projects for 2017 plan.  
14 Different concepts of things that were being  
15 requested.

16 Q. (BY MR. LEININGER) Okay. So the answer is  
17 no?

18 A. Somebody to do that purchasing piece, that  
19 would be a city or others, and that might be the  
20 difference here.

21 Q. Okay. But the answer to my question is no;  
22 is that correct?

23 A. As I understand your question, there -- well,  
24 there are -- these items on the list are projects, not  
25 strategies, which is different from 2003. That's what

1 I was trying to --

2 Q. I see. And projects that don't make it onto  
3 this list include purchasing of water rights, water  
4 rights leasing and transfers, right?

5 A. That's things the steering committee did not  
6 recommend that in here.

7 Q. And what was the -- from the 2003 list, what  
8 was the Las Cruces sustainable water project in 2003?

9 A. Mr. Leininger, I believe -- and this is more  
10 recall. I'm not sure it's quite the same, but I think  
11 that's the project that I was talking about previously  
12 where the City of Las Cruces have purchased lands  
13 within EBID and was seeking to build a surface water  
14 diversion project.

15 Q. And there were -- and it included a treatment  
16 plan for surface water treatment to water standards?

17 A. It did, but I'm not sure I can recall the  
18 details.

19 Q. Okay. But the Las Cruces sustainable water  
20 project didn't make it on to the 2016 list either, did  
21 it?

22 A. It didn't make it on to the list of projects,  
23 correct.

24 Q. Okay. And that's because City of Las Cruces  
25 just wants to continue to pump the aquifer and not

1 acquire additional surface water rights, correct?

2 MR. WECHSLER: Objection; foundation.

3 JUDGE MELLOY: I'll sustain that.

4 Q. (BY MR. LEININGER) Let's go to the next  
5 questioning. You had testified with regard to the  
6 1939 Compact Commission report that stated rules and  
7 regulations for administration of the Rio Grande  
8 Compact. You recall that testimony, Ms. Klahn was  
9 asking you some questions about this document?

10 A. Mr. Leininger, what I have up on my page is  
11 the 2011 report of the Compact Commission. Are you  
12 talking the rules and regulations pieces within that?

13 Q. That's right. Let's go to that page, and  
14 that is Page 108. Let's pop out the first 16 lines.  
15 I think Ms. Klahn had already asked you questions  
16 about this, so my questioning will be a little more  
17 limited, but this is the rules and regulations  
18 referencing a 1939 rules and regulations in which it's  
19 stated here that each state equitably apportions --  
20 sorry -- "The Compact equitably apportions waters of  
21 the Rio Grande above Fort Quitman and permits each  
22 state to develop its water resources at will." I'll  
23 just stop there. So I believe you had answered  
24 Mr. Wechsler a couple weeks ago and Ms. Klahn is that  
25 you understand this language to mean that to the

1 extent New Mexico is able to meet its obligations  
2 under Article 4 and as modified by Article 6, New  
3 Mexico could essentially develop its waters at will in  
4 that area; do you recall that testimony?

5 A. I do recall that testimony, yes.

6 Q. And by Article 4 obligations, any delivery of  
7 Rio Grande water into Elephant Butte, based on the  
8 scheduling, right, based on the stream river indices?

9 A. Mr. Leininger, in this regard, I believe  
10 that's what this section refers to is the place in the  
11 Compact where we have schedules.

12 Q. And by -- by your testimony of in that area,  
13 you mean above Elephant Butte Reservoir?

14 A. Well, this relates, I believe, to the  
15 specific schedules that are there, and I think it  
16 refers to the Compact in its entirety, but then those  
17 specific inset schedules.

18 Q. I'm sorry. My question was more about the  
19 part of this paragraph, which states that each states  
20 develop its water resources at will, and I believe  
21 your testimony was that New Mexico could essentially  
22 develop its waters at will in that area, and I'm  
23 trying to understand what you mean by "in that area."  
24 So is that in that area, you mean above Elephant Butte  
25 Reservoir?

1           A.     In this specific piece to those schedules,  
2     yes, but I don't think that that means there's not a  
3     limit in the lower Rio Grande as we've kind of  
4     discussed already. There are limits that apply.  
5     There's just no schedule as set out so far. That's  
6     what we're -- that's what we're here to try to figure  
7     out what the baseline is, right?

8           **Q.     So permitting each state to develop its water**  
9     **resources at will below Elephant Butte Reservoir is**  
10    **subject to limitations?**

11          A.     Yes. I believe it is.

12          **Q.     All right. Let's move on to your testimony**

13    --

14                **JUDGE MELLOY:** Mr. Leininger, we've been  
15     going for quite a while. If we're going to switch to  
16     a different exhibit, why don't we break until 1:15.  
17     All right?

18                **MR. LEININGER:** Yes. Thank you, Your  
19     Honor.

20                **JUDGE MELLOY:** Okay. Thank you.

21                        (Recess.)

22                **JUDGE MELLOY:** I think we're just about  
23     ready to go.

24                **MR. LEININGER:** I'm sorry, Your Honor.  
25     I may have misheard. Are we ready to go?



1                   **JUDGE MELLOY:** Just about. We don't  
2 have Mr. Wallace back yet, I don't think.

3                   **MR. LEININGER:** Oh, I'm sorry.

4                   **JUDGE MELLOY:** Okay. Now, we're ready  
5 to go. Before we start, though, let me just mention,  
6 you offered New Mexico 2254 as part of an offer of  
7 proof, Mr. Leininger. That -- actually, that exhibit  
8 is already in evidence, so it doesn't need to be part  
9 of an offer of proof.

10                  **MR. LEININGER:** Thank you, Your Honor.  
11 Thank you for that correction.

12                  **JUDGE MELLOY:** All right. You may  
13 proceed.

14                  **MR. LEININGER:** Thank you.

15                  **Q. (BY MR. LEININGER)** So, Mr. Schmidt-Petersen,  
16 you testified to New Mexico's understanding of Project  
17 supply. Do you recall that testimony?

18                  **A.** I recall that I -- I talked about our -- our  
19 understanding of Rio Grande Project allocations in  
20 coordination with Reclamation, yes.

21                  **Q.** My question specifically about your testimony  
22 on Project supply, you identified it, you defined it,  
23 and I'll just read from your -- from your testimony --  
24 your prior testimony. I think we can pull that up if  
25 necessary, but you said, "The Project supply in that

1 regard is usable water that's released from Caballo  
2 Reservoir, return flows to the river system, and  
3 irrigation infrastructure and then tributary inflows  
4 to the river all the way down to Fabens, Texas." Does  
5 that sound familiar?

6 A. Yes, sir, that's correct.

7 Q. So groundwater that returns to the river  
8 system is project supply?

9 A. If water makes it back to the river in any  
10 form, I believe it's Project supply.

11 Q. Okay. And that includes groundwater?

12 A. Seepage from groundwater, yes. If it's  
13 making it in through a drain it's on, yes.

14 Q. Is intercepting those return flows taking of  
15 Project supply?

16 A. Well, I don't believe it is. I think it was  
17 a common understanding. If you go back to even, what  
18 was it, Jesse Gilmer from the Texas commissioner  
19 talking about the impact of groundwater pumping, I  
20 think, in the Rincon and its effect on the surface  
21 water system, a common understanding that that was  
22 going on, and it was not considered to be a problem.

23 Q. So the testimony you gave about the states  
24 developing water resources at will, that's got to be  
25 limited to impacts, by impacts to Project supply,

1 wouldn't you agree?

2 A. I -- well, I believe -- I think the issue at  
3 will for New Mexico in the Lower Rio Grande is the  
4 declaration of -- the declarations of the groundwater  
5 basins in the early 1980s accomplished that.

6 Q. Okay. I'm just trying to understand your  
7 testimony with regard to Project supply, including  
8 return flows to the river system in the ground and  
9 what the state -- what New Mexico can do with regard  
10 to developing water resources at will. I think you  
11 testified --

12 MR. WECHSLER: I'm going to --

13 Q. (BY MR. LEININGER) If I could summarize your  
14 testimony, you said there are limits to that ability  
15 to develop those water resources, correct?

16 MR. WECHSLER: I do want to object  
17 without letting it go to the part of the question  
18 mischaracterized Mr. Schmidt-Petersen's testimony, but  
19 I understand the question as actually posed is  
20 different.

21 JUDGE MELLOY: Go ahead. You may  
22 answer.

23 A. So, I guess, where I was going with that  
24 about the limits piece of that, from New Mexico's  
25 standpoint, the D1/D2 relationship as developed from

1 1951 to 1978 essentially grandfathers in groundwater  
2 pumping throughout the Project area all the way to  
3 Fabens and that by declaring the groundwater basin in  
4 the early 1980s and requiring any new person trying to  
5 put a new well in, the -- the state engineer at that  
6 time effectively limited new uses of groundwater  
7 within the New Mexico portion of the Project, and  
8 that's the limit.

9 Q. (BY MR. LEININGER) Okay. So post 1978  
10 groundwater pumping that exceeded the groundwater  
11 pumping in that period from '51 to '78, you would  
12 agree that the states have to be limited in their  
13 development of that water resource; is that right?

14 A. I would -- I would say that from the  
15 relationship of 1951 to '78 and with the declaration  
16 of the basin, that if we found that in either state,  
17 there were issues with regards to increased depletions  
18 related to that pumping, that those should be charged  
19 to either state as appropriate.

20 Q. Okay. And recall that you were also asked  
21 about New Mexico's historic understanding of how much  
22 of the Project supply its citizens were entitled to.  
23 Do you recall that testimony? I think you replied  
24 that it's 57 percent of the Project supply on an  
25 annual basis?

1           A.    I believe I replied that. I think it was  
2 equal delivery to farmland.

3           Q.    Right. And I was just trying to understand  
4 your reference to the 57 percent. I believe that New  
5 Mexico is entitled to 57 percent of the Project  
6 supply; is that correct?

7           A.    Yeah, that -- that's been my understanding  
8 since, you know, I took the job for the Rio Grande  
9 Project, yeah.

10          Q.    So New Mexico's entitled to 57 -- 57 percent  
11 of the Project surface water released from Caballo and  
12 57 percent of the released water that percolates into  
13 the ground becomes return flows?

14          A.    I don't know that I said that. I think it  
15 comes down, again, to how we define what that baseline  
16 is, and that's part of the reason that we're in this  
17 litigation, right?

18          Q.    Right. I'm just trying to understand the  
19 boundaries the -- your explanation of the 57 percent  
20 of the Project supply. You had testified as to the  
21 surface water, and you had testified to the return  
22 flows and the fact the return flows include release of  
23 water that's percolated into the ground, and I'll  
24 limit my question to just that water. So Project  
25 supply that New Mexico's entitled to is 57 percent of

1 the release water that percolates into the ground and  
2 becomes return flows; is that your testimony?

3 MR. WECHSLER: I'm going to object again  
4 as mischaracterizing his testimony, and also a  
5 compound question.

6 JUDGE MELLOY: Well, I'm not sure it  
7 mischaracterizes. I think he can answer that. But it  
8 is a little convoluted. Why don't you try to break it  
9 up a little bit?

10 MR. LEININGER: Sure, Your Honor.

11 Q. (BY MR. LEININGER) And I apologize,  
12 Mr. Schmidt-Petersen. The direct question is: Is New  
13 Mexico entitled to 57 percent of the released water  
14 that percolates into the ground and becomes return  
15 flows; is that your understanding?

16 A. So I don't believe -- well, so I think  
17 there's an integration piece there that occurs within  
18 the D1/D2 time period that -- that ties in some of  
19 those pieces, but under New Mexico law, once water  
20 seeps into the ground and makes it to groundwater,  
21 that it is no longer within the dominion and control  
22 of that project and so that water is available for  
23 appropriation. The control on that is the declaration  
24 of the basin, and that's not part of Project supply.  
25 The seepage is not part of Project supply. It's water

1 that backs into the river.

2 Q. So the 57 percent, it sounds like what you're  
3 saying, does not apply to the groundwater?

4 A. That's correct. Groundwater is not a part of  
5 the Project right, it's my understanding, in either  
6 New Mexico or Texas, and I would refer you back to, it  
7 was Jesse Gilmer from Texas Commissioner Jack Hammond,  
8 and even Joe G. Hansen where it talked about the Texas  
9 part of that.

10 Q. Okay. Let's move on. I want to talk now a  
11 little bit more about the Rio Grande Compact. You'd  
12 agree that the authority of the Compact Commission is  
13 limited to the terms of the Compact, correct?

14 A. I would -- yeah, to the -- the articles of  
15 the Compact, yes.

16 Q. Right. And you discussed Article 1, certain  
17 definitions tied to the Project. You pointed out that  
18 Article 1L defines usable water as Project water,  
19 which is available for release in accord with  
20 irrigation demands; do you recall that testimony?

21 A. That sounds correct, excluding obviously  
22 credit water, but I don't have it right in front of  
23 me.

24 Q. I don't think that's in Sub L of Article 1,  
25 but --

1           A.     I don't have it.

2           Q.     Okay. Well, I'm just trying to understand  
3 your testimony on the -- on the scope of the  
4 Commission's Compact authority. Ms. Klahn asked you a  
5 few of these questions. I -- I'm -- I'm going to try  
6 not to be redundant in my questioning, but can -- can  
7 the Commission order usable water not be released from  
8 storage?

9           A.     I believe the Compact Commission could make  
10 an order relative to overall operations of the Project  
11 if they thought they were wasteful and that includes  
12 usable water releases, yes.

13          Q.     Let me put it this way: Can the Commission  
14 order usable water be released from storage to meet  
15 irrigation demands?

16          A.     I know the Compact commissioners individually  
17 can release credit water, but I don't know specific  
18 article in the Compact that says you have any one  
19 particular commissioner or the Compact commission can  
20 direct the release of water from any place actually.

21          Q.     Right. So the -- so the commission powers do  
22 not include determination of Project allocations?

23          A.     Yes in part, and no in part. The issue that  
24 would be there with credit water is that, you know, if  
25 we -- through the accounting, if there's a



1 determination that there's credit water in the  
2 reservoir, once the Compact Commission makes that  
3 decision about credit water and that's communicated to  
4 Reclamation, that then changes their usable water  
5 calculation potentially, and they're bound by that.

6 **Q. But the specific question with regard to**  
7 **allocation, the Commission doesn't determine Project**  
8 **allocations, right? That's -- that is a power that is**  
9 **reserved for the districts and Reclamation?**

10 A. Well, I don't think the Compact says that.  
11 It doesn't say that the Compact Commission has a role  
12 in Project operations either.

13 **Q. Right. So the -- the Commission powers do**  
14 **not include deliveries or diversions by or to either**  
15 **districts, right?**

16 A. Within the Compact, there are no terms that  
17 relate to Project operations nor is there any required  
18 gaging under the Rio Grande Compact, except for those  
19 gages Elephant Butte and below it and Caballo  
20 Reservoir and below that. The last Compact gage is  
21 the below Caballo Reservoir gage.

22 **Q. And the Commission doesn't monitor water --**  
23 **Project water orders or releases or diversions or**  
24 **deliveries or drain flows or metering of the canals,**  
25 **right?**

1                   **MR. WECHSLER:** Objection; compound  
2 question.

3                   **MR. LEININGER:** I can take these one at  
4 a time, but I'm just trying to move along here.

5                   **JUDGE MELLOY:** If the witness can  
6 answer, go ahead.

7           A.     Yes, sir. So if you go back to the  
8 resolution from 2002, the issues about usable water, I  
9 would tell you that in my experience, the Commission  
10 has sought to be involved at a high level, as I  
11 indicated before, looking at issues like waste and  
12 looking broadly at the -- you know, the distribution  
13 to the farmers or to EBID farmers and EP No. 1 farmers  
14 at that level, and with various levels of success. In  
15 my experience, in part because Reclamation has reduced  
16 the amount of available data and the districts now  
17 collect data and nobody -- nobody knows anything about  
18 that data. We don't see it.

19           **Q.     (BY MR. LEININGER) Mr. Schmidt-Petersen, the**  
20 **Commission produces annual reports, right?**

21           A.     That's correct.

22           **Q.     And they do annual accounting, correct?**

23           A.     We do annual Rio Grande Compact accounting,  
24 correct.

25           **Q.     The Commission does not monitor the Project**

1     **water orders, right?**

2           A.     The Commission monitors allocations, but we  
3     do not have information about orders at all.

4           **Q.     Right. And you also don't monitor**  
5     **diversions?**

6           A.     As the Compact Commission, that's correct.

7           **Q.     And you also don't monitor Project**  
8     **deliveries?**

9           A.     During the year, we would look at the overall  
10    system that includes deliveries and make some  
11    assessments. I would argue that those issues that we  
12    were identifying from 2002 and so on go to what was  
13    happening within the district and below it.

14          **Q.     Does the Commission monitor return flows?**

15          A.     The Commission does not have available data  
16    on return flows.

17          **Q.     Does the Commission -- and let me preface**  
18    **this question with: Did you watch Dr. King's**  
19    **testimony?**

20          A.     Not really. I think I might have stepped in  
21    for a minute, but I did not see the majority of his  
22    testimony.

23          **Q.     Okay. Well, you're -- you're familiar with**  
24    **metering that occurs by EBID and EP No. 1 along the**  
25    **river, correct?**

1           A.    I have some familiarity with EBID's  
2 monitoring system because we helped them with funding  
3 for that.  Less so with EP1.

4           **Q.    The Commission doesn't monitor those**  
5 **meterings on the river or the canals?**

6           A.    That goes back to the resolution issue.  That  
7 discussion came up and went all the way up to  
8 assistant secretary for water and science that, you  
9 know, we didn't have transparency and data for the Rio  
10 Grande Project, and we were unsuccessful in getting  
11 that resolved.

12          **Q.    So let me understand, after the 2008**  
13 **operating agreement, for instance, the Commission**  
14 **feels like it is not receiving data on Project**  
15 **operations; is that what you're saying?**

16          A.    I'm not sure it was that.  Even before that  
17 to that 2002 resolution of the Rio Grande Compact  
18 Commission that continued -- I think if we -- if you  
19 look through the engineer advisor reports, you'd find  
20 a number of references there to data availability and  
21 transparency, and we had issues, and we still --  
22 there's still issues with the below Caballo gage, for  
23 example, the Compact states paid, I think, \$80,000 for  
24 acoustic Doppler velocity meter to be installed below  
25 Caballo, which would be probably the highest-quality

1 data similar to what Reclamation did on the Colorado,  
2 and to date that still hasn't been installed. And  
3 that's the Compact gage, right. The issue that came  
4 out was --

5 Q. Mr. Schmidt-Petersen, I'm sorry, I have to  
6 interrupt you, but you're getting afar from the  
7 question that's being asked. The question was with  
8 regard to Commission monitoring of the metering on the  
9 river and the canals, and as I understand it, your --  
10 your answer is no, the Commission does not do that?

11 A. I would qualify that a little and say it  
12 doesn't do it and doesn't have available data to do  
13 it.

14 Q. Okay. And I don't know if you saw this part  
15 of Dr. King's testimony, but he presented allocation  
16 sheets. There are allocation sheets generated by the  
17 Project every month, updated allocation sheets. Does  
18 the Commission receive copies of those?

