

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF DECEMBER 15, 2022, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
11:00 a.m.

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P R O C E E D I N G S

1
2 **JUDGE MELLOY:** Good morning, everyone.
3 Are we ready to get started here? This is United
4 States Supreme Court Original No. 141, State of Texas
5 versus State of Colorado and State of New Mexico with
6 United States as intervenor. Let me start, as we
7 usually do, with the appearances. We'll start with
8 Texas.

9 **MR. SOMACH:** Yes, Your Honor. This is
10 Stuart Somach for the State of Texas. With me is
11 Theresa Barfield, Sarah Klahn, Francis Goldsberry,
12 Robert Hoffman, from my office; and Priscilla Hubenak
13 and, I believe, Grant Dorfman will also join from the
14 Texas Attorney General's Office; and Bobby Skov, the
15 Rio Grande Compact commissioner for Texas is also on.

16 **JUDGE MELLOY:** All right. Then for the
17 State of New Mexico?

18 **MR. WECHSLER:** Good morning, Your Honor.
19 Jeff Wechsler from Montgomery & Andrews. We also
20 have, or will have, from my office Shelly Dalrymple,
21 Kayla Brooks. We have Cholla Khoury, the chief deputy
22 attorney general from the New Mexico attorney
23 general's office, and also Zach Ogaz from that same
24 office; Marcus Rael from Robles Rael & Anaya; Lisa
25 Thompson and Michael Kopp from Trout Raley; John

1 Draper and Corinne Atton from Draper & Draper; and
2 then Mike Hamman, the state engineer and Rio Grande
3 Compact commissioner; Rolf Schmidt-Petersen, the
4 interstate stream director; and Nat Chakeres, the
5 general counsel for the Office of the State Engineer.

6 **JUDGE MELLOY:** All right. And then for
7 the State of Colorado.

8 **MR. WALLACE:** Good morning, Your Honor.
9 This is Chad Wallace for the State of Colorado. Also
10 from the attorney general's office is Preston Hartman.
11 We also have Mike Sullivan, the deputy state engineer,
12 and Craig Cotten, the engineer advisor from Colorado.

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

15 **MR. LEININGER:** Good morning, Your
16 Honor. This is Lee Leininger with the United States.
17 I'm joined from the Department of Justice, Judy
18 Coleman, she'll be presenting argument for the United
19 States this morning, and Jennifer Najjar, and then
20 Department of Interior Solicitor's Office, Chris Rich
21 and Shelly Randel.

22 **JUDGE MELLOY:** All right. And then for
23 Albuquerque Bernalillo County Water Utility Authority?

24 **MR. BROCKMANN:** Good morning, Your
25 Honor. This is Jim Brockmann for the Albuquerque

1 Bernalillo County Water Utility Authority.

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

3 **MR. CAROOM:** Good morning, Your Honor.

4 This is Doug Caroom with Susan Maxwell for the City of
5 El Paso.

6 **JUDGE MELLOY:** Who's on for the City of
7 Las Cruces?

8 **MR. STEIN:** Good morning, Your Honor.
9 This is Jay Stein for the City of Las Cruces. I'm
10 joined by Adrienne Widmer, the interim utilities
11 director of Las Cruces joint utilities; Joycelyn
12 Garrison, the interim city attorney; and Brad Douglas
13 of the city attorney's office.

14 **JUDGE MELLOY:** Okay. Then the Elephant
15 Butte Irrigation District?

16 **MS. BARNCASTLE:** Good morning, Your
17 Honor. Samantha Barncastle for EBID, and with me
18 today is board member Greg Daviet, Dr. Patrick
19 Sullivan, our manager, and Dr. Phil King, our
20 engineering consultant.

21 **JUDGE MELLOY:** El Paso County Water
22 Improvement District No. 1?

23 **MS. O'BRIEN:** Yes. Good morning, Your
24 Honor. Maria O'Brien for El Paso County Water
25 Improvement District No. 1. Renea Hicks is also on,

1 and Lisa Aguilar, the district's acting general
2 manager.

3 **JUDGE MELLOY:** Hudspeth County
4 Conservation and Reclamation District No. 1?

5 **MR. MILLER:** Yes, good morning, Your
6 Honor. This is Drew Miller on behalf of the Hudspeth
7 District.

8 **JUDGE MELLOY:** Is there anyone on for
9 the New Mexico pecan growers?

10 **MS. DAVIDSON:** Good morning, Your Honor.
11 Tessa Davidson for New Mexico pecan growers.

12 **JUDGE MELLOY:** And New Mexico State
13 University?

14 **MR. UTTON:** Yes, Your Honor. This is
15 John Utton, good morning, representing New Mexico
16 State University.

17 **JUDGE MELLOY:** And Southern Rio Grande
18 Diversified Crop Farmers Association.

19 **MR. OLSEN:** Good morning, Your Honor.
20 A.O. Olsen on behalf of the diverse crop farmers.

21 **JUDGE MELLOY:** Well, we're here this
22 morning to hear oral argument on two motions. One is
23 the motion to strike the proposed settlement agreement
24 that is part of a motion to approve settlement
25 agreement, and the second is a motion to unseal the

1 proposed settlement agreement and decree. So I'll
2 turn to United States first. It's your motion to
3 strike, and I -- we have the briefing and -- which is
4 very thorough but certainly welcome oral argument on
5 the motion, and so I'll allow Ms. Coleman to proceed.
6 Ms. Coleman?

7 **MS. COLEMAN:** Good morning, Your Honor.
8 Judith Coleman for the United States. There aren't
9 any time limits specified for today, but I want to
10 make sure I reserve some time to reply after the
11 States make their presentation. I'm going to start by
12 explaining why there's no possible outcome today other
13 than granting the United States' motion to strike, and
14 then after that, I'll discuss what granting the motion
15 means for purposes of further proceedings in this
16 case. Our motion to strike is forward. The
17 confidentiality agreement prohibits a party from
18 disclosing in this proceeding any statement, document,
19 conduct, electronic files, statement or nonverbal
20 indication of position, offer of compromise, or other
21 information that was disclosed by a party or parties
22 to a party or parties in the settlement discussions
23 absent consent. When the States filed their motion
24 for entry of their proposed consent decree on November
25 14th, the States disclosed statements, conduct,

1 electronic files, indications of position, mental
2 impressions, offers of compromise, and other
3 information disclosed by the United States to the
4 parties in the mediation without the United States'
5 consent. The States violated the confidentiality
6 agreement plain and simple. The States' opposition
7 brief only serves to confirm this point. The States
8 admit over and over again nine times that the proposed
9 decree in both its form and its content was the result
10 of collaboration with the United States. The very
11 nature of collaboration is that it involves
12 contributions from all of the parties, and the States
13 likewise do not dispute that their consent decree and
14 their expert declarations reflects the contributions
15 of the United States. Now, the States may say, "Well,
16 our experts could have come up with that, too." But
17 the fact is that they did not, at least not in the
18 first instance, and we're not saying that they could
19 not have, but the United States disclosed the
20 proposals, wrote the reports, was assigned to write
21 the reports, and did that, and that's just talking
22 about the contributions of the United States'
23 technical representatives. The States do not and
24 cannot dispute that their proposed consent decree is
25 simply the latest iteration of a settlement document

1 that was drafted with the full participation of the
2 United States' counsel and representatives over many
3 months of mediation, and specifically for that
4 proposed decree between July and September.

