

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

REDACTED TRANSCRIPT OF NOVEMBER 29,
2022, REMOTE HEARING BEFORE HONORABLE MICHAEL A.
MELLOY, SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE,
111 SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401,
beginning at 1:30 p.m.

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1 P R O C E E D I N G S

2 **JUDGE MELLOY:** Good afternoon, everyone.
3 This is Judge Melloy. Shall we get started? This is
4 in the matter of Texas versus New Mexico and Colorado,
5 United States as intervenor, United States Supreme
6 Court Original No. 141.

7 First of all, let me ask: Is someone
8 recording the meeting?

9 **VIDEO TECH:** That's me, Kayla. I'm with
10 Worldwide. I'm just recording for Heather's audio
11 purposes.

12 **JUDGE MELLOY:** Fine. Thank you.

13 Let me start by asking the parties to
14 enter their appearance. Texas? Who's on for the
15 State of Texas, please?

16 **MR. SOMACH:** I'm sorry, Your Honor. I
17 was muted there. Stuart Somach for the State of
18 Texas. With me is Theresa Barfield, Sarah Klahn,
19 Francis Goldsberry, Robert Hoffman; and from the Texas
20 Attorney General's Office, Grant Dorfman, Priscilla
21 Hubenak; and then the Rio Grande Commissioner for the
22 State of Texas, Bobby Skov.

23 **JUDGE MELLOY:** And who do we have on for
24 New Mexico?

25 **MR. WECHSLER:** Good afternoon, Your

1 Honor. Jeff Wechsler from Montgomery & Andrews. We
2 also have Cholla Khoury, the Chief Deputy Attorney
3 General; Marcus Rael from Robles Rael & Anaya; Lisa
4 Thompson and Michael Kopp from Trout Raley; John
5 Draper and Corinne Atton from Draper & Draper. We
6 have the State Engineer, Mike Hamman, who is also the
7 Rio Grande Compact Commissioner; Rolf
8 Schmidt-Petersen, the Director of the Interstate
9 Stream Commission; and Nat Chakeres, the general
10 counsel for the state engineer.

11 **JUDGE MELLOY:** And then for the State of
12 Colorado?

13 **MR. WALLACE:** Good afternoon, Your
14 Honor. This is Chad Wallace for the State of
15 Colorado. I am joined by Kevin Rein, the Colorado
16 Compact Commissioner; Mike Sullivan, Deputy State
17 Engineer; Craig Cotten, the Compact Engineer Advisor
18 to Colorado; and also from the Attorney General's
19 Office, Scott Steinbrecher and Preston Hartman.

20 **JUDGE MELLOY:** All right. For the
21 United States?

22 **MS. COLEMAN:** Good afternoon, Your
23 Honor. This is Judy Coleman for the United States.
24 Mr. Leininger is on by phone. We also have Jennifer
25 Najjar from the Department of Justice, and Chris Rich

1 and Shelly Randel from the Department of Interior
2 Solicitor's Office. We may also have some Reclamation
3 folks online, but there's a long participant list and
4 I'm not going to scroll. So those are the counsel.

5 **JUDGE MELLOY:** Okay. Albuquerque
6 Bernalillo County Water Utility Authority?

7 **MR. BROCKMANN:** Yes, Your Honor. This
8 is Jim Brockmann with Stein & Brockmann on behalf of
9 the Albuquerque Bernalillo County Water Utility
10 Authority

11 **JUDGE MELLOY:** City of El Paso? Anybody
12 on for the City of El Paso?

13 (No response.)

14 **JUDGE MELLOY:** All right. City of Las
15 Cruces?

16 **MR. STEIN:** Good afternoon, Your Honor.
17 This is Jay Stein for the City of Las Cruces. I'm
18 joined by Adrienne Widmer, the acting utilities
19 director for the City; by Jocelyn Garrison, the acting
20 city attorney; and Brad Douglas from the City
21 Attorney's Office.

22 **JUDGE MELLOY:** And then El Paso County
23 Water Improvement District No. 1?

24 **MS. O'BRIEN:** Yes, good afternoon, Your
25 Honor. Maria O'Brien for El Paso County Water

1 Improvement District No. 1. Also on is counsel, Renea
2 Hicks, and acting general manager for the district,
3 Lisa Aguilar, and district engineer, Al Blair.

4 **JUDGE MELLOY:** Elephant Butte Irrigation
5 District?

6 **MS. BARNCASTLE:** Good afternoon, Your
7 Honor. Samantha Barncastle for the Elephant Butte
8 Irrigation District, and with me today is Dr. Phil
9 King, our engineering consultant.

10 **JUDGE MELLOY:** And I understand you may
11 need to drop off at some point, Ms. Barncastle, and
12 that's fine. Just -- just -- you can leave without
13 having to alert anybody.

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

15 **JUDGE MELLOY:** Hudspeth County
16 Conservation Reclamation District No. 1?

17 **MR. MILLER:** Yes. Good afternoon, Your
18 Honor. This is Drew Miller on behalf of the Hudspeth
19 District.

20 **JUDGE MELLOY:** New Mexico pecan growers?

21 **MS. DAVIDSON:** Good afternoon, Your
22 Honor. Tessa Davidson on behalf of New Mexico pecan
23 growers.

24 **JUDGE MELLOY:** New Mexico State
25 University?

1 **MR. UTTON:** Yes. Good afternoon, Your
2 Honor. This is John Utton on behalf of New Mexico
3 State University, and also joining us is Scott Field
4 from the General Counsel's Office.

5 **JUDGE MELLOY:** Okay. Southern Rio
6 Grande Diversified Crop Farmer's Association.

7 **MR. OLSEN:** Good afternoon, Your Honor.
8 A.J. Olsen on behalf of the diverse crop farmers.

9 **JUDGE MELLOY:** Let me start by a couple
10 of preliminary comments about the hearing this
11 afternoon. We have talked to the people at Worldwide
12 so if there comes a point in time -- in time that we
13 feel that some parties want to have a separate
14 discussion with myself outside the presence of others,
15 I assume that would mainly mean the -- the named
16 parties outside the presence of the amici, we can go
17 into a breakout room if that becomes necessary. So we
18 do have that option available.

19 The other thing I wanted to mention is I
20 noticed in one of the filings, I don't normally pay
21 too much attention to the service list, but I noticed
22 one of them had as the mediator Judge Granger. I
23 think that was a prior mediator. So please, you know,
24 make sure your service lists are up to date because we
25 do -- I see -- we get bounce backs so I'd ask you

1 double-check that and make sure your service lists are
2 correct.

3 All right. I'm not exactly sure where
4 to start this afternoon. I think the overriding issue
5 that is -- is before me today is the argument that
6 anything contained in the consent decree is
7 essentially subject to the confidentiality provisions
8 governing the mediation. And I should -- I should
9 also mention that Judge Boylan e-mailed me and said he
10 would not be available this afternoon and so he's not
11 on the call.

12 But -- so I guess, Ms. Coleman, I'll let
13 you start. Where do you -- how do you think we need
14 to proceed to resolve this or what do you -- what's
15 your thoughts about where we go from here?

16 **MS. COLEMAN:** Well, thank you for the
17 question because I -- I think our overarching response
18 for this status conference is that things need to be
19 decided and approached in a logical order, and all of
20 this cascade of motions and filings all kind of
21 depends upon where we land on motion to strike. And
22 so we think that needs to be -- to the extent more
23 briefing is needed and the States respond or we reply,
24 that needs to be briefed and decided before we proceed
25 down this path to the proposed decree, to unsealing,

1 hearing procedures, et cetera. It all turns on that.
2 And I don't know that that -- that motion is ripe
3 today. The States don't seem to be interested in
4 responding unless directed to. I don't know exactly
5 what that means, but my understanding is that there
6 may still be briefing on that to come.

7 **JUDGE MELLOY:** Well, I'm not going to
8 decide that issue today, and I don't particularly want
9 to necessarily have a lot of argument on it today.
10 But a couple things do come to my mind, though, as I
11 was reading through these motions, and if I understand
12 the position of the United States, anything that was
13 discussed in mediation cannot be part of the remedy?
14 Is that what we're talking about here?

15 **MS. COLEMAN:** Well, our confidentiality
16 --

17 **JUDGE MELLOY:** Even if we get to trial
18 -- I guess, what I'm getting at is let's say we get to
19 trial and Texas and New Mexico and Colorado come in
20 and say, you know, we like what was in the decree as a
21 remedy, Judge, order that, is it your position you
22 can't even talk about it?

