

NO. 141 Original

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In The  
SUPREME COURT OF THE UNITED STATES

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

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TRANSCRIPT OF JULY 13, 2021, REMOTE  
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL  
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH  
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at  
2:01 p.m.

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1                   **JUDGE MELLOY:** All right. This is in  
2 the matter of State of Texas versus State of New  
3 Mexico and State of Colorado, United States Supreme  
4 Court Original No. 141. So let's start by asking the  
5 parties to enter their appearance. Mr. Somach, are  
6 you there?

7                   **MR. SOMACH:** Yes, Your Honor, I am. Can  
8 you hear me okay?

9                   **JUDGE MELLOY:** I can.

10                  **MR. SOMACH:** Good. Again, this is  
11 Stuart Somach for the State of Texas. With me are  
12 Theresa Barfield, Francis Goldsberry, Sarah Klahn,  
13 Richard Deitchman, and Robert Hoffman from my office,  
14 and then from the Attorney General's Office of the  
15 State of Texas, Priscilla Hubenak.

16                  **JUDGE MELLOY:** Okay. Mr. Wechsler, who  
17 do you have on board?

18                  **MR. WECHSLER:** Yeah, thank you, Your  
19 Honor. Jeff Wechsler for the State of New Mexico. I  
20 also have Kayla Brooks from our office in with me. We  
21 have Cholla Khoury and Zach Ogaz from the New Mexico  
22 Attorney General's Office; Luis Robles and Susan  
23 Barela from Robles and Rael; Lisa Thompson and Michael  
24 Kopp from Trout Raley; John Draper from Draper &  
25 Draper; Shelly Dalrymple from the New Mexico

1 Interstate Stream Commission; and we have April  
2 Ferguson, our technical coordinator, with us, as well.

3 **JUDGE MELLOY:** All right. And then  
4 Mr. Wallace, anyone on besides yourself?

5 **MR. WALLACE:** Yes, good morning -- or  
6 good afternoon now, Your Honor. Joining us today are  
7 Preston Hartman from the Attorney General's Office,  
8 and we should also have Michael Sullivan. He's the  
9 Deputy State Engineer. And Craig Cotten, who is  
10 Colorado's Division Engineer and Engineer Advisor to  
11 the Compact.

12 **JUDGE MELLOY:** Mr. Dubois, are you on?

13 **MR. DUBOIS:** I am. Good afternoon, Your  
14 Honor.

15 **JUDGE MELLOY:** Good afternoon.

16 **MR. DUBOIS:** This is Jim Dubois for the  
17 United States. Also on are Lee Leininger, Judy  
18 Coleman, and Jennifer Najjar from Department of  
19 Justice; Chris Rich from the Solicitor's Office; and  
20 Seth Allison and Amber Engelke, who are our support  
21 staff that have got sort of the technical expertise.

22 **JUDGE MELLOY:** And the Albuquerque Water  
23 Utility Authority, anyone on for them?

24 **MR. BROCKMANN:** Yes, Your Honor. This  
25 is Jim Brockmann on behalf of the Albuquerque



1 Bernalillo County Water Utility Authority.

2 **JUDGE MELLOY:** City of El Paso?

3 **MS. MAXWELL:** Good afternoon, Your  
4 Honor. Susan Maxwell for the City of El Paso.

5 **JUDGE MELLOY:** City of Las Cruces?

6 **MR. STEIN:** Good afternoon, Your Honor.  
7 This is Jay Stein for the City of Las Cruces.

8 **JUDGE MELLOY:** El Paso County Water  
9 Improvement District No. 1?

10 **MR. BLAIR:** Yes, this is Al Blair, the  
11 district engineer for El Paso County Water Improvement  
12 District No. 1.

13 **JUDGE MELLOY:** Elephant Butte Irrigation  
14 District?

15 **MS. BARNCASTLE:** Good afternoon, Your  
16 Honor. Samantha Barncastle for the Elephant Butte  
17 Irrigation District.

18 **JUDGE MELLOY:** Hudspeth County  
19 Conservation Reclamation District No. 1?

20 (No response.)

21 **JUDGE MELLOY:** Okay. Mr. Miller, I  
22 assume, is not here.

23 New Mexico pecan growers?

24 **MS. DAVIDSON:** Good afternoon, Your  
25 Honor. Tessa Davidson on behalf of New Mexico pecan

1 growers.

2                   **JUDGE MELLOY:** All right. And then  
3 anyone on for New Mexico State University?

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

6                   **JUDGE MELLOY:** Southern Rio Grande  
7 Diversified Crop Farmers Association?

8                   **MR. OLSEN:** Good afternoon, Your Honor.  
9 A.J. Olsen on behalf of the Southern Rio Grande  
10 Diversified Crop Farmers Association.

11                   **JUDGE MELLOY:** Anyone on that I missed?

12                                   (No response.)

13                   **JUDGE MELLOY:** All right. Well, let's  
14 talk about the demonstration we had. I guess, first  
15 of all, let me ask: Is there anyone who's on who was  
16 on the -- who listened in on the demonstration who had  
17 any problems with either the video or the audio? Was  
18 everybody able to hear okay and see okay? What was  
19 the reaction to -- to how -- to how the video  
20 presentation went? Any --

21                   **MS. MAXWELL:** Your Honor, this is Susan  
22 Maxwell. Just one comment from my observation is when  
23 we were on the two-screen view where we could see both  
24 witness and exhibit, I found that when you -- at least  
25 for the example of the exhibit that we were looking

1 at, the page from the expert report, when we were in  
2 the single view of the exhibit, that was legible on  
3 the screen. I found that when we were in the  
4 two-screen view with both witness and exhibit, the  
5 exhibit became blurry to the point of being difficult  
6 to read. I don't know if other folks had that -- had  
7 that issue, as well.

8 **JUDGE MELLOY:** Well, let me ask you  
9 this, Ms. Maxwell, how would you feel about having  
10 only the -- having the single view with just the  
11 exhibit and not being able to see the witness who's  
12 testifying -- testifying about the exhibit.

13 **MS. MAXWELL:** I think personally for  
14 exhibits that are at least as text blatant as that  
15 example was, it's arguably more important to be able  
16 to look at whatever text is being reviewed and -- and  
17 commented on by the witness than continually observing  
18 the witness demeanor themselves. Now, I say that as  
19 one of the parties not cross-examining, so other --  
20 other folks may have a different perspective on that  
21 than ours.

22 **JUDGE MELLOY:** Let me ask Mr. Wechsler  
23 something, and I -- I'll let the other parties jump in  
24 if they have any comments. You're going to use Trial  
25 Director; is that right, Mr. Wechsler?

1                   **MR. WECHSLER:** It is, Your Honor.

2                   **JUDGE MELLOY:** Do you think that would  
3 be any more legible or less legible than what we were  
4 using today, which is basically a PDF?

5                   **MR. WECHSLER:** My experience is that  
6 Trial Director is more legible, and the reason is,  
7 Your Honor, if there are specific parts of the text  
8 that we're asking the witness to focus on then April  
9 Ferguson or whoever is operating Trial Director that  
10 day will be able to blow up that text and so it won't  
11 simply be a full-screen view even if it's on two  
12 separate parts.

