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No. 141 Original

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In the  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF  
INITIAL STATUS CONFERENCE BEFORE  
A. GREGORY GRIMSAL, ESQ.  
SPECIAL MASTER

---

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11 Proceedings recorded by mechanical stenography using  
12 computer-aided transcription software.

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I N D E X

PAGE

Appearances of Counsel	5
Introduction of Special Master and Staff	8
Discussion of Fees and Expenses	8
Transcripts	9
Procedure for Payment of Fees and Expenses	9
Rules Governing Proceedings	12
Filing of Papers	13
Docket	17
Venue for Proceedings	18
New Mexico's Motion to Dismiss	19
Motion for Leave to Intervene	20
Possible Intervenors	22
Comprehensive Case Management Plan	24
Next Status Conference	29

1 PROCEEDINGS

2 (January 6, 2015)

3 **THE SPECIAL MASTER:** Good morning, Counsel. Can  
4 everyone hear me? This is Greg Grimsal in New Orleans.

5 Let me begin by stating we are on the record. I  
6 would like to begin by noting that New Mexico's motion to amend  
7 the case management order is going to be granted. So let me  
8 start with a roll call of the parties to make sure we have all  
9 counsel of record on the line.

10 Is counsel for Texas present, please?

11 **MR. SOMACH:** Yes, Your Honor. This is Stuart Somach.

12 **THE SPECIAL MASTER:** Thank you, Mr. Somach.

13 Counsel for New Mexico?

14 **MS. BOND:** Yes, Your Honor. This is Sarah Bond,  
15 counsel of record for New Mexico.

16 **THE SPECIAL MASTER:** Thank you, Ms. Bond. Let me  
17 take the opportunity to note that your direct dial phone number  
18 will be corrected on the amended distribution list that will  
19 appear on the case management order that I will issue after  
20 this conference. I also apologize for misspelling Attorney  
21 General Balderas' last name. That, too, will be corrected.  
22 Please convey our congratulations to him on his election.

23 Anyone else present for New Mexico, Ms. Bond?

24 **MS. BOND:** Yes, Your Honor. With me is Stephen  
25 Farris as well as Amy Haas, who is both general counsel and

1 acting director of the Interstate Stream Commission. I believe  
2 on the phone may be Lisa Thompson and Jeff Wechsler also.

3 **THE SPECIAL MASTER:** Okay. By the way, I'm going to  
4 have to -- sorry. Go ahead.

5 **MS. BOND:** If I could, Your Honor, I had failed to  
6 note, but the nomenclature of the e-mail for the attorney  
7 general follows the spelling of the name. So the  
8 H-B-A-L-D-E-R-A-S, as in Sam, should also be changed on his  
9 "nmag" e-mail as well.

10 **THE SPECIAL MASTER:** Got it. Got it.

11 **MS. BOND:** Thank you so much.

12 **THE SPECIAL MASTER:** Noted. My pleasure. Thank you.

13 By the way, Counsel, when you speak, for the  
14 benefit of the court reporter, I will ask that you identify  
15 yourselves so our court reporter knows who you are.

16 Is counsel for Colorado on the phone?

17 **MR. WALLACE:** Yes, Your Honor. This is Chad Wallace  
18 from the Colorado Attorney General's Office. With me also are  
19 Karen Kwon and Preston Hartman, also from the AG's Office, and  
20 Mike Sullivan, the deputy director of the Colorado Division of  
21 Water.

22 **THE SPECIAL MASTER:** Thank you, Mr. Wallace.

23 Is counsel for the United States on, please?

24 **MR. DUBOIS:** Good morning, Your Honor. This is James  
25 Dubois for the United States. Also on the line are Lee

1 Leininger and Stephen Macfarlane. I believe Ann O'Connell is  
2 also going to be on. She is with the SG's Office.

3 **MS. O'CONNELL:** This is Ann and I am on. I am from  
4 the Solicitor General's Office at DOJ.

5 **THE SPECIAL MASTER:** Thanks, Ann. What's your last  
6 name, please?

7 **MS. O'CONNELL:** O'Connell.

8 **THE SPECIAL MASTER:** Thank you.

9 **MR. SOMACH:** Your Honor, this is Stuart Somach for  
10 the record. I should mention that I have others with me. I  
11 would like to introduce them to you. I have Andrew Hitchings,  
12 Bob Hoffman, and Francis Goldsberry. I apologize for not  
13 introducing them when you called my name.

14 **THE SPECIAL MASTER:** Thank you, Mr. Somach.

15 Are there any other counsel on the line for any  
16 nonparties?

17 **MR. STEIN:** Your Honor, this is Jay Stein  
18 representing the City of Las Cruces, New Mexico. The city has  
19 appeared as an *amicus curiae* in several motions and in  
20 briefing.

21 **THE SPECIAL MASTER:** Thank you, Mr. Stein.

22 **MR. BROCKMANN:** This is Jim Brockmann also with  
23 Mr. Stein representing the City of Las Cruces.

24 **THE SPECIAL MASTER:** Thank you, Mr. Brockmann.

25 Any other nonparties on the line?

11:04 1 **MS. DAVIDSON:** Your Honor, this is Tessa Davidson  
11:04 2 with New Mexico Pecan Growers, observing only.

11:04 3 **THE SPECIAL MASTER:** Right. Thank you. Anyone else?  
11:04 4 Counsel, let me begin by introducing myself and  
11:04 5 my staff who are present. I'm Greg Grimsal. I've been  
11:05 6 appointed Special Master in this matter. I have with me two  
11:05 7 folks from my firm who I plan to engage as clerks in this  
11:05 8 matter, Mr. Patrick M. Shelby, he goes by -- actually, I'm  
11:05 9 going to ask both of them to make their appearances and  
11:05 10 introduce themselves on the record.

11:05 11 **MR. SHELBY:** Good morning. This is Patrick M. Shelby  
11:05 12 and, as Greg mentioned, I go by Rick.

11:05 13 **MS. GRABILL:** Good morning, Counsel. This is  
11:05 14 Meredith Grabill.

11:05 15 **THE SPECIAL MASTER:** Counsel, I'm moving down the  
11:05 16 agenda. On Item B, I wanted to touch base on that. I have  
11:05 17 informed everyone my thoughts about appropriate hourly rates.

11:06 18 Let me mention that the hourly rates that I set  
11:06 19 out in the case management order were not arbitrary. I picked  
11:06 20 some data points in order to be able to set those rates as I  
11:06 21 did. One of the data points is the special master guide that  
11:06 22 special masters receive from the Supreme Court, which sets a  
11:06 23 range of rates from \$250 to \$490 an hour.

11:06 24 I note further that the special master in  
11:06 25 *Kansas v. Nebraska*, which is No. 126 Original, charged \$490 an



1 hour in 2012 while his standard rate was \$550. I would note  
2 that my standard hourly rate is \$450 and the standard rate for  
3 Mr. Shelby and Ms. Grabill are \$350 an hour, so we have bumped  
4 those rates down for this matter. Are there any comments or  
5 discussion on that before we proceed?

6 Okay. Let me mention further, as I indicated at  
7 the outset, these proceedings are public record. We have a  
8 court reporter here working on the transcript. The process I  
9 anticipate is that my firm will front the cost for the  
10 transcript. After a hearing or a conference, I will post to  
11 the record a notice of filing of the transcript.

12 The parties or anyone else who wants a  
13 transcript will have a window -- I believe that window is 90  
14 days -- to order it directly from the court reporter. After  
15 that time the transcript will be posted of record. The court  
16 reporter's fees that will be billed to my firm and paid by my  
17 firm will be part of the costs that will be submitted for  
18 reimbursement down the road.

19 Moving on to Item C, the procedure I anticipate  
20 for application for approval and payment of fees and expenses,  
21 I've been advised by the Court that they are not going to want  
22 to hear from me more often than every six months. So I would  
23 anticipate filing a motion with the Supreme Court for an  
24 allowance of fees and disbursements every six months. So since  
25 the order of appointment was November 3, I would imagine

11:08 1 somewhere around May 3 we will be filing a motion with the  
11:08 2 Court for fees and expenses that would cover the court reporter  
11:09 3 and similar fees.

11:09 4 One question, which of course I haven't resolved  
11:09 5 and I'm interested in hearing the parties' thoughts on this,  
11:09 6 would be the percentages that each party would be responsible  
11:09 7 for paying. I hasten to emphasize we are in no particular  
11:09 8 hurry on that issue. If you have reached some sort of  
11:09 9 agreement on that, it would be nice to hear it now. If not,  
11:09 10 you can certainly have further discussions on that among  
11:09 11 yourselves and advise me of any agreement you come to.

11:09 12 I do note there is a motion to intervene by the  
11:09 13 Elephant Butte Irrigation District and, of course, that may  
11:09 14 affect the percentages that you agree on. Has there been any  
11:10 15 discussion on that point to date?

11:10 16 **MR. SOMACH:** Your Honor, this is Stuart Somach. I  
11:10 17 had a brief conversation with the United States, who of course  
11:10 18 intervened as a plaintiff, but I don't know that we came to any  
11:10 19 conclusions. I think we did assume -- and this may not be an  
11:10 20 agreed upon assumption -- that at least you had an initial  
11:10 21 division of 50/50 between the plaintiff and defendants. I'm  
11:10 22 not sure that that's necessarily agreed to, but that was as far  
11:10 23 as the discussion that I had with the United States went.