23 **MS. COLEMAN:** I think it's a little
24 premature to talk about where we are versus a remedy
25 after the trial that the States don't even want to

1 have happen, and I think that when we get to -- I
2 mean, I don't really want to -- to talk any more
3 substance about our position on the proposed decree
4 than has already been disclosed, but obviously
5 everyone knows we've been negotiating along these
6 lines for months, right, and so it's not that we think
7 the whole thing -- you know, we wouldn't want to ever
8 see parts of it show up in trial ever again, but we
9 would want to consent to their discussion, and I think
10 --

11 **JUDGE MELLOY:** Well, but what if -- what
12 if you don't consent, then we can't ever talk about
13 anything that was part of the mediation?

14 **MS. COLEMAN:** I mean, our
15 confidentiality agreement is clear as day, that
16 information disclosed by the parties to each other is
17 a settlement framework that was developed in
18 mediation, and I think as is clear from everything
19 with substantial contributions from the United States
20 and the districts, this would not exist but for the
21 settlement negotiation. And so whether you're looking
22 at the confidentiality agreement, which is absolutely
23 clear, no information disclosed, et cetera, no -- and
24 your orders and Rule 408, nothing could be clearer
25 that ideas developed in mediation for purposes of

1 settlement can't be disclosed or used without all the
2 parties' consent. I -- I understand --

3 **JUDGE MELLOY:** Even at trial?

4 **MS. COLEMAN:** -- it's deeply frustrating
5 --

6 **JUDGE MELLOY:** Even at trial?

7 **MS. COLEMAN:** Even at -- I mean,
8 especially at trial, right? That's the whole purpose
9 of Rule 408.

10 **JUDGE MELLOY:** But what if it's a good
11 idea, but -- and they don't tell you who it came from,
12 why can't you -- why can't you use a good idea.

13 **MS. COLEMAN:** Well, let's take it back
14 to August. Right?

15 **JUDGE MELLOY:** Let me tell you how I
16 view this, and I -- I may be viewing it incorrectly.
17 As I understand from the filings that I've seen so
18 far, essentially what the States are saying is we are
19 not disclosing anything that was discussed in terms of
20 who -- who came up with this idea, who proposed that
21 idea, who objected to this proposal, who supported
22 that proposal. We're not talking about anybody's
23 position during the negotiations. But I don't know
24 that they -- and I don't want to speak to this, but I
25 don't know that they would seriously dispute the fact

1 that the decree represents the collective work product
2 of a number of people. Is that fair?

3 **MS. COLEMAN:** That it represents the
4 work product of a group of multiple parties? Yes,
5 that's fair.

6 **JUDGE MELLOY:** Yes. Primarily the
7 technical committee. It's a -- it's a group work
8 product.

9 **MS. COLEMAN:** That's correct.

10 **JUDGE MELLOY:** That United States
11 contributed to, the New Mexico engineers and technical
12 people contributed to, as did Texas, Colorado, and --
13 and maybe even the -- some of the amici. So they took
14 this group contribution and put it together into a
15 settlement that's embodied in the proposed decree, and
16 their position is that we're not saying that Texas
17 supported it or New Mexico opposed it or United States
18 was -- took this position; we're just telling you that
19 this is what we have agreed to settle this case on.
20 And what I'm saying is, if you carry that to its
21 logical conclusion, we can't use anything that was
22 ever discussed in settlement as part of a -- a decree,
23 even if it was totally rejected?

24 **MS. COLEMAN:** I mean, I have several
25 responses. I mean, the first, I am sympathetic to the

1 frustration that everyone on this conference call
2 feels about where we are today. This is not where any
3 of us wanted to be. My next -- so let's take that as
4 a given. My next comment is that -- so our
5 confidentiality agreement is not -- confidential
6 settlement information goes beyond positions. There's
7 no attribution limitation in our agreement. There's
8 no attribution limitation in Rule 408 or in your
9 orders and so it doesn't matter. And so like I was
10 saying, if you go back to August when there was a
11 proposed decree that represented the work product of
12 all of these parties, and we have the amici counsel
13 sign a confidentiality agreement to look at it, now,
14 on the theory that, well, it doesn't attribute
15 anything to anyone, therefore, it's all public,
16 there's no reason for them to sign a confidentiality
17 agreement, just disclose it to the world, but none of
18 the parties took that position. In fact, New Mexico
19 said this would need to stay confidential until it's
20 signed. I see no legal distinction between the draft
21 decree that existed in August and the decree that you
22 have been given today. It's been revised, but legally
23 speaking under the confidentiality agreement, the
24 confidentiality -- you know, the confidential
25 protection for it is and should be the same.

1 **JUDGE MELLOY:** Well, how far -- but you
2 haven't answered my question. How far does this
3 extend? Does it extend into the trial? If at some
4 point, somebody comes up and says this is -- this
5 proposal is a great remedy, you're going to say no,
6 you can't do it because --

7 **MS. COLEMAN:** I'm afraid that has to be
8 our position, yes. But I think we're so far away from
9 even talking about a remedy phase of this trial, which
10 --

11 **JUDGE MELLOY:** But if I -- but if I
12 enter an order that says nothing that was ever
13 discussed during mediation can ever be talked about
14 again without everybody's consent, where are we going
15 to be? We'll never be able to get to an end.

16 **MS. COLEMAN:** I don't -- well, I don't
17 think that's -- that's correct. I think that we have,
18 first of all -- I mean, let me -- I think there are
19 many ways to get to an end that could very well
20 include the concepts in the decree. Everyone was
21 negotiating --

22 **JUDGE MELLOY:** Well, how do you get no
23 that concept if nobody -- if --

24 **MS. COLEMAN:** Well, let's just say that
25 the United States wouldn't consent down the road to

1 talking about it, but I think there's multiple legal
2 --

3 **JUDGE MELLOY:** What if somebody other
4 doesn't consent? That's the point. Under your
5 proposal, all it takes is one person to veto even a
6 discussion about a remedy.

7 **MS. COLEMAN:** It's not my proposal.
8 It's the proposal that was signed by all four parties
9 to this case.

10 **JUDGE MELLOY:** Under your position.

11 **MS. COLEMAN:** Well, I think --

12 **JUDGE MELLOY:** If --

13 **MS. COLEMAN:** Okay. If you -- I think
14 looking at the States' responses thus far, which are
15 not full responses to our motion, but rather to copy
16 and paste versions of the same arguments that cite
17 cases that, in fact, support us, like Lyondell, you
18 would struggle to find a citation to authority, much
19 less an express provision in the confidentiality
20 agreement that permits them to do what they're doing.
21 I don't know what -- there's no provision in the
22 confidentiality agreement that authorizes this, as I
23 think they seem to be suggesting by not citing it at
24 all. There's no case law under Rule 408 that supports
25 them. Indeed, the 2006 amendments to Rule 408 say you

1 can't even submit your own settlement offer.

2 **JUDGE MELLOY:** But you haven't answered
3 my question. Are you telling me that nothing that was
4 ever proposed as a potential resolution of this case
5 can ever be used in trial as long as any one party
6 objects to it being brought up?

7 **MS. COLEMAN:** I think that's right.

8 **JUDGE MELLOY:** Well, then how do we get
9 to a resolution? You have to come up with something
10 that nobody thought of before then, in other words.

11 **MS. COLEMAN:** I mean, that's the
12 consequence. I mean, as I'm saying, where's the -- we
13 haven't even gotten to -- we have half of a liability
14 trial still --

15 **JUDGE MELLOY:** I know. But I'm thinking
16 about the consequences of entering the order that you
17 want me to enter, which says you cannot ever discuss
18 anything that was -- even -- even if Texas had made
19 the most outrageous demand and it was rejected, you
20 can't talk about that because it was part of
21 settlement. If somebody comes up and says, you know,
22 we want to -- we want to take this proposal that is on
23 the table now and tweak it, no, we can't do that.

24 **MS. COLEMAN:** It seems like you're just
25 -- excuse me if I'm misunderstanding what you're

1 saying, but it seems like the remedy proceeding that
2 you're talking about sound like a settlement
3 discussion.

4 **JUDGE MELLOY:** No. I'm talking about a
5 remedy. You're saying that nobody can talk about what
6 was discussed in settlement as a remedy as long as any
7 one of the party's object. Even if you don't
8 attribute it to anybody, just saying this is a good
9 idea, you cannot talk about a good idea in a trial as
10 long as somebody had talked about that good idea
11 during settlement, as long as it was objected to.

12 **MS. COLEMAN:** I think --

13 **JUDGE MELLOY:** I'm just thinking there's
14 going to be objection after objection after objection
15 at trial under your proposal or your position.