5 So in the face of this clear violation
6 of the plain terms of the confidentiality agreement,
7 the States say, "Well, this is our agreement, nothing
8 more, nothing less." But nothing in the
9 confidentiality agreement makes the fact of their
10 agreement relevant. The confidentiality agreement, by
11 its terms, applies whether the discussions end in
12 settlement or not. So the only question is whether
13 the States have disclosed confidential settlement
14 information without the United States' consent. It
15 does not matter if they have called that disclosure an
16 agreement or decree or anything else. They have made
17 the disclosure. I'd like to call attention to that
18 point, that part of the confidentiality agreement that
19 says it applies whether the discussions end in
20 settlement or not. That reveals something very
21 important about the parties' intent when they entered
22 into this agreement. It says, "And in settlement,"
23 singular. Not plural. Not a settlement here. Not a
24 settlement there. Not different combinations of the
25 parties. A singular settlement that resolves and ends

1 the discussion. And at that point, the parties could
2 unanimously decide and agree to disclose their
3 settlement. What the States have proposed here is not
4 what this agreement contemplates, and what they have
5 done here violates the agreement.

6 Rule 408 provides additional support for
7 our plain reading of the confidentiality agreement
8 because the confidentiality agreement is supposed to
9 provide protection broader than that. Nothing in the
10 rule, the advisory committee notes, or the case law
11 applying the rule, shows that its protection is
12 limited to statements that are attributed to one of
13 the parties, as the States contend. As we show,
14 there's circuit court precedent affirming the
15 exclusion of work product by an independent
16 third-party accountant under Rule 408. Necessarily,
17 that is a report that could not be attributed to
18 either party, but it was excluded, and the 8th Circuit
19 in a decision written by Your Honor, cited that very
20 case, Blue Jay, as persuasive authority on the scope
21 of Rule 408. We have provided additional citations.
22 The States have provided none in support of their
23 position.

24 Of course we agree that the
25 confidentiality agreement and Rule 408 are intended to

1 promote settlement. We only pause to say that the
2 United States would like nothing more than to reach a
3 compromise of settlement in this case that secures the
4 agreement of all four parties to resolve this dispute
5 without unnecessary litigation, but that's not what
6 happened here, and in any event, the way that the
7 agreement and the rule promotes settlement is by
8 removing the risks associated with a party's candor in
9 settlement discussions, and that is how the agreement
10 and the rule promoted settlement in this case. All of
11 the parties to this case entered the mediation
12 assuming that their statements and conduct in the
13 discussions would be confidential, and on the basis of
14 the assumptions, these discussions were incredibly
15 candid. I think it was a surprise to all of us, and
16 it was often heated. It was often surprising, and it
17 was often -- it was often amusing. I think people got
18 along very well, and that is exactly what settlement
19 confidentiality is supposed to bring about.

20 We made real progress only because we
21 could have tough and candid discussions, and we, the
22 United States, were only able to bring the Districts
23 to the table in those discussions for their
24 contributions because we could assure them that there
25 was no risk in their participation. And you know that

1 the Districts have lawyers who would fight to the
2 teeth for their districts, and they relied on us. So
3 in response to all of this, the States basically say
4 majority rules. We agree, so United States, just sit
5 down. But majority rules is not the rule established
6 by the confidentiality agreement or by Rule 408, and
7 if any one of the parties had thought that majority
8 rules was all it would take to allow the disclosure of
9 confidential settlement proposals in the litigation,
10 these discussions would never have gotten off the
11 ground. The States' filing is improper on its face
12 and should never have been submitted to the Court.
13 Striking the documents will also make it unnecessary
14 to decide whether they remain sealed. There's no
15 basis to unseal the documents in the absence of a
16 ruling by the Court that says the States may lawfully
17 pursue this unlawful decree.

18 I understand --

19 **JUDGE MELLOY:** Let me ask you one
20 question. You have -- you made a statement during
21 your presentation that the -- the -- the information
22 in the report -- reports that were used to generate
23 some of the indices and triggers and so on that are in
24 the proposed decree are -- were -- were developed by
25 your engineer; is that correct?

1 **MS. COLEMAN:** In the first instance.

2 **JUDGE MELLOY:** And you also went onto
3 say, however, that that's not to say that Texas or New
4 Mexico's experts couldn't have done the same thing,
5 which leads me to the question of Paragraph 8 of the
6 confidentiality agreement, which says
7 that, "Information that's otherwise discoverable" --
8 and you talk about this quite a bit in your reply
9 brief, that the reason a lot of the information that
10 was -- that was disclosed during settlement would --
11 could still come into trial is because it's otherwise
12 discoverable, it's otherwise been disclosed. So one
13 of the categories of non-covered information is
14 potentially available to the parties independent of
15 the settlement discussions. So if the computations
16 and indices and other data that was -- that was
17 compiled from otherwise discoverable material could
18 have been developed by the States' own experts, why
19 isn't that covered by that section of Paragraph 8?

20 **MS. COLEMAN:** Well, first, let me say
21 that my statement was not meant to endorse the
22 principle that the parties' experts could have come up
23 with this on their own. We'll never know the answer
24 to this question, and the same could be said really
25 for any settlement methodology. If you have enough

1 smart people in the room, who's to say that they
2 couldn't all reach something similar? But assuming --
3 I'm not saying -- the States' experts are smart
4 people, and we agree. That's the concept generally of
5 an in-text in the abstract is not something that was
6 invented for purposes of this mediation. We also
7 agree that the data that went into this is public or
8 discoverable. Now, I know some of it came from EPl,
9 the District, but other data was -- was -- is gage
10 data and things like that.

11 But the way that this information was
12 put together, calculated, drafted, presented, it was
13 presented by the United States, a lot of it. Now, I
14 want to be very clear as I was in the status
15 conference. We're not claiming sole ownership, laying
16 claim, asserting, I mean, any sort of ownership
17 concept of anything. We agree this was collaborative,
18 but we undoubtedly disclosed proposals, methodologies,
19 arrangements of data, calculations that we did. So if
20 the data is all there, it was available, the expert
21 opinions that are disclosed for the second phase of
22 trial -- second phase of the liability trial -- have
23 been disclosed, and -- and should have been based on
24 that same data. So changing an opinion based on what
25 was discussed in settlement is just not -- is not

1 permissible. And that would be the case regardless of
2 the proposed decree. Even if we had -- if this
3 proposed decree had never been filed, if we go back to
4 September 27th, and let's just say people threw in the
5 towel then, we would still be going into the second
6 phase of a liability trial limited to admissible
7 evidence, which could not include the evidence that --
8 that would be covered by the confidentiality agreement
9 in Rule 408, and none of the states complained at that
10 time the trial would be limited by the fact that we
11 had just engaged in ten months of mediation.

12 **JUDGE MELLOY:** Okay.

13 **MS. COLEMAN:** So in my view, the filing
14 of the proposed decree changes nothing about the risks
15 or lack of risks at trial. These are issues, and if
16 they would come up at all, and I doubt that's the
17 case, would be -- would have to be addressed.

18 **JUDGE MELLOY:** Okay. Well, you're, I
19 guess, going to go into the next -- you want to talk
20 about where you think we go from here so I'll let you
21 talk about that. I do have some questions about that,
22 but I'll let you go first.