13                   **JUDGE MELLOY:** Okay. Well --

14                   **MS. BARNCASTLE:** Your Honor, this is  
15 Samantha Barncastle, and I just have something to add  
16 here that's incredibly key to what I'll be doing. In  
17 terms of being able to view what's being testified  
18 about in context, it's incredibly important for me to  
19 have the actual document at my disposal to be able to  
20 not necessarily follow along on your screen but follow  
21 along on my own and maybe go ahead and maybe go back  
22 to something, so I'm assuming, but I want to just  
23 double-check, that we will have the ability to publish  
24 these, and even though -- and I didn't see this.  
25 That's why I'm raising this. Even though you won't be

1 physically handing a copy to counsel, we have the  
2 ability to publish them via Zoom or other trial  
3 technology where we can download them on our end and  
4 then use them as we need? Is that a correct  
5 assumption?

6 **JUDGE MELLOY:** I don't know the answer  
7 to that. That's a good question. So what's the --  
8 okay. Let me make -- let's -- something we'll have to  
9 investigate before our next demo.

10 **MS. BARNCASTLE:** We would rather have  
11 the document in hand and be able to watch it, but if  
12 we're -- you know, I'm going to have to disagree with  
13 Ms. Maxwell, if I have the document in front of me, I  
14 don't necessarily need to see it on the screen. I  
15 would rather see the witness.

16 **MS. MAXWELL:** And I would agree with  
17 that if we already have the documents in hand, then I  
18 can follow along with that document and watch the  
19 witness.

20 **MR. SOMACH:** When we did depositions, it  
21 was routine, at least for the United States and Texas,  
22 to have documents available and shared at the same  
23 time. I don't know why we -- that's a pretty easy  
24 thing to do, and I think they were PDFs, so that way  
25 one could see the witness because I agree with Ms.

1 Barncastle, it would be good if someone is remote to  
2 see the witness actually testifying if one had the  
3 document, but I think they could be -- be shared just  
4 like they were during depositions immediately.

5 **MS. BARNCASTLE:** The concern arises that  
6 that feature wasn't on our task bar on the  
7 nonparticipant, the view-only side of things. We  
8 didn't even have the ability to, like, raise our hand  
9 our chat, and, you know, the chat feature can be  
10 incredibly important if we're having some sort of  
11 technical issue to go back and forth with the Zoom  
12 administrator without interrupting trial or what is  
13 more important at that moment. So the -- those sorts  
14 of features seem to have been disabled on our end.

15 **JUDGE MELLOY:** All right. We'll talk to  
16 Worldwide about that and -- and, you know, you've  
17 worked with them, as well, so if you want to talk to  
18 them directly, I certainly have no objection to that.  
19 You certainly all worked actually more closely with  
20 them than we have. One thing I would note, also, is  
21 that I understand -- we got an alert, someone is  
22 recording this hearing. Who's doing the recording?

23 **THE REPORTER:** Your Honor, that's  
24 Worldwide recording the audio portion only, just in  
25 case there are technical glitches during the hearing.

1                   **JUDGE MELLOY:** As I understand, that  
2 function will not be available to any of the  
3 participants at the trial just so you're aware of  
4 that, that the recording is not -- not an option.

5                   **MR. BROWN:** Your Honor, yeah, this is  
6 Brandon Brown. I apologize, Your Honor. The  
7 non-interactive link that we sent out today was  
8 literally non-interactive whatsoever, and if  
9 Ms. Barncastle or anybody -- we can -- we can make the  
10 non-interactive link -- we can enable different  
11 features, whatever you tell -- whatever you authorize  
12 us to activate. We literally made today's 100 percent  
13 non-interactive, but we can certainly activate  
14 whatever Your Honor tells us that the non-interactive  
15 links can do, raise your hand, send a message, without  
16 interrupting the interactive link that's in the  
17 courtroom. We can certainly make that happen, as  
18 well. But, like, today was literally 100 percent  
19 non-interactive.

20                   **JUDGE MELLOY:** Well, Brandon, why don't  
21 we -- why don't you plan to enable those two features,  
22 as well as the feature to allow documents that are  
23 published to be downloaded. I don't know exactly how  
24 that -- that's done. I'm not the techy here, but I  
25 assume if it was done for -- during the depositions,

1 it could be done for -- for the noninteractive. Am I  
2 correct?

3 **MR. BROWN:** Let me check into that, Your  
4 Honor. As far as -- you know, we're streaming the  
5 Zoom interactive feed to a webinar feature of Zoom,  
6 which is noninteractive. I can make it a little  
7 interactive as far as whatever you allow. We can go  
8 over that as far as what we'll be able to do with the  
9 noninteractive Zoom part. As far as downloading  
10 documents from the noninteractive, I'm not sure that  
11 that would be possible. I will double-check that and  
12 let everybody know with an e-mail. But as far as the  
13 noninteractive, we are going to be very limited as far  
14 as to what interaction you can have with the  
15 interactive Zoom link, if that makes sense. You know,  
16 we -- we can certainly -- there is a chat feature.  
17 There is a raise-your-hand feature. I don't know if  
18 they would be able to literally download documents  
19 that are being viewed in the courtroom, you know,  
20 simultaneously. Now, that -- that might be something  
21 that we could do an e-mail to everybody like ASAP,  
22 like we kind of did it two different ways in the  
23 depositions. We used AgileLaw -- some parties used  
24 AgileLaw. Some parties had us show documents, and we  
25 can go through different scenarios for -- for both of



1 those functions, as well.

2           **JUDGE MELLOY:** Well, I think -- well,  
3 we'll just have to talk about this. The -- if you  
4 were to show them, that would be -- I think it would  
5 be difficult for the attorneys. I'll go back to  
6 Mr. Wechsler. You -- you were planning to have  
7 someone in the courtroom doing all that for you. I --  
8 I assume that would not work, as well, to have  
9 Worldwide handling the documents. Am I correct,  
10 Mr. Wechsler?

11           **MR. WECHSLER:** That's correct. We would  
12 strongly prefer to have the ability to control what  
13 documents are showing. There's various things that we  
14 would be doing there. I will add, though, that, you  
15 know, as I mentioned last time, we'll be printing out  
16 a hard copy of all of our documents. That also means  
17 we will be PDFing those documents. We could put all  
18 of those PDFs on a ShareFile folder, and parties can  
19 download what they want at their leisure.

20           **MR. BROWN:** Right. And I agree, Your  
21 Honor, and I apologize if I was confusing. There's  
22 absolutely no way it would work for Worldwide to  
23 handle the documents in trial. I was just simply  
24 pointing out that when we were doing it in the  
25 deposition setting, multiple parties used multiple

1 things, but we could download those ourselves and send  
2 out folders to each party. But in the trial, it would  
3 work different. It was just my understanding that the  
4 concern was with the noninteractive feed, that they  
5 not have any ability to speak up and interrupt the  
6 trial process so the noninteractive, we just made 100  
7 percent noninteractive, but we can certainly tweak  
8 that however needs to happen.

9 **JUDGE MELLOY:** Well, Ms. Barncastle, do  
10 you think if -- if the -- and we're going to be  
11 talking about this in a few minutes about these  
12 counterproposals concerning the dissemination of  
13 exhibits prior to the witness testifying, but if they  
14 were put into PDF and downloaded to a shared file,  
15 would that work?