16 **MS. COLEMAN:** Well, I think, again, that
17 -- I think I've answered your question. I think the
18 logical question is that the parties cannot present
19 mediation proposals developed in mediation for
20 purposes of mediation to seek an affirmative judgment
21 on the remedy in a remedy phase of trial that's down
22 the road. I mean, I think that --

23 **JUDGE MELLOY:** So you can't even talk
24 about this as a remedy, even at trial?

25 **MS. COLEMAN:** I think that's correct. I

1 mean, the way I -- but what I'm telling you is that
2 the United States thinks a number of things in this
3 decree are a good idea and so I just don't -- I think
4 the hypothetical is not going to come true because I
5 think that the United States agrees with a lot of
6 things in this, and obviously we would not have spent
7 ten months of negotiation and devoted thousands of
8 hours of our technical people's work to a solution we
9 thought was not a good idea.

10 **JUDGE MELLOY:** But how do we -- well --
11 but if any one party -- okay. I won't beat a dead
12 horse, but I'm just really concerned about the sort of
13 overarching blanket order that you want entered that
14 is going to allow anything that's a good idea that's
15 in this decree to be off limits as long as one person
16 says -- or one party says, "I don't want to talk about
17 that." We can't even talk about it.

18 **MS. COLEMAN:** Well, I'm going to have to
19 think -- think about that a little more. I'm just --
20 I would like to understand what the States see as the
21 legal authority for overriding the agreement that they
22 signed, and --

23 **JUDGE MELLOY:** But normally, settlement
24 confidentiality agreements go to the parties using
25 positions taken -- taken in settlement discussions

1 against -- against a party. It's not -- it doesn't go
2 to saying, Well, somebody came up with a good idea
3 during negotiations, we can't use that good idea.
4 That's not what confidentiality provisions are
5 designed for.

6 **MS. COLEMAN:** Well, that's what our
7 agreement says. I mean, it doesn't say all good ideas
8 are barred from disclosure forever. But it says
9 information --

10 **JUDGE MELLOY:** That's what you want, as
11 long as anybody objects.

12 **MS. COLEMAN:** The United States does not
13 want you to issue a blanket order that says what
14 you're saying. We want an order striking these
15 documents.

16 **JUDGE MELLOY:** Okay. Well, where do you
17 think -- how do you think we go from here? Direct the
18 States to respond and then have a hearing? Is that
19 what you think we should do.

20 **MS. COLEMAN:** States respond. United
21 States reply. And this could be done swiftly. We had
22 nine days to respond to file our motion after theirs,
23 so I think a deadline of early next week would make
24 sense for them, and then we could reply in a fairly
25 prompt fashion, I think, if their arguments are not

1 going to expand upon anything they've already said
2 today, and then have a -- you know, I don't think this
3 would need to take a particularly, you know, long time
4 out of the schedule. However, you know, we want to
5 review any -- any order that would come out of it, but
6 I -- that's how I see it going. I mean, and as far as
7 a hearing on it, I mean, I think -- I think to avoid
8 the weird Zoom breakout rooms, not breakout rooms, et
9 cetera, it would probably need to be in person in a
10 either closed courtroom or in camera, I think.

11 **JUDGE MELLOY:** Do you think we could
12 just do it on the papers without a hearing?

13 **MS. COLEMAN:** I mean, I think we -- I
14 personally think we could do it on the basis of our
15 papers alone, but I would welcome the other States --
16 what the other States would say.

17 **JUDGE MELLOY:** Okay. Who wants to go
18 first for the States, Mr. Somach or Mr. Wechsler?

19 **MR. WECHSLER:** Yes, Your Honor. This is
20 Jeff Wechsler. I'll go first, and I'll be brief. You
21 asked about the expansion -- expansive view of the
22 United States on the confidential settlement
23 information. That's a thought that has dawned on the
24 States themselves. Any of those issues that were
25 raised in settlement discussions under the United

1 States' view would be off limits. It would be off
2 limits for a potential remedy. It would be off limits
3 for potentially proving an element of the claim,
4 including those elements of the U.S. claim. So we --
5 we agree with you there. The United States asked
6 about the Compacting States' view of the
7 confidentiality agreement, and what I would say is we
8 have a fundamental disagreement about the
9 confidentiality agreement itself. We think the motion
10 to strike the United States fundamentally
11 misunderstands the law governing the confidentiality
12 of settlement discussions for a whole host of reasons,
13 and I'll focus on just a couple here that you raised.
14 I mean, in the first instance, the United States fails
15 to appreciate the defining characteristic of
16 confidential settlement information. The defining
17 characteristic is that it reveals the settlement
18 positions, the willingness to compromise, the internal
19 analysis related to concessions of one of the parties.
20 The United States says that that's -- the
21 confidentiality agreement is different than that, and
22 it's not. You can see that the confidentiality
23 agreement instructs that it protects meaningful
24 compromise discussions, quote, indications of
25 positions, quote, mental impressions and offers of

1 compromise, and the United States in its entire
2 argument fails to appreciate that defining
3 characteristic. Similarly, the purpose of the rules
4 governing confidentiality is to encourage settlement
5 of cases, to prevent offers of compromise from
6 inappropriately influencing a fact finder, and there's
7 nothing in the consent decree or the agreement of the
8 Compacting States that's intention with any of those
9 rules. Turning back to that confidentiality agreement
10 and to address another point that you raise, and that
11 is what's prevented from disclosure is confidential
12 settlement information of another party, in other
13 words -- or in the words of the order that you
14 entered, it's statements and communications by and
15 among the parties that are protected, but there's
16 nothing in the consent decree or the sealed documents
17 that contains any statements by or of the United
18 States. We worked very hard to ensure that the
19 consent decree and sealed documents contained only
20 those agreements of the states, nothing more and
21 nothing less. As to the body of law that's out there,
22 we've looked very hard. We couldn't find a single
23 case where a consent decree or a settlement agreement
24 was considered to be the confidential settlement
25 information of a third party. There's simply no

1 support in the law for the United States' position,
2 and contrary to the statements of Ms. Coleman, I'm
3 happy to address either the case or the -- the
4 comments to the rule that she raised specifically, but
5 all of those support the position of the Compacting
6 states. I'll just mention a couple other things, and
7 that is that I think the U.S. position also fails
8 because it doesn't have a limiting principle. It
9 would be completely unworkable. So as you indicate,
10 every single subject or comment would ultimately be
11 confidential under their view of the world, whether it
12 was a small communication or a large one. In
13 multi-party complex litigation, courts would be in the
14 unenviable position of trying to conduct a factual
15 determination to determine whether certain topics were
16 raised or not and how close certain positions are to
17 ones that were raised in negotiations, and the result
18 would be that any one party could effectively have a
19 veto power, not only over any settlement between any
20 parties, but over the issues that are actually raised
21 in litigation, and -- and finally, there's very strong
22 public policy arguments against the United States'
23 position. It's contrary to the purpose of Rule 408
24 and the confidentiality agreement, which are intended
25 to encourage settlement discussions, and here the

1 United States is trying to use those very rules to
2 discourage settlement. And as I said, their rule
3 would be -- make settlement in multi-party litigation
4 impossible.

5 In short, the position of the United
6 States is counter intuitive, and it should be
7 rejected.

8 **JUDGE MELLOY:** What do you think about
9 the issue? Where do we go from here with this issue?
10 Do you want to file a response to their position to
11 object --

12 **MR. WECHSLER:** We --

13 **JUDGE MELLOY:** Go ahead.

14 **MR. WECHSLER:** I apologize for
15 interrupting.

16 **JUDGE MELLOY:** Go ahead.

17 **MR. WECHSLER:** We don't think that
18 further briefing is necessary. You do have our
19 motion. You have the -- the brief of the United
20 States. On the other hand, if you're inclined to
21 allow further briefing or if it would be helpful, we'd
22 be happy to do so. We don't think it makes sense to
23 separate the deadlines for the responses of the motion
24 to strike and motion to unseal. Those should be done
25 on the same time frame. If the United States wants to

1 do those in nine days, happy to do that. You know,
2 particularly given that they -- both of those motions
3 turn on the -- the same concept, which is, you know,
4 whether -- that position of the United States that the
5 agreement of some of the parties in the consent decree
6 represents confidential settlement position of the
7 United States because it contains general concepts
8 that were developed during settlement discussions,
9 again, nine days is fine with us. They should be
10 simultaneous. I think at that point, certainly you'd
11 have enough paper on file, and you could make a
12 decision simply on the briefs.

13 **JUDGE MELLODY:** All right. Mr. Somach,
14 do you have anything you want to say about this?