11:10 24 **MS. BOND:** Your Honor, this is Sarah Bond for  
11:10 25 New Mexico. I spoke briefly with both counsel of record for

1 the United States as well as counsel for Texas and we batted  
2 around some ideas about this, thinking it would be best if we  
3 could come to some agreement.

4           It was our position that we sorta didn't start  
5 this and we would -- and also given that we are in the unusual  
6 position of having an intervenor plaintiff in this case, the  
7 United States, who has suggested in their reply to our motion  
8 to dismiss that its complaint should stand alone even if the  
9 Court were to dismiss Texas' complaint, suggesting that they  
10 have different claims and independent claims from Texas, in  
11 light of that fact, we would suggest that the cost be split  
12 35 percent to each of the two plaintiffs, 30 percent for  
13 New Mexico, zero for Colorado since they have no claims against  
14 them.

15           The United States suggested that just because we  
16 didn't start it, we should bear an equal burden, but it was our  
17 position that it seems fair to us, of course, as a defendant.  
18 And, of course, if we are found liable in any way, we would be  
19 liable for damages, and so you could take it out of our hide at  
20 the end. Anyway, that's our opening request.

21           **THE SPECIAL MASTER:** Well, may I suggest that it  
22 would be worth the parties' while to attempt to come to an  
23 agreement on that point rather than submitting it to me for a  
24 resolution. As I say, A, there's no hurry; B, there's another  
25 intervention pending. So may I suggest that the parties after

1 this call confer and attempt to achieve some sort of agreement  
2 on appropriate percentages. I would suggest some sort of joint  
3 or consent motion memorializing what that agreement is seems to  
4 kind of make sense to me.

5 Obviously, if you can't agree, let me know about  
6 that and we will deal with it at that time. It seems highly  
7 likely to me the parties are going to be able to come to some  
8 sort of agreement.

9 Is that fair?

10 **MS. BOND:** Yes, Your Honor.

11 **THE SPECIAL MASTER:** Okay.

12 **MR. WALLACE:** Your Honor, this is Chad Wallace for  
13 Colorado. I just want to advise the other parties that the  
14 State of Colorado does intend to at least participate on this  
15 level, so we would like also to join in any talks regarding fee  
16 splitting just to be kept in the loop.

17 **THE SPECIAL MASTER:** So ordered. Any other  
18 discussion on the percentages before we move on?

19 Moving on to the rules governing proceedings, as  
20 I think you all know, Supreme Court rules provide that the form  
21 of pleadings and motions prescribed by the Federal Rules of  
22 Civil Procedure are to be followed, but otherwise the rules and  
23 the Federal Rules of Evidence are only guides to the  
24 proceedings. In this matter the Federal Rules of Civil  
25 Procedure and the Federal Rules of Evidence presumptively

1 apply. Let me state that at this point, as a threshold matter,  
2 I don't see where anything like Rule 26 disclosures are  
3 appropriate and they certainly don't apply at this time.

4 Any other questions about that?

5 **MS. BOND:** No, Your Honor.

6 **THE SPECIAL MASTER:** Yes.

7 **MS. BOND:** No. This is Sarah Bond. We didn't have  
8 any other questions. I think given the preliminary discussions  
9 among counsel, we anticipate that we will be able to work  
10 things out in a pretty amicable and professional fashion among  
11 the counsel of record.

12 **THE SPECIAL MASTER:** Great. Thank you, Ms. Bond.

13 Moving on to the filing of papers, one of the  
14 things we have to resolve is the manner in which the parties  
15 shall serve individuals on the distribution list attached as  
16 Appendix A. I have indicated that the parties should try to  
17 come to some sort of agreement as to the number of papers you  
18 want to serve on each other. Have the parties had any  
19 discussions about that point? We can certainly have the  
20 discussion now.

21 **MS. BOND:** We have not, Your Honor.

22 **THE SPECIAL MASTER:** Any thoughts on that? I know,  
23 Ms. Bond, you have been involved in a couple of these before.  
24 Any standard practices on the number of copies you served to  
25 other parties?

11:16 1           **MS. BOND:** Your Honor, I think the parties are all  
11:16 2 well-versed in this kind of procedure. Now that everybody does  
11:16 3 things pretty much electronically, it's just a matter of  
11:16 4 whether the parties want to have everything sent electronically  
11:16 5 and/or hard copies. I'm old enough that I kind of like a  
11:16 6 couple of hard copies, but one is adequate because now with  
11:17 7 scanning and other electronic facilitation, the number of  
11:17 8 copies is likely to be created after the counsel -- assisting  
11:17 9 counsel will be e-mailed.

11:17 10           **THE SPECIAL MASTER:** Right.

11:17 11           **MS. BOND:** So then the question almost becomes who  
11:17 12 wants the e-mails. We just haven't had a chance to discuss  
11:17 13 that.

11:17 14           **MR. SOMACH:** Again, this is Stuart Somach. We are  
11:17 15 certainly satisfied with an electronic copy. I don't know if  
11:17 16 we need anything further. The question I would raise would be  
11:17 17 just simply in terms of date of service for purposes of  
11:17 18 responding, making sure -- one of the problems, of course, with  
11:17 19 electronic copies is tracing exactly when something was sent  
11:17 20 and so forth, but that would be the only reason perhaps for  
11:17 21 being redundant and having electronic copy plus a hard copy,  
11:18 22 and then the service date would be from the date of the mailing  
11:18 23 of the hard copy.

11:18 24           That's the only issue that I see. We are  
11:18 25 certainly comfortable with electronic copies and certainly just

1 mailing one copy. We don't need multiple copies of documents.

2 **MR. DUBOIS:** This is Jim Dubois. I think that's been  
3 pretty much the norm in the cases that I've been involved in is  
4 that most of it is electronic except for things like exceptions  
5 and stuff that's filed with the Court itself.

6 **MS. BOND:** Do you guys want to have us serve  
7 everybody on your team or just counsel of record and then you  
8 can do an e-mail to your people?

9 **THE SPECIAL MASTER:** Ms. Bond?

10 **MS. BOND:** Yes, sir.

11 **THE SPECIAL MASTER:** I'm sorry. I wanted to make  
12 sure that was you for the court reporter.

13 **MS. BOND:** I apologize, Your Honor. That was Sarah  
14 Bond.

15 **MR. SOMACH:** This is Stuart Somach. Just serving me  
16 is sufficient.

17 **MS. O'CONNELL:** This is Ann O'Connell. The  
18 "supremectbriefs" address for Solicitor General Verrilli is  
19 good, but I would think that Jim and Steve, who are also listed  
20 on our service list, will probably want to be e-mailed in  
21 addition because our "supremectbriefs" address gets checked a  
22 couple of times a day and things forwarded out, so there's  
23 quite a delay sometimes.

24 **MR. WALLACE:** This is Chad Wallace for Colorado. I  
25 can circulate to the parties, in addition, the e-mail address

1 for my paralegal to make sure things get handled appropriately  
2 as far as receiving documents.

3 Also, as far as Stuart's comment regarding the  
4 date of service, which I think is a good issue to raise, it  
5 might be worthwhile to agree that the service date would be the  
6 same as that when we e-mail it to the Special Master and it's  
7 been docketed within his system.

8 **THE SPECIAL MASTER:** That's fine on our end, Counsel.  
9 My concern in this whole discussion was to be sure -- first of  
10 all, I emphasize that we are perfectly comfortable with  
11 electronic filing and electronic service, but I wanted to be  
12 sure that any case management order I entered accommodated the  
13 needs of the parties. So I'm simply listening to see what the  
14 parties prefer.

15 If I'm hearing everybody correctly, the  
16 consensus seems to be electronic service is appropriate, with  
17 the date of service deemed to be the date it's filed with the  
18 Special Master and docketed on the record with -- again, if I'm  
19 hearing you correctly -- one hard copy to be served on each  
20 party. Does that fairly capture a consensus?

21 **MS. BOND:** Your Honor, Sarah Bond for New Mexico.  
22 That's fine for New Mexico. I just have one question and that  
23 is I would like to get a clarification of Mr. McFarlane's  
24 e-mail. I see an E on the end of his name in the snail mail  
25 address, but there is no E on the end of his name in the e-mail



1 address. I wanted to make sure there wasn't an error in that  
2 e-mail address.

3 **THE SPECIAL MASTER:** Well, let me address that more  
4 broadly, Ms. Bond. May I request the parties submit to me a  
5 list of e-mail addresses of those on whom you request service  
6 to be made by other parties and those on whom you request the  
7 Court provide service of any orders the Court issues as well.  
8 I believe that would make life easier for everybody.

9 **MR. MACFARLANE:** Your Honor, this is Stephen  
10 Macfarlane for the United States. We will do that, and I do  
11 note that the e-mail address that's on the service list for me  
12 is not the one that should be used. We will correct that.

13 **THE SPECIAL MASTER:** My apologies to everyone if we  
14 have any of these e-mails wrong. This is our opportunity to  
15 get them right.

16 **MR. DUBOIS:** This is Jim Dubois. I think I have sent  
17 an updated list and a proper e-mail to Anne. Hopefully we have  
18 got it, but we will make sure that they are correct and that  
19 everybody has it.

20 **THE COURT:** Right. Anne would be our paralegal,  
21 Anne Provosty.

22 **MR. DUBOIS:** Yes. Sorry.