23 **MS. COLEMAN:** Right. So we think, as
24 you know, that the motion that States' documents be
25 stricken requiring the denial of the motion to unseal.

1 We think the case should be reset for trial. If
2 Texas, New Mexico, and Colorado want to make changes
3 reflecting their agreement or stipulations, they can
4 present what motion they feel like they need to on
5 that. Let's just get the trial --

6 **JUDGE MELLOY:** I'm sorry. I don't
7 understand. What -- what agreement? Are you talking
8 about -- you're not talking about the settlement
9 agreement? What agreement are you talking about?

10 **MS. COLEMAN:** Well, no, I'm just saying
11 if they've -- you know, they are concerned that
12 they're going to be forced to show up at trial and put
13 on all their evidence as if they still have a full-on
14 dispute with each other. Nothing prevents -- if they
15 don't want to put on certain experts about damages
16 because Texas no longer wants damages, let them take
17 that expert off. United States doesn't care about
18 that. We can make this trial short. Let the United
19 States put its experts on. That's fine. Trial can be
20 shaped to avoid a burden if the States think it's a
21 burden. But we -- as we've said, there's only two --
22 let me also -- as I said, we would -- you know, we
23 would be happy to reach and tried vigorously to reach
24 a comprehensive settlement that all four parties could
25 agree to, and we just didn't get there. Who's to say

1 that that won't -- we won't revisit these discussions
2 and pick up right where we left off at some later
3 date, but for the present purpose of today's hearing,
4 we need to reset things to how they were on October
5 23rd.

6 Now, as we said, so we have the next
7 phase of trial, which is the -- I guess we call them
8 segments now. The second segment of the liability
9 trial, and then after that, presumably there is an
10 opportunity to take exceptions, and at that point, if
11 the parties think that a remedy phase is going to be
12 severely hampered by not -- you know, an inability to
13 disclose things that were disclosed in settlement
14 discussions, then that -- the ruling on this motion to
15 strike can be taken up at that point. And, you know,
16 to the extent it comes up at trial, an exception can
17 be made there, too, but we just don't see it affecting
18 what's going to happen in the next year in this case.

19 What would -- what would be unworkable,
20 I have to say, is proceeding on a denial motion to
21 strike. If we look ahead to this hearing that's been
22 -- that's scheduled, presumably for the week of
23 February 6th, candidly, I have no idea what exactly we
24 are supposed to file or present at this hearing, not
25 knowing what the burden of proof is, not knowing

1 whether we are actually an indispensable party, as New
2 Mexico contended when it proposed Texas' complaint in
3 2013, whether we're an intervenor, whether it's
4 fairness, whether it's the merit. This is -- there's
5 going to be precedent made, no matter how you approach
6 this. This is uncharted territory. The States have
7 not cited a single precedent for the hearing that
8 they're proposing here. That is unworkable. Trial on
9 the merits is a status quo in this case, and that's
10 what we're asking for here.

11 **JUDGE MELLOY:** All right. Thank you.
12 Let me ask you one thing about a trial on the merits.
13 And I don't want to get into that -- a lot of that
14 because I really think that is more for the February
15 6th hearing, if we have a February 6th hearing, as to
16 how this settlement may or may not affect the United
17 States, but in rereading your briefs yesterday, I came
18 across a statement that kind of took me back a little
19 bit because it sort of upended a lot of what I thought
20 I knew about this case, and in it, you indicate that
21 you have claims against Texas. I never understood in
22 this case that you have claims against Texas.

23 **MS. COLEMAN:** We do not have claims
24 against Texas.

25 **JUDGE MELLOY:** Well, you say one of the

1 reasons we can't approve a settlement is because it's
2 not settling your claims against Texas.

3 **MS. COLEMAN:** I don't -- if you direct
4 me to a --

5 **JUDGE MELLOY:** Let me read the specific
6 language.

7 **MS. COLEMAN:** Sure.

8 **JUDGE MELLOY:** This is -- this is
9 referring to the discussions at a prior hearing about
10 a carveout. "The United States opposed a carveout
11 stating that the United States could not promote a
12 decree unless it addressed the United States' claims
13 alleging interference with Project operations against
14 both Texas and New Mexico." Do you have claims
15 against Texas, and if so, when have you ever pled
16 those, when have you ever stated those?

17 **MS. COLEMAN:** We do not have claims
18 against Texas, and if there is a typo, I apologize for
19 that on a four-day deadline.

20 **JUDGE MELLOY:** No, this wasn't a
21 four-day -- this was in your original motion to
22 strike.

23 **MS. COLEMAN:** Oh, okay.

24 **JUDGE MELLOY:** It wasn't in a four --

25 **MS. COLEMAN:** I ask for your forgiveness

1 on that one. We do not have claims against the State
2 of Texas.

3 **JUDGE MELLOY:** And, I guess, do you feel
4 that what you are doing is expanding the litigation
5 because the Supreme Court certainly is -- a lot of the
6 intervention, as I understand it, is the assumption
7 that your intervention would not expand litigation.

8 **MS. COLEMAN:** Not in the least. To
9 demonstrate that, let me read to you from Texas'
10 prayer for relief.

11 **JUDGE MELLOY:** Go ahead.

12 **MS. COLEMAN:** Texas requested a
13 declaration of the rights of the State of Texas to the
14 waters of the Rio Grande, et cetera. Point 2 asks the
15 Court to issue its decree commanding the State of New
16 Mexico, et cetera, to, A, deliver the waters of the
17 Rio Grande in accordance with the provisions of the
18 Rio Grande Compact, et cetera; and, B, cease and
19 desist all actions which interfere with and impede the
20 authority of the United States to operate the Rio
21 Grande Project. This proposed decree itself
22 interferes with and impedes the authority of the
23 United States to operate the Rio Grande Project, but
24 in any event, we -- our interest in reaching a
25 comprehensive settlement is to ensure that there are

1 protections against interference with the Rio Grande
2 Project in New Mexico and in Texas. We feel that this
3 proposed decree does not include those provisions, and
4 that is fully within the scope, not only of the claim
5 that Texas pleaded, but in the scope of the claims
6 that we pleaded and that the Supreme Court expressly
7 allowed us to pursue in this action. We're not
8 expanding the litigation just because Texas is giving
9 up the bulk of its claims.

10 **JUDGE MELLOY:** All right. Thank you.
11 And I should -- I should go back a minute. When I
12 took the appearances, I don't know if -- if there's
13 anyone else on, and I specifically don't know if Judge
14 Boylan is on the call or not, but -- is Judge Boylan
15 on?

16 (No response.)

17 **JUDGE MELLOY:** Apparently not.

18 **MR. WALLACE:** For the record, Your
19 Honor, this is Chad Wallace. I just wanted to note, I
20 missed announcing Kevin Rein, State engineer for
21 Colorado, has also joined.

22 **JUDGE MELLOY:** Did I miss anybody, by
23 the way? I guess I didn't do a catch-all at the end.

24 (No response.)

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

1 All right. Thank you, Ms. Coleman.

2 Mr. Somach, are you going to speak for
3 Texas.

4 **MR. SOMACH:** Yes, I will, but we've
5 agreed that Mr. Wechsler will start for the Compacting
6 states and -- and then Mr. Wallace and I will -- will
7 make some very brief remarks.