15 **MR. SOMACH:** No. I think Mr. Wechsler
16 has really covered it. I will say one thing, though,
17 we -- and -- and I've said this, too, before. We're
18 not enthusiastic about delay. We don't want to see
19 the -- the January 6th date for the United States'
20 response to our -- our joint motion on the decree to
21 be moved. We think that's -- that's a good -- a good
22 date. We think that hearing starting on the 24th of
23 January, we would like to adhere to that, also. We
24 have noted that in every one of the United States'
25 papers, there is this constant -- and this goes back

1 to St. Louis at least, this constant mantra of delay,
2 delay, delay, kick the ball down the road, we'll do
3 more briefing, you've got to change the -- the
4 briefing schedule, you've got to vacate that -- either
5 back then it was the trial date, now it's the -- the
6 hearing date. So I will say, we have a very strong
7 position. I think this is a joint position of the
8 three Compacting states that -- that regardless of --
9 of whether we have some additional briefing in the --
10 in the middle, that we want to adhere to the January
11 6th date for the United States to respond on the
12 decree and that the hearing dates in January are
13 adhered to, also, with the only question being whether
14 or not it's the two days you've previously outlined or
15 whether or not some additional days should be added to
16 it.

17 **JUDGE MELLOY:** You know, I -- I don't --
18 I don't want to sound like I'm getting the cart before
19 the horse, but I have been giving a lot of thought
20 over the last couple days to what happens at a trial
21 and if -- if I grant the government's motion, and I
22 explored some of those with Ms. Coleman. How do you
23 see -- if I were to grant the government's motion, how
24 do you see -- see a trial proceeding from this point?
25 Just as if nothing had ever -- just as if nothing had

1 ever happened?

2 **MR. SOMACH:** I don't -- I don't know how
3 you could do that. I mean, you've got the three
4 Compacting states in agreement on -- on resolution of
5 the case, and what the United States is really saying
6 is we're going to force you to separate and go to
7 trial on issues that we've satisfactorily resolved
8 ourselves. It's such a bizarre outcome that I can't
9 even fathom it. On top of that, United States and
10 Texas have integrated -- they haven't combined their
11 case, but they've integrated their cases, and I -- I'm
12 very uncomfortable, given where we are, to suggest to
13 anybody, you know, that all of a sudden, we've got to
14 go back and go through a six-to-eight month --
15 eight-week trial on issues that we've satisfactorily
16 addressed among us. I don't know where we go with
17 their proposal. It's just -- it's ludicrous. It --
18 it leaves you in a irrational, unreasonable position
19 in terms of trial. I guess that's what we have to do,
20 though, is we have to resort back to where we were 12
21 a months ago and go to trial and -- and go back to our
22 dug-in positions in terms of where we were,
23 notwithstanding the fact that we've made such
24 incredible progress over the 12 months, we've got to
25 agreement, and good agreement. I mean, I think all

1 the -- the Compact -- the three Compact very
2 comfortable about what we've proposed to you and to
3 throw that out the window and to go back to our
4 respective corners and go duke it out in a trial, it's
5 not rational. It's not commonsense. It -- it just --
6 it's just not reasonable. But that's the only --
7 that's where I see us going under those circumstances.

8 **JUDGE MELLOY:** Do you think that there
9 would be any realignment, in essence, of the parties
10 at that point or would you -- do you think you would
11 just have to go back to your original position and --
12 and assume none of what's happened over the last --
13 just like the last year didn't exist?

14 **MR. SOMACH:** I think that would
15 invariably be what we'd have to do. I don't know how
16 you could -- that's the nature of the compromise, you
17 know, is you gave a little bit here, you gave a little
18 bit there. If you start pulling on the loose threads
19 of the compromise, then it all falls apart, and you
20 are right back to where you started from. And I --
21 that would be -- that would be a true tragedy.

22 **JUDGE MELLOY:** Are there things that
23 were discussed in the settlement discussions that
24 would become -- that would have otherwise been
25 admissible in trial that you think might not be

1 admissible under the government's proposal or
2 position?

3 **MR. SOMACH:** Well, you know, I -- again,
4 I adhere to what Mr. Wechsler said. I don't think
5 that anything we've put forward is subject to the
6 confidentiality agreements. Moreover, all the
7 underlying data was public data. We -- we didn't --
8 people didn't fabricate data specifically for this.
9 It was all either stuff that was dealt with in
10 depositions or it was -- or it was open source data
11 out there, and nothing -- you know, yes, we took it.
12 Yes, we worked on it. Yes, technical committee --
13 and, again, that's the other thing. It really was --
14 I wish in some sense that Judge Boylan was here. He
15 would assign someone to be a spokesman or a chairman,
16 but the work that was done was done by the committee.
17 It wasn't done by any one individual. And the Texas
18 experts were involved in everything, the New Mexico
19 experts were involved in everything, the Colorado
20 expert was involved in everything, and, of course, the
21 United States experts, and I'm not diminishing their
22 role. It was a significant role, but it was a
23 committee role. It was a group role. Same thing with
24 the Districts' experts, you know, and for any one
25 individual to claim the whole thing is a work product

1 is just ludicrous. But it was -- most of that, if not
2 all of that stuff, was either open source data that
3 was available out there or had been already discussed
4 in depositions, and we pulled from it. We didn't have
5 time to go out and -- and -- and write new reports and
6 to -- to create more data. It was already there for
7 us, and what we did is we took what we had and -- and
8 worked with it in what was -- what was a collective
9 effort.

10 **JUDGE MELLOY:** Mr. Wallace, do you have
11 anything you want to say?

12 **MR. WALLACE:** Yes. Thank you for the
13 opportunity, Your Honor. I -- Colorado would like to
14 join in the comments already provided by New Mexico
15 and Texas. In addition to the problems that -- that
16 you have raised with your questions about what might
17 be available to even offer at trial this coming year,
18 if it were to happen, or at a remedy phase at some
19 later stage, that presents some real -- some real
20 questions. I'm -- I'm not sure that if you adopted
21 the U.S. position, there are any answers that provide
22 us with a way through to the end at this point in
23 time.

24 I would also note that with the states
25 having reached an agreement as embodied in the consent

1 decree, the U.S. is really in a much different
2 position than it was in when the Supreme Court allowed
3 it to intervene and bring Compact claims that mirrored
4 those of Texas seeking the same relief as Texas
5 without expanding the scope of the Compact litigation.
6 If the states have come to an agreement on how the --
7 the Compact, in fact, apportions water among them, it
8 -- it seems that the U.S. really has nowhere to go in
9 that regard without expanding the Compact claims,
10 without seeking relief different than Texas is seeking
11 at this point in time, and -- and then we really ought
12 to revisit whether the U.S. can even bring such claims
13 and interfere with the states' resolution among
14 themselves.

15 **JUDGE MELLOY:** I think that's -- I think
16 that's more for the January hearing. I think that's
17 -- I think that's going to be probably one of the
18 essential issues we'll be talking about in January, I
19 assume, if we get to that point.

20 **MR. WALLACE:** And depending on your --
21 your order, whether we're able to discuss those items.
22 In addressing one of your earlier questions about, you
23 know, are we prevented from talking about good ideas
24 simply because -- because they may have come up in
25 settlement talks, and without going into details at

1 this stage in the status conference, from Colorado's
2 perspective, a lot of these concepts that are embodied
3 in the consent decree are not terribly original. They
4 are items, they are tools, management techniques that
5 Colorado has been using for over a hundred years to
6 itself manage its intrastate water rights and its
7 interstate Compact obligations. They are not unique
8 at all. They are simply commonly used water
9 administration devices, and what the states have done
10 is -- is landed on numbers about how we are to
11 implement those -- those common management devices.
12 So from our perspective, we really don't see any
13 confidential information, any unique perspectives,
14 offers of settlement in compromise, that are contained
15 in the consent decree at all. It's -- it's a commonly
16 held management -- series of management tools that the
17 states have agreed to implement with the numbers that
18 were submitted to the Court. There's -- there's no
19 secrets there, and there ought not to be continued
20 secrets.

21 **JUDGE MELLOY:** Let me go back to
22 Ms. Coleman. I'm really -- I'm really struggling with
23 how anything that was brought up in settlement
24 discussions, even if it was something, as Mr. Wallace
25 has just said, Colorado has been doing for a hundred

1 years on rivers all over Colorado can't even be
2 discussed at trial. And I -- and I know -- I don't
3 want to get fixated in the trial, but I am -- I guess
4 I am because I'm trying to figure out, what's a trial
5 look like in the second phase? And let me just throw
6 out one example. As I understand it, under the
7 proposed consent decree, in a worst-case scenario, if
8 Texas didn't get the amount of water it was entitled
9 to under the consent decree, in a worst-case -- New
10 Mexico has a number of tools at its disposal that --
11 that it could use to ensure that -- that water
12 deficiency is made up. As I say, worst-case scenario
13 is telling farmers to stop pumping.

