

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 22, 2021, 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 I see we have Judge Boylan on. Let me ask -- let me
4 just run through the appearances and see who we have
5 on for this morning's proceeding. This is, of course,
6 in Texas versus State of New Mexico and State of
7 Colorado, Original No. 141. Who do we have on for the
8 State of Texas?

9 **MR. SOMACH:** Yes, Your Honor. This is
10 Stuart Somach, and with me is Theresa Barfield, Sarah
11 Klahn, Francis Goldsberry, Robert Hoffman, Rich
12 Deitchman. From the Texas Attorney General's Office,
13 Priscilla Hubenak; and then we also have Suzy
14 Valentine, the Engineer Advisor for the Texas Rio
15 Grande Commissioner; and I believe we'll have Bobby
16 Skov, the Rio Grande Commissioner for Texas also on
17 the phone.

18 **JUDGE MELLOY:** I see Mr. Wechsler. Who
19 do you have on for New Mexico?

20 **MR. WECHSLER:** Good morning, Your Honor.
21 Jeff Wechsler. We also have Cholla Khoury, Zach Ogaz
22 from the New Mexico Attorney General's Office; Lisa
23 Thompson and Michael Kopp from Trout Raley; Shelly
24 Dalrymple; Rolf Schmidt-Petersen, the director of the
25 Interstate Stream Commission; and Nat Chakeres, the

1 general counsel for the Office of State Engineer. My
2 apologies if I've missed anyone.

3 **JUDGE MELLOY:** And for Colorado?
4 Mr. Wallace, are you here?

5 **MR. WALLACE:** Yes, good morning, Your
6 Honor. This is Chad Wallace, along with Preston
7 Hartman, from the Colorado AG's office. On the line,
8 we also have Mike Sullivan, the deputy state engineer,
9 and Craig Cotten, Colorado's engineer advisor to the
10 Compact.

11 **JUDGE MELLOY:** All right. And who do we
12 have on for United States?

13 **MR. DUBOIS:** Your Honor, this is Jim
14 Dubois. I apologize for being not on video. I'm
15 stepping down as lead counsel. Mr. Leininger is going
16 to take over as lead counsel in this case and so I
17 will -- I will let him do the rest of the
18 introductions. Thank you, Your Honor.

19 **JUDGE MELLOY:** All right.
20 Mr. Leininger?

21 **MR. LEININGER:** Thank you, Jim.
22 It appears that we have for the
23 Department of Justice, Jim Dubois and Judith Coleman,
24 and for the solicitor's office, Chris Rich, Shelly
25 Randel. I believe from the Department of Interior,

1 Ian Ferguson and Michelle Estrada-Lopez will be
2 joining us.

3 **JUDGE MELLOY:** All right. And --

4 **MR. SOMACH:** Your Honor, this is Stuart
5 Somach. I -- I failed to introduce Mr. Grant Dorfman.
6 He's the Deputy First Attorney General for the State
7 of Texas. I apologize.

8 **JUDGE MELLOY:** All right. Thank you.
9 How about Albuquerque Bernalillo County Water Utility
10 Authority, anyone on?

11 **MR. BROCKMANN:** Yes, Your Honor. This
12 is Jim Brockmann for the Albuquerque Bernalillo County
13 Water Authority.

14 **JUDGE MELLOY:** Anyone on for the City of
15 El Paso?

16 **MR. CAROOM:** Your Honor, Doug Caroom for
17 the City of El Paso, and Susan Maxwell is with me.

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

19 **MR. STEIN:** Good morning, Your Honor.
20 This is Jay Stein for the City of Las Cruces. I
21 expect to be joined by several members of city
22 utilities.

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

25 **MR. HICKS:** Yes, Your Honor. Renea

1 Hicks here for the district, and also on is Dr. Al
2 Blair.

3 **JUDGE MELLOY:** Okay. Elephant Butte
4 Irrigation District?