23 **THE SPECIAL MASTER:** Great. Anything else about  
24 service?

25 Moving on to the next agenda item, we have set

1 up the docket. I assume you have all had a look at it. We  
2 actually had a couple of glitches with it when we first set it  
3 up. I just wanted to make sure everybody knows where it is and  
4 has seen it. Let me know if you have any problems with using  
5 it so we can alert our IT people to get any problems fixed.

6 As to venue for conferences and other  
7 proceedings, the instructions I received from the Supreme Court  
8 indicated that the Court prefers conferences and proceedings to  
9 be held in a federal courthouse, preferably in a circuit  
10 courthouse. I will report to you that I have made arrangements  
11 with the Fifth Circuit here in New Orleans and also with the  
12 Eastern District of Louisiana for use of conference rooms or  
13 courtrooms as we may need them.

14 I would like to take this opportunity to express  
15 on the record my appreciation for the cooperation and support I  
16 have had from the Fifth Circuit and also from the Eastern  
17 District. We are actually sitting in a conference room at the  
18 Eastern District of Louisiana today. My special thanks to  
19 Ms. Toni Tusa, who is the court reporter, who is a regular  
20 court reporter at the Eastern District of Louisiana whose work  
21 we are all familiar with. She is highly qualified. We are  
22 very happy to have her services.

23 If/when we do have conferences and proceedings,  
24 I would anticipate those being here in New Orleans. It's not a  
25 bad town to visit. There are lots of hotels nearby. I'm

1 looking out the window at the Fifth Circuit. The two buildings  
2 are next door to each other. So whichever one we choose, it's  
3 essentially the same spot. Any comments about that?

4 **MR. DUBOIS:** This is Jim Dubois. That's fine with  
5 the United States.

6 **MR. SOMACH:** Yes. That works fine for the State of  
7 Texas, too, Your Honor. This is Stuart Somach.

8 **THE SPECIAL MASTER:** Great.

9 **MS. BOND:** Sarah Bond. That's fine for New Mexico as  
10 well.

11 **THE SPECIAL MASTER:** Thanks, Counsel.

12 Moving on, let me address New Mexico's motion to  
13 dismiss the complaints of Texas and the United States. We are  
14 working on that. The process I anticipate here is that once we  
15 have a draft opinion, I would anticipate circulating that among  
16 the parties and inviting letter briefs from the parties to  
17 comment on the opinion. After we have adjusted any comments  
18 the parties may offer, at that point we will issue an interim  
19 report on it.

20 That's the status. We are working on that  
21 motion diligently, I can assure you, and will let you have the  
22 draft opinion as soon as we have got one.

23 **MS. BOND:** Your Honor, this is Sarah Bond for  
24 New Mexico. We were hoping that we would be allowed to present  
25 oral argument to the Special Master on that motion.

1           **THE SPECIAL MASTER:** Ms. Bond, I appreciate that. My  
2 thought at this time is that oral argument will not be  
3 necessary. If I change my mind, I will alert the parties and  
4 arrange for a date. Your request is noted. I will table it  
5 for the moment.

6           **MS. BOND:** Thank you.

7           **THE SPECIAL MASTER:** You're welcome.

8           I note that there's a motion for leave to  
9 intervene filed by the Elephant Butte Irrigation District. It  
10 was filed in December. Oppositions are due January 29. If no  
11 opposition is filed, I guess it's possible the Supreme Court  
12 could just grant it. According to what I have seen happen in  
13 other special master matters, if there is opposition, it's  
14 possible the Court will refer that motion to us as well.

15           I'm curious. Have any of the parties filed or  
16 planning to file oppositions?

17           **MS. BOND:** Yes, Your Honor. New Mexico will be  
18 filing an opposition. This is Sarah Bond. We represent our  
19 citizens and we think there is no precedent for the Court to  
20 allow one of its citizens who we represent *parens patriae* to  
21 intervene in a case like this. It's an original action on a  
22 compact to which we bind our citizens under *Hinderlider*.

23           **THE SPECIAL MASTER:** Okay.

24           **MR. SOMACH:** Your Honor, this is Stuart Somach for  
25 the State of Texas. We will be opposing also. My

1 understanding is that the date that we are required to file by  
2 is January 29.

3 My assumption is that we will file as normally  
4 with the Court but that we will also provide copies of what we  
5 file to you. I just want to make sure that that's what your  
6 expectation is.

7 **THE SPECIAL MASTER:** Yes, Mr. Somach, that's fine.

8 Again, I note that, for example, in *Alaska v.*  
9 *United States* there was a similar situation. A motion to  
10 intervene was filed while there was a motion to dismiss  
11 pending. In that matter, after the motion to dismiss was  
12 briefed, the Court referred the motion to intervene to the  
13 special master. So it's reasonable to guess that the Court may  
14 do the same thing here. Either way, it would have to be ruled  
15 on and will have some impact on what happens here.

16 **MR. DUBOIS:** Your Honor, this is Jim Dubois. The  
17 United States is going to be opposing as well. I'm just  
18 letting you know.

19 **THE SPECIAL MASTER:** Thank you. That gives us a  
20 pretty good idea of what's going on with that motion.

21 **MR. WALLACE:** Your Honor, this is Chad Wallace. Do I  
22 understand correctly that it is your understanding that the  
23 Supreme Court is entertaining the motion even though it has  
24 deferred the case to you prior to Elephant Butte Irrigation  
25 District filing that motion?

1           **THE SPECIAL MASTER:** No, Mr. Wallace. I don't know  
2 exactly what the Court is going to do. Of course, it can do  
3 whatever it wants.

4           I note that in *Alaska v. United States*, for  
5 example, there was a similar procedural posture. In that  
6 matter, once the motion to dismiss was fully briefed, then at  
7 that point the Court referred the motion to the special master.  
8 I guess it's reasonable to believe the Court would do the same  
9 thing here, but I don't really know what they are going to do.

10           Knowing that there's significant opposition  
11 tells me at a minimum that it's not going to be granted by the  
12 Court itself as unopposed. It's a live motion that will have  
13 to be dealt with. My guess is they will kick it to me to deal  
14 with, which is fine, but we will cross that bridge when we get  
15 to it. I don't actually know what the Court is going to do. I  
16 don't have any preconceptions about that, just observations  
17 about what's happened in similar situations in other matters.

18           Anything else about the motion to intervene?  
19 Counsel, is anybody aware of any other possible intervenors in  
20 the case?

21           **MR. SOMACH:** This is Stuart Somach again, Your Honor,  
22 for the State of Texas. Yes, I have had conversations with  
23 other parties in Texas, particularly the irrigation district,  
24 EP No. 1, and the City of El Paso, who are contemplating  
25 intervention, and that raises a subsidiary question -- I just

1 wanted to make certain -- and that is when we have these  
2 telephone conversation whether or not other parties -- I  
3 noticed that Las Cruces and Pecan Growers were on the call.  
4 I'm feeling a little guilty because I discouraged the City of  
5 El Paso and other Texas entities from joining the call because  
6 I wasn't aware entirely of the process. I don't want to  
7 unilaterally keep them off a call that is open to other  
8 parties.

9           The two comments I have is I am aware that there  
10 will be some Texas intervention papers that will probably be  
11 filed. Number two is simply trying to get an understanding on  
12 a conference call like this whether it's open to the public  
13 generally or whether there's some limited thought on who should  
14 be participating.

15           **THE SPECIAL MASTER:** Mr. Somach, that's a good  
16 question. Thank you for raising it. My understanding is that  
17 it's sort of a delicate balance. On the one hand, these are  
18 open proceedings, theoretically open to the public. On the  
19 other hand, my understanding of what the practice has been in  
20 other special master matters is I would appreciate any nonparty  
21 who wishes to participate to let us know so we can greenlight  
22 that. I don't anticipate denying anyone the right to listen  
23 in, but please contact us in advance and advise us of your  
24 desire to participate as a nonspeaking participant.

25           **MR. STEIN:** Your Honor, this is Jay Stein

1 representing the City of Las Cruces, New Mexico.

2 **THE SPECIAL MASTER:** Yes, sir.

3 **MR. STEIN:** The City of Las Cruces has considered  
4 intervention at different times and is still considering that.  
5 No decision has been made and no decision would be made until  
6 the responsive pleading phase for the State of New Mexico if  
7 the motion to dismiss were denied.

8 **THE COURT:** Right. Okay. Thank you, Mr. Stein.

9 Anything else about possible intervenors or the  
10 participation of nonparties in these calls? Any other  
11 questions or concerns before we move on?

12 With respect to a comprehensive case management  
13 plan, Counsel, let me give you my preliminary thoughts on it.  
14 Counsel, when I'm not doing this, I'm doing what all of you are  
15 doing, which is to say I'm a practicing lawyer as a litigator.  
16 Certainly I have often been in a situation where I have been  
17 involved in a lawsuit where there was a motion pending before  
18 the judge that would have a big impact on the management or  
19 conduct of the case I was involved in.

20 Classically, you're going to trial and there's a  
21 summary judgment motion pending and you think, Golly, if he or  
22 she would only rule on that motion, either I wouldn't have to  
23 go to trial or it would significantly shape discovery or trial  
24 prep or anything like that. Moreover, as a second point, I'm  
25 very sensitive about wasting your time and your clients'



1 resources.