14 **MS. COLEMAN:** May I --

15 **JUDGE MELLOY:** No. Let me just finish.

16 **MS. COLEMAN:** Sorry. I apologize.

17 **JUDGE MELLOY:** So worst-case scenario,
18 they tell farmers stop pumping. That's been a big
19 part of the settlement discussion apparently. Can we
20 not talk about stopping pumping at the trial because
21 if Colorado says we don't want to talk about that,
22 that was settlement?

23 **MS. COLEMAN:** Well, this is where I
24 think we are getting into something that needs to be a
25 closed discussion because that is not at all what

1 their decree provides. So to have further discussion
2 along these lines, I would want a closed session, and
3 I think -- because I -- I think there are important
4 points to be made here that are among the points that
5 we would make in our response to their motion, but
6 what you -- what you just said is not in the proposed
7 decree.

8 **JUDGE MELLOY:** It's part of the overall
9 package, isn't it?

10 **MS. COLEMAN:** No, it's not. I mean, I
11 don't want to -- well, let me put it this way: To
12 describe it any more would be --

13 **JUDGE MELLOY:** Well, let me just -- let
14 me say hypothetically then, assuming that -- that
15 curtailment of pumping was one of the -- one of these
16 topics that was discussed during settlement, does that
17 mean that we cannot talk about curtailment of pumping
18 at trial?

19 **MS. COLEMAN:** Well, that's a topic, not
20 information. I mean, this is a topic. I mean, that
21 would mean we're not discussing -- we're not having a
22 case anymore because the case was discussed in
23 mediation. I mean, we're talking about -- I think
24 we've given you very specific examples, we gave three
25 or four, with declarations that show very clearly half

1 of this consent decree originated from something that
2 our people proposed and discussed. So we're not just
3 talking about topics or -- or good ideas in water
4 administration, right. We're talking about something
5 specifically designed for this mediation. And as I
6 said, this is --

7 **JUDGE MELLOY:** Well, okay. Now, we're
8 talking about something -- so now, are you saying you
9 want your order limited to something that was
10 specifically designed for mediation? I mean, this --
11 I don't mean to be difficult, but I'm just really
12 having a tough time getting my head around how we
13 cabin this in such a way that if we -- if I adopt your
14 position, that some things that were discussed in
15 mediation could be discussed at trial, but some things
16 that were discussed in mediation can't be discussed at
17 trial.

18 **MS. COLEMAN:** Well, I know Mr. Somach
19 doesn't like it when we kick things down the road, but
20 I would say you have an order that's limited to these
21 documents and if a party sees a compelling need down
22 the road to seek relief from the agreement that they
23 themselves signed with the United States down the road
24 in some future remedy phase of a trial that hasn't
25 even finished on liability, then we can address it at

1 that point. I would say --

2 **JUDGE MELLOY:** But -- but I want to --
3 but you're not really addressing the central issue
4 that I'm concerned about is I'm not even talking about
5 the remedy phase. We're talking about a lot of things
6 that were discussed, as I understand it, during
7 settlement that actually go to the -- go to the
8 liability phase.

9 **MS. COLEMAN:** I mean, I don't think
10 that's right, but I also think that discussing it
11 further in open court would not be consistent with our
12 position on what's confidential so I want to be
13 responsive, but it's difficult in this circumstance.

14 **JUDGE MELLOY:** All right. Well, let's
15 go into a breakout room with just the parties and the
16 United States, as intervenor, as a party. None of the
17 amici will be in it. So I'd ask the folks at
18 Worldwide to -- I understand we can go into a breakout
19 room so if they'll set that up, we'll -- we'll take
20 five minutes to get into the breakout room, then we'll
21 talk some more. Let's take a short recess.

22 (Break.)

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JUDGE MELLOY: All right. We're back out of the breakout room and the -- the portion of the hearing in which just the parties participated. I assume, Ms. O'Brien, that you want to speak, and I'll give you a chance to -- to say anything you want to say. You had filed something. Do you want to speak?

MS. O'BRIEN: Yes, Your Honor, if this is a time that's amenable to you.

JUDGE MELLOY: Go ahead.

MS. O'BRIEN: First, I'd like to say that I think we perhaps have a slightly more narrow view of the U.S. motion to strike, even though we have not yet seen it, and as we asked in the letter we filed yesterday, to be given access to that because of our unique interest in asserting our own confidentiality, our own being EPCWID's own confidentiality interests. But, again, I think the

1 U.S. motion to strike, at least at this point in time,
2 is for purposes of precluding a so-called settlement
3 going forward that is to be used against the United
4 States, a party, party to the negotiations, and the
5 districts who are also party to the negotiations,
6 using settlement communications as part of the
7 underpinnings for that settlement. I mean, taking it
8 back to just kind of a classic negotiation, Your
9 Honor, you know, what has been proposed by the states,
10 in our view, and I believe the view of the United
11 States, is akin to a negotiation where Party B offers
12 X if Party A agrees to Y, and Party A says, Thank you,
13 I'll take X, but I'm not going to do Y, and, oh,
14 here's my settlement in court. So what we're trying
15 to preclude is a settlement going forward that takes
16 those offers made in the context of settlement
17 negotiations. I think we would take issue of -- that
18 this was some giant group thing. Yes, it was an
19 incredible collaboration, but there were individual
20 efforts made by different technical experts
21 representing both the districts and the United States,
22 as well as the other parties, and those technical
23 efforts were entwined really with kind of legal
24 strategy and what offers could or should be made in
25 the context of a settlement that was envisioned to be

1 one thing, and, again, we have the states here taking,
2 we'll take that compromise, that's a good one, but
3 we're not going to do -- we're not even going to
4 include the U.S., and we're not going to do the other
5 things that were contemplated and/or still being
6 negotiated to wrap around those offers in compromise.
7 I -- I really take issue with the notion that striking
8 a settlement that is, I would say, you know, encoded
9 at best, and not allowing that to go forward given the
10 confidential nature of the information it -- it
11 contains will not hamstring trial if we were to go
12 back to trial. It will not preclude the concepts that
13 Your Honor mentioned for being litigated. Those have
14 been the litigation positions, you know, of the
15 parties throughout the course of this. You know, what
16 would -- what would be precluded potentially -- and,
17 again, this could not -- an order by Your Honor on the
18 confidentiality of a proposed decree does not need to,
19 and we don't believe it would, make predeterminations
20 of what could be tried or not. But regardless, I
21 think the broad brush that has been expressed as
22 concern that certain things could not be litigated are
23 just -- wouldn't hold true and/or if it came to pass
24 could be addressed at that point in time. You know,
25 unless trial switched to the states coming in saying

1 we want to litigation the proposed decree, you know,
2 either specifically as a remedy and/or in the
3 remaining liability, we don't have the issues that
4 Your Honor has expressed concern about. Again, I
5 think it's addressing the confidentiality concerns can
6 be remedied in a much more surgical and narrow way and
7 allow the case to move forward, either through a
8 fuller resolution or by going back to trial. I would,
9 Your Honor, note that we have -- EPCWID has, in the
10 context of filing its memorandum, supported the U.S.
11 motion. We also filed a conditional motion to
12 intervene to be able to allow the District to protect
13 its independent and individual confidentiality
14 interests. As you know, and as we've articulated, we
15 are also a party and signed on to the confidentiality
16 agreement, and even prior to that, we relied on the
17 U.S. being a signatory to that agreement and, you
18 know, worked with them to provide information and make
19 offers as to ways that the case could move forward in
20 a settlement. So -- so, again, we have our
21 independent interests in confidentiality, but I did
22 want to stress that we -- even prior to signing the
23 agreement, we certainly relied not just on 408, but
24 the U.S. independently being a party to that
25 confidentiality agreement and working with the United

1 States under that premise.

2 **JUDGE MELLOY:** I was -- I couldn't quite
3 understand your motion and Ms. Barncastle's letter in
4 which it was represented that by making the decree,
5 even disclosing the proposed decree to the amici, that
6 you are disclosing settlement positions, discovery
7 material, and other -- and other, I don't know,
8 information that could be used on other forums against
9 you. I didn't understand that at all, how -- how this
10 -- how what's in this decree, somehow the other
11 discloses information that could be used in other
12 forms.