5 **MS. BARNCASTLE:** Good morning, Your
6 Honor. Samantha Barncastle for the Elephant Butte
7 Irrigation District, and with me today is Dr. Phil
8 King, and I believe my client will join shortly, the
9 manager of the district, Gary Esslinger.

10 **JUDGE MELLOY:** All right. Hudspeth
11 County Conservation and Reclamation District No. 1?

12 **MS. TREJO:** Good morning. This is
13 Deborah Trejo standing in for Drew Miller for the
14 Hudspeth Reclamation District.

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

16 **MS. DAVIDSON:** Good morning, Your Honor.
17 Tessa Davidson for New Mexico pecan growers, and A.J.
18 Olsen for the diverse farmers isn't able to
19 participate today. He asked that I stand in his
20 stead.

21 **JUDGE MELLOY:** All right. New Mexico
22 State University? I think I saw Mr. Utton on earlier.

23 **MR. UTTON:** Good morning. This is John
24 Utton for New Mexico State University.

25 **JUDGE MELLOY:** All right. Did I miss

1 anyone? As I mentioned, I did see Judge Boylan on, as
2 well. Thank you for participating, Judge.

3 I don't really plan to make this a very
4 long hearing, and I don't want to get into any of the
5 particulars of the settlement discussions. I don't
6 think that's appropriate for me to be involved in
7 those, but I am more interested just in the timing of
8 where -- do you think you're making progress? I know
9 from talking to the deputy clerk up in St. Paul that
10 Judge Boylan worked you very hard through the weekend
11 a week ago, and I think -- I think you went for six
12 straight days, if I understand correctly, so I hope
13 that's a positive sign. I don't know. Who wants to
14 -- anybody want to speak to that?

15 Maybe I'll ask Judge Boylan: What do
16 you think? Where is this case going in terms of
17 scheduling and -- and how do you feel the mediation is
18 going in general?

19 **JUDGE BOYLAN:** Good morning, Judge.
20 Thank you for inviting me. I think everyone's been
21 working very hard, first of all, and I want to thank
22 all the participants. They've been professional in
23 every respect in everything that I've asked them to --
24 to do, and you are correct in the information that you
25 received, they worked both Thursday, Friday, Saturday,

1 Sunday, and then into Monday and Tuesday, as well, so
2 six straight days, and then a few days in the weeks
3 prior to that, as well. We are planning to conduct
4 further settlement discussions in Albuquerque, New
5 Mexico. Those sessions are scheduled to begin on
6 January 19, I believe, and then I have at least three
7 full days set aside on my calendar, the 19th, 20th,
8 and 21st, to continue discussions. I am cautiously
9 optimistic, given the goodwill that I've seen
10 evidenced by all, that perhaps a settlement is -- is
11 possible. It's not guaranteed by any means. It's a
12 very complex matter, as you know, but I've been
13 encouraged by the participation and willingness of the
14 parties to engage in settlement discussions.

15 **JUDGE MELLOY:** All right. Thank you.
16 This is probably a very difficult question to answer,
17 but do you feel that at the end of those three days,
18 you'll have a pretty good sense one way or the other
19 as to -- as to whether this case is going to settle or
20 are you -- do you think the discussions could spill
21 over into February?

22 **JUDGE BOYLAN:** I'll answer that in two
23 parts. Number one, I do believe that by the end of
24 the session in Albuquerque, that we're going to have a
25 real good idea of whether or not the matter will be

1 settled; and secondly, I suspect given the complexity
2 of the matter, that additional days will be needed.
3 I'm not quite sure of the scheduling, whether that
4 will spill into February or beyond that, but certainly
5 I suspect by the end of our three days in Albuquerque,
6 we'll have a better picture, number one, of whether
7 settlement is going to be achieved, and secondly, what
8 the timing of that will entail.