2 I am disinclined at this point to ask you to  
3 prepare a comprehensive case management plan for several  
4 reasons:

5 First, what I do with respect to the pending  
6 motion to dismiss filed by New Mexico will at a minimum affect  
7 the discovery that the parties may need to conduct;

8 Second, any interim report that I issue is  
9 subject to challenge by the parties and review, modification,  
10 adoption by the Supreme Court; and

11 Third, there's at least one motion to intervene  
12 pending.

13 So in my mind those factors and my experience as  
14 a litigator lead me to think that the better course of action  
15 is not to ask you to prepare a case management plan at this  
16 time, but I particularly wanted to open it up and I'm open to  
17 your thoughts on that point. If everybody says, "Oh, yeah, we  
18 want to start working on one right away," I'm not going to  
19 stand in the way, but I also don't want to waste your time or  
20 waste your clients' resources. The floor is open.

21 **MR. SOMACH:** Well, Your Honor, this is Stuart Somach  
22 again. I think our interest would be -- and, of course, this  
23 would be the assumption that the case is not dismissed -- that  
24 we get the case at issue as quickly as possible. So I think  
25 that certainly delaying the preparation of a case management

1 plan is not a bad thing to do.

2 I would suggest that if the Court denies the  
3 motion to dismiss, in fact, answers would have to be filed,  
4 cross complaints presumably could be filed, and putting that on  
5 a timeline that would maybe run parallel with the motion to  
6 dismiss -- this assumes, of course, that the case is not  
7 dismissed -- would probably get us at issue as quickly as  
8 possible and allow us to really sit down and do a case  
9 management plan that contemplated not just the complaints by  
10 the United States and the State of Texas but whatever  
11 responsive pleadings were filed by New Mexico, Colorado, and  
12 presumably whomever is intervening if intervention is allowed.

13 So that would be where we would like to see, I  
14 think, the emphasis at this point, is getting ourselves at  
15 issue so we know what the case looks like and at that point can  
16 sit down and put together a comprehensive case management plan.

17 **THE SPECIAL MASTER:** Mr. Somach, let me make sure I  
18 understand. Your suggestion is that once the motion to dismiss  
19 would be ruled on, assuming one or more parties would be left  
20 standing after ruling on such a motion, then you would like us  
21 to order a schedule for answers, counterclaims, and the like,  
22 and that the schedule for the preparation of the case  
23 management plan be run parallel with those deadlines. Is that  
24 correct?

25 **MR. SOMACH:** Yes, Your Honor.

11:40 1 THE SPECIAL MASTER: Okay.

11:40 2 MR. SOMACH: That would get us at issue, I think, as  
11:40 3 quickly as possible, with the assumption that the case isn't  
11:40 4 dismissed.

11:40 5 THE SPECIAL MASTER: Any other comments?

11:40 6 MS. BOND: Your Honor, Sarah Bond for New Mexico. We  
11:40 7 will cooperate as best we can in the speedy resolution of the  
11:40 8 claims. If there are some of our claims left in issue after  
11:40 9 the motion to dismiss is ruled upon, we will be able to  
11:40 10 cooperate in establishing deadlines and an efficient procedure  
11:40 11 for getting the other claims and counterclaims resolved.

11:40 12 We do think that it's appropriate, especially in  
11:40 13 light of our not having oral argument on motions in the first  
11:41 14 instance, of having the exceptions filed and having enough time  
11:41 15 to work through that decision effectively, but we have no  
11:41 16 opposition to the Court setting parallel timeframes to file  
11:41 17 other papers in the case.

11:41 18 THE SPECIAL MASTER: Thank you, Ms. Bond. I would  
11:41 19 not anticipate doing that without conferring with the parties  
11:41 20 again to make sure that the schedule was reasonable and  
11:41 21 workable for everyone.

11:41 22 Again, if I'm reading the consensus correctly,  
11:41 23 that won't happen until the motions to dismiss are ruled on,  
11:41 24 which is to say until the interim report is issued, if I'm  
11:41 25 reading everyone correctly.

1           **MR. DUBOIS:** Your Honor, this is Jim Dubois. I was  
2 just sort of wondering whether people were talking about after  
3 the interim report or after the exceptions. I think that is  
4 sort of the question because I think I heard both or neither.  
5 I'm not sure that it's clear which people were talking about.

6           **MR. SOMACH:** Yes, I will clarify. I was thinking the  
7 interim report.

8           **MR. DUBOIS:** This is Jim Dubois. I guess I  
9 understood Ms. Bond to say after the exceptions had been heard,  
10 that the case management plan would be instituted after that,  
11 so that's why I think that we need to make sure we are on the  
12 same page.

13           **MS. BOND:** Your Honor, this is Sarah Bond from  
14 New Mexico. We are happy to go along with what the other  
15 parties wish to do. If they want to do it after the initial  
16 report is issued, that's fine, so long as we have enough time  
17 to file our exceptions and also prepare our counterclaims and  
18 claims on any claims remaining. If the Court confers with the  
19 parties, I'm sure we will be able to work something out.

20           **THE SPECIAL MASTER:** Yes. That's right, Ms. Bond.

21                   Let me make clear that what I anticipate doing  
22 is convening another conference upon the issuance of the  
23 interim report so that the parties can work with me on  
24 preparing an appropriate schedule both for further pleadings  
25 and for a case management plan. Is that fair, Counsel?

11:43 1 MS. BOND: Yes, Your Honor.

11:43 2 MR. SOMACH: Stuart Somach. Yes, Your Honor.

11:43 3 THE SPECIAL MASTER: Great.

11:43 4 MR. DUBOIS: Yes, Your Honor.

11:43 5 THE SPECIAL MASTER: Thank you, Counsel. That's all  
11:44 6 I have on the agenda.

11:44 7 I'm reluctant to set another conference at this  
11:44 8 time because it seems to me the big task we have to accomplish  
11:44 9 is dealing with New Mexico's motion to dismiss. It seems to us  
11:44 10 that nearly everything is going to depend on how that goes  
11:44 11 down. So I'm kind of reluctant at this point to even try to  
11:44 12 set a next conference. I'm open to do that if the parties  
11:44 13 would like me to, just to sort of check in with each other and  
11:44 14 see what's going on. I'm open, Counsel. What are your  
11:44 15 thoughts?

11:44 16 MR. SOMACH: This is Stuart Somach again, Your Honor.  
11:44 17 No, I think your thinking is right, that setting up something  
11:44 18 after the motion to dismiss is probably the most prudent thing  
11:44 19 to do.

11:45 20 THE SPECIAL MASTER: Thank you.

11:45 21 MR. DUBOIS: Your Honor, this is Jim Dubois. So as I  
11:45 22 understand it, there's going to be a draft of your interim  
11:45 23 report, and then you will probably ask for letter briefs and  
11:45 24 give us a timetable for that, and then issue the interim  
11:45 25 report?

11 : 45 1 THE SPECIAL MASTER: That's correct, Mr. Dubois.

11 : 45 2 MR. DUBOIS: All right.

11 : 45 3 THE SPECIAL MASTER: In that regard, I have taken my  
11 : 45 4 instruction from practices I have observed in other special  
11 : 45 5 master matters, so I think that should work fine here.

11 : 45 6 Counsel, anything else for the good of the  
11 : 45 7 order?

11 : 45 8 MS. BOND: This is Sarah for New Mexico. No,  
11 : 45 9 Your Honor. That all sounds fine with us. Thank you.

11 : 45 10 MR. DUBOIS: Not for the United States. Thank you,  
11 : 45 11 Your Honor.

11 : 45 12 THE SPECIAL MASTER: Texas, are you okay?

11 : 45 13 MR. SOMACH: Yes, we are just fine.

11 : 45 14 THE SPECIAL MASTER: Colorado?

11 : 45 15 MR. WALLACE: Nothing further, Your Honor. Thank  
11 : 45 16 you.

11 : 46 17 THE SPECIAL MASTER: Counsel, thanks for calling in  
11 : 46 18 this morning. It was a pleasure to talk with you all. I look  
11 : 46 19 forward to working with you. We are going off the record.  
11 : 46 20 Thank you.

11 : 46 21 (Proceedings adjourned.)