19 A. I -- again, I didn't see Dr. King's  
20 presentation, so I'm not sure what you're referring  
21 to.

22 Q. Okay. Let's just summarize this. The  
23 Commission is not responsible for Project accounting,  
24 right?

25 A. The Commission has responsibility for

1 accounting for the release from Caballo Reservoir,  
2 which would be -- and the usable water in Project  
3 storage, so it has a portion of it, yes.

4 Q. Is Reclamation -- Reclamation is not  
5 responsible for Compact accounting? Maybe that's the  
6 better question.

7 A. That's correct. Reclamation is not  
8 responsible for Compact accounting.

9 Q. Right. Because Reclamation does not author  
10 the annual reports of the Rio Grande Compact  
11 Commission, right?

12 A. It does not.

13 Q. And Reclamation doesn't have a vote on the  
14 Commission's approval of the annual Compact  
15 accounting?

16 A. It does not.

17 Q. Let's -- let's go to Texas Exhibit 543. I  
18 think Ms. Klahn asked you some questions about this.  
19 This is the Texas version, which as she had explained,  
20 include -- included a table. So you recognize this,  
21 this is the memorandum of understanding?

22 A. I do. This is the memorandum of  
23 understanding from that -- that meeting that had those  
24 other resolutions in it, yeah.

25 Q. And you testified to this -- this document or

1 the New Mexico version of this document and Compact  
2 Commission resolutions, right?

3 A. I did.

4 Q. Memorandums of understanding are different  
5 from Compact resolutions. We'll get to the Compact  
6 resolutions in a minute, but they're different because  
7 MOUs are agreements with the federal agency, right?

8 A. Well, I don't know that I -- I understand the  
9 -- the legal differences. Well, I -- one is more of a  
10 legal agreement with the federal agency through a  
11 memorandum of understanding. There are probably are  
12 other legal ways to do that. A resolution is just a  
13 request or direction from a Compact Commission.

14 Q. Right. And unlike a Compact resolution, MOU  
15 is signed by a federal agency, right?

16 A. That -- that's correct. And I'm not sure on  
17 the resolutions if the federal chair assigns them or  
18 not. I don't think so.

19 Q. Right. So how many other MOUs are there that  
20 were entered by Reclamation and the Commission?

21 A. I don't know.

22 Q. Well, this is the only one regarding Compact  
23 accounting, right?

24 A. To the -- no. There's -- there's another  
25 agreement, but I'm not sure if it was the Rio Grande

1 Compact Commission or resolution. It had to do with  
2 issues associated with the Upper Rio Grande Water  
3 Operations Model. I can't remember if that was a  
4 memorandum of agreement or not. It was an acceptance  
5 of that. So there's other pieces that were going on  
6 at this time.

7 **Q. In the upper Rio Grande?**

8 A. The Upper Rio Grande Water Operations Model  
9 now incorporates the entire upper Rio Grande basin is  
10 my understanding, but in 2002, it was just being  
11 developed.

12 **Q. Let's stick to this MOU. Let's go to Page 2.**  
13 **We are going to pop out the "therefore" clause.**  
14 **Basically here, "The states agreed -- the states and**  
15 **Reclamation, excuse me, agreed to clarify and formally**  
16 **articulate the details of the duties, roles and**  
17 **responsibilities of each party for water accounting,**  
18 **reporting, and documentation." And I think Ms. Klahn**  
19 **asked you a few questions about this, so I'm just**  
20 **going to skip to just a few more additional questions.**  
21 **If we go to PDF 4, and that's Section 3.1 that Ms.**  
22 **Klahn already presented to you. It talks about U.S.**  
23 **Bureau of Reclamation roles and responsibilities.**

24 A. Yes.

25 **Q. As related to Compact accounting and**



1 Commission. If we -- if we go to the second bullet  
2 point, and you were asked about this, but I just want  
3 to confirm that the preparation of annual water  
4 accounting that the Commission is going to provide  
5 details on, this doesn't specifically list the Lower  
6 Rio Grande, does it?

7 A. Not specifically.

8 Q. And it doesn't list the Rio Grande Project?

9 A. Not specifically.

10 Q. And if we go to the fourth bullet point, here  
11 again we have agreement by Reclamation to disseminate  
12 to the Commission and all interested parties,  
13 professional San Luis Valley Projects and Juan Chama  
14 Project accounting throughout the year, again, not the  
15 Rio Grande Project, correct?

16 A. Yeah. I think that Rio Grande Project was  
17 associated with that other resolution.

18 Q. Okay. Let's look at the first bullet point  
19 again, and we'll just get our bearings. So this talks  
20 about the Table 1 that Ms. Klahn had referenced, and  
21 if we go to Table 1. I think that's on PDF 7. Just a  
22 little more specifically, what we have here under  
23 stream flow at the bottom is that -- and I'm sorry.  
24 If we could pop this back in for one second. Let's  
25 just give reference to this table. It's a list of raw

1 Compact data and responsible agencies, and it includes  
2 federal agencies. So we go to stream flow in New  
3 Mexico, and there you've got an agreement that  
4 Reclamation will provide the raw data on the Rio  
5 Grande below Elephant Butte Reservoir and the Rio  
6 Grande below Caballo Dam. And then if we go to PDF 8  
7 of this table, under, "Reservoir Storage in New  
8 Mexico," you see that Reclamation has agreed to  
9 provide raw data on Elephant Butte Reservoir and  
10 Caballo Reservoir, and then I think there was one more  
11 in agreement, and this is with regard to reservoir  
12 evaporation. Reclamation to provide reservoir  
13 evaporation data for Elephant Butte Reservoir and  
14 Caballo Reservoir, correct?

15 A. Yes.

16 Q. My question is: Reclamation's role under the  
17 MOU is to provide limited amount of raw data and the  
18 commission engineer advisor's role is to do the annual  
19 Compact accounting, correct?

20 A. I would modify that slightly. I mean, the  
21 role in here for Reclamation and the others, this is  
22 all of the data sets that are required for annual Rio  
23 Grande Compact accounting so it's not limited in that  
24 way. These are the ones that are specifically called  
25 out through Article 2 or otherwise necessary, you

1 know, due to transmountain diversions and so on for  
2 specific Compact accounting.

3 Q. And there's nothing specific in here  
4 requiring or agreeing or requesting data on releases  
5 from Elephant Butte and Caballo?

6 A. That's correct. Not in this memorandum.

7 Q. And there's nothing agreeing or requesting  
8 data on the allocation to the districts?

9 A. I guess it's the same answer, yeah.

10 Q. Nothing on deliveries to the districts?

11 A. That's correct.

12 Q. And nothing on diversions by the districts?

13 A. Yeah. Beyond the aspects of Rio Grande  
14 Compact accounting, as described in the Compact, those  
15 aren't in there.

16 Q. Right. So under the MOU, the Compact  
17 Commission has no say on how water is used for  
18 irrigation by either district, right?

19 A. I wouldn't say that. This was a memorandum  
20 of understanding to talk about the interconnectedness  
21 of a whole bunch of different parties for specific Rio  
22 Grande Compact accounting, and Compact accounting only  
23 includes those gages down to the gage below Caballo  
24 Reservoir.

25 Q. Okay. And the Commission's authority derives

1 from the Compact, right?

2 A. It does.

3 Q. And the Commission cannot exceed that  
4 authority, correct?

5 A. Within the bounds of the articles of the  
6 Compact, yes.

7 Q. Okay. Let -- let's move on to the Compact  
8 itself. You pointed out in your earlier testimony,  
9 the Commission makes resolutions. Let's look at that  
10 authority. If we pull up the Compact, this is the  
11 Joint 428.

12 MR. LEININGER: It's previously been  
13 admitted, Your Honor.

14 Q. (BY MR. LEININGER) This is a -- I guess a  
15 recitation of the Compact that's in that joint  
16 exhibit, but if we go to Article 12, which is PDF Page  
17 8 of this exhibit, and if we look at Article 12, let's  
18 go to the third paragraph. In this sentence -- it's a  
19 very long sentence, but it basically defines the  
20 jurisdiction of the Commission; is that correct?

21 A. That's my understanding, yeah.

22 Q. And it states in here that the Commission  
23 would make recommendations connected with the  
24 administration of the Compact to the states, not to  
25 Reclamation, correct?

1           A.     In that sentence, yes.

2           Q.     If we go to the last sentence here, "The  
3     Commission may unanimously adopt rules and regulations  
4     to govern Commission proceedings." And then if we go  
5     to the very last sentence of this article, it states  
6     that, finally, "The Commission shall not be conclusive  
7     in any court or tribunal which may be called upon to  
8     interpret or enforce this Compact." So the Commission  
9     recommendations are not binding as -- as a matter of  
10    law, correct?

11          A.     "The findings of the Compact Commission"--  
12    I'll just read this -- "shall not be conclusive in any  
13    court."

14          Q.     You discussed a couple of these non-binding  
15    resolutions. Let's go to Joint 391, which has been  
16    previously admitted. And if we go to -- this is from  
17    your testimony on this particular exhibit from the  
18    Compact Commission report of 2001. If we go to -- I  
19    think this is Page 15, and we pop out the right side  
20    -- actually, if we could pop out the entire page.  
21    We'll just note that here's an example of resolution,  
22    and it's not signed by Reclamation, correct?

23          A.     That's correct.

24          Q.     If we get rid of the signatures, I think we  
25    might be able to read this a little bit better. Let's

1 try again. So you recall your discussion with your  
2 counsel in this resolution? It's the resolution  
3 regarding the need for federal agencies to apply for  
4 state permits?

5 A. I remember testifying on it, yes.

6 Q. And you asked whether the states generally  
7 agreed that the federal agencies should follow state  
8 law in operations?

9 A. That's correct.

10 Q. Okay. And you pointed to the "now,  
11 therefore" clause. This resolves that the Commission  
12 requests federal agencies comply with state law by  
13 obtaining permits for any water-related actions that  
14 would result in new or additional water depletions.  
15 Let's look at how this resolution has been interpreted  
16 by the Commission. I want to go to Joint Exhibit 395.

17 MR. LEININGER: And, Your Honor, this is  
18 also -- this is admitted, and it was, I believe, in --  
19 in Mr. Schmidt-Petersen's earlier testimony.

20 Q. (BY MR. LEININGER) This is the 2005 Compact  
21 Commission Report. If we go to PDF 14, Page 14 on  
22 this, and we pop out the right side, it's  
23 entitled, "Compliance by Federal Agencies With State  
24 Law, Water Law, and regulations." Do you see that?  
25 This 2005 report references the state permit

1 resolution. It talks about habitat restoration,  
2 correct?

3 A. Yeah. In this specific instance, yes.

4 Q. Right. And so under the 2002 resolution to  
5 comply with state permitting, the Army Corps of  
6 Engineers here agrees to offset depletions to habitat  
7 restoration and the IBWC, the third paragraph, agreed  
8 to work with EBID on habitat restoration, and then the  
9 last paragraph, the only action involving the New  
10 Mexico Interstate Stream Commission has an agreement  
11 that the ISC does not need a permit or a statement  
12 that the ISC does not need a permit for offset of  
13 habitat restoration within the active channel of the  
14 Rio Grande in the Albuquerque area. Did I cover that  
15 -- this section correctly?

16 A. For 2005, this is what was in the engineer  
17 advisor report. In that regard, yes.

18 Q. Right. The 2002 resolution was never invoked  
19 for the purposes of the operations of the Rio Grande  
20 Project, correct?

21 A. I believe there's a permit for the Rio Grande  
22 Project.

23 Q. Sorry. I didn't understand your answer.

24 A. Well, I think in this regard, there is a  
25 state engineer permit for the Rio Grande Project.

1           Q.     Right. It was -- it was never intended for  
2     the purpose of operations of the Rio Grande Project;  
3     it was always related to ESA concerns, right?

4           A.     I would say no. It was more general than  
5     that, the discussion. Certainly in 2005 in the Middle  
6     Rio Grande, the issues were habitat restoration  
7     projects. In the Lower Rio Grande with IBWC, it was  
8     -- in this year, it was habitat restoration projects.  
9     In other times, it was issues about acquiring water  
10    for levee construction projects and so on. So, yes,  
11    you're right that in this specific report, it  
12    primarily talks about habitat restoration projects.

13          Q.     Okay.

14          A.     But the evolution is more general than that.

15          Q.     So besides levee restoration and habitat  
16    restoration, can you point to any subsequent document  
17    after 2002 in which the Commission made a proclamation  
18    with regard to acquiring permits under state water law  
19    for operations of the projects?

20          A.     I'm not sure about the Commission. I mean,  
21    it's a standing resolution and a standing report piece  
22    in most engineer advisor reports. I do know of one  
23    other related item where the Bureau did get a permit.  
24    That was for a portion of the middle Rio Grande  
25    Project that was not specifically called out in the



1 previous designs, and that was pump stations to  
2 supplement the river.

3 Q. Okay. Let's move on to the other  
4 resolutions, Commission resolutions, that you talked  
5 about. And you brought up two Commission resolutions  
6 on Project accounting. There's one in 2002, 2004. I  
7 want to go to Joint 460, if we can go to the first  
8 page. Oh, here it is. I'm sorry. Just taking a  
9 while to pop up here. So you -- you provided some  
10 testimony with regard to this one concerning federal  
11 agency operations and their water-related facilities  
12 on the Rio Grande and Compact accounting. Do you  
13 recall that testimony?

14 A. I know it was a bunch of resolutions, but I'm  
15 kind of getting lost here. If we went through, I  
16 could check it out again.

17 Q. Okay. Well, let's go to the second page in  
18 this, and we'll just go right to the "therefore"  
19 clause. That should help. So the 2004 resolution  
20 asks federal agencies that operate projects in the Rio  
21 Grande to advise the Commission prior to changing  
22 operations, correct?

23 A. That's right.

24 Q. You testified that you were aware of the  
25 history of Project operations, right?

1           A.     Yeah. I mean, from my time period working on  
2     the Rio Grande, yes, and the research, yeah.

3           **Q.     Was the Rio Grande Compact Commission with**  
4     **the New Mexico ISC kept apprised of the necessary**  
5     **changes to Project operations in what became the 2008**  
6     **operating agreement?**

7           A.     I would say we were apprised of a number of  
8     pieces, but we're very surprised when that stealth  
9     FONSI was dropped by Reclamation, you know, for the --  
10    what became the 2008 operating agreement. I think  
11    that was in 2007, 2006, something like that.

12          **Q.     But before that, you and Ms. Barroll attended**  
13    **informational meetings on the 2008 Operating Agreement**  
14    **proposal, right, where the concepts of the Operating**  
15    **Agreement were discussed?**

16          A.     We attended numerous meetings amongst  
17    multiple parties about various elements that were  
18    being proposed, but we weren't part of the  
19    negotiations.

20          **Q.     Did the Compact Commission resolve that it**  
21    **was necessary that Reclamation seek its unanimous**  
22    **consent before executing the 2008 operating agreement?**

23          A.     I don't believe the Compact Commission  
24    weighed in after this with a new resolution.

25          **Q.     Right. And, in fact, the Commission would**

1     **not have that authority to do so, correct?**

2           A.     I believe the Compact Commission could weigh  
3     in and say if they thought this was in conformance  
4     with the apportionments under the Compact or not, but  
5     it never -- Reclamation never brought it to the  
6     Compact Commission. I think, actually, it was the  
7     Elephant Butte Irrigation District and Pat Gordon that  
8     brought the agreement to the Compact Commission after  
9     it had been signed.

10          **Q.     The Compact Commission does not have the**  
11     **authority to require Reclamation to seek its unanimous**  
12     **consent before executing the 2008 operating agreement,**  
13     **correct?**

14          A.     I would say there's nothing in the Compact  
15     that directs that.

16          **Q.     Let's go to Exhibit 438. And this is a --**  
17     **let's see. I think we may have to enlarge that a**  
18     **little bit if we go back to the first page. Sorry.**  
19     **And just pop out the transmittal sheet. This is from**  
20     **the State of New Mexico Office of the Governor from**  
21     **Mr. Richardson, Governor Richardson, to Pat Gordon.**  
22     **Pat Gordon was the Texas commissioner at this time; is**  
23     **that correct?**

24          A.     That's my understanding.

25          **Q.     And this is dated, looks like it's April 8th**

1 of 2008. If we go to the second page on this. The  
2 governor was writing to the governor of Texas  
3 congratulating him on the successful negotiations that  
4 resulted in the 2008 operating agreement, correct?

5 A. Well, I don't know that I've ever seen the  
6 letter before, but I've heard about it.

7 Q. Okay. This is not in the ISC records?

8 A. I don't know if I'm CC'd there, but I don't  
9 know if we have that or not. Looks like John  
10 D'Antonio would have it.

11 Q. Right. It's John D'Antonio. So are you  
12 familiar with this document?

13 A. I don't know that I've seen it. I've heard  
14 about it.

15 Q. Okay. Well, we'll bring this document back  
16 so I won't move for its admission at this time.

17 Let's move on. You mentioned -- I think  
18 Mr. Wechsler had asked you about a concern that IBWC  
19 raised about the water budget. Do you recall that  
20 testimony?

21 A. Yes.

22 Q. I believe you stated that the IBWC  
23 commissioner, Mr. Drusina, informed the Rio Grande  
24 Commission, the Compact Commission at meetings that  
25 the IBWC was conducting a study regarding releases and

1 the water arriving at the International Dam. Did I  
2 get that right?

3 A. Yeah. I'm not sure exactly on my testimony  
4 piece there, but Ed Drusina certainly brought that up  
5 and made specific requests of the Compact Commission  
6 and Reclamation and others to -- to join with them and  
7 came up in engineer advisor meetings.

8 Q. And you said in your testimony the study  
9 related to groundwater pumping. Do you recall that?

10 A. Yes. It was a water budget study in the  
11 lower Rio Grande, and the issue was there was  
12 groundwater pumping, you know, affecting the  
13 deliveries to Mexico.

14 Q. Right. I think you stated in your testimony  
15 that the outcome of the study showed that there wasn't  
16 an issue with that delivery to Mexico?

17 A. I believe that's correct, that there was no  
18 additional action that was necessary that they felt.

19 Q. You didn't identify the study that the IBWC,  
20 you said it conducted, but let's go -- let's pull up  
21 what's marked as New Mexico 2410. And this is a  
22 transmittal page. I think if we just go to the next  
23 page, which has the actual document. Yes. This is  
24 the -- dated December 6, 2013, "Preliminary Analysis  
25 of Channel Seepage and Water Budget Components along

1 the Rio Grande Canalization Project." It's a report  
2 from Tetra Tech. I'm sorry. If we go back to the  
3 first page, we'll see who it was generated for. So  
4 this is the IBWC document informing Reclamation that  
5 this study has now been conducted, and the result --  
6 the report was attached by Tetra Tech. Is this the  
7 study you were referring to?

8 A. I'm not sure if this is the actual final  
9 piece of it. It kind of -- I don't know. Is this  
10 CC'd to me?

11 Q. It was not. This is a letter from IBWC to  
12 Reclamation, but your reference to the IBWC study  
13 didn't identify a document, and this is the only  
14 document -- if we go to the next page, this is the  
15 only document that I'm aware of that discussed what  
16 you were testifying to. So is this the document that  
17 you were familiar with?