9 **JUDGE MELLOY:** All right. I'll turn to
10 Mr. Somach. Do you have any comment or disagreement
11 with Judge Boylan about where we are with settlement?
12 And, also, how do you think this is going to impact
13 the trial date, given the fact that we're talking past
14 the midpoint of January for settlement discussions?

15 **MR. SOMACH:** Well --

16 **JUDGE MELLOY:** And I'll ask -- I'm going
17 to be asking each of the counsel that, I guess, so
18 I'll -- I'll start with you.

19 **MR. SOMACH:** You know, first of all, I
20 think that the sessions have been very productive, and
21 that we have made progress. I think when I left St.
22 Paul after the first couple of days, I was encouraged.
23 When I left after the -- the one, two, three, four,
24 five, six days that we had more recently, I -- I would
25 agree with Judge Boylan that I am cautiously

1 optimistic that we are making progress. I know that
2 the conversations we've had, both with Judge Boylan
3 and then we had a -- we had a -- a short call this
4 morning, actually, before this call. They've been
5 very -- very professional, very good, very productive.
6 I think everybody is motivated to move -- move
7 forward. I also wanted to say and thank you for the
8 8th Circuit facilities in St. Paul. They were
9 wonderful. The people there could not have been --
10 Maureen is just like a -- a -- what a gift. I mean,
11 she is very, very, very good. I can't say enough
12 about that. But aside from that, you know, Texas has
13 bandwidth to be able to both prepare for trial and
14 also work aggressively in the mediation. We think we
15 will know a lot more after January 21st. If we are
16 making progress then, I think we will need more time.
17 This is complex. There are a lot of moving pieces,
18 and we're trying to stabilize as many pieces as we
19 can. But right now, you know, we're able to move
20 forward both preparing for trial and also mediating.
21 I'm not sure everybody else is in that position, but
22 -- but we certainly can and think certainly by the
23 21st, as Judge Boylan has indicated, that we'll --
24 we'll have a much better idea of -- of what we should
25 do at that point in time.

1 **JUDGE MELLOY:** Well, I -- you're right
2 about Maureen. She is -- she is a gift, but I would
3 also tell you that she was very happy to have you.
4 It's been pretty lonely up there during the pandemic
5 with all of our arguments being virtual, and I think
6 she -- I think she was very happy to have somebody up
7 there to talk to and use our facilities because like I
8 say, we -- for the last year and a half or two years
9 almost now, I guess, we've been pretty much virtual
10 for oral argument so those facilities have been very
11 underutilized.

12 All right. Well, thank you. Let me ask
13 you this, something I'm just a little curious about.
14 Who has the final yes-or-no settlement authority? Is
15 it the attorney general?

16 **MR. SOMACH:** Yes. In -- in Texas, it
17 is. The first -- the deputy first assistant attorney
18 general is on the phone now. He was in St. Paul all
19 of those days. He participated in all of the
20 discussions. He is -- is, in terms of the executive
21 floor, the person that will talk to the -- both the
22 attorney general, who does have the final authority,
23 but he'll also consult with the governor's office.
24 The Rio Grande Commissioner for Texas was -- was also
25 there all -- all of those days. He is, of course, the

1 political appointee in charge of -- of administering
2 the Compact for Texas. He also has -- I know he has
3 recently talked to the governor. The governor is
4 aware of these -- these discussions, but it is the
5 attorney general that has the final say from a
6 technical perspective, but we'll make sure that all
7 the various agencies within the state are -- are
8 looped into the decision, if the decision is to move
9 forward with a settlement agreement.

10 **JUDGE MELLOY:** And I -- and I assume or
11 have assumed all along that if you came to an
12 agreement in principle, that the documentation process
13 would take some period of time. No one wants to be
14 back ten years from now before the Supreme Court
15 arguing over the settlement amount so I'm sure that'll
16 be a fairly lengthy process even at that point.