16 **MS. BARNCASTLE:** Yeah. I think -- but,  
17 see, I do think we're also making this more difficult  
18 than it has to be. We were all adults, and we got  
19 through over a hundred depositions in one summer with  
20 the ability to interact, and nobody was disruptive,  
21 and we figured it out, and we had one key feature  
22 there that would solve all of these problems, and that  
23 was the chat feature. Even here, though, I was just  
24 about to text Mr. Brown and say I have some ideas, but  
25 the chat feature is disabled. I just handled a

1 full-blown trial a couple of weeks ago where all I did  
2 was publish through the chat feature and so they --  
3 then the court reporter would download them, slap an  
4 exhibit label on them, and republish them, and you  
5 could have them either without the exhibit label or  
6 with. One of the keys of following along at trial is  
7 being able to keep track of the 9,000 documents that  
8 are potentially going to be in play, and when it's  
9 marked, it does change things for you as an attorney  
10 versus not having it marked initially. So I think  
11 there's a way we can get around this if we can all  
12 just share the chat feature.

13 **MR. BROWN:** Absolutely. Absolutely.  
14 And we can -- we can chat with you on the  
15 noninteractive if you have a concern, a connection  
16 issue, a -- the document's not great quality issue or  
17 the audio maybe needs to be a little higher issue. We  
18 can absolutely chat with you on the noninteractive.  
19 Literally like today, I literally just made it 100  
20 percent noninteractive; but like I said, we can  
21 certainly -- we can certainly activate the chat  
22 feature or the raise-your-hand feature if you want to  
23 talk to the tech and then that tech can get with the  
24 people in the courtroom to -- to adjust whatever or --  
25 or whatnot. But we can absolutely activate the chat

1 portion of the noninteractive link, as well.

2 **MS. BARNCASTLE:** And that's actually  
3 what I had hoped for because there -- I can think of  
4 numerous times throughout a deposition where counsel  
5 had to e-mail somebody like the court reporter and  
6 say, you know, hey, we're not hearing the witness as  
7 well, can you move the microphone closer to them, but  
8 we didn't interrupt the deposition itself. We just  
9 fixed the problem behind the scenes. So that, I  
10 think, is certainly a possibility if we have the chat  
11 feature, I think that's the key about what's missing  
12 here.

13 **MR. BROWN:** Yes. And we can -- we can  
14 absolutely have contact with the court reporter or --  
15 or somebody in the courtroom on the interactive side,  
16 but you're right, if the -- if the chat feature is  
17 activated on the noninteractive, that would give that  
18 go between that we could be the messengers or  
19 whatever, we can take care of that or if you need  
20 something e-mailed to you or, Hey, can you check with  
21 the court reporter, blah, blah, blah, we can certainly  
22 do that through the chat feature on the noninteractive  
23 link.

24 **JUDGE MELLOY:** All right. Well, it  
25 sounds like this is a problem that -- for which there

1 may be differing solutions, but we can hopefully work  
2 it out.

3           The -- let me just ask sort of the  
4 overarching question, though. Did the technology seem  
5 to work sufficiently for people who may not be  
6 personally present in the courtroom? Did you feel  
7 that the video and audio quality was such that you  
8 would feel comfortable observing a trial from  
9 Albuquerque or El Paso or Las Cruces or some place  
10 else.

11           **MR. BROCKMANN:** Your Honor, this is Jim  
12 Brockmann for the Water Authority. The short answer,  
13 I think, is yes. We did this with depositions  
14 throughout the summer, and subject to -- I agree with  
15 Ms. Maxwell, the exhibits were hard to read on the  
16 screen, but if we work out the ability to have it on a  
17 second screen in our office and actually look at the  
18 document itself, I think -- I think it works  
19 adequately. So we appreciate the Court setting it up.

20           **JUDGE MELLOY:** All right.

21           **MS. BARNCASTLE:** Your Honor, I have a  
22 little bit different perspective if I might. The --  
23 the answer to your question did this work actually  
24 very much depends for me on the District's ability to  
25 participate at trial, which is still not nailed down

1 necessarily. So, you know, EBID is -- and I -- I  
2 can't speak for EP No. 1, and I know they're down  
3 counsel today, but EBID is still hopeful that if  
4 something comes up that we participated on in  
5 depositions and we feel that the United States and  
6 Texas can't adequately protect our interest, we may  
7 need to step in. Now, that being the case, if I am in  
8 New Mexico when a line of questioning starts, I can't  
9 just be in the courtroom the next day necessarily so I  
10 might be requesting the ability to redirect or cross a  
11 witness via Zoom. And at that point, I would hope  
12 that we could make me an active participant instead of  
13 a non-active participant, but I -- you know, that's  
14 sort of a bridge that I had hoped to not actually have  
15 to cross until we got to trial and something went  
16 wrong, but at this point, I don't feel like that I  
17 could adequately protect my client being in New Mexico  
18 if I didn't have the ability to say hold on, this is  
19 going down a path I have a big problem with.

20 **JUDGE MELLOY:** Well, are you talking  
21 about your own employees? Are you talking about  
22 witnesses in general? Can you be more specific?

23 **MS. BARNCASTLE:** There's going to be a  
24 huge battle ongoing over what evidence related to the  
25 operating agreement issues is appropriate, and if that

1 doesn't get cleared up in a way that we're comfortable  
2 with, it could be that a non-EBID witness begins to  
3 testify on issues that are troubling to EBID that we  
4 may be involved in other litigation on that I may need  
5 to stand up and say I'm going to just level an  
6 objection just in case I have to go back to that other  
7 court. We're not acquiescing to this. It might be  
8 just something that simple or it might be that I ask  
9 for permission to, you know, jump in and do a few  
10 things like we had to do in depositions at times, not  
11 necessarily questioning or protecting my own  
12 witnesses, but others. So until we see how some of  
13 this operating agreement evidence issue rolls out,  
14 it's very hard to tell if I'm going to need to be in  
15 the courtroom full time or if I feel comfortable that  
16 I can do my job from New Mexico most of the time.

17 **JUDGE MELLOY:** Well, as I understand it,  
18 and Mr. Brown can correct me if I'm wrong, but we can  
19 make you a participant at any time. It's just going  
20 to have to -- you're just going to have to ask, and  
21 we're going to have to give permission. But I -- I  
22 don't think that's a -- I don't think there's any  
23 technical impediment to doing that. It's just a  
24 question of whether to what extent we ultimately allow  
25 your client or any other client to participate in the

1 examination, and I -- I don't think we're prepared to  
2 discuss or really make any decision on that today.

3 **MS. BARNCASTLE:** Certainly. And my  
4 hope, Your Honor, would be that I've said this all  
5 along. To a certain extent, each of the parties here  
6 represents EBID's interest, including New Mexico, so  
7 my hope would be that the big boys work it out, and I  
8 don't have to play ball. But if it comes down to it,  
9 at a minimum, I will need to be able to raise my hand  
10 and tell the Zoom administrator, next time we go to a  
11 break, let him know I want to make a record, you know,  
12 and have the ability to at least do that.

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

14 **MR. BROWN:** And you're right, Your  
15 Honor, we can do that any time that you tell us, we  
16 can make anybody -- we can get them on the interactive  
17 side whenever you tell us.

18 **JUDGE MELLOY:** All right. Well,  
19 anything else about the demo other than we're going to  
20 do a follow-up, and we're going to -- in about two  
21 weeks to -- when the -- when the courtroom is  
22 available that we're going to actually be using, and I  
23 know, Mr. Wechsler, you indicated you wanted your  
24 paralegal there to actually tie into the system, which  
25 I think is a good idea. I mean, we did this



1 yesterday, and we found a couple glitches. We got  
2 worked out before this morning, so we may find some  
3 more so I think it's a good suggestion. If anybody  
4 else wants to have somebody here for the demo, they're  
5 certainly welcome to do so.

6 **MR. STEIN:** Your Honor, this is Jay  
7 Stein. I have a question.

8 **JUDGE MELLOY:** Sure.