18 A. I'm not sure if this is actually the end  
19 point of that investigation. It sounds like -- looks  
20 like it's a final report from Tetra Tech, but it's a  
21 preliminary analysis, so I can't remember if this is  
22 the final -- final with those in that regard or not.

23 Q. Right. And we're -- I'm trying to get to  
24 your testimony. This report addressed channel loss  
25 along the Rio Grande. It discusses groundwater

1 pumping. Let's go to PDF 63. Your testimony was with  
2 regard to a study by IBWC showing the groundwater  
3 pumping was not an issue for purposes of delivery to  
4 the International Dam, and if we look at 12.2  
5 here, "Best Water Management Practices for Future  
6 Years," first sentence states that, "Based on the  
7 results from this study, the channel seepage component  
8 of the water budget study appears to be a significant  
9 variable in the water budget." And if we go down to  
10 the first sentence in the second full paragraph, it  
11 states that, "Considering the effects that the 2011  
12 pumping had on the aquifer and the associated high  
13 degree of seepage that occurred during the beginning  
14 of the 2012 release, significant pumping from the  
15 aquifer similar to that which occurred in 2011 is not  
16 recommended." So, Mr. Schmidt-Petersen, this would  
17 suggest the groundwater pumping above International  
18 Dam is a concern to the IBWC, right?

19 MR. WECHSLER: Your Honor, at this  
20 point, can I inquire whether this is an admitted  
21 exhibit? I don't think it is. I was trying to give a  
22 little leeway in case what we were doing was laying  
23 foundation, but the question Mr. Leininger just asked  
24 is a substantive question, and we've already heard  
25 Mr. Schmidt-Petersen say he wasn't sure if this is the

1 final document or if -- you know, in what way this  
2 report relates.

3 **MR. LEININGER:** If I may respond, Your  
4 Honor.

5 **JUDGE MELLOY:** You may.

6 **MR. LEININGER:** Mr. Schmidt-Petersen  
7 gave a substantive answer with regard to the IBWC  
8 study and seemed to indicate that this study relates  
9 to that question in the substance of his answer. So I  
10 think for purposes of having him address the question  
11 of impacts of groundwater pumping, this is an  
12 appropriate document, and it should be admitted.

13 **MR. WECHSLER:** Well, we don't have  
14 foundation, Your Honor. We have someone who's saying  
15 he's not sure if this is the final document or if --  
16 in what way this relates. Certainly, we wouldn't want  
17 to have a preliminary document, as it's -- as it's  
18 titled.

19 **JUDGE MELLOY:** Well, I'll let you answer  
20 the question subject to it being struck if we can't  
21 eventually get the document into evidence. Subject to  
22 later admissibility of the document, I'll let you ask  
23 him about it.

24 **MR. LEININGER:** Okay.

25 And if we could go to the second page



1 again because I think there's some confusion that this  
2 is not a preliminary report, this is a final report.  
3 I think Mr. Schmidt-Petersen had testified that he had  
4 seen preliminary reporting. So this particular  
5 document is the final report generated by -- by the  
6 contractor.

7 **MR. WECHSLER:** It's a final report of  
8 the preliminary analysis, I suppose?

9 **Q. (BY MR. LEININGER)** My question,  
10 **Mr. Schmidt-Petersen, is what we had just seen on Page**  
11 **63 -- go back to that -- suggests the groundwater**  
12 **pumping above International Dam is a concern to the**  
13 **IBWC, correct?**

14 **A.** I would say -- well, number one, I don't know  
15 that I've seen this document in reporting. I was  
16 referring, I think, primarily to our conversations  
17 with the Commissioner of IBWC and that, you know, a  
18 number of reports had been generated. So I don't know  
19 where this one sits in that overall process. I'd have  
20 to go look back at it. I think what this says is that  
21 some additional study is necessary because there's  
22 pumping of the aquifer and reductions to irrigation  
23 releases that were in place.

24 **Q.** Did you identify what document you were  
25 referring to when you said there was a report by IBWC

1 that confirmed that groundwater pumping in New Mexico  
2 was not a concern about deliveries at International  
3 Dam?

4 A. I believe what my comment there was, was  
5 reports to us and to the Compact Commission.

6 Q. But you didn't reference a specific report or  
7 you just don't know?

8 A. I know that a number of reports were  
9 generated.

10 Q. But you did not identify a specific report,  
11 correct?

12 A. I believe that's correct.

13 Q. Let's go to your demonstrative slide, and  
14 this is Demonstrative 22. And if we go to PDF 8 of  
15 your demonstrative, you have a list of ISC water and  
16 infrastructure works downstream of Elephant Butte,  
17 but, Mr. Schmidt-Petersen, the amount of money the New  
18 Mexico ISC budgets for the lower Rio Grande is much  
19 less than ISC expenditures upstream of Elephant Butte;  
20 wouldn't you agree?

21 A. In part, yes; in part, no. I can explain.  
22 In part, yes. Our annual budget for work downstream,  
23 you know, includes these types of items, but for  
24 technical work, it's less than other places. The  
25 biggest expenses that we have are related to channel

1 construction activities, and those occur primarily  
2 upstream of Elephant Butte because downstream, they're  
3 IBWC's responsibility and not ours.

4 Q. Are you familiar with the annual ISC work  
5 plans, right?

6 A. Oh, absolutely, yeah.

7 Q. And you were present when New Mexico ISC  
8 approved the work plan for the Lower Rio Grande for  
9 fiscal year 2019?

10 A. Yes, for '19, as well as the litigation  
11 budget.

12 Q. Okay. Let's pull up this next document. And  
13 I'm using this -- I'm not going to attempt to enter  
14 this document. It is not an exhibit, but I am going  
15 to use it for impeachment purposes. Can we pop out  
16 the executive summary here?

17 MR. WECHSLER: Well, if it's being used  
18 for impeachment purposes, I suppose he's going to have  
19 to say something inconsistent with it; is that right?

20 JUDGE MELLOY: Go ahead. Go ahead and  
21 ask your question.

22 MR. LEININGER: Okay.

23 Q. (BY MR. LEININGER) There's a list of three  
24 tasks here, correct, and the budget states that should  
25 not exceed \$100,000 in fiscal year 2019. Am I reading

1 that correctly?

2 A. Yes.

3 Q. And then you're familiar with the fiscal year  
4 2019 middle Rio Grande work plan, too, right?

5 A. I -- I am.

6 Q. And if we pull that up, we'll see the middle  
7 Rio Grande work plan, and if we go to Page 18 of this,  
8 we see the 2019 budget for the middle Rio Grande, and  
9 you have about ten here that are related to the river,  
10 and the budget is over \$1 million. Am I reading that  
11 correctly?

12 A. I would say the overall middle Rio Grande  
13 budget significantly more than that. These are just  
14 primarily river maintenance or specific  
15 Compact-related activities.

16 MR. LEININGER: Thank you,  
17 Mr. Schmidt-Petersen. I have no further questions.

18 JUDGE MELLOY: All right. Mr. Wechsler,  
19 do you have some redirect?

20 MR. WECHSLER: A little bit, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. WECHSLER:

23 Q. Just to clarify a couple of issues, starting,  
24 Mr. Schmidt-Petersen, going chronologically and  
25 starting with a question Ms. Klahn asked you about the

1 La Plata Compact and whether that notice -- principles  
2 of notice apply. I think you offered some direct  
3 testimony about that, as well. In your view given  
4 your role in administering Compacts, does the  
5 principal of notice apply below Elephant Butte  
6 Reservoir in the Rio Grande Compact?

7 A. I think that applies, yes.

8 Q. And why is that?

9 A. It goes to a point that they were making  
10 before. We don't know, and we really don't have a way  
11 of knowing what issues might arise in the Lower Rio  
12 Grande because we don't have access to that data or  
13 information, particularly the Texas piece of that, and  
14 so by providing notice, we can evaluate that, ask  
15 questions, and try to gather that information.

16 Q. Mr. Schmidt-Petersen, moving then to another  
17 question that you were asked by Ms. Klahn, you were  
18 asked about Exhibit New Mexico 2362. Do you recall  
19 that?

20 A. Is this the -- it's the -- is this this long  
21 --

22 Q. That's right. If you -- if you scroll down a  
23 couple pages, it gets to the summary, and you had a  
24 discussion with Ms. Klahn, and you were --

25 A. Yes.

1           Q.    -- you were cut off in the middle of your  
2 answer. I'd just like to get you to go ahead and  
3 please finish what -- the point you were making about  
4 --

5           A.    My point was that the -- this summary to  
6 Federal Commissioner Salazar was Reclamation's  
7 summation of the activities and background related to  
8 the -- really, the Colorado request and concern about  
9 January and February, 1996, releases for the Project,  
10 and -- and I just wanted to say that from my  
11 perspective in looking at this, the end point of the  
12 memo was that the -- the water was being released in  
13 January and February, in large part to supply some  
14 water to the City of El Paso, potentially for, you  
15 know, for moving water and water quality concerns, but  
16 then the -- the aspect of a 20 percent efficiency in  
17 Project operations means to me, similar to what I saw  
18 in 2002, that there was a lot of water just passing  
19 through the system and not actually being delivered to  
20 farms. So in the end, I saw this as water being  
21 released from the reservoir where it was likely being  
22 released through demands and that a lot of water  
23 wasn't making it to the farms and going out the  
24 bottom.

25          Q.    Moving then to the -- you had a discussion

1 with -- with both Ms. Klahn and Mr. Leininger about  
2 the Compact rules. We don't need to look at them, but  
3 I want to make sure your testimony is clear. They  
4 both pointed you to this ability of the states to  
5 develop their water resources subject only to the  
6 Article 4 deliveries. You recall that?

7 A. I do.

8 Q. And to be clear, is it your understanding  
9 that that provision of the ability to develop water  
10 resources also applies to water resources below  
11 Elephant Butte Reservoir?

12 A. It does, anywhere in the basin above Fort  
13 Quitman.

14 Q. During the testimony with Ms. Klahn, she  
15 showed you some of the hydrographs from wells in the  
16 lower Rio Grande that were part of the lower Rio  
17 Grande regional plan. Do you recall that?

18 A. Yes, I do.

19 Q. And -- and I think when you testified on  
20 direct, you used that as just one example. Do you  
21 regularly review similar types of hydrographs of wells  
22 in the lower Rio Grande?

23 A. My office certainly does.

24 Q. And does that include hydrographs all the way  
25 up through to the present?

1       A.     It would include hydrographs up at least  
2     within one or two years of now, yes.

3       Q.     And what -- remind us what those trends show.

4       A.     For the valley bottom within New Mexico, it  
5     continues to climb in water levels or some  
6     stabilization in some areas but no recoveries.

7       Q.     Moving next to a discussion you had with  
8     Mr. Leininger about the 57 percent of supply that you  
9     testified New Mexico's entitled to, and there was some  
10    confusing questions about return flows. Is it your  
11    understanding that return flows that make it to the  
12    bed of the river form part of that 57 percent that --  
13    that -- or form part of overall Project supply?

14    A.     Yes, it is.

15    Q.     And so then New Mexico would be entitled to  
16    57 percent of that?

17    A.     That's correct. Water that's in the river.

18    Q.     And I think your testimony was ultimately  
19    that has to do with an equal amount of that Project  
20    supply arriving at each acre of land; is that right?

21    A.     That's correct.

22    Q.     And then you had, again, sort of a lengthy  
23    discussion both with Ms. Klahn and Mr. Leininger about  
24    this MOU. I wasn't quite clear where that was going,  
25    but let me just ask you directly: I mean, has New



1 Mexico regularly monitored the allocations, the  
2 Project allocations, that are made?

3 A. Yes, we have.

4 Q. And is that because it makes up part of New  
5 Mexico's Compact apportionment?

6 A. That's correct.

7 Q. And I think you testified on direct that the  
8 Compact Commission and the engineer advisors have  
9 regularly reviewed, considered, evaluated those  
10 Project allocations as part of Compact matters. Do I  
11 have that right?

12 A. I would say that to the extent that  
13 information is available to us, yes, but that has been  
14 sporadic and sometimes delayed.

15 Q. Do you consider that lack of information to  
16 be a problem?

17 A. I do.

18 MR. WECHSLER: No further questions,  
19 Your Honor.

20 JUDGE MELLOY: Ms. Klahn, anything  
21 further?

22 MS. KLAHN: No, Your Honor. Thank you.

23 JUDGE MELLOY: Mr. Leininger?

24 MR. LEININGER: No, Your Honor. Thank  
25 you.

1                   **JUDGE MELLOY:** Did you have anything,  
2 Mr. Wallace? I guess I didn't give you a chance.

3                   **MR. WALLACE:** No, Your Honor. Thank  
4 you.

5                   **JUDGE MELLOY:** I'm still confused about  
6 what's project supply. You said it's water in the --  
7 that's released, return flows, accretions, but you  
8 also said, as I understand it, that if the water seeps  
9 into the ground, the groundwater is not part of any  
10 Project water; is that my understanding?

11                  **THE WITNESS:** That's -- that's correct.

12                  **JUDGE MELLOY:** What if the groundwater  
13 pumping totally deletes return flows?

14                  **THE WITNESS:** So, Special Master, I  
15 would say that that comes to the aspect of looking at  
16 the D1/D2 relationship, and there is a limit to that,  
17 right. So during that '51 to '78 time period, there  
18 was substantial pumping that was going on throughout  
19 the system, resulted in the relationship that -- that  
20 we now have today, and within that, didn't get to that  
21 point. And so for New Mexico, with the declaration of  
22 the basin in 1980 and '82, there should be no  
23 additional groundwater pumping to -- to cause a  
24 different situation on the river.

25                  **JUDGE MELLOY:** So basically, pumping is

1 frozen as of 1978; is that what you're saying?

2 THE WITNESS: I believe, yes. From that  
3 time period -- actually, it would be declaration of  
4 the basin, and I'm not sure if it would be a whole lot  
5 of difference in wells there, right, between '78 and  
6 '80 or '82, but with those declarations, anybody new  
7 coming in would basically have to go through the  
8 permit process and bring offsets as required. Now,  
9 farmers and others had wells prior to this and so  
10 that's -- that -- the question there is how much of  
11 that pumping, you know, really occurred in what was  
12 grandfathered, I think.

13 JUDGE MELLOY: And I was a little bit  
14 confused about two numbers. You had said in response  
15 to a question that there had been an adjudication that  
16 gave the farmers 5.5 acre-feet combined surface and  
17 groundwater pumping, yet as I understood from some  
18 prior testimony, is the state engineer limited that to  
19 4.5? The number 4.5 has also been thrown around.

20 THE WITNESS: Yes, sir. So within New  
21 Mexico and the adjudication, and I'm not the -- this  
22 is just me from my memories of that, within the  
23 adjudication, the farmers were adjudicated a right,  
24 and that was generally 4.5 feet -- acre-feet per acre  
25 combined surface water and ground with the opportunity

1 to prove up that they had actually historically  
2 consumed or utilized more than that. So I don't think  
3 -- I think the general number applies, and I don't  
4 remember, you know, what the status is for these  
5 individuals that made separate applications to prove a  
6 higher duty.

7 JUDGE MELLOY: All right. Does anybody  
8 want to follow up on any of those questions?

9 MR. WECHSLER: Briefly, Your Honor.

10 Q. (BY MR. WECHSLER) Just a couple  
11 clarifications, Mr. Schmidt-Petersen. So you're  
12 talking about with the Special Master, the closure of  
13 the basin, and that closure of the basin occurred in  
14 New Mexico; is that right?

15 A. That's correct.

16 Q. In 1980 and 1982?

17 A. That's right.

18 Q. Was there a closure of the groundwater basin  
19 in Texas to your knowledge?

20 A. I don't believe. Texas has a similar process  
21 and that no such closures occurred.

22 Q. And then you mentioned Stream System Issue  
23 101 in your discussion with the Special Master. Was  
24 that intended to quantify the historic beneficial use?

25 A. Of the farmers, yes.

1           Q.    And are you aware that it's Mr. Longworth who  
2           will be testifying to that issue for the State of New  
3           Mexico?

4           A.    I wasn't aware that it's Mr. Longworth, but I  
5           knew somebody else was doing it.

6           Q.    I'll represent that it is.

7                   MR. WECHSLER:  Thank you.  No further  
8           questions.

9                   JUDGE MELLOY:  Ms. Klahn or  
10          Mr. Leininger, do you have anything?

11                  MS. KLAHN:  I have one question of  
12          clarification related to the basin closure.

13                  JUDGE MELLOY:  Go ahead.

14                               RE CROSS EXAMINATION

15          BY MS. KLAHN:

16                Q.    Mr. Schmidt-Petersen, you testified about the  
17                basin closures in 1980 and '82 as being administrative  
18                actions that prevented new wells, correct?

19                A.    I think I believe anybody that -- at that  
20                point in time, anybody that wanted to drill a new well  
21                needed to come to the state engineer's office and make  
22                application.

23                Q.    So if you had an existing well in 1980 or  
24                '82, and you were pumping it at a particular level,  
25                let's call it 1 acre-foot per acre, you weren't

1 limited to that 1 acre-foot per acre of pumping in  
2 1982, were you?

3 A. I don't know that there would be data  
4 associated with that, but I know that a lot of farmers  
5 were pumping wells prior to that time period, yes.

6 Q. Right. But my point was administratively,  
7 the declaration of the basin was limited to, before  
8 and after, existing wells, new wells, but it didn't  
9 control or -- or limit the existing wells pumping in  
10 any way, correct?

11 A. As I understand it, at that time, it was  
12 simply a declaration saying that you needed to come  
13 forward. The thing that comes to my mind in that time  
14 period is actually the remark by Texas Commissioner  
15 Gilmer that, you know --

16 Q. Can I just get you to answer my question,  
17 which doesn't have anything to do with Texas  
18 Commissioner Gilmer?

19 A. Okay.

20 Q. It simply was: Administratively, the basin  
21 closure orders didn't control or limit in any way the  
22 pumping in wells that were existing in 1980 and '82,  
23 correct?

24 A. Anything prior to the closure of the basin.

25 MS. KLAHN: Thank you. That's all I

1 have.

2 **JUDGE MELLOY:** All right. If there's  
3 nothing further, then the witness is excused. I  
4 understand we're going to take up Dr. Stevens next.  
5 Should we take five minutes to get chairs changed and  
6 --

7 **MR. WECHSLER:** Yes, please.

8 **JUDGE MELLOY:** Okay.

9 (Recess.)

10 **JUDGE MELLOY:** All right. I think we're  
11 ready to get started here. Just to make sure the  
12 record is clear, could I ask the parties who have --  
13 will be examining this witness to enter their  
14 appearance, please? For Texas, we have Ms. Atton; is  
15 that correct? Excuse me. You're for New Mexico. I'm  
16 sorry. Ms. Coleman -- Mr. Hoffman for Texas, right?

17 **MR. HOFFMAN:** Yes, Your Honor. Robert  
18 Hoffman appearing on behalf of Texas.

19 **JUDGE MELLOY:** And for New Mexico, Ms.  
20 Atton?

21 **MS. ATTON:** That's correct, Your Honor.

22 **JUDGE MELLOY:** And Ms. Coleman for the  
23 United States?

24 **MS. COLEMAN:** Yes. Good afternoon.