8 **JUDGE MELLOY:** All right. Thank you.
9 Mr. Wechsler?

10 **MR. WECHSLER:** Thank you, Your Honor.
11 Good morning. The United States, with its motion,
12 takes the expansive and unprecedented position that
13 all subjects or ideas that were discussed in the
14 mediation are confidential and can't be disclosed even
15 at trial. The effect of this position would be to
16 prevent the Compacting states from ever being able to
17 settle this equitable apportionment case. Now, the
18 United States' position is consistent with the law.
19 It lacks a limiting principle, and it would result in
20 an unmanageable trial, and the motion to strike should
21 be denied.

22 I want to talk briefly about
23 confidentiality generally. Underlying the United
24 States' position is a fundamental misunderstanding of
25 the law. The courts are clear that neither a

1 confidentiality agreement nor Rule 408 can -- and this
2 is a quote from the 1st Circuit -- make secret that
3 which is not secret. So confidential settlement
4 information generally falls into one of two
5 categories. Either it's secret and proprietary
6 information, for example, data or -- or documents that
7 have not been disclosed, and the second category is
8 communications or statements that -- and the like that
9 reveal the settlement positions or willingness to
10 compromise the parties, including internal analysis.
11 Here, the United States concedes that the information
12 was not secret proprietary information, and it
13 concedes that the data and methods that were used were
14 publicly available so that first category simply
15 doesn't apply.

16 Now, as to the second category, the
17 States have been clear, the consent decree, and the
18 other sealed documents, I mean, those represent the
19 agreement of the Compacting states. It's nothing
20 more; it's nothing less. The States were very careful
21 to remove anything other than simply what their
22 agreement is. So we've made no representations about
23 the settlement positions or involvement of any other
24 party whatsoever. So if we turn first to the
25 confidentiality agreement, the plain language supports

1 the Compacting states, and -- and really it requires
2 denial of the motion to strike. So I'll start with
3 the most straightforward way that you could deny the
4 motion to strike, and that's with Paragraph 8, the
5 very paragraph that you asked Ms. Coleman about, and
6 -- and that is the consent decree is constructed using
7 public data and methods that are widely known, widely
8 used in interstate water Compacts. So Paragraph 8 of
9 the confidentiality agreement, as you indicated, it
10 provides that information, data, or documents that are
11 -- and this is a quote -- potentially available to
12 the parties independently of these settlement
13 discussions is not confidential settlement
14 information. So the following facts are uncontested,
15 as I read the various declarations, and -- and really
16 dispositive on this point. The technical committee
17 worked collaboratively to develop the proposals and
18 analysis, and the United States does not and really
19 cannot claim sole authorship over any part of the
20 consent decree. The Compacting states significantly
21 change the consent decree in appendices after the
22 United States ceased participating in these
23 negotiations. All of the data used in the consent
24 decree was developed using publicly available sources.
25 All of the methods were widely known and commonly

1 utilized in interstate Compacts. Both of those facts
2 are undisputed. I was very surprised to hear Ms.
3 Coleman say that the concept originated or came from
4 the United States in the first instance, and I think
5 if you look at the Compacting states' declarations,
6 that's simply incorrect. Those concepts, the original
7 ideas, came from Texas or New Mexico largely in terms
8 of the way those were implemented from a technical
9 standpoint. It was done through the technical
10 committee, and while it's true that the United States
11 often volunteered to take the pen in the first
12 instance, that doesn't change the fact that these
13 ideas didn't originate from them.

14 And it's also, I think, I heard Ms.
15 Coleman concede that if the United States didn't
16 participate in the settlement discussions at all, the
17 Compacting states would have developed the same
18 concepts in the consent decree. So to give a little
19 more concrete example, in their motion, one of the few
20 specific things the United States point to is a
21 spreadsheet that's attached to Dr. Hutchison's
22 declaration in support of a consent decree, and what
23 they say is, Hey, this is very similar to one that
24 Dr. Ferguson produced. What the United States fails
25 to appreciate is the reason it's similar is because it

1 was created using the same publicly available data and
2 the same widely understood regression methodology, a
3 methodology that I suspect is taught in high school
4 calculus these days. In fact, the index concept and
5 index departure concept itself come directly from the
6 Rio Grande Compact in Articles 3 and 4. Now, the
7 United States, until today when you asked the
8 question, hadn't responded to or addressed this
9 important issue at all, and that should really end the
10 analysis.

11 But turning to the definition of
12 confidential settlement information, that plain
13 language also requires denying the motion to strike.
14 And I'll point out several things here. I mean,
15 first, Paragraph 2 of the confidentiality agreement
16 includes a detailed list of items that constitute
17 confidential information, but conspicuously absent
18 from that list is a consent decree or settlement
19 agreement, and you certainly would expect to see those
20 items listed given the customary state of the law that
21 documents that settlement agreements among governments
22 or consent decrees are not confidential.

23 Second, a consent decree or settlement
24 agreement are just fundamentally different from the
25 list of things -- list of items that are covered there

1 in Paragraph 2. All of those items listed are
2 communications of some form during settlement
3 negotiations but before an agreement is reached. Now,
4 Ms. Coleman referred to Paragraph 13, and I -- I don't
5 think Paragraph 13 really helps the United States
6 here. In fact, I think it helps our position, and
7 that is because Paragraph 13 recognizes a distinction
8 between confidential settlement information, which is
9 formed during the settlement negotiations, and the
10 final settlement itself, and in light of this explicit
11 recognition, if the confidentiality agreement had
12 intended to keep documents related to final settlement
13 confidential, it would have done so explicitly.

14 Now, third, the United States' argument
15 is that full subjects, topics, ideas that were
16 discussed during the mediation are confidential, but
17 there's no language in the confidentiality agreement
18 to support that broad concept, and the United States
19 points to that. Instead, as I said, Paragraph 2
20 really identifies specific communications as
21 confidential.

22 Now, fourth, to be considered
23 confidential settlement information under Paragraph 2,
24 the communication must have belonged to or been the
25 secret information of the United States. We know this

1 because what it does, it has to be a document,
2 statement, et cetera, that was disclosed, in other
3 words, something that existed before but was revealed.
4 But the consent decree is not a statement, a document,
5 or mental impression of the United States. Rather,
6 the United States has already conceded that the
7 consent decree is a document that was created or
8 developed collectively by the parties in the course of
9 the mediation. Now, in their reply, the United States
10 argues that attribution is irrelevant, in other words,
11 it doesn't matter whether it's their or the United
12 States' confidential information and that that
13 confidential information can't be disclosed even if
14 it's not attributed to the United States. But under
15 the confidentiality agreement, that's absolutely
16 incorrect. Paragraphs 4 and 6 provide that what is
17 forbidden is to disclose -- and, again, this is a
18 quote -- another party's confidential settlement
19 information. So thus, the United States must be able
20 to identify its own unique proprietary information.
21 You can look through all 60 pages of their briefing in
22 this case, both the motion and the reply, and you
23 simply cannot find specific identification of their
24 unique secret proprietary information, and its failure
25 to do so is fatal to the motion, which really takes me