9 **MR. STEIN:** With respect to the feed.  
10 As I understand it, the feed will be directed to  
11 attorneys' offices or to a court building such as the  
12 federal court building in Las Cruces. Would the  
13 attorney's office component also include the Las  
14 Cruces city attorney's office? Two -- two attorneys  
15 are counsel in this case, Jennifer Vega-Brown, the  
16 city attorney, and Robert Caballo, and I'm asking if  
17 there could be a conference room available at the city  
18 attorney's office as part of the feed for them or  
19 others from city utilities.

20 **JUDGE MELLOY:** Are they attorneys of  
21 record? Mr. Stein, are you attorneys of record?

22 **MR. STEIN:** Yes, they are, Your Honor.  
23 Jennifer Vega-Brown is the city attorney, and Robert  
24 Caballo is the utilities attorney from the Las Cruces  
25 attorney's office.

1                   **JUDGE MELLOY:** Well, they would -- they  
2 would automatically, I guess, qualify in my mind for  
3 -- as -- as one of the attorney offices to which the  
4 feed can be made. I'm -- for instance, I'm looking at  
5 Texas here. I wouldn't limit the feed just to  
6 Mr. Somach's office. If -- if the attorney general's  
7 office wants the feed, that -- since they're attorneys  
8 of record, I would have no problem with that. Same  
9 way with New Mexico. You have multiple firms and  
10 entities, including the attorney general's office. I  
11 think they're all entitled to a feed. I would also  
12 clarify this point. I think this came up with one of  
13 the attorneys last time. Mr. Brockmann, it may have  
14 been. But when I say the attorney office, I'm talking  
15 about to wherever the attorney is located. You know,  
16 hopefully most people are probably back in the office  
17 now, but it very well could be that people are still  
18 going to be working from home in September/October.  
19 So if -- if -- if you're -- if -- so it's where the  
20 attorney is located. It may be their office. It may  
21 be their home. It may be some place else is -- is  
22 what I'm -- what I'm envisioning.

23                   **MR. STEIN:** Thank you, Your Honor.

24                   **JUDGE MELLOY:** Any questions about that?

25                   **MR. UTTON:** This is John Utton. Can I

1 make one quick comment on the prior discussion about  
2 the -- the visibility of the combined witness and  
3 document on the screen, the two boxes. I think it  
4 would be helpful to have the exhibits ourselves, but  
5 it also is helpful to see what specifically is being  
6 referred to. I know in other Zoom contexts, these are  
7 mostly in presentations, the document is a larger box,  
8 and the speaker is a smaller box. If that's possible,  
9 that might help remedy that so we could still see the  
10 witness, but they wouldn't take up half the screen.  
11 There would be a smaller box off to the side and the  
12 document would be bigger, and we could see it better.  
13 That might be helpful if that's possible.

14 **JUDGE MELLOY:** I guess I'll ask  
15 Mr. Brown, is that an option?

16 **MR. BROWN:** Yes, Your Honor. That would  
17 be done with the trial presenters that are in the  
18 courtroom, Mr. Wechsler's IT guys who will use Trial  
19 Director, and somebody else may be using some other  
20 feature. But having the PIP, I think we can certainly  
21 make that happen where we make the witness a little  
22 smaller.

23 **JUDGE MELLOY:** Okay. All right. I'm  
24 sure as we get into this, particularly at the trial,  
25 there will be some tweaks as to how the presentation

1 is made, and -- so I -- I guess that's all I can say  
2 at this point.

3 **MS. BARNCASTLE:** Your Honor, this is  
4 Samantha Barncastle again for EBID, and I'll ask for  
5 forgiveness, but I'll -- let me just push the envelope  
6 a little bit here. I find it very difficult to try a  
7 case without seeing the judge, and even though I'm not  
8 responsible for trying this case, I feel very  
9 handicapped by the fact that we aren't going to have  
10 the ability to watch you and evaluate you from where  
11 we're sitting. And to me, body language is huge in  
12 your trier of fact, and I just would really prefer to  
13 be able to see you somehow in addition to the witness.  
14 I may be the lone ranger here begging for this  
15 opportunity. I'm hopeful there's some way you could  
16 arrange the cameras so that it's further back so you  
17 could still see you and the witness but not be, you  
18 know, clear across the room, whatever we can do to --  
19 I recognize you have an interest in not necessarily  
20 being on camera all day every day, as well, but it  
21 certainly would help from my perspective, particularly  
22 when you have in this instance farmers going, well,  
23 what did the judge do when so and so said X. You  
24 know, sometimes the answer is simple. Nothing. He's  
25 playing poker just like we are. But sometimes the

1 answer is, oh, he almost flew out of his chair. So,  
2 you know, I -- I would really appreciate your  
3 consideration of that matter.

4 **JUDGE MELLOY:** Well, I will -- I will  
5 consider it. There's -- there are some technical  
6 limitations to doing that. I think the camera view  
7 would have to be so far back to get both me and the  
8 witness into the screen, it's -- I'm afraid you may  
9 not see either of us all that clearly, but we'll have  
10 to -- so anyway, I'll -- I'll think about it, and  
11 we'll -- we'll look at what the technical limitations  
12 are, as well.

13 **MS. BARNCASTLE:** Thank you, Your Honor.

14 **MR. WALLACE:** Your Honor, I do -- this  
15 is Chad Wallace for Colorado. I do have an additional  
16 question on the video feed following on Mr. Stein's  
17 question. I've had some of the attorneys from some of  
18 the stakeholder groups who were present at our last  
19 status conference ask if there is a way that they  
20 could get a feed of the trial as attorneys. Do you  
21 have any suggested process for doing that. Would you  
22 like them to apply to receive video feed? What are  
23 your thoughts on that?

24 **JUDGE MELLOY:** You can ask them to  
25 apply. I don't necessarily -- am opposed to video

1 feeds to other attorneys' offices. What I don't want  
2 to do is open it up to anybody who wants to log onto  
3 Zoom to participate. Nothing that's -- that's secret  
4 or embarrassing about it, other than that's what I  
5 told the Supreme Court we were going to do is limit it  
6 to the attorney's offices, and I don't want to go back  
7 and now tell them that we're going to make it  
8 available to anybody who wants to look at it. So if  
9 there are other attorneys, I wouldn't necessarily be  
10 opposed to that, but -- but I don't want to open it up  
11 to everyone.

12 **MR. WALLACE:** That's understood. If --  
13 if I understood what you said just correctly, I can  
14 inform them they are all attorneys. Would you like it  
15 in a form of a motion or a letter requesting access?

16 **JUDGE MELLOY:** Letter is fine.

17 **MR. WALLACE:** Thank you.

18 **JUDGE MELLOY:** All right. And then --  
19 let's see. In Ms. O'Brien's letter, indicates she  
20 wouldn't be available, she had indicated that someone  
21 was talking to the folks in El Paso at the U.S.  
22 courthouse there. Does anyone know who has been  
23 contacted in the El Paso courthouse?

24 (No response.)

25 **JUDGE MELLOY:** Okay. I'll ask Ms.

1 O'Brien -- would somebody ask Ms. O'Brien to send me  
2 an e-mail with that information? I'd like to know who  
3 she's dealing with there.

4 We're going to do the -- the -- the  
5 second demonstration in about two weeks. Does anybody  
6 -- is there any strong preference as to whether we do  
7 it 27th, 28th? I was thinking either Tuesday or  
8 Wednesday. Should we just plan on Tuesday, the 27th,  
9 same time.