25 **JUDGE MELLOY:** And Mr. Wallace, again,

1 for the State of Colorado.

2 **MR. WALLACE:** Yes, Your Honor.

3 **JUDGE MELLOY:** All right. I believe  
4 when we left off, you were cross-examining, Ms.  
5 Coleman; is that correct?

6 **MS. COLEMAN:** That's correct.

7 **JUDGE MELLOY:** All right. And I do want  
8 to advise the witness, again, welcome back,  
9 Dr. Stevens, that you are still under oath and the  
10 same admonitions about documents and having access to  
11 communication devices applies. Do you understand is  
12 that.

13 **THE WITNESS:** I do, Your Honor. Thank  
14 you.

15 **JUDGE MELLOY:** All right. Ms. Coleman,  
16 you may proceed.

17 **MS. COLEMAN:** Thank you.

18 **JENNIFER STEVENS,**  
19 having been previously duly sworn, testified further  
20 as follows:

21 **FURTHER CROSS-EXAMINATION**

22 **BY MS. COLEMAN:**

23 **Q.** Good afternoon, Dr. Stevens. We're picking  
24 up from where we left off on October 20th since then,  
25 since October 20th, have you done anything to prepare



1     **for your testimony today?**

2           A.    I have, just sort of to recollect, make sure  
3     that the things that I was remembering were correct,  
4     I've gone back and looked at a few of the documents  
5     that I had in my head from last time, but other than  
6     that, nothing specific.

7           **Q.    Did you review the transcripts from your**  
8     **testimony on the 19th and 20th?**

9           A.    I did, yes.

10          **Q.    And since October 20th, have you met**  
11     **virtually or otherwise with any attorneys for the**  
12     **State of New Mexico?**

13          A.    Yes.

14          **Q.    How many times?**

15          A.    Just yesterday in New Mexico.

16          **Q.    For about how long?**

17          A.    Five hours -- well, we were -- we were in the  
18     same building for five hours. We weren't meeting the  
19     whole time.

20          **Q.    Okay. How many attorneys were there?**

21          A.    Just one. Sorry. Mr. Draper was there, as  
22     well.

23                   **THE REPORTER:** I apologize for  
24     interrupting but mister who was there?

25                   **THE WITNESS:** Mr. Draper.

1           Q.    (BY MS. COLEMAN) Did you speak to any other  
2 New Mexico witnesses?

3           A.    No. Just in the hallway as  
4 Mr. Schmidt-Petersen was leaving, but otherwise no.

5           Q.    Did you watch Mr. Schmidt-Petersen's  
6 testimony on October 21st?

7           A.    No.

8           Q.    Did you review the transcript of his  
9 testimony on October 21st?

10          A.    No.

11          Q.    And you watched his testimony today, though,  
12 right?

13          A.    I watched some of it. I didn't watch the  
14 whole thing.

15          Q.    Okay. So let's go back to where you were  
16 when we were finishing up last time, which is Rebuttal  
17 Opinion 2 on Page 15 of your rebuttal report, which is  
18 New Mexico Exhibit 2098. And in the second sentence,  
19 you say, "The Bureau of Reclamation and other parties'  
20 conduct in the post-Compact era indicates that no  
21 contemporary actor believed that the Compact  
22 prohibited groundwater pumping." You remember our  
23 discussion about that last time, right?

24          A.    Yes. Can you tell me again -- oh, never  
25 mind. I found it.

1           Q.    So in that category of other parties'  
2   conduct, we talked about EBID requesting the USGS  
3   study in 1946, the USGS conducting and issuing a press  
4   release about that study, and some Reclamation water  
5   announcements. Is that a fair summary of the conduct  
6   that you're talking about in this opinion?

7           A.    And the actual farmers who dug the wells and  
8   installed them.

9           Q.    Right. Was there any conduct by New Mexico  
10   officials that you considered in Rebuttal Opinion 2?

11          A.    Well, I looked at, you know, the Project  
12   histories and many other documents in the post-Compact  
13   era up to the 1960s and so New Mexico was, of course,  
14   represented in those documents. There's nothing that  
15   leaps to mind specifically that relates to this exact  
16   sentence, but I -- I did review to the degree that it  
17   was in the materials that I looked at, New Mexico --  
18   what was happening in New Mexico during this time  
19   period.

20          Q.    But you haven't cited any conduct by a New  
21   Mexico state official encouraging pumping, right?

22          A.    I would have to look back through my whole  
23   report to see if I've done that. That's -- I can't  
24   think of any off the top of my head, but that doesn't  
25   mean that I didn't. I don't know.

1           Q.    Okay.  And in preparing your reports, did you  
2 develop an understanding of how groundwater was  
3 administered under New Mexico law during the '40s and  
4 '50s?

5           A.    No.

6           Q.    Okay.  But you do mention Steve Reynolds, the  
7 New Mexico state engineer, in your reports, right?

8           A.    I think I do.

9           Q.    Okay.  Let's go to Page 94 of your first  
10 report, which is New Mexico Exhibit 2097.  We look  
11 towards the bottom there -- here we go -- we see the  
12 last sentence of this paragraph.  "But the appointment  
13 of Steve Reynolds to state engineer in 1955, a post he  
14 would hold for more than 30 years, altered the  
15 groundwater system in New Mexico with his focus on  
16 groundwater basin declarations and regulations."  Do  
17 you see that?

18          A.    I do.

19          Q.    So did you develop an understanding of  
20 groundwater basin declarations and regulations in  
21 preparing your reports?

22          A.    Not specifically, no.

23          Q.    So is there a documentary basis for this  
24 statement at the end on the bottom of Page 94?

25          A.    I've done a lot of work in New Mexico, and I

1 just happen to know that he -- and, of course, have  
2 heard in this case that he declared groundwater  
3 basins, but I don't have any specific information  
4 about the role that he played here. So I'm not  
5 referring to any specific document; I'm just stating  
6 what I happen to know was one of the focuses that he  
7 had during his administration or his tenure.

8 **Q. Is that from your work on the Pecos?**

9 A. It's my work here, as well as on the Pecos,  
10 and just reading a lot of New Mexico water  
11 documentation over the years.

12 **Q. Okay. So who was Steve Reynolds'**  
13 **predecessor?**

14 A. The state engineer -- I'd have to look back  
15 at the -- I can't remember specifically off the top of  
16 my head who preceded him immediately.

17 **Q. Okay. Let's look at the next -- so staying**  
18 **with your first report here, we'd go to Page 95.**  
19 **That's the next page here, which is your conclusions**  
20 **page, and there's the big second paragraph. In the**  
21 **middle there, we've highlighted the sentence for you.**  
22 **So we've highlighted the sentence that**  
23 **says, "Furthermore, the absence in the historical**  
24 **record of any water users objecting to these studies**  
25 **or to actual groundwater pumping between the 1930s and**

1 the 1950s suggests that no one contemporarily believed  
2 that the Project owned a prior right to these  
3 supplies." Do you see that?

4 A. Yes.

5 Q. And "supplies" there is referring to  
6 groundwater supplies?

7 A. I believe so, yes.

8 Q. Sorry. I was trying to save time by not  
9 reading through each prior sentence. Okay. So let's  
10 -- last time we were looking at EBID board minutes  
11 from October, 1947. Do you remember that?

12 A. Yes.

13 Q. Okay. And that was New Mexico Exhibit 1605.  
14 Just as a point of clarification for the record, I  
15 stated that some of the -- that the highlighting on  
16 this document was attributed to you in the native  
17 Adobe PDF, but for the record, I'll just say that  
18 there's highlighting at the top of Page 9 of New  
19 Mexico 1605 on the section marked "pumping" that  
20 cannot be so attributed. So I just wanted to clarify  
21 that for the record.

22 Now, when we spoke last time, you said you  
23 had access to all of the EBID minutes. Do you  
24 remember that?

25 A. Yes.

1           Q.    Okay. Did you review all of them, at least  
2 from the 1940s and 1950s?

3           A.    Yes.

4           Q.    So let's take a look at New Mexico -- New  
5 Mexico Exhibit 176, which is previously admitted.  
6 This is a giant set of EBID meeting minutes from the  
7 1950s. We'll go to Page 33, and we see the heading at  
8 the top there, these are minutes from a meeting held  
9 August 8th, 1950, and so then we'll skip two pages  
10 ahead to Page 35 and look at the bottom of that page.  
11 We see in the margin, "Drilling of wells and use of  
12 groundwater in district." Do you see that?

13          A.    I see what's on the screen, yes.

14          Q.    Yes. Okay. And so on the last line of that  
15 page, we see, "Judge Mechem was requested to furnish  
16 information on the following topics." We discussed  
17 Judge Mechem last time. Do you remember that?

18          A.    I do.

19          Q.    He was one of Texas' legal advisors in the  
20 Compact negotiations, right?

21          A.    Yes.

22          Q.    So let's go to the next page, 36, to the  
23 continuation. And so we see there at the top, there's  
24 a numbered list, and so these are the other topics  
25 Judge Mechem was asked to furnish information on. So

1 we see an analysis and explanation of New Mexico  
2 groundwater law, the question about the operation of  
3 wells and whether it can be controlled by the state  
4 engineer or by anyone else, and then whether or not  
5 there would be any basis for the Bureau of  
6 Reclamation, or the District, to claim control over  
7 groundwater. Do you see that?

8 A. Yes.

9 Q. Okay. So let's just look at that --

10 JUDGE MELLOY: Excuse me a second.

11 Ms. Coleman, could you possibly get just a little  
12 closer to the mic? I'm hearing you but not super --  
13 super well.

14 MS. COLEMAN: Actually, let me turn my  
15 microphone settings up. Hopefully that helps.

16 Q. (BY MS. COLEMAN) Okay. So --

17 JUDGE MELLOY: That's better. Thank  
18 you.

19 MS. COLEMAN: Is that better? Thank  
20 you.

21 JUDGE MELLOY: Thank you.

22 Q. (BY MS. COLEMAN) So a summary of Judge  
23 Mechem's statement follows below, and we see that  
24 first paragraph we're highlighting. "It was the  
25 opinion of Judge Mechem that a groundwater District



1 could not be created in and adjacent to the Elephant  
2 Butte Irrigation District unless it was definitely  
3 established that groundwater was derived from some  
4 source other than the river." Do you see that?

5 A. I do.

6 Q. Do you know what a groundwater District  
7 means?

8 A. I don't specifically, no.

9 Q. You don't. Okay. All right. So you don't  
10 -- you don't know if it has to do with groundwater  
11 basins and declarations?

12 A. I don't.

13 Q. Okay. So then we see in the next paragraph,  
14 we'll go partway through, there's a sentence  
15 beginning, "In his opinion, groundwater derived from  
16 the river, arroyo inflow, and rainfall is not subject  
17 to appropriation under New Mexico state law, nor to  
18 control by means of a groundwater district; but  
19 groundwater derived from other sources is subject to  
20 appropriation under New Mexico state law and to  
21 control by means of a groundwater district."

22 So, Dr. Stevens, as a historian specializing  
23 in western water issues, you're familiar with the  
24 doctrine of prior appropriation, right?

25 A. Yes.

1           **Q.**     Generally, not asking you for any opinion  
2     about New Mexico state law, what does an appropriation  
3     refer to?

4           **A.**     It refers to --

5                   **MS. ATTON:**   Objection, Your Honor, I'm  
6     sorry, to the extent it calls for a legal opinion.

7                   **JUDGE MELLOY:**   Overruled.   As a  
8     historian, she can answer the question.   Go ahead.

9           **A.**     An appropriation is a claim for water, and  
10    depending on where you are, there are various  
11    requirements and such, but it's basically a claim to  
12    water.

13           **Q.**     **(BY MS. COLEMAN)**   And you agree that the  
14    surface waters of the Rio Grande were fully  
15    appropriated by the time of the Compact, right?

16                   **MS. ATTON:**   Same objection; calls for a  
17    legal opinion.

18                   **JUDGE MELLOY:**   I'll sustain that.  
19                   Go ahead.

20           **Q.**     **(BY MS. COLEMAN)**   Okay.

21                   **JUDGE MELLOY:**   Well, let me just go back  
22    a second.   Is that in her report?

23                   **MS. COLEMAN:**   It's in her deposition.

24                   **JUDGE MELLOY:**   I think it's in the  
25    report so I'm going to overrule the objection.   You

1 may answer that question.

2 A. I will -- I think you asked if the surface  
3 water supply was fully appropriated at the time of the  
4 Compact; is that what you asked?

5 Q. (BY MS. COLEMAN) Yes.

6 A. Okay. And I would say that the 1908 filing  
7 by the Rio Grande Project appropriated all of the  
8 surface water in the Rio Grande, yes, that had not  
9 been appropriated.

10 Q. Okay. Thank you. So let's continue down  
11 Page 36 to the letter that's reproduced there, Mechem  
12 & Mechem, Attorneys at Law, dated 11 August, 1950.  
13 Have you looked at this letter before?

14 A. Yes, but not for quite some time.

15 Q. Okay. So just focusing in on the fourth  
16 paragraph in the letter, can you read that clearly on  
17 your screen?

18 A. Yes.

19 Q. Okay. So he says there, "In my opinion, any  
20 pumping which diminishes the Project water supply can  
21 be stopped," right?

22 A. That's what the letter -- that's what this  
23 particular line says that you have highlighted, yes.

24 Q. So -- let's see. So when you said in your  
25 conclusion paragraph in your first report that no one

1 contemporarily believed that the Project owned a prior  
2 right to the supplies, meaning groundwater supplies,  
3 doesn't this show that Judge Mechem believed that the  
4 Project owned a prior right to the supplies that  
5 affect the Project surface water supply?

6 MS. ATTON: Objection; mischaracterizes  
7 the witness' testimony and her report.

8 JUDGE MELLOY: I think it's --

9 MS. COLEMAN: Her report --

10 JUDGE MELLOY: I think that's fair  
11 cross-examination. Go ahead.

12 A. So I'm just going to take a second to read  
13 this whole letter because I haven't read it in several  
14 years at this point and so I'm just going to read it  
15 and then read my -- my conclusion and then try to  
16 answer your question, so give me just one second. I  
17 don't actually think they're involved with each other.  
18 No. I mean, if you read the entirety of Mr. Mechem's  
19 letter here, he says at the very -- the last two  
20 paragraphs, he states it would be difficult to  
21 basically stop anybody from pumping because it says --  
22 he says it would be difficult, if not impossible, to  
23 prove that the District is being injured. So, I mean,  
24 I think if you take the entirety of that letter, it  
25 does not stand in contrast to what I say in this

1 conclusion, no.

2 Q. (BY MS. COLEMAN) Now, again, as an expert  
3 specializing in western water issues and with -- with  
4 knowledge of a prior appropriation doctrine, have you  
5 heard the term priority call?

6 A. Yes, I have.

7 Q. And what -- what do you understand that term  
8 to mean?

9 MS. ATTON: Objection to the extent it  
10 calls for a legal conclusion.

11 JUDGE MELLODY: You may answer.

12 A. My understanding is that a priority call is  
13 when you cut off more junior users in order to compel  
14 water to be delivered to more senior users who have  
15 better or more senior rights.

16 Q. (BY MS. COLEMAN) And, again, not asking for a  
17 legal conclusion, but what is your understanding of  
18 what priority is?

19 A. Priority is the way that historians -- I  
20 mean, many in the record historically have referred to  
21 it as first in time first in right, so priority who  
22 has the first right, oldest right, that's been proven  
23 and used. The water has been put to beneficial use.  
24 That's what priority is, older.

25 Q. Now that you've read this entire letter, you

1 would agree that it doesn't talk about priority, does  
2 it?

3 A. No, I don't think that it does.

4 Q. Okay. And within the historical records that  
5 you reviewed, are you aware of any document where the  
6 Compact negotiators discussed the protection of the  
7 Project water supply by priority call?

8 A. Can you -- can you just read that back to me  
9 or repeat it? Any time during Compact negotiations  
10 where they talked about priority calls? Is that what  
11 you asked?

12 Q. Whether the Compact -- the Compact  
13 negotiators discussed the protection of the Project  
14 water supply by priority call?

15 A. I don't -- I don't recall. I don't think so.  
16 I don't recall, though.

17 Q. Okay. Let's go, now, to Page 142 of New  
18 Mexico Exhibit 176. These are the minutes of a  
19 meeting held on July 11th, 1952, and we're going to  
20 Page 143, which is -- sorry -- that's the following  
21 page, and there is a large block paragraph under the  
22 table there in the middle. We are not going to read  
23 it all. So we see the first section -- sorry. Do you  
24 know if you reviewed these minutes specifically?

25 A. Yes. As I've stated, I reviewed all the

1 minutes up through the '60s, so I did at some point,  
2 but it's been a while.

3 Q. So you read a lot about gopher bounties, I  
4 imagine?

5 A. Yeah. Like, 42,000 gophers in a year.

6 Q. Okay. So let's see. In this section here  
7 that we've put up on the screen, it says, "The summary  
8 section of a Bureau of Reclamation report dated July  
9 1st, 1952, and entitled River Loss Caballo Dam to El  
10 Paso and Irrigation Wells, and a letter of transmittal  
11 were read to the Board." Do you see that?

12 A. Yes.

13 Q. Do you know which report that's referring to?

14 A. Yes. I'm -- I believe I do.

15 Q. Okay. And then we -- a couple sentences  
16 down, we highlighted there. It says, "In connection  
17 with this matter, the attention of the Board was  
18 called to Section 11 of a form issued by the Bureau  
19 and entitled, Temporary License for Conveyance of  
20 Water Pumped from Drains or from Farm Wells through  
21 Project Canals and Laterals." Do you see that?

22 A. Yes.

23 Q. Do you know what form that's referring to?

24 A. Not specifically, no.

25 Q. Okay. And so did you address either the

1 river loss report or this form in your expert reports  
2 that you know of?

3 A. I would have to go back and scour it to -- to  
4 see if I did, but I -- I don't think that I did.

5 Q. Okay. Do you recall if either the river loss  
6 report or the license form were considered by you in  
7 reaching your opinions?

8 A. Well, I considered, I mean, obviously,  
9 thousands of documents so I did consider it, I'm sure,  
10 but I -- if I didn't cite it in my report, then I  
11 didn't cite it in my report.

12 Q. If you didn't cite it in your report, then is  
13 it fair to assume that you didn't find it significant?

14 A. No. I wouldn't say that. I think that what  
15 I do when I'm writing historical report is I rely upon  
16 the preponderance -- and I don't mean that in a legal  
17 sense, but the largest body of records, and history  
18 can be messy and sometimes doesn't always -- not all  
19 things point in the same direction. So if I didn't  
20 look at it -- if I didn't cite it, that doesn't mean I  
21 don't think it's significant, but I just -- there were  
22 -- like I said, I looked at thousands and thousands of  
23 documents and so I just happened to not cite this one.

24 Q. If you came across something that pointed in  
25 a different direction from your opinion, would you



1 address it typically?

2 A. You know, I would say every situation is  
3 different. That happens all the time because like I  
4 said, history is messy, and so I try to look at the  
5 entire record and draw my conclusions based on what  
6 the majority of the evidence is pointing to, and  
7 that's how I draw my conclusions and that's how I  
8 write my reports.

