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

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

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

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

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

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

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

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

JUDGE MELLOY: And for the United States?

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

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

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

Bernalillo County Water Utility Authority.

JUDGE MELLOY: City of El Paso?

MR. CAROOM: Good morning, Your Honor. This is Doug Caroom with Susan Maxwell for the City of El Paso.

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

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

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

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

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

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

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

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

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

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

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

JUDGE MELLOY: And New Mexico State University?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I understand --

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

MS. COLEMAN: In the first instance.

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

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

smart people in the room, who's to say that they couldn't all reach something similar? But assuming -- I'm not saying -- the States' experts are smart people, and we agree. That's the concept generally of an in-text in the abstract is not something that was invented for purposes of this mediation. We also agree that the data that went into this is public or discoverable. Now, I know some of it came from EP1, the District, but other data was -- was -- is gage data and things like that.

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

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

JUDGE MELLOY: Okay.

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

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

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

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

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

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

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

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

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

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

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

MS. COLEMAN: We do not have claims against Texas.

JUDGE MELLOY: Well, you say one of the

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

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

JUDGE MELLOY: Let me read the specific language.

MS. COLEMAN: Sure.

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

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

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

MS. COLEMAN: Oh, okay.

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

MS. COLEMAN: I ask for your forgiveness

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

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

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

JUDGE MELLOY: Go ahead.

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

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

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

(No response.)

JUDGE MELLOY: Apparently not.

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

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

(No response.)

JUDGE MELLOY: All right. Thank you.

All right. Thank you, Ms. Coleman.

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

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

JUDGE MELLOY: All right. Thank you. Mr. Wechsler?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And third, I would say Rule 408 is key

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

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

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

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

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

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

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

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

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

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

of the decree itself and settlement agreement be enough?

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

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

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

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

JUDGE MELLOY: All right. Thank you, Mr. Wechsler.

Mr. Somach?

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

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

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

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

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

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

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

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

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

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

JUDGE MELLOY: All right. Thank you, Mr. Somach.

Mr. Wallace?

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

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

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

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

Thirdly, and I think this is the most

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

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

Thank you.

JUDGE MELLOY: Thank you. Ms. Coleman, you indicated you wanted some time for rebuttal. I'll give you a few minutes.

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

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

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

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

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

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

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

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

Thank you.

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

MS. COLEMAN: About the proposed decree?

JUDGE MELLOY: No. About settlement.

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

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

MS. COLEMAN: Well, let me --

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

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

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

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

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

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

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

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

JUDGE MELLOY: Okay. Well, we'll talk

about that. Anything else we need to visit about?

(No response.)

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

(The proceedings adjourned at 12:12 p.m.)

CERTIFICATE.

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.

I further certify that I am not, in any capacity, a regular employee of any of the parties in whose behalf this status hearing is taken, nor in the regular employ of any of the attorneys; and I certify that I am not interested in the cause, nor of kin or counsel to any of the parties.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on this, the 6th day of January, 2023.

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