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CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of proceedings in the above-entitled matter.

s/ Toni Doyle Tusa  
Toni Doyle Tusa, CCR, FCRR  
Official Court Reporter

12 [1] 4/2	1	addresses [1] 17/5
13 [1] 4/2		adequate [1] 14/6
17 [1] 4/2	1000 [1] 1/19	adjourned [1] 30/21
18 [1] 4/2	1120 [1] 2/7	adjusted [1] 19/17
19 [1] 4/2	126 [1] 8/25	adoption [1] 25/10
20 [1] 4/2	1300 [1] 2/11	advance [1] 23/23
22 [1] 4/2	141 [1] 1/1	advise [3] 10/11 12/13 23/23
24 [1] 4/2	1508 [1] 1/24	advised [1] 9/21
29 [1] 4/2	1600 [1] 2/7	affect [2] 10/14 25/6
5 [1] 4/2	18th [1] 2/14	after [15] 5/19 9/10 9/14 11/25 14/8
8 [2] 4/2 4/2	2	19/17 21/11 26/20 27/8 28/2 28/3 28/9
9 [2] 4/2 4/2		28/10 28/15 29/18
Appearances of Counsel [1] 4/2	2012 [1] 9/1	AG's [1] 6/19
Co: [2] 3/11 4/2	2015 [1] 5/2	again [8] 14/14 16/18 21/8 22/21 25/22
Comprehensive Case Management	20530 [1] 2/21	27/20 27/22 29/16
Plan [1] 4/2	2067 [1] 2/24	against [1] 11/13
Discussion of Fees and Expenses [1]	2240 [1] 3/3	agenda [3] 8/16 17/25 29/6
4/2	26 [1] 13/2	agree [3] 10/14 12/5 16/5
Docket [1] 4/2	275 [1] 3/6	agreed [2] 10/20 10/22
Filing of Papers [1] 4/2	29 [2] 20/10 21/2	agreement [8] 10/9 10/11 11/3 11/23
In: [28] 5/4 5/4 8/3 8/3 8/14 8/14 9/5	3	12/1 12/3 12/8 13/17
9/5 9/18 9/18 12/18 12/18 13/12 13/12	30 percent [1] 11/12	ahead [1] 6/4
17/24 17/24 18/5 18/5 19/11 19/11	325 [1] 2/3	aided [1] 3/11
20/7 20/7 22/20 22/20 24/11 24/11	35 percent [1] 11/12	Alaska [2] 21/8 22/4
29/6 29/6	370 [1] 2/15	alert [2] 18/5 20/3
Introduction of Special Master and	5	all [11] 5/8 12/20 14/1 16/10 18/1 18/21
Staff [1] 4/2		24/14 29/5 30/2 30/9 30/18
Motion for Leave to Intervene [1] 4/2	50 [1] 10/21	allow [2] 20/20 26/8
MR. BROCKMANN: [1] 7/21	50/50 [1] 10/21	allowance [1] 9/24
MR. DUBOIS: [12] 6/23 15/1 17/15	500 [2] 1/19 3/6	allowed [2] 19/24 26/12
17/21 19/3 21/15 27/25 28/7 29/3	501 [1] 2/18	almost [1] 14/11
29/20 30/1 30/9	504 [1] 3/7	alone [1] 11/8
MR. MACFARLANE: [1] 17/8	589-7778 [1] 3/7	along [1] 28/14
MR. SHELBY: [1] 8/10	7	also [18] 5/20 6/2 6/8 6/18 6/19 6/25
MR. SOMACH: [15] 5/10 7/8 10/15		7/2 7/22 11/5 12/15 15/19 16/3 18/11
14/13 15/14 19/5 20/23 22/20 25/20	700 [1] 2/18	18/16 20/25 21/4 25/19 28/17
26/24 27/1 28/5 29/1 29/15 30/12	70130 [1] 3/6	am [4] 7/3 7/3 23/9 25/2
MR. STEIN: [3] 7/16 23/24 24/2	7778 [1] 3/7	amend [1] 5/6
MR. WALLACE: [5] 6/16 12/11 15/23	8	amended [1] 5/18
21/20 30/14		amicable [1] 13/10
MS. BOND: [23] 5/13 5/23 6/4 6/10	80202 [1] 2/15	amicus [1] 7/19
10/23 12/9 13/4 13/6 13/20 13/25	80203 [2] 2/7 2/11	among [4] 10/10 13/9 13/10 19/15
14/10 15/5 15/9 15/12 16/20 19/8	87048 [1] 3/4	AMY [2] 1/23 5/25
19/22 20/5 20/16 27/5 28/12 28/25	87501 [2] 1/24 2/4	and/or [1] 14/5
30/7	87504 [1] 2/25	ANDREW [2] 1/18 7/11
MS. DAVIDSON: [1] 7/25	9	Andrews [1] 2/2
MS. GRABILL: [1] 8/12		ANN [5] 2/20 7/1 7/3 7/5 15/17
MS. O'CONNELL: [3] 7/2 7/6 15/16	9-700 [1] 2/18	Anne [3] 17/17 17/20 17/21
New Mexico's Motion to Dismiss [1]	90 [1] 9/13	Anne Provosty [1] 17/21
4/2	950 [1] 2/21	another [3] 11/24 28/22 29/7
Next Status Conference [1] 4/2	95814 [2] 1/20 2/18	answers [2] 26/3 26/21
Omit elements: Timecodes [2] 3/11	999 [1] 2/14	anticipate [10] 9/9 9/19 9/23 13/9 18/24
30/21	A	19/14 19/15 23/22 27/19 28/21
Page break [3] 1/24 4/2 30/21		any [30] 7/15 7/15 7/25 9/4 10/11
Possible Intervenors [1] 4/2	ability [1] 31/5	10/14 10/18 11/18 12/15 12/17 13/4
Procedure for Payment of Fees and	able [5] 8/20 12/7 13/9 27/9 28/19	13/8 13/18 13/22 13/24 16/12 17/7
Expenses [1] 4/2	about [14] 8/17 11/2 12/5 13/4 13/19	17/14 18/4 18/5 19/3 19/17 20/15
Resume elements: Timecodes [1] 4/2	17/23 19/3 22/16 22/17 22/18 24/9	22/16 22/19 23/20 24/10 25/8 27/5
Rules Governing Proceedings [1] 4/2	24/25 28/2 28/5	28/18
THE COURT: [2] 17/19 24/7	above [1] 31/6	anybody [1] 22/19
THE SPECIAL MASTER: [50]	above-entitled [1] 31/6	anyone [4] 5/23 8/3 9/12 23/22
Transcripts [1] 4/2	accommodated [1] 16/12	anything [7] 13/2 14/16 17/23 22/18
Venue for Proceedings [1] 4/2	accomplish [1] 29/8	24/9 24/24 30/6
\$	According [1] 20/12	Anyway [1] 11/20
\$250 [1] 8/23	achieve [1] 12/1	apologies [1] 17/13
\$350 [1] 9/3	acting [1] 6/1	apologize [3] 5/20 7/12 15/13
\$450 [1] 9/2	action [2] 20/21 25/14	appear [1] 5/19
\$490 [2] 8/23 8/25	actually [4] 8/8 18/2 18/17 22/15	appearances [4] 1/15 2/1 3/1 8/9
\$550 [1] 9/1	addition [2] 15/21 15/25	appeared [1] 7/19
	address [9] 15/18 15/21 15/25 16/25	Appendix [1] 13/16
	17/1 17/2 17/3 17/11 19/12	