1 to the fifth point, and that is the confidentiality
2 agreement does not include documents that were created
3 or developed during the discussions, and in that
4 regard, the good eagle confidentiality agreement that
5 we attached as Exhibit 4 is -- is useful to look at.
6 There it specifically says that documents that are
7 created in the course of the negotiations are -- are
8 confidential, but we don't see any of that of such
9 language in -- in the confidentiality agreement in
10 this case, which is to say that we think the plain
11 language supports our position, and you should deny
12 the motion to strike on that basis alone. However, if
13 you think that the confidentiality agreement is
14 ambiguous in any way, then as we explained in the
15 briefing, the cases make very clear that you look next
16 to the background principles of confidentiality. And,
17 again, all of those favor the Compacting states. And
18 I won't go through all of the background principles
19 that would apply here. I'll focus on a couple. I
20 mean, the first is just generally, confidentiality is
21 intended to promote and not prevent settlements, and
22 that includes partial settlements in complex
23 litigation. But the United States' position is
24 inconsistent with that very purpose. They're trying
25 to prevent a settlement here. Second, and maybe more

1 importantly, consent decrees and settlement agreements
2 involving government agencies are almost always
3 public. The United States cites no cases to the
4 contrary. The DOJ policy, in fact, we would say that
5 we cite in our briefs is -- is very illustrative of
6 this very principle, and I'll go ahead and read that.
7 It's a regulation. It says, "It is the policy of the
8 Department of Justice that in any civil matter in
9 which the Department is representing the interest of
10 the United States or its agencies, it will not enter
11 into final settlement agreements or consent decrees
12 that are subject to confidentiality provisions, nor
13 will it seek or concur in the sealing of such
14 documents." Now, it's irrelevant that the United
15 States never entered the settlement. That forms --
16 it's just illustrative of the very principle that
17 governments, including the United States, don't enter
18 into settlement negotiations with the intent to keep
19 those confidential. Now, if the parties had intended
20 to modify any of the background principles, they would
21 have done so explicitly. You would have expected to
22 see that in the confidentiality agreement, but, of
23 course, it's nowhere in there. And one last provision
24 I'll point to in the confidentiality agreement, and
25 that is there's a separate reason that the consent

1 decree is protected, and that could be found in
2 Paragraphs 4, 6, 10, and 13, and those are the
3 paragraphs that basically say disclosure of any
4 document, even one that would otherwise be
5 confidential, is permissible if it's required by law,
6 and those documents are not considered to be
7 confidential or protected by the confidentiality
8 agreement. Now, in Section 2(b) of our response, the
9 Compacting states explain that a consent decree or a
10 settlement agreement involving government agency is
11 required to be disclosed by both FOIA and the States'
12 sunshine laws. Now, in their reply, the United States
13 really doesn't seriously dispute this concept. They
14 have a short paragraph on Page 8, which has no
15 citations to authority, and its sole argument is, Hey,
16 the cases that the States cite don't require
17 disclosure, I guess, until a settlement agreement or
18 consent decree is approved. But first of all, that's
19 slightly incorrect. As an example, you can look at
20 the FOIA case we cited, the Center of Auto Safety
21 Case, and there not only is a settlement agreement
22 that hasn't been approved yet required to be turned
23 over in FOIA, but actual settlement materials
24 themselves, and -- and more importantly, the sunshine
25 laws are clear that a final agreement, one that's been

1 completed with state governments, like the consent
2 decree in this case, those must be disclosed. And I
3 would point you to, for example, the Colorado case we
4 cite there, the Denver Public Company case.

5 So turning to Rule 408 briefly, I mean,
6 the United States doesn't fare much better under that
7 rule. You observed during -- correctly, we think,
8 under our last status conference, that Rule 408
9 doesn't prevent the Compacting states from entering
10 the consent decree or help the United States in their
11 argument that it's confidential. I won't belabor that
12 point. I'll make a few observations. The first is
13 that the case law is very clear that Rule 408 does not
14 protect the consent decree. Every case cited by both
15 parties supports that position. I'd point you to the
16 Good Eagle, Miller, and DirectTV cases. Second, Rule
17 408 applies by its terms to evidence that is offered,
18 again, this is the language of the rule, "To prove or
19 disprove the validity or amount of the disputed
20 claim." So Rule 408 only bars admission of evidence
21 relating to compromise in settlement if that evidence
22 is offered to prove liability or in validity of the
23 claim or the amount, and the consent decree is not
24 being offered for any of those forbidden purposes.

25 And third, I would say Rule 408 is key

1 to offers of very specific evidence, the very kind of
2 specific evidence that the United States fails to
3 identify here. It doesn't render entire subjects off
4 limits the way the United States' motion is -- is
5 based. Which leads me to the notion that the motion
6 to strike should be denied because its position is
7 just unprecedented. Now, we've looked at and cited a
8 lot of cases for you, and in all of those cases,
9 there's not a single case that has excluded whole
10 subjects or ideas because those subjects or ideas were
11 discussed in a mediation. There's not a single case
12 that defines confidential material in the broad manner
13 the United States does. There's not a single case
14 that prevents entry or consideration of a proposed
15 consent decree because of confidential information.
16 In fact, the United States hasn't presented a single
17 case where a consent decree was found to be
18 confidential. And there's not a single case that
19 allows a single party in a multi-party litigation to
20 veto a settlement due to confidentiality. And in
21 contrast, nearly all of the case law strongly supports
22 the position of the Compacting states, and I'll give
23 you just one example. Courts have routinely rejected
24 overly broad interpretations of confidentiality
25 agreements like the one the United States presents,

1 and an illustration is seen in that Miller case where
2 the Court rejected a similarly expansive
3 interpretation of confidentiality agreement explaining
4 that -- and, again, this is a quote from Miller --
5 "Under this reading, the parties would never be able
6 to actually settle because they would be barred from
7 ever informing the Court of a settlement." That same
8 concept applies here.

9 Now, the next reason their motion should
10 be denied is that -- has to do with there being no
11 limiting principle that their rule is unmanageable,
12 and we had a lot of discussion at the status
13 conference about that. The United States' expansive
14 position would create an unworkable rule with no
15 limiting principle. As we outlined in our response,
16 the United States admitted to the sweeping reach of
17 its rule during the last hearing. I thought that we
18 would see them back off to a more reasonable position
19 in the reply, but, in fact, that didn't happen. The
20 United States doubled down on its far-reaching view,
21 admitting that there was, "No principled way for the
22 United States to narrow their motion." Now, the
23 United States claims in the reply that this position
24 will not create an unmanageable trial because as you
25 heard Ms. Coleman suggest today, exhibits and

1 witnesses for the liability phase have already been
2 disclosed, but that doesn't really address the problem
3 for several reasons. I mean, first of all, the lines
4 aren't clear as to what information was disclosed
5 prior to settlement discussions compared to
6 information that was raised or learned by the parties
7 as a part of the negotiations. And so the result
8 would be a series of objections, mini trials over the
9 information, whether things are confidential or not,
10 where they trace their origin.

11 Second of all, the U.S.'s position is
12 broad, as I said, preventing any subjects, whole
13 subjects from being discussed in the mediation, and
14 there are a number of subjects that weren't -- that
15 were raised in the mediation, discussed in the
16 mediation, that weren't raised in the exhibits or
17 witness disclosures. Again, this would lead to
18 objections over very important parts of the case in
19 direct and cross-examination and -- and just the -- a
20 series of having to resolve those disputes.