13 **MS. O'BRIEN:** Well, Your Honor, I'll let
14 Ms. Barncastle speak for herself, and I think that was
15 the point that you're raising was, I think, a point
16 that was primarily raised and articulated by Ms.
17 Barncastle, but certainly for EP1, as you're well
18 aware, there was Federal District Court litigation in
19 New Mexico regarding the operating agreement, and I
20 believe as you have seen now and as, I think,
21 Mr. Wechsler articulated in open court earlier, there
22 are specific issues in the proposed decree related to
23 -- to project operations, and I'm not comfortable,
24 frankly, saying more at this point in open court other
25 than what I've said. And the -- on that point, also,

1 the amici -- other amici have seen the proposed
2 decree, so I -- I think it was the -- allowing the
3 documents to be released from having been filed under
4 seal is -- was, I think, our main point as opposed to
5 a further argument that Ms. Barncastle made.

6 **JUDGE MELLODY:** But I don't -- but how --
7 how does the fact -- maybe you don't want to discuss
8 it in open court, but how does affecting project
9 operations disclose your position if it's the result
10 of this collaborative process that -- and the
11 technical committee? I don't -- I'm having trouble
12 understanding how that -- how that discloses something
13 that's confidential in your position.

14 **MS. O'BRIEN:** I think there -- I can say
15 a little bit, Your Honor, but, yes, I think it is
16 walking into an arena that I would be more comfortable
17 in articulating some specifics that -- where we
18 weren't in open court, but there -- again, I first
19 would -- I agree as a general premise that the work of
20 the technical committee was a collaborative process,
21 but the confidential information that was -- that
22 doesn't mean that information shared in the context of
23 that collaborative process becomes no longer
24 confidential based on 408 and the confidentially
25 agreements and your orders in this case. And the --

1 some of the specifics relating to project operations
2 were specifically offers that were discussed and made
3 in the context of, again, a negotiation as I described
4 quite simply before, in the context of negotiation,
5 we'll offer X if you agree to Y, and Y was still being
6 worked out, and now we have something fundamentally
7 different that says we'll take X and whole bunch of
8 other things, too, and we'll wrap that into a
9 fundamentally different approach without the other
10 things that were being contemplated.

11 **JUDGE MELLOY:** I hate to say it, Ms.
12 O'Brien, but your comments just sort of reinforce my
13 concern about the trial because now you're saying that
14 certain information shared with the technical
15 committee will be considered confidential, and at the
16 trial -- and we're talking about information
17 concerning project operations. At the trial, we're
18 going to be talking about project operations, so I'm
19 just -- I'm just envisioning a lot of mini trials
20 within the trials where we're going to say take time
21 out. That's information that was in the public
22 domain, as Mr. Somach said, so that's not covered by
23 the confidentiality agreement, but this is something
24 that was in the -- that was in -- we're going to be
25 fighting over project operation information about,

1 well, you got that because of settlement. I don't
2 know. Maybe I'm blowing this out of proportion, but I
3 just -- I just have these visions that -- that what
4 we're talking about with this expansive view of the
5 confidentiality agreement is going to result in a
6 number of mini trials within the trial.

7 **MS. O'BRIEN:** Respectfully, Your Honor,
8 I disagree. I mean, as you know, New Mexico has made
9 an issue of -- of project operations and actually
10 dragged its claims from the Federal District Court
11 litigation in New Mexico into -- into this case, and
12 those counterclaims have generally been dismissed.
13 But, you know, all the issues regarding project
14 operations that have been litigated to date that are
15 contained in expert reports, those remain fair game
16 for trial, and I think the -- how to resolve those
17 claims, counterclaims, concerns, issues, it's the how.
18 If that how to resolve those were specifically in --
19 all from the context of the settlement negotiation,
20 it's that -- it's that nuance, it's that offer, it's
21 that specific issue, which I -- I think is very far
22 from what you're describing as having mini trials
23 within the trial. Again, I respectfully disagree. I
24 don't think that the settlement negotiations, at least
25 in our view, have taken off the table, you know, what

1 is at issue, again, in expert reports and depositions
2 and trials to date -- trial to date, all the things
3 that were set for the second phase of liability and
4 were anticipated in the remedy. So I -- and, again, I
5 don't think that we need to tackle that -- again, I
6 respectfully disagree as to the -- the broadness and
7 the impact of your concern, but I also don't think
8 that procedurally, we need -- in our view, that you
9 need to go there with the United States' motion to
10 strike. It's what the states are trying to do right
11 now is to pose a settlement, use that settlement
12 against negotiating party, the United States, and
13 negotiating entity -- entities, the Districts, and
14 wrap that so-called states-only proposed decree, you
15 know, under the cloak of this is -- this is our deal,
16 and we're going -- we're going to take, you know, all
17 the offers in compromises to date and simply wrap it
18 into something and carve out the United States and,
19 again, truncate the settlement discussions, which were
20 not -- were not complete. So that -- you know, I
21 think it's a much more narrow issue in terms of what
22 at least our view is regarding the motion to strike in
23 terms of what Your Honor needs to decide at this point
24 in time, and we do not believe that it would have the
25 kind of ramifications that you're talking about for

1 purposes of trial if we were to go there.

2 **JUDGE MELLOY:** Thank you. Anybody else
3 wish to speak?

4 **MS. BARNCASTLE:** Your Honor, this is
5 Samantha Barncastle. I have a limited capacity and
6 ability right now, but I do wish to address one thing
7 and that is that what EBID is concerned about is this
8 idea of a carveout, and what was carved out was the
9 protection EBID was seeking through this process and
10 so when we say there was cherry picking done, the
11 cherry picking was that there was agreement on how the
12 state line delivery should be handled, but there was
13 this big unknown after your order on summary judgment,
14 and that was 57/43 of what, and it's that of what that
15 EBID was negotiating and providing confidential
16 information and -- and compromising -- compromises on,
17 and when we provided compromises, the idea was that we
18 would compromise our litigation claims in an effort to
19 seek resolution of the overall case, but when our
20 compromises were accepted, but the quid pro quo was
21 that we were kicked to the curb, now I am left to go
22 back into state court without the ability to continue
23 my litigation as though it was previously postured
24 because I will be limited by the cherry picking that
25 was done here. But aside from that, the letter

1 yesterday -- the purpose of that was because it is not
2 at all clear to me what is and is not being disclosed
3 in camera or otherwise, and the request of the New
4 Mexico amici, specifically the entities that are
5 seeking in our state court adjudication to limit the
6 EBID portion of the Rio Grande Project water rights
7 would have full access to the information we believe
8 would be used against us in a harmful manner. Now,
9 that may never come to fruition, but the idea was that
10 I'm not clear on exactly what would and would not be
11 disclosed to whom and under what context, and the
12 compromises and offers that we made were in an effort
13 to seek a global resolution of the 57/43 of what, and
14 that's where we've failed as far as EBID's concerns
15 go. So I -- I don't want to elaborate further because
16 getting into the technical details would necessarily
17 require us to get into the confidential discussions
18 and the documents and information we believe are out
19 -- out there, but Mr. Somach is absolutely correct,
20 we're working from data that is publicly available.
21 It's not that data that we're concerned about. It is
22 -- it's the legal principles behind what we viewed as
23 protection for EBID's water right and ultimate
24 recognition of the water right on behalf of EBID and
25 its members under the Compact, which now the states

1 say has nothing to do with this case.

2 **JUDGE MELLOY:** All right.

3 **MS. DAVIDSON:** Your Honor, may I address
4 some of these issues from the New Mexico amici
5 perspective?

6 **JUDGE MELLOY:** Okay. Go ahead.

7 **MS. DAVIDSON:** You know, we have not
8 even been able to see what the United States alleges
9 has been improperly disclosed in its confidential
10 information, and we have no basis for even responding
11 to whether or not there's any claims that New Mexico
12 amici have done any improper disclosures, but the
13 issues raised in Ms. Barncastle's letter did --

14 **JUDGE MELLOY:** I don't think they're
15 alleging you've made improper disclosures, but I'll
16 let Ms. Coleman speak to that. I don't think that's
17 one of the allegations.

18 **MS. DAVIDSON:** Well, and this idea that
19 there's some future risk to litigation in state court,
20 I also don't understand. We attorneys for the New
21 Mexico amici have been working very closely with New
22 Mexico and its defense team for over seven years. All
23 five of us have decades of experience litigating water
24 law disputes in federal and state courts. We have
25 decades of experience in negotiating in those matters.

1 We all understand our legal obligations to follow
2 court orders and confidentiality agreements, and I
3 think between this case and the lower Rio Grande
4 adjudication case, we have, like, six confidentiality
5 agreements and multiple court orders that have
6 governed negotiations that have been occurring with
7 EBID and the United States and the State of New Mexico
8 and all of the New Mexico amici since at least 2016,
9 and at no point in this matter has anyone ever alleged
10 that we are disclosing improperly settlement
11 communication or information or violating Rule 408.
12 There is no basis for any determination that we can't
13 continue to do our jobs, the jobs we know how to do
14 ethically and in accordance with the law, and there's
15 been no basis provided for why these particularly
16 sealed documents can't be provided to us. We've been
17 involved in settlement discussions all throughout this
18 case. We have also, like Ms. O'Brien's client and Ms.
19 O'Brien herself, signed the same confidentiality
20 agreements. We're subject to your orders. We know
21 the requirements of Rule 408, and I -- I -- I frankly
22 just don't see any reason why this kind of information
23 is being withheld from us, other than baseless
24 suspicions and suggestions that we may do something
25 improper with this information in future litigation.