17 Mr. Wechsler, what do you -- what's your
18 thoughts on all of this?

19 **MR. WECHSLER:** Thank you, Your Honor. I
20 would echo many of the things we've heard, first the
21 appreciation for the 8th Circuit and its staff. I
22 would also say that we appreciate the -- the help that
23 we've had from Judge Boylan that we thought has been
24 invaluable and -- and the goodwill of all the parties.
25 We also think that the discussions have been very

1 promising, that we have made progress, but I do think
2 that we are at very preliminary stage. All of the
3 parties are continuing to do a significant amount of
4 evaluation. There is much to be worked on, much that
5 hasn't been agreed to, and -- and I don't think the
6 parties, even with the progress we've made, that we
7 fully understand all of the moving parts. Our view in
8 terms of the January 19th, 20th, 21st sessions is at
9 the end of that session, our expectation and our hope
10 is that we will know whether or not we should be
11 devoting our resources to mediation and settlement
12 discussions with the other parties or alternatively
13 simply is better to proceed to trial in March, and so
14 I think the expectation is shortly after that time, we
15 would be in a position with the other parties to be
16 making that determination and -- and -- and ask -- and
17 approaching you with if we have any requests. Our
18 intent up until that time, you know, we have the
19 holidays, and then there's only about three weeks
20 prior to that mediation session so our intent prior --
21 up until that mediation session is to be working in
22 parallel on both the mediation and -- and litigation
23 tract, and we're in a good position, as Mr. Somach
24 expressed, I think, for all of us to be doing that.

25 I think that -- you asked about sort of

1 the next steps. My anticipation is if we are
2 fortunate enough to continue to make progress, and we
3 have in place at least some principles on which we all
4 agree we want to continue to work, that we would want
5 to talk to you towards the end of January at. At that
6 point, if we're in that position, we'd be asking for a
7 continuation of the trial, likely an additional amount
8 of time, both to continue negotiations, which is --
9 has been expressed, and you understand this is very
10 technical in nature so there's many moving parts that
11 would be a significant amount of work to get to the
12 final point. In other proceedings, interstate
13 proceedings, if the states are able, again, lucky
14 enough to reach that point, then there have been a
15 presentation of the documentation of the settlement in
16 the form of a motion and evidentiary hearing before
17 the Special Master, and then the Special Master
18 oftentimes has -- has questions, and eventually makes
19 a recommendation to the Court. Again, I think we're a
20 very far way off from that, but just in thinking about
21 what the process is like if we are fortunate enough to
22 get there.

23 As to your question as to who has
24 settlement authority, our answer is also the same.
25 It's the attorney general by the constitution and

1 statutes in the state of New Mexico that has the
2 ultimate authority for settlement or resolution of
3 cases, but, of course, the attorney general and the
4 state engineer and the other water officials have been
5 working hand in hand so our anticipation is it will be
6 a collective decision by the State of New Mexico.

7 **JUDGE MELLOY:** Thank you.

8 Mr. Wallace, do you have anything you'd
9 like to say on all of this? I understand you've been
10 participating or at least the State -- I'm not sure
11 about you personally, but I understand Colorado has
12 been participating.

13 **MR. WALLACE:** We have been. I was in --
14 in Minnesota with the rest of the parties, and I have
15 to echo that it was -- I think it was a very
16 productive week there. I would also like to thank the
17 8th Circuit and their staff and Judge Boylan. I think
18 they were very productive talks, and it was a great
19 facility to have those talks in. I'll also
20 acknowledge that it's going to be very complex and
21 comprehensive to settle and that it'll probably take
22 time to do that and everyone recognizes that fact, but
23 I would defer to the other parties as to their
24 opinions on the trial schedule. That's something --
25 they've got a much heavier lift on that so I think

1 their opinion on what to do in that timing, they're
2 going to have a much better view on how to handle
3 that.

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

5 Mr. Leininger, what's the position of
6 the United States on all this?

7 **MR. LEININGER:** Yes, thank you, Your
8 Honor. First of all, let me also add our appreciation
9 to the 8th Circuit and 8th Circuit staff. Wonderful
10 facilities, and I think meeting in person greatly
11 facilitated our efforts. Thank you very much, and
12 thanks, again, to the staff and Judge Boylan.