21 And third, what the -- the United
22 States' argument fails to recognize is that the
23 upcoming trial only covers liability. Now, many of
24 the concerns you expressed ten days ago or so is that
25 the good ideas discussed in the settlement discussions

1 embodied in the consent decree could never be a part
2 of those remedy phase, and that concern still applies.

3 So, finally, the last issue I'll talk
4 about is that the United States didn't narrow their
5 request, as required by the Special Master, and
6 frankly, by the Rules, and that's really fatal to
7 their motion. The law requires that a party
8 specifically identify confidential information,
9 whether that is to seal or for the very extraordinary
10 relief of striking that information, but, again, the
11 United States really -- their motion is very
12 atmospheric. They pointed to no specific proprietary
13 information, no information that reveals a secret of
14 theirs or a compromised position within the consent
15 decree, and the reason is they can't. Instead, it
16 sort of waves obliquely at the consent decree and says
17 that it, quote, embodies the ideas that it, quote,
18 shared or that its, quote, contributions are reflected
19 in the consent decree, but -- but that's not enough.
20 I mean, the case law makes that very clear. If the
21 United States were able to identify any actual
22 specific confidential information, it clearly would
23 have been done so by now. So the motion to strike
24 should be -- should be denied, which takes us to the
25 motion to unseal. I think you indicated at the last

1 hearing that really it's two sides of the same coin,
2 and because this information is not confidential,
3 there's simply no basis for the United States to be --
4 for those documents to be kept sealed. Now, I won't
5 -- again, you've read the briefing. The burden is
6 very high for the United States to show that the --
7 the joint motion, the consent decree, should remain
8 sealed. The basis for that is relatively
9 straightforward. I'll address briefly a couple points
10 that the United States makes in there.

11 **JUDGE MELLOY:** Let me interrupt you for
12 just a second there. I -- I still, I guess, are of
13 the opinion that it's both sides of the same coin, as
14 you phrase it, that if I -- if I -- if I grant the
15 United States' motion to strike the consent decree,
16 then almost by necessity, I will keep the consent
17 decree confidential; and conversely, if I deny the
18 motion and we go forward with the hearing in February,
19 I -- I would anticipate that the consent decree would
20 then be made public. What about the other exhibits,
21 though, that are -- that are attached to the consent
22 decree? Is it necessary, do you think, for -- for
23 disclosure to interested parties, farmers, water
24 districts, municipalities, whatever, to have -- have
25 the attached affidavits or is -- would just disclosure

1 of the decree itself and settlement agreement be
2 enough?

3 **MR. WECHSLER:** I think the most
4 important thing is for disclosure of the consent
5 decree. I think the accompanying affidavits and
6 declarations, those are simply explanation of the
7 consent decree itself, so if I had to pick, I would
8 pick the consent decree. I will tell you that the
9 United States mentions in its reply that -- or
10 identifies the fact that we have focused really on the
11 consent decree and less -- with less emphasis on the
12 other sealed documents, and the reason is, I mean, the
13 consent decree itself is the one that really was
14 directly involved in the -- in the negotiations,
15 albeit, it was a much earlier draft and a much changed
16 draft. So their argument, as weak as it is, is
17 stronger for the consent decree than for any of the
18 sealed documents, and I just don't see any basis for
19 sealing those declarations or other documents,
20 considering that all they're really doing is exploring
21 or explaining the consent decree. But -- but I will
22 recognize that the most important document, at least
23 from New Mexico's perspective, is the ability to show
24 that consent decree that embodies the agreement of the
25 Compacting states to our constituents.

1 I'll just very briefly touch upon those
2 -- those issues on the motion to -- to unseal, and --
3 and that is the United States talks about the various
4 factors, and clearly some of those are more important
5 than others. Factor 4 is one of the ones they focus
6 on, and they -- this is the sort of strength of any
7 interest that the United States has, but that's really
8 determined here as to whether or not there's any
9 specific confidential information that the United
10 States has identified, and because they haven't, the
11 strength of that interest is very, very low. And then
12 the next one is prejudice, and, you know, we've
13 pointed out the United States has really struggled to
14 identify any actual prejudice here, and in the reply
15 for the first time, they give us two possibilities.
16 What they say is, Well, look, the United States
17 devoted many hundreds of hours to the mediation.
18 Well, what I would say to that is that's true for all
19 of the parties. I mean, that's just the commitment
20 that was made by the parties when they chose to enter
21 into complex mediation. There was, of course, never
22 any guarantee that any of us would be able to reach a
23 resolution. We're happy we were. But it doesn't
24 identify something that would unfairly harm the United
25 States if the consent decree were public.

1 Now, the second reason that they
2 identified their prejudice is they say that unsealing
3 the consent decree would reveal the settlement
4 position -- positions of the United States, and -- and
5 I think that's kind of useful to look at, to look at
6 the consent decree and say to yourself, if the consent
7 decree were public, what problems would that cause the
8 United States in another case, as they say? And the
9 answer is really nothing. There's nothing in the
10 consent decree that if revealed could be used by any
11 other party in any other case, which really underlies
12 the point on the motion to strike, that this really
13 isn't confidential in the first instance, but also
14 reveals that it should certainly be unsealed.

15 Unless there's any other questions, I
16 think the motion to unseal is relatively
17 straightforward.

18 **JUDGE MELLOY:** All right. Thank you,
19 Mr. Wechsler.

20 Mr. Somach?

21 **MR. SOMACH:** Yes, Your Honor. I just
22 have a very few points. I think Mr. Wechsler has
23 covered the ground very well. The -- the -- the first
24 point I wanted to -- to make is really a question, and
25 that is after all of this briefing and after all of

1 the oral argument that we've had so far, I don't think
2 I can still identify what the United States believes
3 is confidential in terms of either the -- the decree
4 or even the -- the declarations and appendices
5 associated with -- with the Compacting states'
6 filings. I -- I can't identify it unless it's
7 everything, and as Mr. Wechsler said, that's so
8 expansive that it can't possibly be what either the
9 confidentiality agreement or the rule or any of the
10 case law supports. In fact, it's -- it's contrary to
11 the case law. But I -- I can't identify what is the
12 United States' confidential information.

13 The second point I wanted to make was
14 related to their Footnote 4, and that's whether or not
15 Texas has received the relief that it -- it -- it
16 complained of when the Supreme Court agreed to hold
17 its petition. That Footnote 4 in their brief, all it
18 does is recite the Texas litigation position, and if
19 we go back to trial, that is Texas' litigation
20 position. But settlement is all about giving up in
21 terms of and resolving and to -- to compromise
22 litigation positions in order to get a reasonable
23 settlement. At its very heart, the Texas complaint
24 was we need and we want to get the water that was
25 apportioned to us under the Compact, and Texas

1 believes that this consent decree creates a -- a
2 guarantee by the State of New Mexico that it will
3 deliver quantifiable objective amounts of water to the
4 state of Texas. How New Mexico does it, how it
5 implements internally within the State of New Mexico
6 its administration of New Mexico state law in order to
7 achieve that is up to New Mexico. It's its sovereign
8 right to decide how it's going to do that, but we're
9 convinced that the -- the decree provides the
10 guarantee that -- that Texas is entitled to.