9 Q. Okay.

10 A. So I certainly don't, you know, intentionally  
11 overlook things or not -- you know, I mean, I think  
12 it's my job make sure that my clients know all the  
13 documents that are out there. So, no, I wouldn't say  
14 that I didn't think it was significant. I'd just say  
15 that's how I do my reports. I look at the entirety of  
16 the evidence.

17 Q. Okay. All right. So we're going to just  
18 skip ahead quickly to Page 380 in New Mexico Exhibit  
19 176. These are the minutes from a meeting on  
20 September 21st, 1956. We see here in the one of the  
21 first entries, it says, "A Bureau of Reclamation  
22 report entitled Reconnaissance Report on Water  
23 Conservation Plans for Rio Grande Project, New  
24 Mexico/Texas, dated July 1956, was presented to the  
25 Board for consideration." Do you know which report

1 that's referring to?

2 A. I do.

3 Q. And that's the 1956 report that you discussed  
4 with Ms. Atton, right?

5 A. I believe so, yes.

6 Q. Okay. So, now, by 1956, Conover's 1954  
7 report had been published, of course, right?

8 A. Yes.

9 Q. But prior to 1954, some version of that -- of  
10 his final report was circulating, right?

11 A. I think that's fair, yes.

12 Q. Okay. So in between his 1947 preliminary  
13 memorandum and the publication in 1954, some more  
14 preliminary version of -- of the Conover report was  
15 being circulated?

16 A. The record indicates that that's the case,  
17 yes.

18 Q. Okay. So, now, let's take a look at the  
19 Conover report. We have it as -- as Texas Exhibit  
20 698. I believe it may have been admitted as -- a  
21 second time as New Mexico 499, but we're going to look  
22 at Texas 698, and we're going to look at Page 127.  
23 Okay. So we're going to -- we see that  
24 heading, "Supplemental pumping of groundwater in a  
25 drought period," and then two paragraphs below that,

1 can you -- can you read this clearly? Okay. Well,  
2 now, you can. So we see this sentence, "Pumping of  
3 groundwater for supplemental use does not represent an  
4 additional supply or new source of water, but rather a  
5 change in method, time and place of diversion of  
6 available supplies." Do you see that?

7 A. Yes.

8 Q. Okay. So just to paraphrase, is it fair to  
9 say Conover was saying that pumping could be seen as a  
10 different method of diverting Project supply? Is that  
11 a fair summary of this statement?

12 A. No.

13 Q. How would -- what was wrong in how I  
14 paraphrased it?

15 A. Well, I think what he's saying is that -- and  
16 I think this is consistent with all of the historical  
17 records that I talked about in my direct, that this is  
18 a supplemental supply during times of drought, and I  
19 think if you read Conover's report in its entirety,  
20 that -- that's what he's saying. And to my  
21 recollection, he doesn't talk about Project supply at  
22 all in this report, if I'm not mistaken. I could be  
23 wrong about that, but I don't remember seeing that  
24 terminology used. I think what he's doing is -- well,  
25 I've already said what he's doing so, that it's a

1 supplemental supply during times of drought.

2 Q. So you would define supplemental supply to  
3 mean something other than additional supply or new  
4 source of water?

5 A. You know, I don't know. That's a good  
6 question. Supplemental, the way I've seen it used  
7 historically throughout all the records that I've  
8 looked at, is that when the surface supply runs dry,  
9 they always looked to groundwater as a way to  
10 supplement that -- the fact that the surface is not  
11 running, right, that they can't just divert that  
12 surface supply in the canals. And I -- and I know  
13 that this document, you know, states that it's not a  
14 new source of water, but, again, the term -- and he  
15 uses the term supplemental here, too. I think it's  
16 consistent with what the historical record says, which  
17 is, you know, this is where you go when the surface  
18 supply runs -- surface supplies run dry. So I don't  
19 know. I'm probably getting tangled up in -- in the  
20 question that you asked. Maybe you could restate it,  
21 but I don't think that this is inconsistent with the  
22 historical record in terms of how the Project and the  
23 Districts looked at the potential of groundwater prior  
24 to the drought.

25 Q. In your opinion, the historical record shows

1 that the districts and the Project looked at the  
2 groundwater as a different source of supply from the  
3 Project surface water?

4 A. So I didn't say different source of supply.  
5 I said supplemental supply. Again, I think those are  
6 the words that are in the documents that I have  
7 presented during my testimony.

8 Q. So something could be the same supply and yet  
9 supplemental?

10 MS. ATTON: Your Honor, I object.  
11 Dr. Stevens is a historian, not a hydrologist.

12 MS. COLEMAN: She spent a good bit of  
13 time in her report talking about Conover.

14 JUDGE MELLOY: I agree. I'll let the  
15 witness answer.

16 A. So I -- could you repeat it? Could you have  
17 the realtime that you could just read it back to me?  
18 Sorry.

19 Q. (BY MS. COLEMAN) So in talking about supplies  
20 of water and how you're using the term supplemental,  
21 so some part of water -- some part of a water supply  
22 could be -- well, now, I'm tangled up in my own  
23 question. I'll just ask it again.

24 A. Okay.

25 Q. Something could be the same supply and yet

1     **also be a supplemental supply?**

2                   **MS. ATTON:** Your Honor, this is  
3     hypothetical.

4                   **MS. COLEMAN:** I'm trying to understand  
5     her terminology.

6                   **JUDGE MELLOY:** Okay. You can answer.

7           A.     So I think if you go back to my report, and  
8     that's where I have to go back to and -- and think  
9     about the opinions I offer in my reports, in my  
10    declarations. What I argue and what I state that the  
11    historical record explains is that the understanding  
12    between the relationship between the groundwater in  
13    this basin and the surface water supply was an  
14    evolving understanding and so whether it's the same or  
15    supplemental, I don't think -- I think you have to ask  
16    me that for a moment in time because I don't think  
17    that their understanding of that, A, at a specific  
18    moment in time is the same as, B, another moment in  
19    time, and then in addition to that, I think that it  
20    depends on where in the basin you were. So the --  
21    what was true up in -- above Elephant Butte,  
22    specifically up in the closed basin and then also in  
23    the middle Rio Grande, was much better understood than  
24    Mesilla Valley, because of that data below Elephant  
25    Butte dam as it related to that relationship between

1 groundwater and surface water, which, of course, is  
2 exactly why Conover had been contracted with EBID. He  
3 needed -- they needed to have a better understanding  
4 of that. So I don't think I can give you a blanket  
5 answer as to whether or not water supply can be the  
6 same and supplemental because it -- it depended on the  
7 specifics of the things I've already mentioned, the  
8 moment in time and the location that you were at.

9 Q. (BY MS. COLEMAN) But didn't we just read  
10 Judge Mechem distinguishing between groundwater  
11 supplies that come from the river and groundwater  
12 supplies that come from the adjoining mesas?

13 A. Well, that was in the letter. We -- I don't  
14 think we read that in. But, again, so that's a  
15 particular moment in time, right. That's 1950, and  
16 that's downstream of Elephant Butte Dam. So it's -- I  
17 mean, the specifics of what the context within which  
18 we're talking matters.

19 Q. And the context of this lawsuit is the water  
20 below Elephant Butte Dam, right?

21 A. Yes.

22 Q. Okay. So I don't know if we have the ability  
23 to stay on this same page -- well, you know what,  
24 forget that. We'll just move on. Let's go to Page  
25 139 of Texas Exhibit 698, and we'll take a look at

1 Paragraph 6 there at the bottom. So this says, "If an  
2 increased portion of releases from the reservoir were  
3 made up to the lower district as compensation for the  
4 reduction in flow of the drains, caused by pumping in  
5 the Rincon and Mesilla Valleys, a corresponding  
6 reduction in the diversions to the Elephant Butte  
7 Irrigation District would be necessary." Did I read  
8 that correctly?

9 A. Yes.

10 Q. So here, Conover is discussing the Project  
11 supply, right?

12 A. He's talking about releases from the  
13 reservoir specifically.

14 Q. What's released from the reservoir?

15 A. Water that's stored behind the dam.

16 Q. That's part of Project supply, right?

17 A. Part of Project supply.

18 Q. And the diversions to the Elephant Butte  
19 Irrigation District are also Project supply, correct?

20 A. Yes.

21 Q. Okay. Now, in your opinion, and I'm sure  
22 you'll correct me if I'm wrong, Reclamation ignored  
23 what Conover had to say at the time, right?

24 A. I probably wouldn't quite connect it that  
25 way, no. I don't think that I would say that they



1 ignored him.

2 Q. Well, let's go to Page 94 of your first  
3 report, New Mexico Exhibit 2097, and we'll look there  
4 at the -- back to almost where we were before. So a  
5 few lines above the bottom, it says, "By this time  
6 with the drought extending to years, Conover's  
7 connections between ground and surface water and his  
8 encouragement to limit the amount of pumping seemed  
9 long forgotten and there was nothing to limit the use  
10 of the water of the Rio Grande that laid beneath the  
11 surface." Do you see that?

12 A. Yes.

13 Q. So I'll ask again. I'll change my words. In  
14 your opinion, Reclamation forgot what Conover had to  
15 say; is that right?

16 A. No. I they that -- I don't know that I have  
17 opined at all about whether or not Reclamation  
18 commented specifically on Conover. I think what we  
19 know is that Reclamation, knowing that the Project was  
20 in jeopardy with the drought, encouraged the users  
21 beneath -- underneath the -- within the Project  
22 boundaries to pump water as a way to save their crops.

23 Q. And that's what you mean when you say "seemed  
24 long forgotten"?

25 A. Well, I think what I mean is that, you know,

1    what they -- what Reclamation actually did was  
2    different than, you know, didn't -- didn't take  
3    Conover's conclusions to that next step, which is, you  
4    know, we've got to figure out how -- well, I'll leave  
5    it at that.

6           Q.    Okay. We're actually going to skip ahead now  
7    to New Mexico Exhibit 619. And we'll go to Page 3 of  
8    this document. We'll zoom in at the top there. We'll  
9    see it says, "Temporary License for Conveyance of  
10   Water Pumped from Drains or from Farm Wells through  
11   Project Canals and Laterals." And it says, "This  
12   agreement made the 1st day of April, 1952." Do you  
13   see that?

14          A.    I do.

15          Q.    Do you recall if you reviewed this document  
16   when formulating your opinions?

17          A.    I do not.

18          Q.    So let's go to Page 4 of this Exhibit 619,  
19   and we'll look at Paragraph 11. That says, "Inasmuch  
20   as water pumped from the farm well described in  
21   licensee's application dated April 1st, 1952, may  
22   constitute a part of the Rio Grande Project water  
23   supply, nothing herein contained shall be construed as  
24   an admission on the part of the United States that  
25   said water is the property of the licensee or, as a

1 waiver of any right or claim to such water as a part  
2 of the Rio Grande Project supply." Do you see that?

3 A. I do.

4 Q. So did you take this statement into account  
5 in considering what contemporary actors thought about  
6 Project supply?

7 A. Well, as I already stated, I don't remember  
8 looking at this document, so I -- I don't know if I  
9 did or not.

10 Q. Okay.

11 A. I don't know. I don't recall.

12 Q. So in this document, which says, "Inasmuch as  
13 water pumped from the farm well may constitute a part  
14 of the Project water supply," would you agree that  
15 that points against your opinion that water supply  
16 didn't include groundwater?

17 A. Where do I say the water supply -- where do I  
18 -- can you point to what you're talking about in my  
19 report, where specifically -- what sentence you want  
20 me to compare that to?

21 Q. Okay. Well, we will -- we will certainly get  
22 to that part of your report very soon. So let's just  
23 put a pin in that one. So let's -- we will now go to  
24 the 1956 reconnaissance report. That's U.S. Exhibit  
25 656. So we talked about this one last time. Let's

1 look at the title. Actually, it's okay. It  
2 says, "Reconnaissance Report on Water Conservation  
3 Plans." Do you agree that this is the report  
4 mentioned in the EBID minutes, right?

5 A. It makes -- yeah, I think it is.

6 Q. Okay. So let's see here. Let's go to Page  
7 20 of U.S. Exhibit 656, and we see that  
8 heading, "Pumping of Groundwater." And you went over  
9 this section a bit with Ms. Atton. Do you remember  
10 that?

11 A. Yes.

12 Q. Okay. So looking at the table there, we see  
13 -- so this is by the end of 1955, which doesn't say it  
14 here, but in this 1956 report, it shows under wells  
15 serving Project lands, in the Rincon Valley, 324, and  
16 in the Mesilla Valley, 790 NM for New Mexico. Do you  
17 see that?

18 A. Yes.

19 Q. Do you know if the New Mexico state engineer  
20 was aware of how many wells there were?

21 A. No.

22 Q. Do you know if these wells would have been  
23 recorded in some way with the state engineer?

24 A. No.

25 Q. Let's go to Page 66 of US-656. We'll look at

1 that first full paragraph. Okay. So we've  
2 highlighted this to save time. So at the end of the  
3 paragraph, it says, again, "The water obtained by  
4 pumping does not represent an additional supply or new  
5 source of water for project lands -- for the project  
6 lands, but is water that is normally intercepted and  
7 reused. Therefore, pumping represents only a change  
8 in the method, location and time of diversion of  
9 supplies already available." Do you see that?

10 A. Yes.

11 Q. Does that last line sound familiar to you?

12 A. Yes.

13 Q. And how does it sound familiar to you?

14 A. Comes from Conover's report.

15 Q. Okay. So as you testified earlier, you would  
16 agree that Reclamation had not forgotten Conover  
17 during the 1950s drought, right?

18 A. No, I don't -- I don't agree with that  
19 assessment. I mean, I think if you look at the  
20 entirety of the 1956 reconnaissance report, there's a  
21 lot of things in here that indicate that maybe that  
22 they didn't forget Conover, but that they were well  
23 aware of the pumping and they knew what was going on.  
24 So, I mean, in the sense that that's what I meant by  
25 the word forgotten, which perhaps I used a little

1 loosely in my report, you know, I -- I still stand by  
2 the intent behind that statement.

3 Q. Okay. Fair enough.

4 JUDGE MELLOY: Ms. Coleman, we've been  
5 going for quite a while, although we did take a little  
6 break about 45 minutes ago. Why don't we take about  
7 15 minutes at this point, and we'll come back. Do you  
8 think you can finish up in the next half an hour or  
9 so?

10 MS. COLEMAN: Sadly, no.

11 JUDGE MELLOY: Okay. Well, can we  
12 finish up today?

13 MS. COLEMAN: Yes. Yes.

14 JUDGE MELLOY: Okay. All right. Okay.  
15 We'll be back in 15 minutes. Thank you, everybody.

16 (Recess.)

17 JUDGE MELLOY: We'll get going as soon  
18 as Mr. Wallace gets on. All right. There we go. All  
19 right. You may proceed, Ms. Coleman.

20 Q. (BY MS. COLEMAN) Okay. We're going to move  
21 onto another topic so let's go to your Opinion No. 5  
22 on Page 11 of your 2019 report, New Mexico Exhibit  
23 2097. "The United States Rio Grande Project water  
24 filings ." Do you see that?

25 A. Yes.

1           Q.    You say, "The water filings did not include  
2           nor were they intended to include the upper Rio Grande  
3           basin's groundwater." See that?

4           A.    Yes.

5           Q.    Now, when you say water filings here, you're  
6           referring to the letters from 1906 and 1908 that you  
7           discussed with Ms. Atton, right?

8           A.    Yes.

9           Q.    Can you tell me why you referred to those as  
10          filings?

11          A.    Not specifically, no. That's just sort of  
12          how I refer to them generally. I mean, they're -- no,  
13          I can't really.

14          Q.    So are you offering any opinion in this case  
15          about the priority of the Project's water rights under  
16          state law?

17          A.    No.

18          Q.    In your work on western water issues, have  
19          you encountered the concept of releasing back?

20          A.    It sounds familiar, but I don't know what it  
21          is.

22          Q.    Okay. Are you aware that the New Mexico  
23          adjudication court has ruled that the Rio Grande  
24          Project is a priority of 1903 based on the relation  
25          back doctrine?

1           A.    I heard that it has a 1903 -- that the Court  
2           said 1903, but I didn't know anything about why.

3           Q.    Okay.  So your Opinion No. 5 is based on the  
4           content of the 1906 and 1908 filings, the  
5           understanding of groundwater in the 1900s, and a  
6           comparison with some other Reclamation projects; is  
7           that right?

8           A.    And the many other documents and things that  
9           I looked at that are cited in my reports, yes.

10          Q.    Okay.  Well, as a historian, we do expect  
11          that we'll know which documents we're talking about  
12          and not just referring to a whole list of cited  
13          references, so I do want to be specific about the  
14          documents here.  So let's -- let's -- let's pull up  
15          Texas Exhibit 513, and as we go through this  
16          discussion, I want to distinguish between what you say  
17          the notice -- the notion of what the notices included  
18          on the one hand and what they were intended to include  
19          on the other hand.  So starting with what the notices  
20          included, so we looked on Page 1 here of Texas Exhibit  
21          513, this is the 1906 letter from B.M. Hall to David  
22          White, right?

23          A.    Yes.

24          Q.    You discussed this with Ms. Atton.  Do you  
25          remember that?



1           A.     I do.

2           Q.     Okay. And in your discussion with Ms. Atton,  
3 you read that block quotation that's in the middle of  
4 the page there, and that's quoting a New Mexico  
5 territorial law from 1905, right?

6           A.     Yes.

7           Q.     Okay. You then said, and I'm quoting from  
8 the transcript, "This is, as I read it, a surface  
9 water law that the Project filed for its water rights  
10 under." Do you remember that?

11          A.     Not specifically, but I'll take your word for  
12 it that I said that, yes.

13          Q.     Okay. What is your basis as a historian for  
14 characterizing this 1905 law as a surface water law?

15          A.     Well, I mean, basically at this time,  
16 generally in American Western Water History, that's  
17 what these laws were. They were specific to surface  
18 water. So if you do contrast that with a couple of  
19 the other projects that were in the works at this  
20 time, they specify pumping, and this one didn't, and  
21 New Mexico, of course, was territory at the time, and  
22 the law itself was understood to be surface water  
23 generally in the time period that we're talking about  
24 here. To my knowledge, there were no other -- there  
25 were no groundwater laws in any of the western states

1 at this time to my knowledge.

2 Q. So you're saying that the filings for other  
3 Reclamation projects specified pumping?

4 A. Yeah. That's my recollection.

5 Q. Okay. So let's go to Page 6 of Texas Exhibit  
6 513. So this is the letter from Louis Hill to Vernon  
7 Sullivan, right?

8 A. Yes.

9 Q. And it's dated -- we see at the top there,  
10 it's dated April, 1908, from Phoenix, Arizona. Do you  
11 see that?

12 A. I do.

13 Q. Okay. And you testified to Ms. Atton that  
14 this was a letter filed to, quote, "Comply with a new  
15 law that was passed by the state -- I'm sorry -- by  
16 the territory of New Mexico in 1908." Do you remember  
17 that?

18 A. Yes.

19 Q. Okay. Let's look at the third paragraph on  
20 this page. So we see here, it says, "Section 40 of  
21 Chapter 49 of the laws enacted in 1907." Do you see  
22 that?