1 So I ask you to disregard those suggestions, Your
2 Honor, and I can't imagine what would be in any of
3 these filings that we haven't already seen or been
4 fully apprised of by the State of New Mexico anyway.
5 Thank you.

6 **MR. STEIN:** Your Honor, this is Jay
7 Stein. May I make a comment?

8 **JUDGE MELLOY:** Yes.

9 **MR. STEIN:** This goes to our
10 participation as an amicus. The City of Las Cruces is
11 not a party to this case. The City of Las Cruces is
12 an amicus. The State is the party, and they appear in
13 an original action under one of two theories, either
14 on behalf of their proprietary interests or as parens
15 patriae on behalf of their citizens who they represent
16 when they are faced with a severe or substantial
17 injury. That's a quote from the Maryland v. Louisiana
18 case in 1981 case, but the concept goes back to the
19 first equitable apportionment case over the Arkansas
20 River in 1902 where the parens patriae document was
21 discussed as a basis for equitable apportionment and
22 the states appearing on behalf of their constituents.
23 So our role is to advise our state of issues that come
24 up in the case, and we can do that because we often
25 have a much better understanding of facts on the

1 ground. Our firm, for example, has represented Las
2 Cruces for nearly 40 years, has represented
3 Albuquerque for nearly 30 years. We have a very clear
4 understanding of their water rights and of the
5 operation of their utilities, and we can advise them
6 of issues that they need to address, as well as being
7 able to aggrieve them on our own. And for those
8 reasons, we need to be fully apprised of all
9 documents, legal documents that are before you.
10 Specifically I'm referencing the United States'
11 November 23rd motion because we need -- because it --
12 to keep that information from us creates a wall
13 between us and our state that impedes and defeats the
14 whole parens patriae concept.

15 **JUDGE MELLOY:** All right.

16 **MR. BROCKMANN:** Your Honor, this is Jim
17 Brockmann. If I could just --

18 **JUDGE MELLOY:** Go ahead.

19 **MR. BROCKMANN:** -- go into some of the
20 reasoning, also. If you look at the principles that
21 have been articulated by the United States and EP No.
22 1, those are also directly at issue for the other --
23 for the New Mexico amici. As I understand the -- the
24 United States' motion to strike from -- from reading
25 what EP No. 1 said in its motion and support and from

1 the arguments today, if -- if the concept is being
2 considered by the Court that ideas or analysis
3 discussed among the parties or amici are now
4 confidential and cannot be part of the settlement
5 agreement or even part of a trial without getting the
6 consent of all of the parties involved, that directly
7 affects the New Mexico amici, also. Ms. O'Brien
8 described how EP No. 1 participated either through the
9 United States or directly in settlement negotiations.
10 The same is true for the New Mexico amici. We've
11 provided information of documents. We've been part of
12 discussions. If the principle is going to be adopted
13 that any ideas that were put out there or any analysis
14 can't be part of a settlement unless it's unanimous
15 among the parties or it can't be discussed at trial
16 unless all of the parties consent, that directly
17 affects the New Mexico amici. Likewise, Ms. O'Brien,
18 on behalf of EP No. 1, filed a motion to intervene to
19 protect our confidential information work product.
20 That may also be true for the New Mexico amici who
21 have put ideas out there through the State of New
22 Mexico or potentially directly. I'm afraid that if --
23 if we don't cut this off, it's going to go on forever,
24 but those same principles do apply to us. The bottom
25 line is I think from the New Mexico amici perspective,

1 we need to be able to see the filing made by the
2 United States, and if Your Honor is going to direct
3 the states to file a response brief, we also need to
4 be able to file responses either in support or in
5 opposition to that. The only other matter, Your
6 Honor, I want to raise, and you might want to get to
7 it later is a separate agenda item, but we did submit
8 a letter to you, also. The documents that were filed
9 under seal with the -- with the joint motion by the
10 states on -- on the 14th, some of the New Mexico amici
11 have not distributed those to -- to our client and
12 technical representatives because there was a small
13 bit of confusion, I think, in the joint motion and --
14 and there was a question about whether one of your
15 orders allowed that or not, but we'd also like
16 clarification on that point while we're on the status
17 conference today. Thank you.

18 **JUDGE MELLODY:** Well, on that last point
19 -- and I'm glad you brought that up, Mr. Brockmann,
20 because I did want to talk about that. I think there
21 was some confusion there, but as far as the
22 attachments to the motion to approve the proposed
23 consent decree, that can be distributed and the
24 attachments can be distributed, as far as I'm
25 concerned, to any of the amici who have signed the

1 consent -- the confidentiality agreement on the terms
2 contained within the confidentiality agreement, which
3 I believe without having that particular document in
4 front of me, I believe will limit it to the attorneys,
5 and I believe your technical representative and so on
6 that basis, it can be -- it can be distributed on the
7 same basis that other documents have been distributed
8 during this process.

9 **MR. UTTON:** Your Honor -- I'm sorry.

10 **JUDGE MELLOY:** Go ahead.

11 **MR. UTTON:** I was just going to say,
12 this is John Utton representing NMSU. Just briefly, I
13 just want to chime in a little bit. I agree with the
14 comments that have just been -- just been made. I
15 think one problem, I think, we see is that, you know,
16 we were one of the parties, I think many parties, that
17 wanted to have a comprehensive settlement. We heard
18 various analogies of setting the table to have this
19 complete and comprehensive settlement. I think the
20 problem is -- is the way the United States and others
21 have -- have described this in and the position
22 they're taking is it's an all or nothing. Either you
23 have a -- a settlement of all the parties or you can't
24 have any settlement, and that really is not workable.
25 You know, I also -- my client also would like to have

1 a comprehensive settlement, but if the three
2 Compacting states have been able to reach an agreement
3 on terms that they agree on then are good ideas
4 without attribution or disclosure of confidential
5 information by someone else, then they should be able
6 to move forward. It is progress, and it's very
7 important progress and the fact that other people were
8 in the negotiation room should not give them a veto.
9 We've all been in multiparty cases where there's
10 settlement discussions and perhaps because of whatever
11 particular circumstance or difficult position one
12 party may take, there isn't the complete settlement
13 and only some of the parties settle, and they should
14 be allowed to do that. And the fact that the -- the
15 terms of an ultimate settlement agreement may have
16 arisen from discussions shouldn't be a bar to that.
17 They were -- those terms can be adopted by the
18 settling parties. So my client is very concerned that
19 we're going to be procedurally derailed by this
20 confidentiality question, which to me finds no support
21 in law, and it's going to derail us from making any
22 progress at all. So I'm hoping we can put this aside
23 and actually get to the merits of the -- the partial
24 settlement. It may not be comprehensive, but at least
25 it's a major resolution of the interstate issues that

1 are before the Court. Thank you.

2 **MR. WALLACE:** Your Honor, if I may, I
3 don't mean to disrail, I think, the very good take on
4 the situation by Mr. Utton. I would certainly echo
5 his perspective on that regard. But with regard to
6 the -- the memo in conditional motion filed by EP No.
7 1, the comment that Mr. Brockmann made earlier about
8 potential responses, I just want to note, Your Honor,
9 for the record, that Colorado objects to the ability
10 of EP1 being even able to file a motion in this case.
11 I've got three reasons why that they -- that such a
12 motion should not even be entertained by Your Honor.
13 The first is obviously EP No. 1 is not a party to this
14 case, which involves an interstate Compact
15 apportionment dispute among the three states, which
16 the U.S. was later allowed to intervene in. The
17 irrigation districts of EP1 and EBID have no special
18 standing different than any of the other amici when
19 they were allowed to participate by providing useful
20 information in the -- in the settlement. Moreover,
21 they have no standing to ask for any particular relief
22 before this Court. In fact, the prior special master
23 held in the first interim report that all of the amici
24 are represented *parens patriae* by the respective
25 states, not by the United States, but by their states,

1 that's Texas and New Mexico in this case. Further,
2 that report said with regard to EBID, that it did not
3 own a water right at all and had potentially less of
4 an interest than any of the other water user claimants
5 within New Mexico. And as to EP No. 1, that same
6 interim report found that EP No. 1 is only a
7 distributor of project water, and that same project
8 water is, in fact, derivative of Texas' equitable
9 apportionment right.