11 You know, at its heart, and this -- this
12 really is toward the February hearing and -- and
13 obviously you know how I feel about maintaining that
14 -- that hearing and that date, but we did address this
15 issue in our -- in -- in the joint motion. If you
16 look at Pages 37 to 38, I mean, we -- we did look at
17 that issue when we describe it, but at its heart, I
18 think when you get to that issue, any opposition that
19 the United States would -- would bring has got to
20 revolve around the notion of is the Compact the
21 servant of a Project or is the Project the servant of
22 the Compact? We believe and have always believed and
23 in our complaint, we believed that it was the -- the
24 Compact that was superior to the Project and Project
25 operation, that if New Mexico adhered to the Compact,

1 then the Project would be served, and we believe that
2 that's exactly what the consent decree does. It
3 defines what the New Mexico obligation is and -- and
4 the Project follows accordingly. We heard in the
5 briefing and we heard last time, in particular, Ms.
6 Coleman talk about the 1938 condition. That certainly
7 is our litigation position. If we go back to trial,
8 that will be our position, but -- but the real world
9 and the fact that we've been operating to this D2
10 condition is certainly that was -- that was involved
11 in -- in the settlement discussions, and also the
12 United States and the Districts insistence that the
13 operating agreement be maintained and that their could
14 be nothing done in this litigation that would
15 adversely affect the operating agreement. It was the
16 Districts and the United States and the operating
17 agreement that adopted D2 and abrogated the notion of
18 the 1938 condition. And so it galls me, you know,
19 that there's somehow a notion that Texas has conceded
20 something in the decree when what Texas has done is
21 adopted, in terms of its settlement position, the
22 exact position of the Districts and the United States.

23 Question of what the trial will look
24 like. I -- I did want to say, when we thought there
25 was going to be no settlement, I became very concerned

1 about what the trial would look like because we've
2 spent 10, 12 months, our experts, our fundamental
3 experts, Dr. -- Dr. Ferguson, Dr. Hutchison,
4 Dr. Brandes, Greg Sullivan, Dr. Barroll, the
5 collective experts for all of the parties have spent
6 all this time together learning the positions,
7 understanding exactly how positions were put together,
8 not just for settlement, but also in the context of
9 trial because we're talking about the exact same
10 stuff, how one would -- would operate under the
11 Compact. I became concerned, I am concerned now if we
12 have to go to trial, how our experts unlearn what
13 they've learned over the last 12 months. I can just
14 see one objection after another objection when our
15 witnesses testify that they are revealing information
16 about the other parties' views that they gained during
17 these 10 to 12 months of litigation. I have already
18 expressed my view that -- that -- that the United
19 States' position about a trial puts us in an
20 irrational, unreasonable, and unworkable position, and
21 I can't think of any other -- any other way to
22 describe it. I don't know how we could possibly go to
23 trial after the three states have -- have -- have
24 cooperated and worked together, you know, as they
25 have.

1 And -- and the final question I have is
2 Ms. -- Ms. Coleman says, Well, if the Compacting
3 states want to not put on any evidence or want to --
4 want to just maintain their -- their settlement
5 position, they're still entitled to go to trial. I
6 question what it is they're going to go to trial on.
7 What is it the United States wants to go to trial on.
8 And I know what it'll be is issues that don't relate
9 to the Compact. They relate to administration of --
10 of water within New Mexico, which is exactly the
11 problem that's presented here is the fact that their
12 issues don't deal with the Compact. They deal with
13 their issues, and what they want to do is expand
14 impermissibly the litigation into issues that -- that
15 -- that Texas and Colorado have no interest in that
16 are solely issues within New Mexico about how New
17 Mexico administers its water.

18 Thank you for the extra time, Your
19 Honor. That's all I have to say.

20 **JUDGE MELLOY:** All right. Thank you,
21 Mr. Somach.

22 Mr. Wallace?

23 **MR. WALLACE:** Yes, Your Honor. I'll
24 endeavor to keep this brief. Colorado certainly joins
25 the statements already made by New Mexico and Texas so

1 I'll just make these additional few points. First,
2 the U.S. is incorrectly maintaining that the entirety
3 of subjects and ideas are confidential. And I like to
4 walk through a few examples of what we have now until
5 the Rio Grande Compact. We've got an index in
6 Articles 3 and 4 that allows an inflow and a
7 corresponding outflow as Compact obligations from one
8 section of the river to another section of the river.
9 Those indices are measured over a number of years
10 using historical records, and Colorado has in the past
11 looked at multiple year regression analysis in order
12 to make its Compact delivery obligations in the
13 administration of water from Colorado to the New
14 Mexico state line. The Compact also contains
15 deviation allowances in debits and credits allowing
16 certain under and over deliveries through certain
17 delivery points. Those allowances lead further to
18 triggers. For example, Article 7 of the Compact
19 specifies that water in upper reaches cannot be added
20 to storage reservoirs under certain hydrologic
21 conditions. And finally, the Compact contains
22 reallocation provisions. That's, again, in Article 7,
23 the relinquishment provisions, allowing New Mexico and
24 Colorado to give up water that they have an
25 apportionment of under the Compact to the lower

1 reaches going to the lower portion of New Mexico and
2 Texas under certain provisions in the Compact. I
3 think what's important when we discuss indices,
4 deviations, triggers, and allocations, I've just
5 mentioned all of those instances as they exist today
6 in the Compact. I didn't once mention a consent
7 decree. So I think it'd be very, very difficult to
8 find that the consent decree itself contains unique
9 settlement positions rather than commonly accepted
10 methodologies and data, as my colleague from New
11 Mexico has already pointed out.

12 Second point I'd like to make is -- is
13 really the U.S. position, as expansive as it is,
14 remains entirely unworkable. My friend from the
15 United States suggested that we might revisit the
16 motion to strike during the liability phase. That
17 essentially admits that the damages liability phase
18 remains unworkable if everything that are the good
19 ideas that can actually be implemented are now off the
20 table. It makes no sense to say that we can't
21 consider such things during a -- a liability phase of
22 the trial or to settle the entire matter, but maybe we
23 should revisit those issues if we're still litigating
24 the remedy phase.

25 Thirdly, and I think this is the most

1 important part for Your Honor to consider, is the
2 States have resolved the Compact dispute among
3 themselves. This dispute is about an apportionment
4 between New Mexico and Texas. New Mexico and Texas
5 are satisfied that what we've achieved here implements
6 the Compact apportionments between them and contains
7 provisions that allow administration into the future,
8 a very workable decree. The Supreme Court has, time
9 and again, cautioned that it may not be able to
10 resolve these interstate disputes adequately through
11 litigation, but that the States themselves should seek
12 settlement because they're the ones in the best
13 position to achieve an enduring and lasting remedy.
14 That's exactly what we've done here. Conversely, with
15 the U.S. position to strike that settlement and not
16 allow the states to proceed puts us in a very awkward
17 position. Over the past year and, in fact, beyond
18 that, the States have really achieved, I think, a
19 level of goodwill and good working relationships that
20 they have not had in quite some time. In addition to
21 settling this very complex dispute, as has been
22 noticed in the briefing, the states have also resolved
23 a decade-long dispute over Compact accounting
24 principles. I -- I think that that was in part due to
25 the relationship that we have built up with one

1 another over the course of this settlement. If that
2 is thrown out, if we are not allowed to proceed with
3 that settlement because the U.S. strikes it and
4 doesn't allow the Court to even look at it, it really
5 puts at risk the working relationship the States have
6 built up, and it forces us back into an adversarial
7 position where none no longer exists. It really is --
8 it's the opposite of what the Supreme Court wishes all
9 the states to do when these disputes arise. We've
10 taken care of it, and -- and there's really no reason
11 to -- to throw that all out because of a misapplied
12 standard regarding confidentiality.