10 **MR. SOMACH:** Your Honor, this is Stuart  
11 Somach. I just wanted to let you know, we will have  
12 someone there in person in addition to -- to us  
13 looking at this. We'll have our folks that are going  
14 to be working on the technical part of our  
15 presentation will be there on this date.

16 **JUDGE MELLOY:** Okay. So let's plan on  
17 the 27th. We'll do it the same time. We'll do the --  
18 the non-participant feed at 1:00. We'll do the --  
19 then the follow-up at 2:00 like we -- as we did today.

20 **MR. BROWN:** And, Your Honor, I heard  
21 that the -- the link was a little confusing as far as  
22 the 1:00 p.m. run through this afternoon as far as  
23 having both links in one e-mail. However it works for  
24 you guys, we can send it a different way if -- if this  
25 morning was confusing. We can certainly make it how

1 it's, you know, good for everyone.

2 **JUDGE MELLOY:** Why don't you just send  
3 it as a non-participation for the 1:00.

4 **MR. BROWN:** Okay. Perfect. Yes, sir.  
5 Yes, sir.

6 **JUDGE MELLOY:** All right. Anything more  
7 about the -- the demonstration or the -- the video  
8 feed?

9 (No response.)

10 **JUDGE MELLOY:** All right. Then let's  
11 move on to the issue of the tour. As far as dates are  
12 concerned, I would probably prefer the 23rd/24th. And  
13 as to the question that was raised about the final  
14 pre-trial conference, let me ask this, we're about a  
15 week out -- I have to look at the schedule, but a week  
16 or ten days out on the deadline of filing motions in  
17 limine. I guess I'll start with you, Mr. Somach. Are  
18 you anticipating filing extensive motions in limine.

19 **MR. SOMACH:** Well, we're going to file  
20 some motions in limine. They're not extensive. I  
21 think in your order, you allowed 20 pages per motion,  
22 and I know for a fact that we're way under 20 pages  
23 total for what we're going to file so they're not  
24 extensive at all. There may be a couple pages per  
25 issue, and there may be five issues at the most. So



1 that's -- and I think that's actually more than what  
2 they are, but we do intend to file something.

3 **JUDGE MELLOY:** What about you,  
4 Mr. Wechsler, what are your thoughts?

5 **MR. WECHSLER:** We will be filing  
6 something. I -- I -- I think the volume is similar to  
7 what Mr. Somach's describing. I think we have  
8 approximately five issues that we're raising.

9 **JUDGE MELLOY:** Well, I think if that's  
10 -- if that's what we're talking about, I think then  
11 doing something in Texas or New Mexico would probably  
12 be doable. So I would be willing to do the final  
13 pre-trial conference on the 25th, and we -- and I'll  
14 have to talk to the judges down there, whether we do  
15 El Paso or Las Cruces, I'll have to see. Probably El  
16 Paso, because I think that's where most people are  
17 going to be staying, although as I understand, it's  
18 not that difficult to drive up to Las Cruces. So  
19 we'll plan on that unless it turns out the final  
20 pretrial is going to be so complex that we're going to  
21 need a lot more document accessibility and so on, but  
22 let's plan on that.

23 And then Mr. Wechsler brought up the  
24 issue of the flyover. I think he's pretty well laid  
25 it out in his e-mail or letter. What -- what's your

1 -- tell me what your thinking is, Mr. Somach, as to  
2 why we would need to go all the way up to Albuquerque?

3 **MR. SOMACH:** Yeah, I'm going to defer,  
4 if I can, to Ms. Klahn who's going to be on the  
5 flyover, and who's been working directly with  
6 everybody on the issue. So she'll be able to give you  
7 a much better and more direct response.

8 **JUDGE MELLOY:** Ms. Klahn?

9 **MS. KLAHN:** Good afternoon, Your Honor.  
10 The thinking was that we wanted to be able to start in  
11 Las Cruces and end in Truth or Consequences and see  
12 most of the basin. As a logistical matter, it's my  
13 understanding that if we go up the east side of the  
14 mountains, because they fly at a higher elevation, the  
15 plane can go faster. The goal was to try and do this  
16 in a couple of hours and not have to refuel. So by  
17 doing it in this fashion, we don't have to refuel, so  
18 that's the kind of logistical reason. From a  
19 substantive point of view, Albuquerque and the middle  
20 Rio Grande, which is south of Albuquerque are part of  
21 this case in the sense that that's where the water has  
22 to come through in order to get to Elephant Butte,  
23 and, of course, New Mexico has witnesses from  
24 Albuquerque on their witness list and, of course, we  
25 have Mr. Brockmann at every status conference. So I

1 think it's not really fair to say that Albuquerque and  
2 the middle Rio grande aren't part of this case even if  
3 they aren't directly at issue because they are both  
4 Elephant Butte. So that was the thinking for why we  
5 proposed this. This way, we can start from Las  
6 Cruces, we can end in Truth or Consequences, and the  
7 idea is that the buses or the vans or whatever will  
8 pick up for the field trip at the Truth or  
9 Consequences airport and -- and take off from there.  
10 And any -- any area of the Rincon Valley that you  
11 didn't see from the air, you're going to be going  
12 through in the van. But it's not -- according to Ms.  
13 Barncastle, it's really not a very substantial part of  
14 the Rincon Valley. So that's the thinking from our  
15 team.

16 **JUDGE MELLOY:** Well, as I understand it,  
17 what Mr. Wechsler is proposing is we would start in  
18 Las Cruces, then fly south to Fort Quitman, then back  
19 basically up to Rio Grande Valley to Truth or  
20 Consequences, which would, if I'm reading the map  
21 correctly here, is only about less than half of what  
22 you're proposing in terms of a flight. I don't  
23 understand the -- the logistics of why that is more  
24 efficient than -- why a flight that's twice as long is  
25 more efficient than -- than what is being proposed by

1 New Mexico.

2           **MS. KLAHN:** I don't disagree that if the  
3 -- if Your Honor doesn't want to go all the way north  
4 to Albuquerque, starting in Las Cruces, going to Fort  
5 Quitman, and then back to Truth or Consequences is  
6 more efficient. What our position -- we started from  
7 the position that we needed to go all the way to  
8 Alamosa because the entire Rio Grande Compact is at  
9 issue, and seeing the Compact area from source to out  
10 -- output -- outfall seemed like the best true  
11 bird's-eye view. You get a sense of how the valley  
12 changes from the headwaters as you move down into the  
13 desert and so on. After looking at that and looking  
14 at the -- getting some pushback from New Mexico and --  
15 and talking with the aviation company, we thought  
16 maybe Albuquerque was a middle ground and -- and part  
17 of the problem with Alamosa, frankly, was that we were  
18 going to have to refuel up there. So it would have  
19 meant some time on the ground. So we were -- we were  
20 trying to approach this in a way that we thought was  
21 going to provide the best bird's-eye view of the  
22 system to everybody and -- and that's where we --  
23 that's where we came down.

24           **JUDGE MELLOY:** Well, I -- I guess I have  
25 to say, I'm not that interested in going 150 miles

1 north of the basin. I just don't think that would be  
2 that efficient, and I would like to see us work on an  
3 itinerary that's closer to what Mr. Wechsler  
4 suggested. And he did indicate that there -- what was  
5 it you indicated, there was a gap, Mr. Wechsler, that  
6 you thought should be filled?