13 We worked diligently and very hard for
14 six straight days there with technical people and
15 legal staff, legal counsel. There's still quite a bit
16 of work to be done, however, and as counsel and Judge
17 Boylan has noted, we have a series of meetings next
18 January, both technical meetings and legal staff
19 meetings. Because -- because of the effort and the
20 work that still needs to be accomplished, Your Honor,
21 we would ask that the trial schedule -- the existing
22 start -- restart of the trial date of March 14th be
23 postponed. So we would ask that the restart of that
24 trial be extended two to three months to allow the
25 parties to concentrate on this settlement effort. I

1 agree with Judge Boylan and Mr. Somach that even if we
2 have an agreement in principle as of January 21st,
3 we're still going to be working into February to try
4 to finalize our agreement, and resources should be
5 devoted to that effort. We have our technical staff,
6 our engineers, working very closely with the -- with
7 the other technical staff on this. These are also
8 people that are either going to -- intended to testify
9 in the spring or assist in testimony in the spring.
10 We would prefer that their efforts be concentrated on
11 the settlement effort. A short extension, therefore,
12 of two to three months to May or June, I think, is
13 appropriate.

14 Your Honor, I may also add that it's our
15 preference that we appear in person, and with the
16 circumstances that we're encountering now with regard
17 to anticipated surge in COVID cases, we don't know if
18 that's likely in March so that should be a
19 consideration as to a short delay postponement with
20 regard to the restart of the trial. Thank you.

21 **JUDGE MELLOY:** Let me ask: Do any of
22 the amici want to be heard on any of these issues or
23 have any comments about what's going on?

24 **MS. BARNCASTLE:** Yes, Your Honor. This
25 is Samantha Barncastle for the Elephant Butte

1 Irrigation District. The only thing that I would like
2 to say is that, consistent with what the United States
3 is saying, EBID lacks sufficient resources to be able
4 to prepare for trial while also devoting the necessary
5 resources to the settlement process. EBID has proven
6 integral in a number of ways in these discussions, and
7 we don't anticipate that that's going to go away
8 anytime soon. We're working on multiple fronts, based
9 on just EBID's background with these issues, to help
10 the parties in any way possible to reach some sort of
11 middle ground, and that requires a substantial part of
12 our time.

13 Now, we're very little more than a
14 one-man band. Dr. King and I are the primary
15 resources from EBID for settlement discussions.
16 Dr. King is also one of the primary expert witnesses
17 that'll be testifying in the spring so we would join
18 the request of the United States to postpone
19 everything for a short period of time because EBID is
20 far more than just encouraged by the discussions that
21 are going on, and I think that given the right amount
22 of time without the pressure at this point of trial
23 knocking on our door -- we all know that we could end
24 up back in trial. We know what that means. With a
25 little bit of a reprieve, I do believe we can get this

1 done.

2 **JUDGE MELLOY:** All right. Anybody else
3 want to be heard?

4 **MR. HICKS:** Your Honor, Renea Hicks for
5 EP No. 1. First, I would say that we are hopeful, but
6 cautiously so, about where this is going. We are a
7 little bit more on the outside, and I think EBID is,
8 too, than the parties so we don't know as much. Judge
9 Boylan has been gracious in inviting us up and
10 listening to some of our concerns in a couple of
11 separate meetings or one separate meeting in
12 particular. That's been very helpful, and we hope
13 this involvement can grow since we're such an integral
14 part of what's being discussed. As to the United
15 States' position on a two or three-month delay, again,
16 all the parties are in a much better position than we
17 are to assess that, but I think it makes sense and we
18 would join with EBID's position that that two- to
19 three-month delay would be a good idea and to make a
20 decision about it soon -- sooner rather than later so
21 that people can focus where it needs to be. Thank
22 you.