<p><b>A</b></p> <p>Appendix A [1] 13/16  application [1] 9/20  apply [2] 13/1 13/3  appointed [1] 8/6  appointment [1] 9/25  appreciate [2] 20/1 23/20  appreciation [1] 18/15  appropriate [6] 8/17 12/2 13/3 16/16 27/12 28/24  appropriately [1] 16/1  approval [1] 9/20  arbitrary [1] 8/19  are [44]  argument [3] 19/25 20/2 27/13  around [2] 10/1 11/2  arrange [1] 20/4  arrangements [1] 18/10  as [48]  ask [5] 6/14 8/9 25/2 25/15 29/23  assisting [1] 14/8  assume [2] 10/19 18/1  assumes [1] 26/6  assuming [1] 26/19  assumption [4] 10/20 21/3 25/23 27/3  assure [1] 19/21  at [29] 7/4 9/6 10/20 11/19 12/6 12/14 13/1 13/3 18/1 18/17 18/20 19/1 19/18 20/2 22/6 22/11 24/4 25/2 25/6 25/11 25/15 25/24 26/7 26/14 26/14 26/15 27/2 29/7 29/11  attached [1] 13/15  attempt [2] 11/22 12/1  attorney [4] 1/22 5/20 6/6 6/18  Avenue [1] 2/21  aware [3] 22/19 23/6 23/9  away [1] 25/18</p>	<p>Box [2] 2/24 3/3  bridge [1] 22/14  brief [1] 10/17  briefed [2] 21/12 22/6  briefing [1] 7/20  briefly [1] 10/25  briefs [2] 19/16 29/23  broadly [1] 17/4  Broadway [1] 2/11  Brockmann [4] 2/23 2/24 7/22 7/24  buildings [1] 19/1  bumped [1] 9/3  burden [1] 11/16  but [19] 6/6 10/18 10/22 11/16 12/22 14/6 14/20 15/19 16/11 16/25 17/18 21/4 22/9 22/14 23/23 25/16 25/19 26/10 27/15  Butte [3] 10/13 20/9 21/24</p> <p><b>C</b></p> <p>California [2] 1/20 2/18  call [6] 5/8 12/1 23/3 23/5 23/7 23/12  called [1] 7/13  calling [1] 30/17  calls [1] 24/10  came [1] 10/18  can [12] 5/3 10/10 13/19 15/8 15/25 18/5 19/21 22/2 23/21 26/15 27/7 28/23  can't [1] 12/5  Capitol [1] 1/19  capture [1] 16/20  case [24] 5/7 5/19 8/19 11/6 16/12 20/21 21/24 22/20 24/12 24/19 25/3 25/15 25/23 25/24 25/25 26/6 26/8 26/15 26/16 26/22 27/3 27/17 28/10 28/25  cases [1] 15/3  CCR [3] 3/5 31/2 31/9  certain [1] 23/1  certainly [8] 10/10 13/3 13/19 14/15 14/25 14/25 24/16 25/25  CERTIFICATE [1] 31/1  certify [1] 31/4  CHAD [5] 2/9 6/17 12/12 15/24 21/21  challenge [1] 25/9  chance [1] 14/12  change [1] 20/3  changed [1] 6/8  charged [1] 8/25  check [1] 29/13  checked [1] 15/21  choose [1] 19/2  circuit [4] 18/9 18/11 18/16 19/1  circulate [1] 15/25  circulating [1] 19/15  citizens [3] 20/19 20/20 20/22  city [8] 2/23 7/18 7/18 7/23 22/24 23/4 24/1 24/3  Civil [2] 12/22 12/24  claims [8] 11/10 11/10 11/13 27/8 27/8 27/11 28/18 28/18  clarification [1] 16/23  clarify [1] 28/6  Classically [1] 24/20  clear [2] 28/5 28/21  clerks [1] 8/7  clients' [2] 24/25 25/20  COLORADO [15] 1/9 2/7 2/9 2/9 2/11 2/15 6/16 6/18 6/20 11/13 12/13 12/14</p>	<p>15/24 26/11 30/14  come [5] 10/11 11/3 11/22 12/7 13/17  comfortable [2] 14/25 16/10  comment [2] 16/3 19/17  comments [5] 9/4 19/3 19/17 23/9 27/5  Commission [1] 6/1  compact [1] 20/22  complaint [2] 11/8 11/9  complaints [3] 19/13 26/4 26/9  comprehensive [3] 24/12 25/3 26/16  computer [1] 3/11  computer-aided [1] 3/11  concern [1] 16/9  concerns [1] 24/11  conclusions [1] 10/19  conduct [2] 24/19 25/7  confer [1] 12/1  conference [9] 1/12 5/20 9/10 18/12 18/17 23/12 28/22 29/7 29/12  conferences [3] 18/6 18/8 18/23  conferring [1] 27/19  confers [1] 28/18  congratulations [1] 5/22  consensus [3] 16/16 16/20 27/22  consent [1] 12/3  considered [1] 24/3  considering [1] 24/4  contact [1] 23/23  contemplated [1] 26/9  contemplating [1] 22/24  convening [1] 28/22  conversation [2] 10/17 23/2  conversations [1] 22/22  convey [1] 5/22  cooperate [2] 27/7 27/10  cooperation [1] 18/15  copies [8] 13/24 14/5 14/6 14/8 14/19 14/25 15/1 21/4  copy [6] 14/15 14/21 14/21 14/23 15/1 16/19  Corrales [1] 3/4  correct [5] 17/12 17/18 26/24 30/1 31/4  corrected [2] 5/18 5/21  correctly [5] 16/15 16/19 21/22 27/22 27/25  cost [2] 9/9 11/11  costs [1] 9/17  could [5] 6/5 11/3 11/19 20/12 26/4  counsel [30] 5/3 5/9 5/10 5/13 5/15 5/25 6/13 6/16 6/23 7/15 8/4 8/13 8/15 10/25 11/1 13/9 13/11 14/8 14/9 15/7 16/8 19/11 22/19 24/13 24/14 28/25 29/5 29/14 30/6 30/17  counterclaims [3] 26/21 27/11 28/17  couple [4] 13/23 14/6 15/22 18/2  course [10] 10/4 10/13 10/17 11/17 11/18 14/18 22/2 25/14 25/22 26/6  court [41]  courthouse [2] 18/9 18/10  courtrooms [1] 18/13  cover [1] 10/2  created [1] 14/8  cross [2] 22/14 26/4  Cruces [6] 2/23 7/18 7/23 23/3 24/1 24/3  curiae [1] 7/19  curious [1] 20/15</p>
<p><b>B</b></p> <p>B-275 [1] 3/6  bad [2] 18/25 26/1  balance [1] 23/17  Balderas' [1] 5/21  base [1] 8/16  batted [1] 11/1  be [65]  bear [1] 11/16  because [7] 11/15 14/6 15/21 23/4 23/5 28/4 29/8  becomes [1] 14/11  been [12] 8/5 9/21 10/14 13/23 15/2 15/3 16/7 23/19 24/5 24/16 24/16 28/9  before [6] 1/12 9/5 12/18 13/23 24/11 24/17  begin [3] 5/5 5/6 8/4  being [2] 14/21 18/24  believe [5] 6/1 7/1 9/13 17/8 22/8  benefit [1] 6/14  best [3] 11/2 27/7 31/5  better [1] 25/14  between [1] 10/21  big [2] 24/18 29/8  billed [1] 9/16  bind [1] 20/22  Bob [1] 7/12  BOND [21] 1/22 5/14 5/16 5/23 10/24 13/7 13/12 13/23 15/9 15/14 16/21 17/4 19/9 19/23 20/1 20/18 27/6 27/18 28/9 28/13 28/20  both [5] 5/25 8/9 10/25 28/4 28/24</p>	<p>California [2] 1/20 2/18  call [6] 5/8 12/1 23/3 23/5 23/7 23/12  called [1] 7/13  calling [1] 30/17  calls [1] 24/10  came [1] 10/18  can [12] 5/3 10/10 13/19 15/8 15/25 18/5 19/21 22/2 23/21 26/15 27/7 28/23  can't [1] 12/5  Capitol [1] 1/19  capture [1] 16/20  case [24] 5/7 5/19 8/19 11/6 16/12 20/21 21/24 22/20 24/12 24/19 25/3 25/15 25/23 25/24 25/25 26/6 26/8 26/15 26/16 26/22 27/3 27/17 28/10 28/25  cases [1] 15/3  CCR [3] 3/5 31/2 31/9  certain [1] 23/1  certainly [8] 10/10 13/3 13/19 14/15 14/25 14/25 24/16 25/25  CERTIFICATE [1] 31/1  certify [1] 31/4  CHAD [5] 2/9 6/17 12/12 15/24 21/21  challenge [1] 25/9  chance [1] 14/12  change [1] 20/3  changed [1] 6/8  charged [1] 8/25  check [1] 29/13  checked [1] 15/21  choose [1] 19/2  circuit [4] 18/9 18/11 18/16 19/1  circulate [1] 15/25  circulating [1] 19/15  citizens [3] 20/19 20/20 20/22  city [8] 2/23 7/18 7/18 7/23 22/24 23/4 24/1 24/3  Civil [2] 12/22 12/24  claims [8] 11/10 11/10 11/13 27/8 27/8 27/11 28/18 28/18  clarification [1] 16/23  clarify [1] 28/6  Classically [1] 24/20  clear [2] 28/5 28/21  clerks [1] 8/7  clients' [2] 24/25 25/20  COLORADO [15] 1/9 2/7 2/9 2/9 2/11 2/15 6/16 6/18 6/20 11/13 12/13 12/14</p>	<p>15/24 26/11 30/14  come [5] 10/11 11/3 11/22 12/7 13/17  comfortable [2] 14/25 16/10  comment [2] 16/3 19/17  comments [5] 9/4 19/3 19/17 23/9 27/5  Commission [1] 6/1  compact [1] 20/22  complaint [2] 11/8 11/9  complaints [3] 19/13 26/4 26/9  comprehensive [3] 24/12 25/3 26/16  computer [1] 3/11  computer-aided [1] 3/11  concern [1] 16/9  concerns [1] 24/11  conclusions [1] 10/19  conduct [2] 24/19 25/7  confer [1] 12/1  conference [9] 1/12 5/20 9/10 18/12 18/17 23/12 28/22 29/7 29/12  conferences [3] 18/6 18/8 18/23  conferring [1] 27/19  confers [1] 28/18  congratulations [1] 5/22  consensus [3] 16/16 16/20 27/22  consent [1] 12/3  considered [1] 24/3  considering [1] 24/4  contact [1] 23/23  contemplated [1] 26/9  contemplating [1] 22/24  convening [1] 28/22  conversation [2] 10/17 23/2  conversations [1] 22/22  convey [1] 5/22  cooperate [2] 27/7 27/10  cooperation [1] 18/15  copies [8] 13/24 14/5 14/6 14/8 14/19 14/25 15/1 21/4  copy [6] 14/15 14/21 14/21 14/23 15/1 16/19  Corrales [1] 3/4  correct [5] 17/12 17/18 26/24 30/1 31/4  corrected [2] 5/18 5/21  correctly [5] 16/15 16/19 21/22 27/22 27/25  cost [2] 9/9 11/11  costs [1] 9/17  could [5] 6/5 11/3 11/19 20/12 26/4  counsel [30] 5/3 5/9 5/10 5/13 5/15 5/25 6/13 6/16 6/23 7/15 8/4 8/13 8/15 10/25 11/1 13/9 13/11 14/8 14/9 15/7 16/8 19/11 22/19 24/13 24/14 28/25 29/5 29/14 30/6 30/17  counterclaims [3] 26/21 27/11 28/17  couple [4] 13/23 14/6 15/22 18/2  course [10] 10/4 10/13 10/17 11/17 11/18 14/18 22/2 25/14 25/22 26/6  court [41]  courthouse [2] 18/9 18/10  courtrooms [1] 18/13  cover [1] 10/2  created [1] 14/8  cross [2] 22/14 26/4  Cruces [6] 2/23 7/18 7/23 23/3 24/1 24/3  curiae [1] 7/19  curious [1] 20/15</p> <p><b>D</b></p> <p>damages [1] 11/19</p>