10 The second point I'd like to make is
11 that EP No. 1, even if it's allowed to advance its
12 argument, in fact, has no right of action enforceable
13 with this Court. It is referred to the
14 confidentiality agreement, however, Paragraph 20 of
15 that agreement specifically provides, and I
16 quote, "This document does not create any independent
17 right of action subject judicial review." That pretty
18 much ends the story right there as far as
19 enforceability of that agreement with this Court.

20 As regard to 408 evidence, it 's not a
21 party, therefore, it cannot offer any statements in
22 settlement or conditional offer of a claim. It has no
23 claims. It has no defenses. 408, I think as Your
24 Honor has said before, doesn't apply to the situation
25 here, and certainly the consent decree tendered by the

1 three states does not offer any confidential
2 statements of any party or amici.

3 The third point, and I've saved this for
4 the last because I think it's the most important, is
5 that the motion -- conditional motion tendered by EP1
6 alleges a breach of contract and enforcement of EP No.
7 1's rights. That action is barred by the 11th
8 Amendment of the U.S. Constitution. EP1, as a
9 political subdivision of Texas, is considered a
10 citizen of the state of Texas, and, of course, long
11 standing precedent says that a citizen, one state
12 cannot sue another state or its own state in federal
13 court. That's exactly the situation we have here.
14 The precedent also says it's not exactly how you frame
15 your claim for relief but how that claim could be
16 framed, and here we clearly have a breach of contract
17 which cannot be brought by EP1 against any of the
18 three Compacting states. And, also, the relief sought
19 by EP1 precludes settlement, as reached by the three
20 states. That forces the states to engage in
21 litigation against their will. This is exactly a
22 situation that the 11th Amendment seeks to prevent.
23 EP1 cannot be allowed to force the states to litigate
24 a claim that they no longer have against each other.
25 It's simply without jurisdiction. So because of that,

1 Colorado objects to a motion filed by EP1 to seek any
2 relief from this Court against the three states.

3 **JUDGE MELLOY:** Well, when you say,
4 "Motion by EP1," I -- I assume you're referring to the
5 November 26th filing by Ms. O'Brien where she's asking
6 for conditional -- a conditional right to intervene?
7 Is that what you're referring to?

8 **MR. WALLACE:** Yes, Your Honor. So it's
9 a motion to intervene in order to seek relief against
10 the states vis-a-vis their alleged rights for
11 confidentiality. The relief sought there would be to
12 prevent the states from reaching a settlement and
13 force the states to litigation.

14 **JUDGE MELLOY:** Well, I think we've kind
15 of exhausted the issues this afternoon, and here's
16 where I think we're going to -- I'd like to go from
17 here. I would like to have the -- first of all, I'm
18 going to limit the participation of the issues dealing
19 with the confidentiality agreement to the parties.
20 I'm not going to allow disclosure of the United
21 States' motion to strike nor any responses to any of
22 the amici at this time. I think New Mexico can
23 adequately represent the interests of the amici, New
24 Mexico amici, and United States can represent the
25 interests of the water districts adequately. I don't

1 see their interests being so divergent on the issues
2 of confidentiality that they need independent standing
3 to address those issues. And so it will be limited to
4 the -- to the parties.

5 Secondly, I will direct that the parties
6 file a response -- or the states file a response to
7 the motion, and I know we want to move this along as
8 quickly as possible. Does -- can we -- can we do it
9 in -- well, I gave -- I gave the United States nine
10 days. I would have given you ten days, but the tenth
11 day would have been Thanksgiving, and I thought it'd
12 probably be better to do it the day before
13 Thanksgiving than the day after, but can we do it in
14 nine days and give them nine days and then I'll give
15 the government -- United States government four days
16 to respond? Well, let me just look at a calendar and
17 make sure I'm not screwing up the dates here. Today
18 is the 29th, so that -- I -- I would give the states
19 until Monday, the 5th of December, to -- to file a
20 response and give the United States the balance of
21 that week to file a reply on the 9th, and I'd like to
22 schedule a Zoom hearing. I just -- I think the
23 logistics of trying to get everybody together are a
24 little daunting at this point. I'd like to schedule a
25 Zoom hearing for Thursday, the 15th. Unfortunately, I

1 am actually sitting earlier in the week of the 12th,
2 but I would be -- I could do a Zoom hearing on the
3 15th.

4 **MR. WALLACE:** Your Honor, just a point
5 of clarification, did -- did I mishear you, you said
6 supply briefs filed on the 9th, Friday, the 9th?

7 **JUDGE MELLOY:** Yes. That would be the
8 United States' reply brief. They indicated they
9 wanted to file -- have the opportunity to reply to any
10 response to their motion to strike that you -- that
11 you and the other states may file.

12 **MR. WALLACE:** Would you want the states
13 to likewise file a reply brief to their motion to
14 unseal by the same date?

15 **JUDGE MELLOY:** Yes. If they file -- if
16 they file a response to the motion, I'd see them. But
17 I think they're all pretty much wrapped up into one
18 issue. You know, either -- I'm -- I'm assuming that
19 in all likelihood, if -- if the United States' motion
20 is granted, that's going to be the end of it. The
21 settlement is off, and we'll set a trial date. On the
22 other hand, if it's denied, in all likelihood, much of
23 this will be unsealed. Let me think about the
24 deadlines on the -- the hearing. We -- I may end up
25 having to push the hearing back, the January 24th

1 hearing back a couple weeks. I don't want to unduly
2 delay it, but this may be pushing it a little, make it
3 a little too tight. But I -- so let me think about
4 that. Any questions?

5 **MR. WALLACE:** Your Honor, are you
6 anticipating the hearing on the 15th be remote or in
7 person?

8 **JUDGE MELLOY:** Yes. Zoom. Yes, remote.

9 **MR. SOMACH:** Your Honor, will we
10 maintain the December -- the January 6th --

11 **MR. WECHSLER:** The January 6th date for
12 the United States to respond substantively, even while
13 the -- while the other motions are -- are being looked
14 at.

15 **JUDGE MELLOY:** Let me think about that.
16 Let me -- I may push everything back two weeks,
17 Mr. Somach. I know you want to keep it moving, and I
18 want to keep it moving, but I -- that may be just a
19 little too tight. I may move the United States'
20 response date back to the 20th, move your reply date
21 back to February 3rd, and would anybody have a
22 scheduling conflict if we did the hearing on the
23 approval of the settlement, assuming we go ahead with
24 that, during the week of February the 6th? Is that
25 going to cause anybody a problem?

1 **MR. WECHSLER:** We'll make it work.

2 **JUDGE MELLOY:** Okay. I think we'll plan
3 on that. I think it -- I do think this is a serious
4 motion that the United States has filed. It requires
5 serious consideration, and I think we may be pushing
6 it a little bit to try to compress everything that
7 much so we'll give it an extra couple weeks to it.

8 All right. Anything else we need to
9 talk about today? And as far as the -- the motion to
10 unseal, that, of course, will be taken up with the --
11 with the motion to strike. As far as the motion to
12 clarify the procedures for the January hearing, I will
13 -- I will at this time set aside that entire week. We
14 can decide if -- if the United States motion is not
15 granted, how much time we need. At this time there
16 will be no disclosure to the amici, including the
17 water districts, and -- oh, one final thing. I don't
18 know if -- does anybody feel there's a reason to or
19 not -- a reason not to give these sealed documents to
20 Judge Boylan? Do you think this will be of any
21 benefit to him one way or the other?

22 **MR. SOMACH:** I have no -- Texas has no
23 objection to that, and I think it might be a good
24 idea.

25 **MR. WECHSLER:** New Mexico agrees. And,

1 Your Honor, I spoke too soon. On February 6th and
2 7th, I'm scheduled for an evidentiary hearing. If
3 you're able to accommodate that, I would appreciate
4 it. If not, I'll make other arrangements.

5 **JUDGE MELLOY:** All right. Let me take a
6 look at that.

7 **MS. COLEMAN:** Your Honor, on the
8 question of the mediator, I need to confer here before
9 providing a position, which we can just send to you
10 and everyone by e-mail.

11 **JUDGE MELLOY:** That's fine. All right.
12 And -- all right. Any other questions? All right.
13 If not, we'll -- we'll be adjourned. Thank you,
14 everyone.

15 (The proceedings adjourned at 3:30 p.m.)
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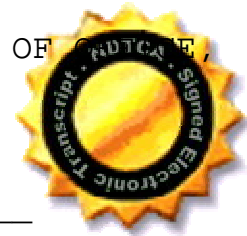
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on this, the 29th day of December, 2022.



Heather L. Garza

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