23 **JUDGE MELLOY:** Well, let me make just
24 two comments. I'm not prepared to make a decision
25 today on a continuance. I just wanted to sort of get

1 a sense of the landscape and whether we can wait until
2 January 24th -- well, I -- I shouldn't say 24th/25th.
3 I was -- I made a note here we'd have a status
4 conference on the 24th or 25th and see where we were
5 after the sessions on the 19th, 20th, and 21st, and
6 that would be sort of our go/no-go date -- decision
7 date. Whether we would do it -- make a decision
8 earlier than that, I'll have to think about. The
9 problem I have, and I -- I don't know if this is
10 anybody else has is given how long this trial is,
11 we're not talking about a two-week trial. We're still
12 talking probably six weeks, if we're lucky, of trial.
13 It isn't something you can just turn on and off very
14 easily. I don't -- quite frankly, and this is a
15 personal concern, but it's -- it's one I -- that's --
16 it's a big one for me is that I have -- you know, I've
17 sort of structured my whole life around having the
18 spring off for this -- spring available for this
19 trial, and I have things scheduled in June/July. I
20 could -- I could restart in August, but I have things
21 scheduled in June/July that right now I'm not all that
22 -- not crazy about totally moving. I really think if
23 we -- if we stop this trial at this point, there's a
24 good chance that it's going to be late summer or fall
25 before we get going again, and I suspect a lot of the

1 other attorneys have the same issue, that they've made
2 plans, summer plans, and have other issue -- other
3 things going on in their lives that might not
4 accommodate just a very short delay of the trial. So
5 I -- I do want to throw that out, that if -- if -- if
6 it gets delayed, it's probably going to be four or
7 five months, not two or three months.

8 But let me -- let -- but this gives me a
9 good sense of where we are. I guess I would say to
10 Mr. Leininger, if you want the case continued, file a
11 motion, and let me think about it. I'll probably set
12 it for a hearing, and you can talk -- talk to the
13 other parties about it, whether you -- whether you're
14 comfortable waiting until after the mediation session
15 on the 19th, 20th, and 21st, or whether you want to
16 see if we can come to a decision earlier than that.

17 In the meantime, I will -- I will
18 tentatively schedule a status conference for the week
19 after the 21st. I don't know if there's any
20 particular scheduling conflicts. I -- I wrote down
21 the 24th or 25th. That's Tuesday or Wednesday. Does
22 it make a difference to anybody as to which of those
23 two days we do it? You know, obviously at that point,
24 if we haven't already continued the trial, I -- I
25 would expect that we would make, as I say, sort of a

1 go/no-go decision, either we -- we're -- we continue
2 the trial for a few months while hopefully settlement
3 is finalized or we look at -- we say, you know, it's
4 not going very well, and we'll go ahead with the
5 mid-March trial date. But -- but in any event, I'll
6 get a notice out as to a date and time. I assume
7 11:00 Central works as well as any time for everybody,
8 but other than that, I don't have a lot more to take
9 up today.

10 Anything anybody else needs to talk
11 about or wants to bring up before we -- we sign off?

12 (No response.)

13 **JUDGE MELLOY:** All right. Well, if not,
14 then I hope everyone has a wonderful holiday, and good
15 luck with the negotiations. Thank you very much,
16 everybody.

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

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

19 **MR. WALLACE:** Thank you, Your Honor.

20 **MR. WECHSLER:** Thank you, Your Honor,
21 happy holidays.

22 (The proceedings adjourned at 11:28 a.m.)
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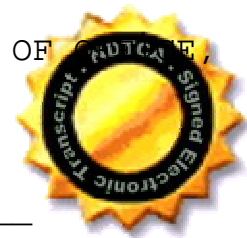
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CERTIFICATE

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 7th day of November, 2022.



Heather L. Garza

HEATHER L. GARZA, CSR, RPR, CRR

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