<p><b>D</b></p> <p>data [2] 8/20 8/21  date [10] 10/15 14/17 14/22 14/22 16/4  16/5 16/17 16/17 20/4 21/1  Davidson [3] 3/2 3/3 8/1  day [1] 15/22  days [1] 9/14  DC [1] 2/21  de [1] 2/3  deadlines [2] 26/23 27/10  deal [2] 12/6 22/13  dealing [1] 29/9  dealt [1] 22/13  December [1] 20/10  decision [3] 24/5 24/5 27/15  deemed [1] 16/17  defendant [1] 11/17  defendants [1] 10/21  deferred [1] 21/24  delay [1] 15/23  delaying [1] 25/25  delicate [1] 23/17  denied [1] 24/7  denies [1] 26/2  Denver [3] 2/7 2/11 2/15  denying [1] 23/22  Department [4] 2/9 2/13 2/17 2/20  depend [1] 29/10  deputy [1] 6/20  desire [1] 23/24  dial [1] 5/17  did [2] 8/21 10/19  didn't [3] 11/4 11/16 13/7  different [2] 11/10 24/4  diligently [1] 19/21  direct [1] 5/17  directly [1] 9/14  director [2] 6/1 6/20  disbursements [1] 9/24  disclosures [1] 13/2  discouraged [1] 23/4  discovery [2] 24/23 25/7  discuss [1] 14/12  discussion [6] 9/5 10/15 10/23 12/18  13/20 16/9  discussions [3] 10/10 13/8 13/19  disinclined [1] 25/2  dismiss [15] 11/8 11/9 19/13 21/10  21/11 22/6 24/7 25/6 26/3 26/6 26/18  27/9 27/23 29/9 29/18  dismissed [3] 25/23 26/7 27/4  distribution [2] 5/18 13/15  district [10] 10/13 18/12 18/17 18/18  18/20 20/9 21/25 22/23 31/3 31/3  division [2] 6/20 10/21  do [21] 10/12 15/6 15/8 17/10 17/10  18/23 21/14 21/21 22/2 22/2 22/8 22/9  22/15 25/5 26/1 26/8 27/12 28/15  28/15 29/12 29/19  docket [1] 18/1  docketed [2] 16/7 16/18  documents [2] 15/1 16/2  does [3] 12/14 14/2 16/20  doing [5] 24/14 24/14 24/15 27/19  28/21  DOJ [1] 7/4  don't [12] 10/18 13/2 13/3 14/15 15/1  22/1 22/9 22/15 22/16 23/6 23/22  25/19</p>	<p>door [1] 19/2  down [6] 8/15 9/4 9/18 26/8 26/16  29/11  Doyle [4] 3/5 31/2 31/9 31/9  draft [3] 19/15 19/22 29/22  Drawer [1] 1/24  DUBOIS [10] 2/13 6/25 15/2 17/16  19/4 21/16 28/1 28/8 29/21 30/1  due [1] 20/10  Dunn [1] 1/17</p> <p><b>E</b></p> <p>e-mail [11] 6/6 6/9 15/8 15/25 16/6  16/24 16/25 17/2 17/5 17/11 17/17  e-mailed [2] 14/9 15/20  e-mails [2] 14/12 17/14  each [6] 10/6 11/12 13/18 16/19 19/2  29/13  easier [1] 17/8  Eastern [5] 18/12 18/16 18/18 18/20  31/3  effectively [1] 27/15  efficient [1] 27/10  either [2] 21/14 24/22  EI [2] 22/24 23/5  El Paso [2] 22/24 23/5  election [1] 5/22  electronic [9] 14/7 14/15 14/19 14/21  14/25 15/4 16/11 16/11 16/16  electronically [2] 14/3 14/4  Elephant [3] 10/13 20/9 21/24  else [7] 5/23 8/3 9/12 17/23 22/18 24/9  30/6  emphasis [1] 26/14  emphasize [2] 10/7 16/10  end [4] 11/20 16/8 16/24 16/25  engage [1] 8/7  enough [3] 14/5 27/14 28/16  entered [1] 16/12  entertaining [1] 21/23  entirely [1] 23/6  entities [1] 23/5  entitled [1] 31/6  EP [1] 22/24  equal [1] 11/16  error [1] 17/1  especially [1] 27/12  ESQ [20] 1/12 1/17 1/18 1/18 1/19  1/22 1/23 1/23 2/3 2/6 2/9 2/10 2/10  2/13 2/14 2/17 2/20 2/23 2/24 3/3  essentially [1] 19/3  establishing [1] 27/10  even [3] 11/8 21/23 29/11  every [2] 9/22 9/24  everybody [7] 14/2 15/7 16/15 17/8  17/19 18/3 25/17  everyone [5] 5/4 8/17 17/13 27/21  27/25  everything [2] 14/4 29/10  Evidence [2] 12/23 12/25  exactly [2] 14/19 22/2  example [2] 21/8 22/5  except [1] 15/4  exceptions [5] 15/4 27/14 28/3 28/9  28/17  expectation [1] 21/6  expenses [2] 9/20 10/2  experience [1] 25/13  express [1] 18/14</p>	<p><b>F</b></p> <p>facilitation [1] 14/7  fact [2] 11/11 26/3  factors [1] 25/13  failed [1] 6/5  fair [3] 11/17 12/9 28/25  fairly [1] 16/20  familiar [1] 18/21  far [3] 10/22 16/2 16/3  FARRIS [2] 1/23 5/25  fashion [1] 13/10  FCRR [3] 3/5 31/2 31/9  Fe [3] 1/24 2/4 2/25  federal [5] 12/21 12/23 12/24 12/25  18/9  fee [1] 12/15  feeling [1] 23/4  fees [5] 9/16 9/20 9/24 10/2 10/3  Fifth [3] 18/11 18/16 19/1  Fifth Circuit [3] 18/11 18/16 19/1  file [6] 20/16 21/1 21/3 21/5 27/16  28/17  filed [13] 15/5 16/17 20/9 20/10 20/11  20/15 21/10 23/11 25/6 26/3 26/4  26/11 27/14  filing [7] 9/11 9/23 10/1 13/13 16/11  20/18 21/25  fine [11] 16/8 16/22 19/4 19/6 19/9  21/7 22/14 28/16 30/5 30/9 30/13  firm [5] 3/2 8/7 9/9 9/16 9/17  first [4] 16/9 18/2 25/5 27/13  fixed [1] 18/5  floor [1] 25/20  folks [1] 8/7  followed [1] 12/22  follows [1] 6/7  foregoing [1] 31/4  form [1] 12/20  forth [1] 14/20  forward [1] 30/19  forwarded [1] 15/22  found [1] 11/18  FRANCIS [2] 1/19 7/12  Freeman [1] 2/6  front [1] 9/9  fully [1] 22/6  further [6] 8/24 9/6 10/10 14/16 28/24  30/15</p> <p><b>G</b></p> <p>general [4] 5/21 5/25 6/7 15/18  General's [3] 1/22 6/18 7/4  generally [1] 23/13  get [9] 16/1 16/23 17/15 18/5 22/14  23/11 25/24 26/7 27/2  gets [1] 15/21  getting [2] 26/14 27/11  give [2] 24/13 29/24  given [2] 11/5 13/8  gives [1] 21/19  glitches [1] 18/2  go [4] 6/4 8/12 24/23 28/14  goes [2] 8/8 29/10  going [18] 5/7 6/3 7/2 8/9 9/21 12/7  21/17 21/20 22/2 22/9 22/11 22/15  24/20 25/18 29/10 29/14 29/22 30/19  GOLDSBERRY [2] 1/19 7/12  Golly [1] 24/21  good [9] 5/3 6/24 8/11 8/13 15/19 16/4  21/20 23/15 30/6</p>
--	---	--