7 **MR. WECHSLER:** Well, the -- and the  
8 route, Your Honor, that I -- that I suggested would  
9 fill that in. If you look at the picture there, you  
10 can see the northern pink dot there between there and  
11 the southernmost blue dot on the western side, which  
12 is the Truth or Consequences dot. There's no route  
13 there indicated. That's that Rincon part of the New  
14 Mexico basin. But the route that we're proposing  
15 would go directly to Truth or Consequences. You would  
16 see all of that. You would see the entire basin. We  
17 did contact the plane, and we're assured there are no  
18 logistical issues with taking the more direct and  
19 efficient route.

20 **JUDGE MELLOY:** I think that's something  
21 I prefer both in terms of time and just flying --  
22 anyway, that's my preference as something along the  
23 lines of what Mr. Wechsler is suggesting. Hopefully  
24 we can work that out between the two of you. And  
25 we'll finalize any details at the hearing in two weeks

1 on this -- on this issue, if there's anything left  
2 unresolved.

3                   Let me talk about the mechanics of the  
4 -- of the tour. You mentioned buses and vans. I  
5 don't want this to be a huge group. We've talked  
6 about limiting it to one or -- or most two attorneys  
7 for each of the parties. The amici will certainly be  
8 involved when we visit their particular locations.  
9 Anything in the EBID, I certainly expect Ms.  
10 Barncastle to be there, and anything in El Paso No. 1,  
11 I expect Ms. O'Brien to be there. But I -- I don't --  
12 I'm not anticipating the amici, for the most part,  
13 going along on the tour, and I don't anticipate more  
14 than one or two lawyers from each of the firms. I  
15 mean, does anybody have differing thoughts on that or  
16 is that -- anybody find that objectionable?

17                   **MS. KLAHN:** Your Honor, I may have  
18 created some confusion by referring to buses and vans.  
19 I think the idea is to keep it very limited, and I'm  
20 not exactly sure about the number of -- of people who  
21 are planning to -- or who are going to be included at  
22 this point, but what you just sketched out is at least  
23 in the ballpark. I believe it's one lawyer for each  
24 party will be on the bus and so that probably isn't a  
25 bus. It's probably a van.

1                   **JUDGE MELLOY:** All right. And -- and  
2 certainly if we're visiting a site that an amici has  
3 particular interest in, they're certainly welcome to  
4 be at that site, but as a general proposition, we're  
5 not going to have 30 people on a bus or a van as far  
6 as I'm concerned. So is there any question about  
7 that?

8                   **MS. KLAHN:** I don't think so.

9                   **JUDGE MELLOY:** Any other logistical  
10 issues dealing with the tour that we need to talk  
11 about today?

12                   **MS. BARNCASTLE:** Your Honor, I -- I  
13 would like to briefly just note for the parties that I  
14 went out to some of these sites recently and that two  
15 of them, there were rattlesnakes. So please dress  
16 appropriately. High -- knee-high boots would be  
17 excellent, long pants. I know it's going to be  
18 summertime but certainly don't need an emergency out  
19 on a canal bank, and the snakes like to come out and  
20 sun during the day when we're going to be out and  
21 about so that, you know, they have the warmth to get  
22 them through the cold, desert nights. That is one  
23 logistical issue to be very aware of. The other thing  
24 is that some of our farmers have -- they keep bees,  
25 and bees attract other bugs so if you have any

1 allergies, make sure you have your Epipen or something  
2 available. There are often bees out and about.

3           And then finally, at least in our  
4 District, I'll be placing porta potties at areas that  
5 are convenient along the way because this can be a  
6 long tour without bathrooms. So we'll try to make  
7 those accommodations for everybody there. At the end  
8 of the day, they're porta potties, so I highly  
9 recommend you go at the restaurant or at the state  
10 parks when you have time, but we will have them toward  
11 the southern end in case somebody needs them because  
12 this can be a long miserable day in the heat with the  
13 sun and the rattlesnakes and no bathroom. But those  
14 are the only logistical issues I noted.

15           **JUDGE MELLOY:** All right. Well, and I  
16 would -- and I was going to mention, too, and I had  
17 forgotten. This reminded me, Ms. Barncastle. I  
18 certainly don't expect people to dress the same as  
19 they would in -- for a court proceeding. It's going  
20 to be hot, I assume, this time of the year, so dress  
21 comfortably, short-sleeve shirts or blouses are  
22 certainly encouraged, and you're not -- suit and tie  
23 is not -- is not required so dress -- dress  
24 comfortably for the trip. Anything else?

25           **MR. DUBOIS:** Your Honor, I actually have



1 sort of a curiosity question for you. On -- on the  
2 flyover, are you interested in seeing -- getting --  
3 getting out so you can get a view of -- of Elephant  
4 Butte Reservoir and its -- well, we'll see what kind  
5 of water is in it at that point, but going up to Truth  
6 or Consequences doesn't necessarily give you a full  
7 view of Elephant Butte itself. Is that something you  
8 would like us to try to include in the itinerary?

9 **JUDGE MELLOY:** Yes. I assume that would  
10 be in the itinerary. We definitely would fly over the  
11 reservoir.

12 **MR. DUBOIS:** Okay. We've had enough  
13 discussions and enough sort of disagreement internally  
14 that understanding what you would like to see would  
15 also be helpful.

16 **JUDGE MELLOY:** And I'm not saying we  
17 can't go a little bit north of Truth or Consequences  
18 in order to get a full view of the reservoir and --  
19 and what leads into it, but I'm -- I -- I'm not  
20 particularly interested in going all the way up to  
21 Albuquerque.

22 **MS. BARNCASTLE:** As a practical matter,  
23 landing in T or C, you will see the reservoir. You  
24 have to because you're going to have to fly north of  
25 the reservoir and then shoot out over the west Mesa to

1 be able to land where the airport is so you're going  
2 to see it.

3 **JUDGE MELLOY:** Well, it must be an  
4 impressive --

5 **MS. BARNCASTLE:** The question is at what  
6 point do you -- the channel is also that comes in, the  
7 middle Rio Grande has done a significant amount of  
8 work to channelize that and get water to the  
9 reservoir, and that, you won't necessarily see, but  
10 you could if you went further north.

11 **JUDGE MELLOY:** Like I say, I don't mind  
12 going, you know, 20 miles further north or something  
13 like that. I -- I just don't want to go all the way  
14 up to Albuquerque.

15 **MR. DUBOIS:** That's the clarification I  
16 was hoping for. Thank you, Your Honor.

17 **JUDGE MELLOY:** And it must be an  
18 impressive airport at Truth or Consequences. I  
19 understand that Mr. Branson took his space flight off  
20 from there.

21 **MS. BARNCASTLE:** Actually, no, Your  
22 Honor, that's at Upham. The original flight plan that  
23 directs you behind on the east side of the mountains  
24 directs you around the restricted air space that's  
25 above the space port airport, but the T or C airport

1 is actually pretty impressive, too, because Ted Turner  
2 had it redone so that he could get his jets in and  
3 out. The airport used to not be large enough.

4 **JUDGE MELLOY:** All right. Well, good.  
5 If it's good enough for Ted Turner, it should work for  
6 us. All right. Thank you. Anything else about the  
7 tour that we need to talk about?

8 (No response.)

9 **JUDGE MELLOY:** And then finally we have  
10 this issue about the exhibits and the duelling letters  
11 that came in today. I read them, and not sure I  
12 entirely understand the disagreement. There seems to  
13 be, if I'm understanding correctly, New Mexico and  
14 Texas and United States seem to be in agreement that  
15 the deadline for filing objections were extended to  
16 August 2nd, which I don't have any problem with, and  
17 that those objections would be limited to authenticity  
18 -- well, Texas' authenticity, New Mexico says  
19 authenticity or identification. I'm not sure I know  
20 the difference. But -- but basically what we're  
21 talking about there are foundational objections,  
22 right? Is that what we're saying?