23 A. Yes.

24 Q. So your testimony that the law was passed in  
25 1908 was a mistake, right?

1           A.     Apparently so, yes.

2           **Q.     Did you consider any differences between the**  
3           **1905 and 1907 territorial laws when you came up with**  
4           **Opinion No. 5?**

5           A.     You know, I don't recall specifically. I  
6           know that I've read them both, but I don't remember to  
7           the -- the degree to which that played into the  
8           language that I used in writing that opinion.

9           **Q.     Okay. So when -- okay. So your opinion that**  
10           **these filings don't include groundwater is based on**  
11           **your general understanding that the laws of this time**  
12           **were surface water laws and the fact that the word**  
13           **groundwater or pumping doesn't appear in the text of**  
14           **the document; is that a fair summary?**

15           A.     No, not -- not really. I mean, if you look  
16           at the entirety of the materials -- not the materials,  
17           the -- the documents that I do cite in my report that  
18           relate to all of the history that predated these  
19           filings, as well as the creation of the act, the Rio  
20           Grande Project Act, all of that together makes it very  
21           clear this was a surface water project. I mean,  
22           there's no doubt about it. There was no mention of  
23           groundwater anywhere in any of those discussions and,  
24           of course, these date back to the 1890s when there  
25           were fights with Mexico and the treaty and all the

1 various things that we've talked about. There was  
2 nothing in any of that material that relates to  
3 groundwater so, no, it wasn't just the things that you  
4 just said. It was also all of the many, many  
5 documents that I looked at that predated these  
6 filings, the context of them.

7 **Q. Okay. So the basic -- so is the answer to**  
8 **all of my questions going to be if you look at the**  
9 **entirety of the record, it supports my opinion?**

10 A. So I don't think that's what I just said. I  
11 think I said if you look at the materials that I cited  
12 in my report, that I looked at that relate to  
13 everything up to the Rio Grande Project Act, all of  
14 those documents relate to -- none of them say anything  
15 about groundwater. They all specify surface water. I  
16 think that's what I said.

17 **Q. Okay. What is the Rio Grande Project Act, by**  
18 **the way?**

19 A. What is the Rio Grande Project Act?

20 **Q. Correct. What is the Rio Grande Project Act?**

21 A. It was the law that was passed by Congress  
22 that created the Rio Grande Project.

23 **Q. And was it called the Rio Grande Project Act?**

24 A. I don't believe it was originally. I think  
25 it made -- I can't recall without the document right

1 in front of me.

2 Q. Okay. All right. So let's look at -- let's  
3 talk about the question of what the notices were  
4 intended to include. So when you say what the notices  
5 were -- well, in fact, what they were not intended to  
6 include, you're talking about the intent of B.M. Hall  
7 in 1906 and the intent of Louis Hill in 1908; is that  
8 right?

9 A. Yes.

10 Q. And it's your opinion that Hall and Hill had  
11 only a nascent understanding of surface water and  
12 groundwater connections; is that right?

13 A. If you compare that to later understandings  
14 of those connections throughout the basin, as I  
15 describe in my report, in the '20s, '30s, '40s, '50s,  
16 yes, I believe that compared to that, it was nascent.

17 Q. Okay. So when we -- let's focus on B.M. Hall  
18 for a minute. So he was the supervising engineer for  
19 the Rio Grande Project for a time, right?

20 A. Yes.

21 Q. And he was the one who commissioned Slichter  
22 to study the groundwater in the Mesilla; is that  
23 right?

24 A. Yes.

25 Q. Okay. So you watched Dr. Miltenberger's

1 testimony, right?

2 A. Yes.

3 Q. Okay. Including his cross-examination by  
4 Mr. Draper?

5 A. Yes.

6 Q. Okay. Now, during -- it's now been 11 days  
7 so I'll understand if you don't remember this  
8 specifically, but during the cross-examination of  
9 Dr. Miltenberger, Mr. Draper showed an excerpt from  
10 the proceedings of the 1904 Irrigation Congress where  
11 some of Slichter's findings were reported. Do you  
12 remember that?

13 A. I don't recall that, no.

14 Q. It was with the heading of, "Pumping in the  
15 Mesilla"?

16 A. I -- I don't recall specifically the  
17 exchange.

18 Q. Okay. Let's see if we can --

19 MS. COLEMAN: Can you bring up Joint  
20 Exhibit 432? It's actually -- can we do the  
21 transcript instead?

22 Q. (BY MS. COLEMAN) Okay. We're just looking at  
23 -- in lieu of bringing up the document, we're just  
24 going to look at the transcript quickly here to see if  
25 it refreshes your recollection. So we see here at the

1 top, that's by Mr. Draper referring to Joint Exhibit  
2 432, which is the proceedings of the Irrigation  
3 Congress, and if we look at -- Page 227, this is also  
4 part of the report from Engineer Benjamin Hall in that  
5 document, and we highlighted a statement by Hall with  
6 respect to Source of Mesilla Wells. Do you see that?

7 A. Yes.

8 Q. Okay. Is this -- are you remembering this  
9 part of the testimony yet?

10 A. No.

11 Q. No. Okay. So -- well, we might have to  
12 bring up the joint exhibit later, but let's see.  
13 Mr. Draper read through this discussion of wells in  
14 the Mesilla Valley, and he said that this discussion,  
15 quote, "Indicates that even at this early date, there  
16 was a significant appreciation for the relationship of  
17 groundwater and surface water, particularly the effect  
18 that pumping can have on nearby surface waters  
19 potentially." So you don't remember this part, right?

20 A. Can you point me where you are? I haven't  
21 found your --

22 Q. Yes. So we've pulled up Page 58 from the  
23 October 19th transcript there.

24 A. I see it now. Thank you.

25 Q. Okay.

1       A.     Sorry. It just took me a second to catch up  
2 with you.

3       Q.     Sure.

4       A.     Okay.

5       Q.     So -- so I will put that question to you  
6 then. Do you agree that even in 1904, there was a  
7 significant appreciation for the relationship of  
8 groundwater and surface water?

9       A.     Yes. I don't think that is at odds with what  
10 I said just a moment ago about the understanding being  
11 nascent so, yes, I do agree with this.

12      Q.     Okay. And, again, this is Hall's  
13 presentation, right, so he has -- he has a significant  
14 appreciation that is yet still nascent compared to the  
15 '30s and '40s; is that what you're saying?

16      A.     As well as compared to different parts of the  
17 basin that were studied in greater depth and in more  
18 detail, technical detail, at other times, yes.

19      Q.     Okay. So now, Dr. Stevens, one of the  
20 Reclamation projects you've compared to the Rio Grande  
21 Project is the Salt River Project in Arizona, right.

22      A.     I don't think I made that comparison. I  
23 think it's from the 1956 reconnaissance report. I  
24 think that's where Reclamation said that just like the  
25 Salt River Project, the Rio Grande Project had become



1 reliance on pumping even though it was originally a  
2 surface water project.

3 Q. Let's go to your rebuttal report at Page 8.  
4 This is New Mexico Exhibit 2098. The first full  
5 paragraph saying, "It was shortly after the  
6 publication of Slichter's 1905 study." Do you see  
7 that paragraph?

8 A. Yes.

9 Q. And then you say, "Unlike other Reclamation  
10 service projects, such as the Salt River Project,  
11 parenthesis 1903 filing, and the Garden City Project,  
12 1905 filing, on which the federal agency reported well  
13 water," and then it continues. Do you see that?

14 A. I do. I had forgotten about this. Thank  
15 you.

16 Q. So going back, you have some prior experience  
17 doing research for the Salt River Project, right?

18 A. I do.

19 Q. Okay. And that was -- that was in the '90s?

20 A. Yes.

21 Q. Okay. And were -- are you aware -- strike  
22 that.

23 Do you know who -- are you aware of Louis  
24 Hill having any role with respect to the Salt River  
25 Project?

1           A.    No, not specifically. My role when I was  
2 looking at the Salt River Project was related to the  
3 history of the navigability of the river just to give  
4 you some context on that, so I wasn't necessarily  
5 looking at the history of -- so, anyway, no, I don't  
6 know about Louis Hill's specific role there.

7           Q.    Okay. Let's -- actually, let's pull up the  
8 report. So this is a document, "Assessment of Salt  
9 River navigability prior to and on the date of  
10 Arizona's statehood February 14, 18912, by Douglas  
11 Littlefield." Do you see that?

12          A.    Yes.

13                   MS. ATTON: Your Honor, objection. I  
14 don't think this has been identified for Dr. Stevens  
15 in either his direct or cross-examination.

16                   MS. COLEMAN: I'm refreshing her  
17 recollection of the work on this project.

18                   JUDGE MELLOY: Go ahead.

19                   MS. COLEMAN: In particular, Louis Hill.

20                   JUDGE MELLOY: Go ahead.

21          Q.    (BY MS. COLEMAN) So this is the report that  
22 you worked on, right?

23          A.    Well, I was Dr. Littlefield's research  
24 assistant at the time, so I assisted with the  
25 research.

1           Q.    Let's go to -- it's PDF Page -- sorry. We'll  
2 go to the next one. So it's internal Page 134 of this  
3 document. Okay. So a few lines down from the bottom,  
4 we see, "In the report, Reclamation service  
5 supervising engineer Louis C. Hill observed that," and  
6 there's a quote. Do you see where I'm referring to?

7           A.    I do, yes.

8           Q.    Okay. So does this refresh your recollection  
9 about whether Louis Hill was involved in the Salt  
10 River Project?

11          A.    No.

12          Q.    Okay.

13          A.    There's not enough context here. I can't  
14 tell from this sentence what his role on this project  
15 was. No, I'm sorry. It's not enough. I'd have to go  
16 back and reread this report. I can't recall it. It's  
17 a long time ago.

18          Q.    Okay. Well, I'll just -- I'll just say for  
19 the record then, and this is a Joint Exhibit 454 at  
20 78, which isn't in the record yet, that Louis C. Hill  
21 was an engineer on the Salt River Project starting  
22 August 24th, 1903. We saw -- if we go back to Texas  
23 Exhibit 513 and go to Page 6, we see that he -- this  
24 letter is dated from Phoenix, Arizona, right?

25          A.    Yes.

1           Q.    Okay.  So going back to your rebuttal report  
2   that we were just showing on Page 8, New Mexico  
3   Exhibit 2098, so here you are referring to the Salt  
4   River Project with its 1903 filing and the Garden City  
5   Project with the 1905 filing.  So did you look at the  
6   1903 filing for the Salt River Project?

7           A.    No.  What I cite here -- I'm sure I did at  
8   some point, not for this project, I don't think, but  
9   what I cite here is the annual report of the  
10   Reclamation service.

11          Q.    Do you know for a fact that there is a 1903  
12   filing for the Salt River Project?

13          A.    If you could pull up the document that I cite  
14   there, I'm sure I'd be able to respond to that, but  
15   I'm not prepared to answer that question right --  
16   without looking at that document.

17          Q.    So there's nothing cited for this sentence,  
18   in fact?

19          A.    The citation comes after the -- in the middle  
20   of the next sentence.  It's Footnote 21.

21          Q.    And Footnote 21 is to an annual report to  
22   Congress, right?

23          A.    It's the 10th annual report of the  
24   Reclamation Service, that's right.

25          Q.    It's not to the filing itself, right?

1           A.     But my -- without that document in front of  
2     me, my sense is my -- knowing my work, I would imagine  
3     that that document says that there's a 1903 filing,  
4     but, again, I'd like to see that document so I could  
5     see what it says and whether or not it references a  
6     1903 filing. The footnote does not specifically cite  
7     the 1903 filing. It cites the Reclamation Service  
8     Annual Report.

9           Q.     Okay. And so we can check that document  
10    ourselves to see if it references a 1903 filing,  
11    right?

12          A.     Yes.

13          Q.     Okay. We looked and all we could find was a  
14    1906 filing by Louis C. Hill, but I won't spend time  
15    showing it. So when you were doing this comparison  
16    here on Page 8 of your rebuttal report, you're  
17    comparing the descriptions of the projects in, you  
18    know, various reports to Congress, against each other  
19    and not to the actual content of the filings, right?

20          A.     I think that this paragraph, the two  
21    citations are for the annual reports of the  
22    Reclamation service.

23          Q.     Okay. So when you've compared the filings  
24    for the Rio Grande Project to the filings for the Salt  
25    River Project and the Garden City Project, you're not

1 actually comparing the content of the files to each  
2 other, right?

3 A. You're right. I'm taking them from the --  
4 what the agency itself said the -- the projects were  
5 comprised of in their own documents.

6 Q. Okay.

7 A. Regarding the projects.

8 Q. Okay. So you didn't look at any territorial  
9 laws for Arizona and whether those were surface water  
10 laws, right?

11 A. Not recently, no.

12 Q. Okay. So let's -- so you can't tell us one  
13 way or another whether the filings themselves actually  
14 referenced pumping or groundwater then, right?

15 A. Not right now, no.

16 Q. And since those filings are not cited in your  
17 materials, none of us can figure that out either,  
18 right?

19 A. I'm sure that any of us could figure it out  
20 if we did the research and found it, but I did not do  
21 that. I cited the Reclamation reports, which I  
22 already stated.

23 Q. Okay. So --

24 A. And which -- on their own projects.

25 Q. I'm sorry. I missed the last thing you said.

1           A.     And which they're reporting on their own  
2 projects.

3           Q.     Okay.  So looking back at this paragraph  
4 here, when you -- the last sentence of this paragraph,  
5 it says, "No reports on the Rio Grande Project water  
6 filing included reference to subsurface flows obtained  
7 through the drilling of wells, despite knowledge of  
8 the existence of such wells."  Do you see that?

9           A.     Yes.

10          Q.     Okay.  Is there any reason that you, as a  
11 historian, would focus on wells specifically in  
12 reading these reports?

13          A.     In reading which reports?

14          Q.     The Reclamation service reports to Congress.

15          A.     Yes.  Because of the research questions that  
16 I was investigating, which related to groundwater.

17          Q.     But did they -- did the research questions  
18 you were investigating specify that there had to be a  
19 reference to wells?

20          A.     I'm not sure I understand your question.  I  
21 mean, groundwater is obtained through drilling and --  
22 and installing of wells, so it necessarily follows  
23 that since that was part of my investigation, that I  
24 was going to be looking for references and information  
25 regarding wells.

1           Q.     So wouldn't you agree that there were reports  
2 to Congress that referenced seepage as part of the  
3 Project water supply?

4           A.     Seepage and -- seepage was -- was part of a  
5 lot of the -- a lot of the documentation related to  
6 this project, so can you be more specific about what  
7 -- when you say reports to Congress, what do you mean?  
8 Do you mean Reclamation reports?

9           Q.     Let's go to -- well, you can be more  
10 specific, and you were in your 2019 report, New Mexico  
11 Exhibit 2097 at Page 21. And so we look in that top  
12 paragraph. I'm sorry. Let me just back up. So -- so  
13 in this paragraph, let's just look at the -- the  
14 footnotes here so you know what we're talking about,  
15 if we can. Do you recall a 1911 report to Congress on  
16 the fund for the Reclamation of arid lands?

17          A.     Not specifically off the top of my head, no.

18          Q.     So you don't recall Dr. Miltenberger  
19 testifying about -- this would be Texas Exhibit 669 --  
20 so you don't recall any discussion of this report that  
21 is cited in the first three footnotes on Page 21 of  
22 your report?

23          A.     You're going to have to refresh my memory.  
24 I'm sorry. There are a lot of documents I looked at,  
25 and this one is not top of my mind right now so, no,



1 not right now.

2 Q. Okay. Well, let's look at how you quote it  
3 in that top paragraph. So speaking of this document,  
4 which I'll represent is the 1911 Report on the Fund  
5 for the Reclamation of Arid Lands, "However, the  
6 system design also assumed that a portion of the water  
7 diverted in the upper reaches of the Project would  
8 return to the system for reuse further downstream."  
9 Then you go, "Losses in transit... will be partly  
10 offset by the return seepage in upper parts of the  
11 valley, which will be available for diversion lower  
12 down. It, therefore, appears that the available  
13 supply accords with the demand." Do you have any  
14 reason to believe that you misquoted that statement?

15 A. No.

16 Q. Okay. So here, we see return seepage  
17 referenced, and then in the next sentence, you  
18 say, "Nowhere did the documentation mention  
19 groundwater." So here, can we infer that you don't  
20 consider seepage to be groundwater?

21 A. The way that I read seepage and the way that  
22 it's been referred to in many documents, including  
23 this one, is it's water that was in the ground that  
24 has arisen to the surface and is flowing back to the  
25 stream and becomes part of the surface supply. When I

1 say it doesn't reference groundwater, I'm referring to  
2 pumping groundwater out of the ground that hasn't  
3 naturally arisen back to the surface water and flowed  
4 back to the stream.

5 Q. Okay. So in this quote here, though, it's  
6 saying that the losses in transit will partly -- will  
7 be partly offset by the return seepage in upper parts  
8 of the valley, which will be available for diversion  
9 lower down. So this is contemplating that the return  
10 seepage will be available, right?

11 A. The return -- the seepage, the groundwater  
12 that returns naturally to the surface and returns to  
13 the stream, yes.

14 Q. Okay. All right. Let's go back to your  
15 statement of Opinion No. 5 on Page 11 of your 2019  
16 report, which we're still in here, and we see the  
17 second sentence. "Scientific understanding for  
18 connections between groundwater and surface water was  
19 to nascent in the first decades of the 20th century  
20 for Reclamation to have intended such an overreach."  
21 How, as a historian, do you define the term "overreach  
22 "?

23 A. I'm not sure I have any special, like, expert  
24 opinion on the word overreach as a historian. I just  
25 would define it the way that it probably came -- comes

1 in the dictionary, which is just overstepping.

2 Q. So here, if Reclamation had intended to  
3 include groundwater, what would Reclamation be  
4 overstepping?

5 A. The knowledge and the general understanding  
6 of the relationship between surface and groundwater at  
7 the time.

8 Q. So in your view, this is not a legal opinion?

9 A. No. I think I -- I think I just said this,  
10 like, historically, and I -- I think we talked about  
11 it quite a bit that -- that that connection between  
12 surface and groundwater, to your point about the  
13 Slichter report and what Mr. Draper asked  
14 Dr. Miltenberger, you know, there was an  
15 understanding. There was some sort of -- some sort of  
16 understanding about the relationship between the two,  
17 and all I'm saying here is that -- that they -- it was  
18 -- it was a small understanding compared to what we  
19 got to later, but that more importantly, you know,  
20 this was a surface water project, and if they had  
21 intended to include groundwater, they would have  
22 stated so and I don't believe that they did. I  
23 believe that there -- I'll leave it at that.

24 Q. Okay. So when you say "overreach," it means  
25 stepping beyond the limits of its knowledge?

1           A.    I think that what I -- what I mean in this  
2 sentence is that if they had intended to include  
3 groundwater, they would have stated so, and to  
4 interpret all the entire record that I've already  
5 described leading up to this point of the filings as  
6 including groundwater would be an overreach to say  
7 that that's what Reclamation intended to do because  
8 they didn't.

9           Q.    Okay.  So it would be interpreting overreach  
10 then?

11          A.    I think that's probably better, yeah.

12          Q.    Okay.  Thank you.  Okay.  So we will -- let's  
13 go to one more opinion here in your report, and that  
14 is Opinion No. 2.  So this Opinion No. 2 says, "The  
15 success of the Rio Grande Project depends upon the  
16 administration of the water to the lands within the  
17 project boundary as a single unit, with an equal  
18 allocation of water to each Project acre."  So that  
19 sentence is in present tense, right?