13 Thank you.

14 **JUDGE MELLODY:** Thank you. Ms. Coleman,
15 you indicated you wanted some time for rebuttal. I'll
16 give you a few minutes.

17 **MS. COLEMAN:** Yes. I'll keep it to a
18 few minutes hopefully. You heard nothing from the
19 States other than what was in their opposition brief
20 in which we replied to over 30 pages last week, and
21 the extent their arguments are not addressed in that
22 reply, they will be addressed in February, but there
23 are a few points I would like to pull out just to
24 highlight before this section of the argument closes.
25 First and foremost, we hear over and over again from

1 New Mexico and, now, Colorado that the United States'
2 position would foreclose the discussion of subjects.
3 No, it does not. This -- the subject of the dispute
4 is -- is water. Water was discussed in the mediation.
5 We're not saying don't discuss water. We're talking
6 about information, statements, indications of
7 position, nonverbal indications of position, offers of
8 compromise that were disclosed -- disclosed, not
9 discussed, not subjects, but information that was
10 disclosed. So this straw man argument that they have
11 hitched their entire position on just must be rejected
12 out of hand.

13 I do -- I'm trying to prioritize among
14 different things that I've heard today that were
15 plainly wrong. So we discussed earlier this whether
16 Paragraph 8 and noncovered information gets the states
17 where they want to go. It does not. The fact that
18 the data was public and that they have smart experts
19 does not make the United States proposals any less
20 confidential or any less written by the United States
21 and as we said, we are not claiming sole ownership.
22 We disclosed these in confidence.

23 On the question of prejudice, it's
24 surprising to me that Mr. Wechsler says he only hears
25 about it for the first time in our reply when it was

1 right there in our motion, and it's abundantly clear
2 that we and all the parties gave many, many hours and
3 many resources to working the settlement, but those
4 resources are now being used to the detriment and
5 disadvantage of the United States, and it is amazing
6 that the states will say, oh, we're not using this for
7 a forbidden purpose against you. We are using it to
8 seek dismissal of our claims. And to that end, the
9 whole argument about a veto right could easily just be
10 turned upon them. They say we're trying to veto their
11 settlement as an indispensable party. There is no
12 settlement without us, but in any event, what they are
13 trying to do is veto our claims, veto our sovereign
14 prerogative over the project, and this they cannot do
15 as we will explain further in our opposition if we
16 even have one and this motion isn't granted.

17 This takes me to something that
18 Mr. Somach said. He described the -- the decree as
19 including a guarantee by New Mexico. Well, perhaps it
20 says that, but what it actually does is have the
21 United States guarantee New Mexico's compliance by the
22 United States making concessions from the project and
23 transferring yet more water from EBID to make this
24 happen. So the fact that the decree leaves it up to
25 New Mexico at New Mexico's discretion and according to

1 its sovereign right while at the same time mandating
2 that the United States take particular actions and has
3 no sovereign right over the project is one reason,
4 among many, that this decree will fail if it is even
5 heard on the merits. The United States is not the
6 servant of the states period.

7 So let's sort of pull it back out. As I
8 say, we are interested and would hope to reach a
9 comprehensive settlement with all four of the parties
10 in this case. Only one ruling promotes that outcome
11 and that is the ruling granting our motion to strike.

12 Thank you.

13 **JUDGE MELLOY:** Why is that the only
14 ruling? Why can't you talk regardless?

15 **MS. COLEMAN:** About the proposed decree?

16 **JUDGE MELLOY:** No. About settlement.

17 **MS. COLEMAN:** Well, how can we --
18 there's no -- if we're having a trial of some sort on
19 their proposed decree, what is there to settle? I
20 mean, it's -- it's -- according to them, their
21 proposed decree kicks us out of the case.

22 **JUDGE MELLOY:** Well, but that doesn't
23 mean you still can't settle. I guess -- well, we've
24 talked about this before. I'm not going to beat a
25 dead horse. You know --

1 **MS. COLEMAN:** Well, let me --

2 **JUDGE MELLOY:** I think everybody would
3 like to see a comprehensive settlement, and I never
4 heard from the States saying that just because they've
5 reached this agreement, that they can't fold into this
6 agreement or even modify it to accommodate a
7 comprehensive settlement, but -- so I -- I don't know.
8 I -- but we've -- like I say, we've kind of beat this
9 issue to death and so --

10 **MS. COLEMAN:** Well, let -- I -- to
11 clarify what I mean, I mean enforcing the
12 confidentiality protections is necessary to ensure
13 that the parties could engage in settlement
14 discussions. If we don't think that confidentiality
15 is enforceable, that makes it rather difficult for us
16 to engage candidly in such discussions going forward.

17 **JUDGE MELLOY:** Okay. All right. Well,
18 thank you for your arguments. I'll show the matter
19 submitted, and we'll get out an order in due course.
20 Hopefully it won't take too long. I do want to say in
21 the meantime that we -- as of now, all the deadlines
22 that are currently in place will remain in place, and
23 we will still work towards a February 6th hearing,
24 and, of course, if I grant the government's motion,
25 that'll be cancelled. But as for now, we want to keep

1 this case moving so that's what's before me right now,
2 and that's what we're going to proceed on.

3 I guess, I don't know if there's
4 anything else we need to talk about today. Is there
5 anything else that needs to be discussed?

6 **MR. SOMACH:** Let me -- have you thought
7 -- with the assumption that we will have a February
8 hearing, I recognize that you're still deciding that,
9 but have you given any thought to where the location
10 is going to be?

11 **JUDGE MELLOY:** I think we'll do it here
12 in Cedar Rapids. And -- and if we have to -- we'll
13 probably -- we'll have something. I would anticipate
14 that if I deny the government's motion -- well, either
15 way, if I deny -- if I grant the government's motion,
16 we'll have a status conference, set a trial. If I
17 deny the government's motion, we'll have a status
18 conference to talk some more about the mechanics of
19 the hearing. And we'll need to talk about -- I guess
20 you have a conflict for the first two days,
21 Mr. Wechsler, is that correct, of that week?

22 **MR. WECHSLER:** That's correct, Your
23 Honor, but if that's the day you've decided to have
24 the hearing, I'll make other arrangements for that.

25 **JUDGE MELLOY:** Okay. Well, we'll talk

1 about that. Anything else we need to visit about?

2 (No response.)

3 **JUDGE MELLOY:** If not, then we'll be
4 adjourned. Thank you, everyone.

5 (The proceedings adjourned at 12:12 p.m.)
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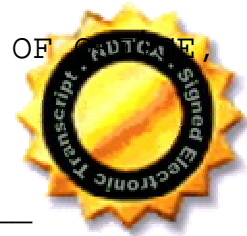
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I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the foregoing pages comprise a true, complete and correct transcript of the proceedings had at the time of the status hearing.

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