23 **MR. WECHSLER:** Your Honor, that's --  
24 that's not our position. You are correct about  
25 agreeing on August 2nd. Our thought is your original

1 order that required us to do objections early is a  
2 good one, and that will help facilitate and move  
3 things along at trial. We do think, however, that we  
4 -- we think Texas' proposal of five or six days in  
5 advance of the witnesses testifying actually trying to  
6 resolve those objections, that that -- that also makes  
7 a lot of sense to us, will be more efficient and allow  
8 us to not have to look at all of the exhibits, for  
9 example, ones that may never see the light of day in  
10 the courtroom. But our view is even though we will  
11 have objected on all grounds by August 2nd, that we  
12 still need to be able to do a meet and confer on  
13 authenticity issues, because in the event that one of  
14 the parties is raising certain authenticity issues, we  
15 need to be able to take a look at that, see if there's  
16 some way we can correct that or if we need a witness  
17 at trial, to be able to address that. So that's our  
18 rationale for dealing with those up front. Otherwise,  
19 we think that identifying all of those objections  
20 early and then actually resolving them in the meet and  
21 confer later on when those exhibits are actually  
22 identified as a part of that five-day process.

23 **JUDGE MELLOY:** So let me understand, if  
24 I understand your position correctly. The -- when you  
25 talk about authenticity, I guess I tend to think of

1 foundation, but are we -- we're talking about whether  
2 it's, in fact, a business record or whether, in fact,  
3 it's a historical record, or whether -- whether it  
4 meets one of the other -- one of the exceptions to the  
5 hearsay rule or -- or what kind of witness you have to  
6 put on to -- to prove that up. Is that what you're  
7 talking about with authenticity?

8 **MR. WECHSLER:** It is, Your Honor.

9 **JUDGE MELLOY:** Okay.

10 **MR. DUBOIS:** Your Honor, if I --

11 **JUDGE MELLOY:** Yeah, go ahead.

12 **MR. DUBOIS:** This is Jim Dubois. I was  
13 following Mr. Wechsler for a while, but then we seemed  
14 to have a jump, and it may have just been a  
15 misstatement because he said that he wanted the  
16 objections on all grounds by August 2nd, in which case  
17 why are we only talking about authenticity? I'm not  
18 clear if we're talking about authenticity by August  
19 2nd or all grounds, because then what's the second --  
20 you know what I mean? What are we going to do with  
21 redoing the same objections five days before trial?  
22 I'm just -- I'm just not clear, and I want to make  
23 sure that we are all on the same page. So I guess the  
24 question, Jeff, is: Were you intending to say object  
25 based on all grounds by August 2nd or on the

1 authenticity so we can, as the Court says, sort of get  
2 to the foundational issues if there are any?

3 **MR. WECHSLER:** So we -- if I may, Your  
4 Honor, we -- we do think that it should be on all  
5 grounds by August 2nd, and we don't view that as sort  
6 of redoing the objections in that trial. Those same  
7 objections would -- would stand. That would be the  
8 objections that were applicable. But at that point,  
9 you know, let's say one of our witnesses is on the  
10 stand, we're now identifying the specific exhibits in  
11 advance that we actually are intending to present and  
12 so that gives the other parties an opportunity to,  
13 again, identify their objections and really walk  
14 through the meet-and-confer process, and the  
15 efficiency we think that gains is if we do all of the  
16 objections now and then we also have to do all of the  
17 meet-and-confer process now, that's going to be  
18 difficult. That's going to be hours and hours and  
19 hours, and it will also cover -- I mean, as you  
20 probably saw from our e-mail, there have been over  
21 9,000 exhibits that have been identified so that  
22 process would be extremely lengthy. But actually  
23 going through the objection meet and confer at the  
24 time, you know, right before a witness, as Texas  
25 proposes, that makes a lot of sense to us, and it

1     obviates the need to go through everything. Now, that  
2     being said, we do think identifying these objections  
3     early is helpful because it allows us to go through  
4     our exhibit list, potentially, you know, pare off  
5     things if necessary, deal with authenticity issues and  
6     also, potentially, we're hopeful that we might be able  
7     to -- if we know the objections early, to deal with  
8     large categories of documents. You know, so let's  
9     say, for example, there's certain types of data sheets  
10    that one party or another is objecting to on relevance  
11    grounds or something, if there's a hundred of those,  
12    we can talk about that before the trial, that might  
13    help speed up the process when we actually get to  
14    trial. And all of this, our purpose is really to try  
15    and be as efficient as possible and to reserve trial  
16    time for things that actually matter.

17                   **JUDGE MELLOY:** So just so I understand,  
18    you would still meet and greet over -- over the issues  
19    of, as you call them, authenticity or foundational  
20    exhibits before the trial, but you would not meet and  
21    greet about the other objections, hearsay, relevance,  
22    those type of objections until -- until a decision is  
23    made five or six days before the witness is called  
24    that that exhibit is actually going to be used?

25                   **MR. WECHSLER:** That's correct, Your

1 Honor. I will also just explain why I'm not using the  
2 word "foundation." I sometimes would think of  
3 foundation like, you know, let's say there's a report  
4 that was done in 1989 or something. Certainly there  
5 is a witness who you could lay foundation for that  
6 witness to testify to that particular exhibit, but I  
7 don't know in that initial process that we're going to  
8 know that until we understand what exhibit is  
9 identified with what witness later on in the process  
10 if that makes sense.

11 **MS. BARFIELD:** Your Honor --

12 **MR. DUBOIS:** I guess, Your Honor -- I'm  
13 sorry. Go ahead, Ms. Barfield.

14 **MS. BARFIELD:** Thank you, Mr. Dubois.  
15 On behalf of Texas, Your Honor, I think that the last  
16 point that Mr. Wechsler made --

17 **JUDGE MELLOY:** I'm sorry. I'm having a  
18 little trouble hearing you. Could you speak up a  
19 little bit?

20 **MS. BARFIELD:** Yes, Your Honor. I  
21 apologize. I think that the last point that  
22 Mr. Wechsler made is a great example of why the  
23 process of going through the better part of 9,000  
24 exhibits at this juncture in an attempt to make  
25 appropriate and meaningful objections is inefficient,



1 given the volume of documents or exhibits rather that  
2 have been exchanged among the parties. Using  
3 Mr. Wechsler's example, until we know the purpose for  
4 which an exhibit is going to be offered, as well as  
5 the person who's going to be testifying about it, we  
6 really don't know how we can say now by August 2nd  
7 whether or not the State of Texas will have, for  
8 example, a foundation objection. So the process for  
9 9,000 documents, we believe, is inefficient. We think  
10 it's more efficient for all the parties and more  
11 appropriate to look at the actual exhibits that  
12 ultimately will be used for each witness, and that's  
13 why we propose this alternative method of presenting  
14 the actual exhibits that we intend to present tethered  
15 specifically to a reason so that the parties can then  
16 evaluate is this particular exhibit relevant for this  
17 witness's testimony, appropriate for a foundational  
18 perspective for this witness's testimony, have a  
19 discussion about it before that witness gets on the  
20 stand, try to resolve those objections, and only come  
21 to Your Honor when the witness testifies when actual  
22 disputes that still exist. But we think that doing it  
23 now by August 2nd to 9,000-plus exhibits is going to  
24 leave the parties really guessing as to what the  
25 purpose of each exhibit is, what witness will testify

1 to each exhibit, and we think that this process is a  
2 great way to streamline the real issues that could be  
3 in dispute. I think all the parties agree that we're  
4 not going to be offering 9,000 exhibits into evidence  
5 in the trial, but rather, we're going to -- this is  
6 our -- this is our universe of what -- what folks are  
7 going to choose from, and then we're going to figure  
8 out, you know, the subset of 20 documents or 10  
9 documents or whatever it will be for any given witness  
10 or perhaps 50. But at any rate, we'll be asserting  
11 objections and discussing objections, not in a vacuum,  
12 but rather with actual information as to the purpose  
13 of the document and the -- and the witness who will  
14 use the document.