20          A.    It is written in present tense.

21          Q.    Is that a historical opinion?

22          A.    It is a historical opinion, yes.  Intended to  
23 be.

24          Q.    Okay.  All right.  So let's -- how as a  
25 historian do you define success of a Reclamation

1 **project?**

2 A. Well, again, I use the documents as they  
3 speak for themselves. So many documents, during the  
4 course of the history that I looked through, refers  
5 specifically to administering this Project as a single  
6 unit, and that it was necessary to treat the lands  
7 within the entire project equally, and there's -- you  
8 know, in the Project histories, in the water  
9 announcements, in lots of documents, many of which are  
10 cited in my report, there is specific reference to  
11 this administration of the Project as a unit and that  
12 they have to treat the lands equally in order for the  
13 Project to succeed. So that's -- I mean, I'm  
14 basically stating -- I'm stating what the records  
15 themselves say from the history that I looked at.

16 Q. So into a single unit is kind of interesting  
17 because it's redundant, right? It's a single unit?  
18 Are there any documents that you -- historical  
19 documents that use the term single unit that you're  
20 aware of?

21 A. I'd have to go back and look. I'm not sure.

22 Q. Okay. Is single unit a term that's familiar  
23 to you from Reclamation projects?

24 A. I don't recall.

25 Q. Okay. And to you, does the term single unit

1 have any meaning other than equal allocation of water  
2 to each project acre?

3 A. Can you be more specific in I mean, I'm not  
4 sure. I guess, I don't know. I don't know.

5 Q. Okay. So let's just -- let's back up. What  
6 do you mean by equal allocation per project acre?

7 A. Well, again, exactly what the documents tell  
8 me, right. So as I look through the project  
9 histories, the project histories make clear that they  
10 -- as they approach, especially during the drought in  
11 the '40s and into the '50s, as they approach the  
12 beginning of the irrigation season, they are  
13 allocating water equally to each acre of land  
14 throughout the Project. So I'm just stating here in  
15 my own words what those documents say.

16 Q. But you're not specifically aware of any  
17 project history water announcements before the drought  
18 in the '40s and '50s that refer to an equal allocation  
19 of water to each project acre, correct?

20 A. I can't come up with a document right off the  
21 top of my head, but the entirety of the record up to  
22 -- and, again, I mean, I know that you -- you're  
23 frustrated by me saying that, but it's really true. I  
24 mean, if you look at the evidence and you look at the  
25 documents of the project histories, not just the

1 project history that were issued each year starting in  
2 1912, but sort of all the documents taken together,  
3 it's repeated over and over and over that each of  
4 these project acres are treated equally. So, I mean,  
5 I can't come up with another document for you right  
6 this second. I just gave you some from the '40s and  
7 '50s, but there are documents from earlier times, as  
8 well, that do the same thing. I mean, this is a --  
9 this is a common theme that goes on over and over and  
10 over through the course of the history and through the  
11 course of Reclamation documents that were collected  
12 from the national archives in Denver from the Bureau  
13 of Reclamation records. So --

14 Q. Okay. So if we were to go through, which we  
15 will not do, but if we were to go through the project  
16 histories from prior to the '40s drought, we would  
17 find an equal allocation of water to each project acre  
18 occurring every year?

19 A. Are you asking me if you would find that  
20 exact language?

21 Q. I'm saying are you telling us today that we  
22 would find evidence of an equal allocation of water to  
23 each project acre prior to the 1940s and '50s drought?

24 A. I don't know if I can answer that. What I  
25 think I can say is that if you look at the people who

1 -- the documents from the people who managed the  
2 project and the engineers on the project, their  
3 intent, and they repeat this in many, many documents,  
4 that was to treat each project acre equally,  
5 regardless of which district it was in, regardless of  
6 which state it sat in, and that was sort of the basis  
7 of the project. And you can see that consistently in  
8 the documents prior to 1940. Whether or not it says  
9 exactly the language you just said, I can't say on the  
10 fly. I don't know. But I can tell you that the  
11 evidence was very clear all the way through the  
12 Project history and through the Reclamation documents  
13 that that was the intent.

14 **Q. I am not frustrated by that answer, but I**  
15 **think someone trying to write up the report with**  
16 **citations would be frustrated by that answer. So you**  
17 **are certain that there are documents prior to the**  
18 **Compact that refer to an equal allocation per acre?**

19 **A.** I've already answered the question. The page  
20 that you're on right now is just the summary of my  
21 opinions, but there's an entire chapter devoted to  
22 this in my report, Chapter 2, and so if you'd like, we  
23 can -- we can go through each page of that and go  
24 through where we state that, but, I mean, I think I've  
25 answered the question to the best of my sitting here



1 without going through every single document again.

2 Q. So your role as an expert historian is to  
3 assist the parties and the Court with identifying the  
4 relevant documents in the record, correct?

5 A. Which I think I've done in my report and to  
6 the best of my ability with -- I don't have instant  
7 recall. Unfortunately, I've reviewed thousands and  
8 thousands of documents. That is part of my job, and I  
9 think I've fulfilled that job through submitting the  
10 reports and the testimony I've given.

11 Q. Okay. Let's look at one part of your report  
12 at least, Page 17 of your 2019 report. So we're still  
13 in New Mexico Exhibit 2097. We'll look at the middle  
14 paragraph of that page. Now -- so I'm sorry. I  
15 should have pointed out. In your -- the summary of  
16 your statement, you say -- actually, can we go back?  
17 That second sentence there. "In fact, the compromise  
18 of the 1904 Irrigation Congress in El Paso." This is  
19 on Page 11 of New Mexico Exhibit 2097. "The  
20 compromise of the 1904 Irrigation Congress in El Paso  
21 depended upon this conceptual administration and  
22 permitted the parties to finally agree to the Elephant  
23 Butte Dam over the International Dam." Do you see  
24 that?

25 A. I do.

1           Q.    And this is discussed in Chapter 2 of your  
2 report, right?

3           A.    Yes.

4           Q.    Okay.  So let's go back to Page 17 of your  
5 report.  Here, you're talking about the National  
6 Irrigation Congress of 1904 again, and you -- and the  
7 comparison of two dam proposals, D-A-M, proposals, and  
8 at the end there, you refer to, "Hall believed  
9 Elephant Butte was a better site, and the compromise  
10 that came out of the 1904 meeting paved the way for  
11 its construction."  So can you tell us briefly what  
12 compromise you're referring to there?

13          A.    Yes.  There was proposal to build the dam  
14 closer to El Paso, which would have flooded a great  
15 deal of land in New Mexico and that was because there  
16 was already a private filing for a dam at Elephant  
17 Butte, which we've referred to in earlier parts of the  
18 testimony.  And so there were some people in -- at the  
19 National Irrigation Congress and some people involved  
20 in the entire negotiations, I guess I'll call it, of  
21 the Rio Grande Project that believed that the dam  
22 further down into El Paso was the better choice.  They  
23 were very concerned about what they called  
24 international comity.  They believed that the United  
25 States owed Mexico for depleting some of its water.

1 So essentially what the agreement was to pursue the  
2 Elephant Butte Dam further upstream was a compromise  
3 amongst these various parties that they all agreed  
4 jointly would serve the purposes of both the Mexico  
5 depletions and making them whole with the 60,000  
6 acre-feet, as well as preserving lands, irrigated  
7 lands or irrigable lands in New Mexico, as well as the  
8 lands in Texas. So that's the compromise.

9 Q. And in this discussion of the compromise in  
10 your report, can you tell me where you show that this  
11 compromise depended upon the conceptual administration  
12 of equal allocation of water per acre?

13 A. Do you want me to find where in the report I  
14 talk about that or you want me --

15 Q. Well, I don't -- I don't want to waste  
16 everyone's time waiting for that, but off the top of  
17 your head, you don't know where you talk about a  
18 conceptual administration being -- that the compromise  
19 of the 1904 Irrigation Congress depended upon this  
20 conceptual administration?

21 A. Well, I can't point for the specific page  
22 right off the top of my head. I 'd have to look  
23 through the footnotes. There's a lot of footnotes  
24 spanning the next couple of pages that relate to this,  
25 and I -- again, I can't recall every document, but I

1 can tell you that, yes, conceptually, because that  
2 original proposal to build the dam further downstream  
3 would have flooded a great deal of land in New Mexico,  
4 part of the idea behind the Elephant Butte site  
5 instead was that it would serve lands in New Mexico,  
6 the water behind that dam would serve lands in New  
7 Mexico, as well as lands in Texas. So it was a  
8 compromise that -- that looked at both of those sets  
9 of irrigated lands between -- across the two lines --  
10 across the state line. It wasn't a state line at the  
11 time because New Mexico was still a territory, but  
12 across that -- that boundary equally and -- and would  
13 serve both sets of farmers equally.

14 Q. Dr. Stevens, do you know who Estevan Lopez  
15 is?

16 A. I do.

17 Q. Okay. Are you aware he was the director of  
18 the New Mexico Interstate Stream Commission at the  
19 time you were retained?

20 A. I know he was and did hold that position, but  
21 I wasn't sure when.

22 Q. Are you aware that he submitted expert  
23 reports in connection with this litigation?

24 A. I have heard that, yes.

25 Q. Okay. Did you review Mr. Lopez's first

1 report prior to submitting your October, 2019, report?

2 A. I don't believe I did, no.

3 Q. Okay. So we were talking about equal  
4 allocation per acre, and you were referring to the  
5 project history water announcements that referred to  
6 allotments. Is that -- is that right?

7 A. Yes.

8 Q. So do you remember in -- in our discussion on  
9 October 20th, when you were talking about conjunctive  
10 management, that you spoke about the -- the transfer  
11 of unused allotments within the project. Do you  
12 remember that?

13 A. Yes.

14 Q. Okay. So an allotment is, in your mind, the  
15 same -- is the equal allocation per acre, right?

16 A. I'm aware that there's maybe some legal  
17 difference, but, yes, I sort of see them as -- I mean,  
18 when I'm saying that, I'm referring to the fact that  
19 they're looking at each -- each acre equally, yes, as  
20 it relates.

21 Q. Okay. So let's just go back to New Mexico  
22 Exhibit 176. That's the EBID minutes from the 1950s.  
23 We'll go to Page 133, which are minutes from  
24 May 7th, 1952. We can -- all right. May 7th, 1952,  
25 and then we'll -- we'll go down on to the page in the

1 margin note that says, "Permanent allotment and other  
2 features" -- oh, I'm sorry. These are not May 7th,  
3 1952. These are the December, 1952. We can work with  
4 this. This is fine. So -- sorry. These are -- these  
5 are minutes from later -- sorry. These are May 7th,  
6 1952. Sorry. Anyway, we see next to this  
7 entry, "Permanent allotment and other features of a  
8 Project water conservation program." Do you see that?

9 A. Yes, I do.

10 Q. Okay. And in the first sentence there, it  
11 says, "The matter of establishing a permanent  
12 allotment system on the Project together with other  
13 means of conserving the Project water supply came  
14 before the Board for consideration." Do you see that?

15 A. Yes.

16 Q. And then farther down it says, "It was moved  
17 by Stringer, seconded by Smith and unanimously  
18 carried, that a letter be addressed to the El Paso  
19 District requesting a statement from that District as  
20 to its attitude regarding the following matters,  
21 numeral 1, the establishment of a permanent allotment  
22 system on the Rio Grande Project, if feasible from a  
23 legal standpoint." Do you see that?

24 A. Yes.

25 Q. So here in 1952, they're talking about

1 establishing a permanent allotment system, right?

2 A. Yes.

3 Q. That would suggest there was not a  
4 preexisting allotment -- permanent allotment system,  
5 right?

6 A. Not in the same sense, no. But, I mean, if  
7 you just look at, for instance, the 1938 downstream --  
8 downstream contracts, which allot a particular amount  
9 of water equally to the 155,000 acres, it's not called  
10 a permanent allotment system, but it's the same idea.

11 Q. Except as we all know, it says in times of  
12 shortage, right?

13 A. That the 1938 downstream contract does?

14 Q. Yes.

15 A. Yes.

16 Q. Okay. So just a few concluding questions  
17 here. Dr. Stevens, at your deposition, you testified  
18 that the Compact protects the Rio Grande Project water  
19 supply. Do you remember that?

20 A. Yes.

21 Q. Do you still agree with that statement?

22 A. Yes.

23 Q. In your direct testimony with Ms. Atton, you  
24 testified that the Compact is, quote, a  
25 forward-looking document, not a document intended to

1 freeze anything in time except for the acreage number.

2 Do you remember that testimony?

3 A. Yes.

4 Q. Is that still your opinion?

5 A. Yes.

6 Q. So it's your opinion that there was no  
7 particular set of project operations that the  
8 Compacting states intended to impose on a permanent  
9 basis, right?

10 A. I'm sorry. Can you repeat it?

11 Q. In your opinion, there was no particular set  
12 of Project operations that the Compacting states  
13 intended to codify?

14 A. The normal release of 790,000 acre-feet,  
15 which I think I -- I stated, and acreage.

16 Q. And the acreage number, right?

17 A. Correct.

18 Q. Okay. Okay. You might remember a few hours  
19 ago, Mr. Schmidt-Petersen was asked some questions  
20 about the Rio Grande Compact Commission rules and  
21 regulations. Do you remember that?

22 A. I don't. I might not have been there for  
23 that.

24 Q. Okay. Are you familiar with the 1939 Rio  
25 Grande Compact Commission rules and regulations



1 document?

2 A. I think I am, yes.

3 Q. And do you recall the preamble that  
4 says, "The Compact permits each state to develop its  
5 water resources at will"? Do you remember that line?

6 A. I do, yes.

7 Q. Okay. In your review of the historical  
8 record, have you found any document after 1939 that  
9 cites that language from the Commission rules and  
10 regulations in relation to water development below  
11 Elephant Butte?

12 A. Not that I can recall off the top of my head,  
13 no.

14 Q. Okay.

15 MS. COLEMAN: That's all I have. Thank  
16 you.

17 JUDGE MELLOY: Let me think. Is -- I  
18 guess, Mr. Wallace, do you have anything?

19 MR. WALLACE: No questions. Thank you,  
20 Your Honor.

21 JUDGE MELLOY: Ms. Atton, do you have  
22 any redirect?

23 MS. ATTON: I have one question on  
24 redirect if I may.

25 JUDGE MELLOY: You may.

## REDIRECT EXAMINATION

BY MS. ATTON:

Q. So, Dr. Stevens, in your cross-examination before the week break, counsel for the U.S. asked you, setting aside the 1958 Bureau Reconnaissance Report, was there any other statement by Reclamation characterizing groundwater pumping as anything other than an emergency measure. You answered that you saw no reference in the historical record to the temporal nature of any pumping. Is there anything else you'd like to say in response to Counsel's question?

A. Yes. There were a couple additional things indicating that it was not, in fact, intended to be temporary. In the 1965 -- or at least there was a recognition that it was a permanent or expected to be a permanent part of the project. In 1965, for instance, in one of the project histories -- or in the project history for 1965, there's actually a letter from Floyd Dominy, who was the head of Reclamation at the time, reporting to the secretary of interior about pumping as part of the project, and then, of course, EP1's manager, Moseley, testified in 1971 to Congress, as well, that pumping had become a permanent part of the -- of the Project. So those are the only two things I would probably add.

1                   **MS. ATTON:** Thank you. I have no  
2 further questions.

3                   **JUDGE MELLOY:** Mr. Hoffman, anything  
4 further?

5                   **MR. HOFFMAN:** No, Your Honor. Thank you  
6 very much.

7                   **JUDGE MELLOY:** Ms. Coleman, anything?

8                   **MS. COLEMAN:** One question.

9                   RE CROSS EXAMINATION

10 BY MS. COLEMAN:

11           **Q. Is that Floyd Dominy letter cited in any of**  
12 **your expert reports?**

13           A. I don't believe so, but I haven't, of course,  
14 reviewed all the Project histories so I don't know  
15 that I cited it, no.

16           **Q. Was that letter specific to EBID or EP1?**

17           A. I don't believe it was, no. It was  
18 throughout the Project.

19           **MS. COLEMAN:** Thank you.

20           **JUDGE MELLOY:** All right. Thank you,  
21 Dr. Stevens. You're excused.

22           **THE WITNESS:** Thank you.

23           **JUDGE MELLOY:** We have a half an hour.  
24 I'd like to get started on the next witness if we can  
25 do it, try to keep moving forward. Who's next up for

1 New Mexico?

2 **MS. ATTON:** I believe it's Mr. Salopek.

3 **JUDGE MELLOY:** Is he ready to go?

4 **MS. ATTON:** I believe he is, but if we  
5 could have five minutes just to change seats and  
6 change positions, I would appreciate that.

7 **JUDGE MELLOY:** You may. Go ahead.  
8 We'll take five minutes. Thank you.

9 (Recess.)

10 **JUDGE MELLOY:** All right. Mr. Wechsler,  
11 is your witness ready to go?

12 **MR. WECHSLER:** I think he's just about  
13 ready, your Honor, as soon as his camera comes on, but  
14 I know he was in the witness room.

15 **JUDGE MELLOY:** Okay. While we're  
16 waiting for the witness, let me just indicate for the  
17 record, it looks like Ms. Klahn's going to be on for  
18 Texas, Mr. Leininger for United States, Mr. Wechsler  
19 for New Mexico, and then Mr. Wallace, again, just so  
20 the record is clear.

21 All right. You may call your witness.

22 **MR. WECHSLER:** Thank you, Your Honor.  
23 New Mexico calls David Salopek.

24 **JUDGE MELLOY:** Mr. Salopek, would you  
25 raise your right hand, please? Do you swear or affirm

1 that the testimony you're about to give will be the  
2 truth, the whole truth, and nothing but the truth?

3 THE WITNESS: I do.

4 JUDGE MELLOY: Mr. Salopek, I need to  
5 advise you of a couple things that we're going over  
6 with each of the witnesses. First, let me ask you:  
7 Is there anyone in the room with you at this time?

8 THE WITNESS: No, sir.

9 JUDGE MELLOY: Do you have any documents  
10 that you will be referring to during your testimony,  
11 other than the exhibit book?

12 THE WITNESS: No, sir.

13 JUDGE MELLOY: All right. And then I do  
14 need to advise you that you're not allowed to have any  
15 communication devices, such as iPhones, iPads,  
16 laptops, et cetera, that can communicate during your  
17 testimony. Do you understand?

18 THE WITNESS: Yes, sir. None available.

19 JUDGE MELLOY: All right. Thank you.

20 Before we start, let me just go over the  
21 exhibit list here. We have Joint Exhibit 421, which  
22 is an A exhibit and will be admitted. We have New  
23 Mexico 1963, which has been admitted as a Texas  
24 Exhibit 139, and as I understood it, there's no  
25 objection to substitution of Texas 139, so as I

1 understand, we won't admit it as New Mexico 1963, but  
2 we'll refer to it as Texas 139, then we have New  
3 Mexico Demonstrative Exhibits 22, 23, and -- excuse me  
4 -- New Mexico 32, 33, and 34, which are admitted, and  
5 New Mexico -- or Texas, excuse me, 139, which is an A  
6 exhibit and will be admitted. Let me see if there's  
7 anything else. Then we have on cross-examination New  
8 Mexico 470, New Mexico 600, New Mexico 602, and New  
9 Mexico 689, all of which are A exhibits and will be  
10 admitted.

11 All right. Mr. Wechsler, you may  
12 proceed.

13 **MR. WECHSLER:** Thank you, Your Honor.  
14 One question about exhibits. Joint Exhibit 474 I have  
15 on my table listed as a Category A document.

16 **JUDGE MELLOY:** I'm sorry. You're right.  
17 It is. 474 is admitted, Joint 474.

18 **MR. WECHSLER:** May I proceed?

19 **JUDGE MELLOY:** You may.

20 DAVID SALOPEK,  
21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. WECHSLER:

24 Q. Good afternoon, Mr. Salopek.

25 A. Good afternoon.

1           **Q.     Where do you live?**

2           A.     Las Cruces, New Mexico.

3           **Q.     How long have you lived in Las Cruces?**

4           A.     My entire life.

5           **Q.     What's your education?**

6           A.     I have a bachelor's degree in ag economics  
7     and a minor in farming.

8           **Q.     What is your profession?**

9           A.     I'm a pecan farmer.

10          **Q.     How long have you been farming?**

11          A.     Little over 50 years, 43 years as a manager.

12          **Q.     Before we talk about your farming operations,  
13     have you been on any trade or industry boards?**

14          A.     Yes, I have.

15          **Q.     Please describe those.**

16          A.     I have been on the Western Pecan Growers  
17     Board from 1990 through 2011. I was president from  
18     '95 to '97. I was a founding member of New Mexico  
19     Pecan Growers Association. It started in 2001. I was  
20     president when it formed from 2001 to 2011. I was on  
21     -- and I'm still a member of that board. I was on the  
22     -- from '98 until now, I was on the National Pecan  
23     Shellers Marketing Board, and I was on their -- I'm  
24     still on their board of directors. I was on their  
25     board of directors from 2002 to present. We just

1 recently formed -- the USDA formed a new board. It is  
2 American Pecan Promotion Board, and that has 17  
3 members appointed by the USDA. There are ten growers  
4 and seven importers from United States and Mexico, and  
5 I am -- was just elected -- starting in September, I  
6 was just elected chairman of that board.

7 **Q. How about the National Pecan Growers Council?**

8 A. Yes. I was actually -- I forgot about that  
9 one. I'm not on that one anymore, but I was on that  
10 one for about ten years. I was chairman of that from  
11 about 2002 to 2003, and I was on that board from '95  
12 to 2005.

13 **Q. Those were trade industry boards. Have you**  
14 **been on any professional boards?**

15 A. I was. I was on the Farm Credit Board of New  
16 Mexico from 2009 to 2014. That is for farmers and  
17 ranchers throughout the state of New Mexico, and I was  
18 also on the environmental improvement board for the  
19 state of New Mexico from 1997 to 2002, I believe.

20 **Q. Has your involvement in nationwide and**  
21 **regional pecan trade associations allowed you to**  
22 **understand the pecan industry nationwide?**

23 A. I have a pretty good understanding of it.

24 **Q. Does that understanding include the pecan**  
25 **production in different parts of the country?**



1           A.     Yes, it does.

2           **Q.     Do you have an understanding of the issues**  
3 **being faced by pecan farmers in New Mexico and**  
4 **throughout the country?**

5           A.     I have a pretty good idea.

6           **Q.     To give us some perspective, how does the LRG**  
7 **and New Mexico compare to other areas in the country**  
8 **in terms of pecan production?**

9           A.     The LRG, there's some in Sierra County. Most  
10 of it is in Dona Ana County. Dona Ana County is the  
11 largest pecan producing county in the United States,  
12 last time I checked by a margin of two over any other  
13 county in the U.S.

14          **Q.     Let's talk about your family farming history**  
15 **and your farming operations. Has farming in the LRG**  
16 **been a family business?**

17          A.     Yes, it has. My -- it started with my  
18 grandfather. He emigrated to the United States in  
19 1924. He ended up in El Paso in the late '20s. He  
20 had an uncle that had a goat dairy in El Paso, and he  
21 was helping him with that. His uncle helped him get,  
22 I believe, 40 acres in the El Paso area. He had the  
23 unfortunate luck, my grandfather did, of being flooded  
24 out two years in a row in the early '30s, so he sold  
25 that 40 acres and bought 87 acres up in the Mesilla

1 Valley in 1935 and that's where the Salopeks got their  
2 start in that valley and have stayed ever since.

3 **Q. Did your grandfather pass the family farm**  
4 **onto his kids, your parents?**

5 A. Yes, he did. He had good success in the area  
6 there. He had five sons so he had a good work force,  
7 and he was able to expand and then by the early '50s,  
8 he started each of his own -- each of his sons with  
9 their own farm. In the early '50s, '50, '51,  
10 somewhere in there, I believe, and my dad was one of  
11 those sons that allowed us to continue to farm.  
12 There's four farms that are still currently being  
13 farmed -- being farmed from the original five  
14 brothers.

15 **Q. When did your father pass away?**

16 A. December of 1979.

17 **Q. Is that when you took over operating the**  
18 **family farm?**

19 A. Yes. My mother and I did. I was 17, and she  
20 was 47.

21 **Q. When did your mother pass away?**

22 A. She passed away in 2015. Her and I were in  
23 farming together for 35 years.

24 **Q. Are any of your children involved in the**  
25 **family farming operation?**

1           A.     Yes. My son is farming with us. My wife  
2 works with us, and our son is hoping to keep the  
3 legacy going forward.

4           **Q.     Do you run your family business under a**  
5 **corporate name?**

6           A.     Yes, we do. It's David Salopek Farms, Ltd.

7           **Q.     What's your --**

8           A.     I'm sorry. It's in honor of my father.

9           **Q.     What's your official company role?**

10          A.     I am the managing member.

11          **Q.     Let's turn to New Mexico Demonstrative**  
12 **Exhibit 33. What does New Mexico Demonstrative**  
13 **Exhibit 33 show?**

14          A.     That's the original 87 acres my grandfather  
15 started with in 1935.

16          **Q.     Where is this original 87 acres located?**

17          A.     Approximately 5 miles south of Mesilla, New  
18 Mexico.

19          **Q.     When your father died, how many acres were**  
20 **actually in the farm?**

21          A.     We had 550.

22          **Q.     Let's turn to New Mexico Demonstrative**  
23 **Exhibit 32. What does New Mexico Demonstrative**  
24 **Exhibit 32 show, Mr. Salopek?**

25          A.     That is what we refer to as our main farm,

1 and that is the outlying boundaries of that farm.

2 Q. And how many acres is this?

3 A. Approximately 600.

4 Q. Do you have any other farms located in the  
5 lower Rio Grande?

6 A. I do.

7 Q. How many acres in total do you farm?

8 A. Approximately 2000.

9 Q. Where are the other farms located?

10 A. My furthest south farm is close in Berino,  
11 which is about 5 miles north of the Texas state line,  
12 and my furthest north farm is just a little below the  
13 Caballo Reservoir, so it's up and down the whole  
14 valley.

15 Q. What do you grow on your farms?

16 A. Pecans on most of it. Some of the farm is  
17 open ground, and the open ground grows chile, onions,  
18 alfalfa, silage, and cotton.

19 Q. Today, I want to focus on your farming  
20 operations near Mesilla on the main farm. We'll have  
21 other witnesses that will address farming operations  
22 in the northern part of the basin. So what do you  
23 grow on the main farm?

24 A. Pecans.

25 Q. Turning to the subject of the operations and

1 -- and starting with investments and expenses for  
2 pecan farming, let's take a look at New Mexico  
3 Demonstrative Exhibit 34. And this is the cover page.  
4 We'll turn to Page 2. This has already been admitted.  
5 Mr. Salopek, focusing on the upper part of New Mexico  
6 Demonstrative Exhibit 34, Page 2, under the  
7 heading, "Pecan Planting," how long does it take for a  
8 pecan tree to mature so that you have a marketable  
9 crop?

10 A. Roughly ten years, if you have good luck with  
11 weather.

12 Q. To help us understand the investments of  
13 pecan farming -- farmer makes, can you explain the  
14 growing process for pecan trees from seedling to  
15 maturity?

16 A. Yes. Assuming you have a farm that you're  
17 going to convert to pecans or you buy one to convert  
18 to pecans, you will amend the soil through -- with an  
19 excavator to make the ground a little bit more mellow  
20 so it will be easier for the roots to grow, and that's  
21 a very expensive proposition. To buy trees, last time  
22 I bought some small trees, was -- they were about \$24  
23 a tree. You plant somewhere in the neighborhood of 48  
24 to 50 trees per acre, so your initial investment cost  
25 on year one is going to be in the neighborhood of

1 2,500 to \$3,000, and then the next nine years or ten  
2 years after that, you're going to be putting in 15 to  
3 \$1,700 an acre with keeping the fields clean, training  
4 the trees, irrigation, fertilizing, et cetera, et  
5 cetera. It's expensive. And by the end of -- this  
6 was last year's dollars. With all the inflation, that  
7 number is going to be higher going forward, but it is  
8 not uncommon to have \$19,000 invested by the time you  
9 get in production on year ten. That does not include  
10 the cost of the land or the equipment or any  
11 infrastructure cost.

12 **Q. Fair to say that farming pecans has a big**  
13 **up-front investment without any crop?**

14 **A. Yes. It has a large barrier to entry.**

15 **Q. Looking now at the bottom part of New Mexico**  
16 **Demonstrative Exhibit 34, Page 2, under the**  
17 **heading, "Mature Pecan Orchard Operations," what is**  
18 **this list of items showing?**

19 **A. These would be some expense categories that**  
20 **you would have on the farm. Labor is one of the**  
21 **big-ticket items. Fertilization and soil amendments**  
22 **is another big one. Management of pests and weeds and**  
23 **brush, you know, is part of the maintenance throughout**  
24 **the year to protect your trees and crops. You have to**  
25 **replace equipment, repair equipment, maintain the**

1 equipment that you have. Land management is going to  
2 be lasering, taking care of the -- the needs of the  
3 soil and then irrigation management and irrigating and  
4 then you get into the harvest season and nut cleaning  
5 and then you'll be marketing the product after harvest  
6 is over.

7 **Q. In your experience, how long do pecans live?**  
8 **How long do pecan trees live and still produce in the**  
9 **lower Rio Grande?**

10 A. We don't know the answer to that question yet  
11 because the trees -- some of the oldest trees in the  
12 valley were planted in the 1915, and they're still  
13 producing. Some of the oldest trees that I farm are  
14 85-plus years in age, and they're still producing  
15 quite well.

16 **Q. What's the range in age for your trees?**

17 A. I have trees that go from 85 years of age to  
18 I have some that just had their third summer.

19 **Q. For all of your trees, do you still expect**  
20 **production from those trees in the coming years?**

21 A. Yes, I do.

22 **Q. We'll talk a little bit about your water,**  
23 **your irrigation, in a moment, but let me ask you:**  
24 **Would your family have been able to plant and maintain**  
25 **your pecan orchards without the ability to pump**

1 groundwater?

2 A. No, they wouldn't.

3 Q. Let's talk about just a couple of the items  
4 here on New Mexico Demonstrative Exhibit 34, Page 2,  
5 starting with farm labor. How many people do you  
6 employ?

7 A. 20 year round.

8 Q. Are you personally engaged in the farm work?

9 A. Yes, I am.

10 Q. If you employ 20 people year round, do you  
11 also have seasonal employees?

12 A. Yes. We'll bring on an additional 30  
13 employees for the harvest season, so it'll give us a  
14 total of about 50.

15 Q. What's involved in a typical workday on your  
16 farm during the irrigation season?

17 A. Well, we'll start irrigating typically in  
18 March, first part of April, depending on the winter  
19 moisture, and then we'll irrigate again 30 days later,  
20 but in between, by the time we get to the first  
21 irrigation in March, we have done all our pruning, we  
22 have cleaned up the pruning brush, we have fertilized  
23 and worked our soil, done any lasering that needs  
24 touchup on the farm to keep our fields efficient for  
25 irrigations. We'll start spraying zinc after bud



1 break at the end of March and that will go through the  
2 middle of May. We'll have a second irrigation  
3 typically that we'll start about the end of April,  
4 first part of May, and we may have some more  
5 fertilization to do in May and June and July in  
6 between irrigations. Once it starts to warm up in May  
7 a little bit, we may be on the next irrigation, two to  
8 three weeks. We'll have a -- typically a pest called  
9 pecan nut case bearer that will show up right around  
10 Memorial Day, and we'll have to treat for that, then  
11 we'll have aphids will start to show up in June so  
12 we'll have to spray for those. They tend to come back  
13 in July so we'll spray them, maybe August/September  
14 for aphids again. Those are the main pests that we  
15 deal with. And in between irrigation, which by the  
16 time we get into June, we will be irrigating every two  
17 weeks typically depending on soil types and then the  
18 nuts will start to size more so in July and start to  
19 mature, though the irrigation cycle will drop from a  
20 two-week cycle maybe to a 12, 10, 9-day cycle, and  
21 it's critical to keep the trees with the water that  
22 they need in order to grow a good crop, and we will  
23 irrigate on a fairly tight cycle 12 to 9 days, 10  
24 days, all the way through September, then you'll have  
25 -- the trees will start slowing down under use as the

1 crop is maturing, and we will typically have our final  
2 irrigations, depending on soil types, again, somewhere  
3 around the 10th of October to the end of October. We  
4 just had our last irrigation for the season on the  
5 sandy grounds last week.

6 **Q. When does pecan harvest occur?**

7 A. It starts right around Thanksgiving or our  
8 first hard frost, which is typically around  
9 Thanksgiving. It goes for five or six weeks. It'll  
10 go through Christmas, New Year's, and finish around  
11 the middle of January. When I got married, I forgot  
12 to mention to my wife that she married into the  
13 anti-holiday business. She has since learned then.

14 **Q. What's involved in a typical workday for you**  
15 **during harvest?**

16 A. We -- we will start early in the morning. We  
17 organize the crews. We will get the pecan shakers  
18 going. We sweep them into wind rows. Mature pecan  
19 trees, you're constantly fighting branches that die  
20 throughout the season. They'll come off when you  
21 shake so you have to collect those and put them out of  
22 the way. We have little machines that are called  
23 sweepers that will make wind rows out of the nuts and  
24 the leaves then you go over the top of them with a  
25 pecan harvester. It separates out the leaves, and you

1 typically end up with just pecans and small, light  
2 debris, and from there as they go through the  
3 harvester, they're put into a trailer. We'll take the  
4 trailer to our sorting plant. From there, we separate  
5 all the good pecans out with any debris or any reject  
6 pecans, and then from there, we'll put them into a  
7 storage barn. I happen to have a large freezer on our  
8 farm, so we will put the pecans in the freezer at zero  
9 degrees, and we will decide when we're going to market  
10 those pecans at a later date.

11 **Q. One of the bullet points here is identified**  
12 **as harvest and nut cleaning. How many pecans do you**  
13 **harvest on average?**

14 A. Three-and-a-half to five-and-a-half million  
15 pounds a year.

16 **Q. Can you explain the difference between a**  
17 **harvest for an on year and an off year?**

18 A. Yes. Pecan trees, by nature, will alternate  
19 bear, and they will have a large crop one year and a  
20 not-so-large crop the next year, and that's part of  
21 the reason why we do our pruning to try and help abate  
22 that a little bit, but you can never quite get rid of  
23 it. Just to give you a little 101 on pecan trees is  
24 as they evolved over time, it's a wild tree native to  
25 the United States and Mexico, and it evolved to mature

1 the crop with the monsoonal rains. So as the  
2 monsoonal rains would start in July and August and  
3 September, that's when the nuts would size and  
4 typically finish off by October, and if you compare  
5 pecans to a peach tree, for example, a peach tree's  
6 fruit is done by the end of June, so that tree will  
7 have July, August, September, October to store  
8 carbohydrates for next year's crop. A pecan tree will  
9 only have the middle of October until your first  
10 frost, which is four to five weeks to store  
11 carbohydrates for the next year's crop, and that's  
12 part of the reason why we get these giant fluctuations  
13 of production, and it's due to carbohydrate storage.  
14 So on the off crop, that tree is storing carbohydrates  
15 up for the next oncoming crop.

16 **Q. What's the current going rate for pecans?**

17 **A.** Right now it's around \$2.10 a pound.

18 **Q. Before we leave this slide, one of the bullet**  
19 **points there is fertilization and soil amendments. We**  
20 **can also see equipment and maintenance. Do you**  
21 **purchase goods and services in the state of New**  
22 **Mexico?**

23 **A.** Yes, I do.

24 **Q. Do you also purchase goods and services in**  
25 **the state of Texas?**

1           A.     Yes, we do in El Paso area.

2           **Q.     To give us an idea of the scale, can you give**  
3 **us an example of how much you would spend on**  
4 **fertilizer and soil amendments in a typical year?**

5           A.     Yes. We -- I put several different types of  
6 fertilizers out. The -- I just actually purchased my  
7 fertilizer for next year because of concerns about  
8 supply chain issues and stuff, and our fertilizer cost  
9 for next year are going to be close to \$900,000 the --  
10 and we will put out sulfur amendments to help with  
11 salts and your basic elements, your nitrogen,  
12 phosphorous, and potassium, and we -- we applied  
13 several different types of sulfur to help amend the  
14 soils.

15                   **MR. WECHSLER:** Your Honor, I'm about to  
16 talk about irrigation management. I see it's 5:00  
17 Central. For New Mexico, I'm happy to continue.  
18 What's your preference?

19                   **JUDGE MELLOY:** If you're going to change  
20 subjects, maybe this would be a good time. I was  
21 going to go another few minutes, but if this is a good  
22 stopping point, let's -- we will stop until tomorrow  
23 morning, and we'll re-adjourn or come back together at  
24 11:00 Central and 10:00 Mountain time. All right?  
25 See everybody in the morning. Thank you, everyone.

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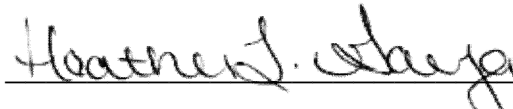
**MR. WECHSLER:** Thank you.  
(The proceedings adjourned at 5:02 p.m.)

## 1 CERTIFICATE

2  
3 I, HEATHER L. GARZA, a Certified  
4 Shorthand Reporter in and for the State of Texas, do  
5 hereby certify that the facts as stated by me in the  
6 caption hereto are true; that the foregoing pages  
7 comprise a true, complete and correct transcript of  
8 the proceedings had at the time of the hearing.

9 I further certify that I am not, in any  
10 capacity, a regular employee of any of the parties in  
11 whose behalf this status hearing is taken, nor in the  
12 regular employ of any of the attorneys; and I certify  
13 that I am not interested in the cause, nor of kin or  
14 counsel to any of the parties.  
15  
16

17 GIVEN UNDER MY HAND AND SEAL OF OFFICE,  
18 on this, the 8th day of December, 2021.

19 

HEATHER L. GARZA, CSR, RPR, CRR

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