15 **MR. WECHSLER:** I would -- the only thing  
16 I would add, I understand we're wrapping up this  
17 conversation, is we agree, we're not going to be  
18 presenting 9,000 documents, but Ms. Barfield  
19 identifies the precise reason that we need to start to  
20 whittle those down and address objections as early as  
21 possible, so we're not taking trial time for that. I  
22 guess I don't understand the problem. I mean, whether  
23 or not we're doing objections now or at trial, we're  
24 certainly not going to wait until then to review all  
25 9,000 of those exhibits. I mean, that's part of our

1 due diligence in preparing for trial. I assume that  
2 Texas will do the same.

3 **JUDGE MELLOY:** Well, I guess one of my  
4 concerns is one of the -- one of the objections that  
5 may be made, I'm assuming, in a case like this is that  
6 a document is hearsay, and the -- the counterargument  
7 would then be, well, it fits under one of the  
8 exceptions to the hearsay rule, whether it be a  
9 business record, whether it be a historical document,  
10 whatever. And if you don't know that there's going to  
11 be a hearsay objection until six days before trial,  
12 that means whoever is propounding a witness that wants  
13 to rely on that document now has to scramble to get  
14 somebody to come in and authenticate it as a business  
15 record or come in and authenticate it as -- as a  
16 historical document. I'm not sure we can wait that  
17 long on some of those types of objections. Anybody  
18 have any response to that or am I -- am I missing  
19 something here?

20 **MR. WECHSLER:** We agree, Your Honor.  
21 That -- that is our position.

22 **MS. BARFIELD:** Your Honor, on behalf of  
23 Texas, we do understand that concern. We think that  
24 addressing hearsay-styled objections five days in  
25 advance of the witness testifying is sufficient time.

1 We do believe that we'll be looking at a limited set  
2 of documents. I think right now, again, we're dealing  
3 with a situation where the parties are going to be  
4 tasked with identifying potential hearsay objections  
5 for 9,000-plus documents, not knowing what witness is  
6 going to testify about each of those specific 9,000  
7 documents. So, in other words, there might not be a  
8 hearsay objection if we knew the purpose for the  
9 document and who was going to be testifying about the  
10 document, but because we don't have that information  
11 now, I feel like it is potentially an exercise process  
12 that would be quite difficult, given the volume,  
13 whereas if we have a streamlined process closer to  
14 trial tethered to a specific witness, many of those  
15 ultimate hearsay objections that the parties may have  
16 to preserve will not matter, and the party may not  
17 want to assert them anyway. And to alleviate the  
18 concern of five to six days, we could even propose an  
19 exchange that included a few more days. It could be  
20 ten days before trial. We meet and confer for five of  
21 those. We attempt to resolve those concerns and  
22 provide a little more time. But the point is to  
23 tether an exhibit that truly a party does intend to  
24 use for a specific witness and that we all know the  
25 witness that's going to be used for and the purpose

1 because we do have an understanding of the general  
2 categories of testimony for each of the proposed  
3 witnesses via the exchange of the -- the witness list  
4 themselves. Our fear is that we are going to be --  
5 perhaps have to over object, which we do not want to  
6 do. We do not want to create objections to preserve  
7 objections, because we don't know the purpose of an  
8 exhibit or the witness who might be prefer for some to  
9 talk about.

10 **MR. DUBOIS:** Your Honor, this is Jim  
11 Dubois. I'll also add that context is obviously going  
12 to be very meaningful for things like a relevance  
13 objection. That may be affected by the outcomes of  
14 the motions in limine, as well. So I guess we were  
15 looking at some of those kinds of problems, and as Ms.  
16 Barfield said, we end up having to over object to a  
17 lot of documents based on -- on relevance of -- of how  
18 we think the case is going to go or should go, and  
19 it's -- if the noting all of that seems like it's  
20 --it's going to generate an awful lot of work going  
21 through thousands of documents without any context.

22 **MR. WECHSLER:** We have -- to that point  
23 of over objecting, Your Honor, we're certainly  
24 attempting to be cautious in our objections. And I  
25 can report that we've done between 1,500 and 2,000 of

1 the documents submitted by the United States and  
2 Colorado, and it's not so burdensome.

3 **JUDGE MELLOY:** Well, let me give this  
4 some thought. I don't have any objection to extending  
5 the deadline until August 2nd, and I'd like to --  
6 let's -- let's -- I think what I'll order at this time  
7 is that by August 2nd, the category what would be  
8 referred to A and B documents, those are -- to which  
9 there are no objections be identified, and those to  
10 which there are authenticity objections as that's been  
11 described are identified, and the meet-and-greet  
12 process will continue. I want to see what the motions  
13 in limine look like. I may -- I may very well  
14 ultimately agree with New Mexico and require that the  
15 other objections be filed in advance of trial, but I  
16 want to think about that a little bit and see exactly  
17 how -- how things shake out with the -- with the other  
18 objections.

19 Is there anything else we need to talk  
20 about today?

21 (No response.)

22 **JUDGE MELLOY:** All right. Well, if not  
23 --

24 **MR. DUBOIS:** Your Honor, I'm sorry.  
25 Just to be clear, I want to make sure I -- we're doing

1 the tour the 23rd and 24th would be your preference,  
2 and then the final pre-trial conference would be Las  
3 Cruces or El Paso on the 25th?

4 **JUDGE MELLOY:** Right.

5 **MR. DUBOIS:** Is that correct? Okay.  
6 Just double-checking.

7 **JUDGE MELLOY:** I'm assuming -- I -- I'm  
8 -- I'm assuming the pre-trial conference will be more  
9 than an hour, so we may be spending the better part of  
10 the morning or well into the afternoon. Without any  
11 disparagement of El Paso, my daughter, who's a lawyer,  
12 and does immigration work, used to spend a lot of time  
13 taking depositions in El Paso, and her saying was you  
14 can get to El Paso, but you can't get out because  
15 there's -- the last flight out is about 2:00 in the  
16 afternoon so if you -- if you don't get done in time  
17 to make a 2:00 flight, you're pretty much going to be  
18 there for the rest of the day. But hopefully we can  
19 get done. If not, we'll stay over until the next  
20 morning, and -- but -- but I think it will probably  
21 take a better part of the morning and maybe into the  
22 afternoon to final pretrial conference. Any other  
23 questions?

24 (No response.)

25 **JUDGE MELLOY:** All right. Thank you.

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**MR. DUBOIS:** Thank you.

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

**MR. WECHSLER:** Thank you, Your Honor.

**MR. WALLACE:** Thank you.

(The proceedings adjourned at 3:10 p.m.)



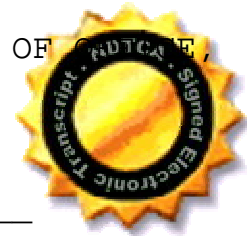
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