<p><b>G</b></p> <p>got [4] 6/10 6/10 17/18 19/22 governing [1] 12/19 Grabill [2] 8/14 9/3 grant [1] 20/12 granted [2] 5/7 22/11 Great [4] 13/12 17/23 19/8 29/3 greenlight [1] 23/21 Greg [3] 5/4 8/5 8/12 GREGORY [1] 1/12 GRIMSAL [3] 1/12 5/4 8/5 Growers [3] 3/3 8/2 23/3 guess [5] 20/11 21/13 22/8 22/13 28/8 guide [1] 8/21 guides [1] 12/23 guilty [1] 23/4 guys [1] 15/6</p>	<p>ideas [1] 11/2 identify [1] 6/14 if [27] 6/5 10/8 10/9 11/2 11/8 11/18 12/5 14/15 16/15 16/18 17/13 18/4 18/23 20/3 20/10 20/13 24/6 24/21 25/17 26/2 26/12 27/8 27/22 27/24 28/15 28/18 29/12 If/when [1] 18/23 I [1] 1/19 I [1] 1/19 imagine [1] 9/25 impact [2] 21/15 24/18 in [71] independent [1] 11/10 indicated [3] 9/6 13/16 18/8 individuals [1] 13/15 informed [1] 8/17 initial [3] 1/12 10/20 28/15 instance [1] 27/14 instituted [1] 28/10 instruction [1] 30/4 instructions [1] 18/7 intend [1] 12/14 interest [1] 25/22 interested [1] 10/5 interim [8] 19/18 25/8 27/24 28/3 28/7 28/23 29/22 29/24 Interstate [1] 6/1 intervene [7] 10/12 20/9 20/21 21/10 21/12 22/18 25/11 intervened [1] 10/18 intervening [1] 26/12 intervenor [1] 11/6 intervenors [2] 22/19 24/9 intervention [5] 11/25 22/25 23/10 24/4 26/12 introduce [2] 7/11 8/10 introducing [2] 7/13 8/4 inviting [1] 19/16 involved [4] 13/23 15/3 24/17 24/19 irrigation [4] 10/13 20/9 21/24 22/23 is [122] isn't [1] 27/3 issuance [1] 28/22 issue [12] 5/19 10/8 14/24 16/4 19/18 25/8 25/24 26/7 26/15 27/2 27/8 29/24 issued [2] 27/24 28/16 issues [1] 17/7 it [47] it's [16] 14/3 16/6 16/17 18/24 19/2 20/11 20/13 20/21 21/13 22/8 22/11 22/12 23/12 23/17 27/12 28/5 item [3] 8/16 9/19 17/25 its [2] 11/8 20/20 itself [2] 15/5 22/12</p>	<p>14/17 14/25 15/7 15/15 16/22 18/3 20/12 21/5 21/17 22/16 22/25 26/9 28/2 29/13 30/13 Justice [3] 2/13 2/17 2/20</p>
<p><b>H</b></p> <p>H-B-A-L-D-E-R-A-S [1] 6/8 HAAS [2] 1/23 5/25 had [11] 6/5 10/17 10/20 10/23 13/18 14/12 18/1 18/2 18/16 22/22 28/9 hand [2] 23/17 23/19 handled [1] 16/1 happen [2] 20/12 27/23 happened [1] 22/17 happens [1] 21/15 happy [2] 18/22 28/14 hard [5] 14/5 14/6 14/21 14/23 16/19 HARTMAN [2] 2/10 6/19 has [9] 7/18 10/14 11/7 17/19 18/4 21/23 23/19 24/3 24/5 hasten [1] 10/7 have [57] haven't [2] 10/4 14/12 having [5] 11/6 14/21 27/13 27/14 27/14 he [2] 8/8 24/21 hear [3] 5/4 9/22 10/9 heard [2] 28/4 28/9 hearing [4] 9/10 10/5 16/15 16/19 held [1] 18/9 her [1] 18/22 here [8] 9/8 18/11 18/24 19/14 21/14 21/15 22/9 30/5 hide [1] 11/19 highly [2] 12/6 18/21 him [1] 5/22 Hinderlider [1] 20/22 his [6] 5/22 6/8 9/1 16/7 16/24 16/25 HITCHINGS [2] 1/18 7/11 HOFFMAN [2] 1/18 7/12 Honor [40] Hopefully [1] 17/17 hoping [1] 19/24 hotels [1] 18/25 hour [3] 8/23 9/1 9/3 hourly [3] 8/17 8/18 9/2 how [1] 29/10 hurry [2] 10/8 11/24</p>	<p><b>I</b></p> <p>I'm [29] 6/3 8/5 8/8 8/15 10/5 10/21 14/5 15/11 16/13 16/15 16/18 18/25 20/15 21/17 23/4 24/14 24/14 24/15 24/24 25/16 25/18 27/22 27/24 28/5 28/19 29/7 29/11 29/12 29/14 I've [3] 8/5 9/21 15/3 idea [1] 21/20</p>	<p><b>K</b></p> <p>Kansas [1] 8/25 Kansas v [1] 8/25 KAREN [2] 2/10 6/19 keep [1] 23/7 kept [1] 12/16 kick [1] 22/13 kind [4] 12/4 14/2 14/5 29/11 know [12] 10/18 12/5 12/20 13/22 14/15 18/4 21/18 22/1 22/9 22/15 23/21 26/15 Knowing [1] 22/10 knows [2] 6/15 18/3 KWON [2] 2/10 6/19</p>
<p><b>J</b></p> <p>JAMES [3] 2/13 2/24 6/24 January [3] 5/2 20/10 21/2 January 29 [2] 20/10 21/2 JAY [3] 2/23 7/17 23/25 Jeff [1] 6/2 JEFFREY [1] 2/3 Jim [9] 7/22 15/2 15/19 17/16 19/4 21/16 28/1 28/8 29/21 join [1] 12/15 joining [1] 23/5 joint [1] 12/2 judge [1] 24/18 judgment [1] 24/21 just [20] 11/15 12/13 12/16 14/3 14/12</p>	<p><b>L</b></p> <p>Las [6] 2/23 7/18 7/23 23/3 24/1 24/3 Las Cruces [5] 7/18 7/23 23/3 24/1 24/3 last [2] 5/21 7/5 Law [2] 2/9 3/2 lawsuit [1] 24/17 lawyer [1] 24/15 lead [1] 25/14 least [3] 10/20 12/14 25/11 leave [1] 20/8 LEE [2] 2/14 6/25 left [2] 26/19 27/8 LEININGER [2] 2/14 7/1 let [16] 5/5 5/7 5/16 8/4 8/18 9/6 12/5 13/1 17/3 18/4 19/12 19/21 23/21 24/13 26/17 28/21 letter [2] 19/16 29/23 letting [1] 21/18 level [1] 12/15 liable [2] 11/18 11/19 life [1] 17/8 light [2] 11/11 27/13 like [16] 5/6 7/11 12/15 13/2 14/5 15/4 16/23 18/14 20/21 23/12 24/24 26/13 26/15 26/20 26/21 29/13 likely [2] 12/7 14/8 limited [1] 23/13 Lincoln [1] 2/7 line [4] 5/9 6/25 7/15 7/25 LISA [2] 2/6 6/2 list [6] 5/18 13/15 15/20 17/5 17/11 17/17 listed [1] 15/19 listen [1] 23/22 listening [1] 16/13 litigator [2] 24/15 25/14 little [1] 23/4 live [1] 22/12 LLC [1] 3/2 long [1] 28/16 look [2] 18/1 30/18 looking [1] 19/1 looks [1] 26/15 loop [1] 12/16 lots [1] 18/25 Louisiana [5] 3/6 18/12 18/18 18/20 31/4</p>	
		<p><b>M</b></p> <p>MACFARLANE [3] 2/17 7/1 17/10</p>

<p><b>M</b></p> <p>made [4] 17/6 18/10 24/5 24/5  mail [12] 6/6 6/9 15/8 15/25 16/6 16/24  16/24 16/25 17/2 17/5 17/11 17/17  mailed [2] 14/9 15/20  mailing [2] 14/22 15/1  mails [2] 14/12 17/14  make [15] 5/8 8/9 12/4 15/11 16/1 17/1  17/8 17/18 18/3 21/5 23/1 26/17 27/20  28/11 28/21  making [1] 14/18  Mall [1] 1/19  management [14] 5/7 5/19 8/19 16/12  24/12 24/18 25/3 25/15 25/25 26/9  26/16 26/23 28/10 28/25  manner [1] 13/14  master [12] 1/13 8/6 8/21 8/24 16/6  16/18 19/25 20/13 21/13 22/7 23/20  30/5  masters [1] 8/22  matter [9] 8/6 8/8 9/4 12/24 13/1 14/3  21/11 22/6 31/6  matters [4] 20/13 22/17 23/20 30/5  may [11] 6/2 10/1 10/13 10/19 11/21  11/25 17/4 18/13 19/18 21/13 25/7  May 3 [1] 10/1  maybe [1] 26/5  McFarlane's [1] 16/23  me [33]  mechanical [1] 3/11  memorializing [1] 12/3  mention [3] 7/10 8/18 9/6  mentioned [1] 8/12  Meredith [1] 8/14  MEXICO [30] 1/8 1/21 1/22 1/24 2/3  2/4 2/6 2/23 2/25 3/2 3/4 5/13 5/15  5/23 7/18 8/2 10/25 11/13 16/21 16/22  19/9 19/24 20/17 24/1 24/6 25/6 26/11  27/6 28/14 30/8  Mexico's [3] 5/6 19/12 29/9  might [1] 16/5  Mike [1] 6/20  mind [2] 20/3 25/13  minimum [2] 22/11 25/6  misspelling [1] 5/20  modification [1] 25/9  moment [1] 20/5  Montano [1] 2/5  Montgomery [1] 2/2  months [2] 9/22 9/24  more [3] 9/22 17/3 26/19  Moreover [1] 24/24  morning [5] 5/3 6/24 8/11 8/13 30/18  most [2] 15/4 29/18  motion [35]  motions [4] 7/19 12/21 27/13 27/23  move [2] 12/18 24/11  moving [6] 8/15 9/19 12/19 13/13 17/25  19/12  Mr. [15] 5/12 6/22 7/14 7/21 7/23 7/24  8/8 9/3 16/23 21/7 22/1 23/15 24/8  26/17 30/1  Mr. Brockmann [1] 7/24  Mr. Dubois [1] 30/1  Mr. McFarlane's [1] 16/23  Mr. Patrick [1] 8/8  Mr. Shelby [1] 9/3  Mr. Somach [5] 5/12 7/14 21/7 23/15  26/17</p>	<p>Mr. Stein [3] 7/21 7/23 24/8  Mr. Wallace [2] 6/22 22/1  Ms. [12] 5/16 5/23 9/3 13/12 13/23  15/9 17/4 18/19 20/1 27/18 28/9 28/20  Ms. Bond [10] 5/16 5/23 13/12 13/23  15/9 17/4 20/1 27/18 28/9 28/20  Ms. Grabill [1] 9/3  Ms. Toni [1] 18/19  much [3] 6/11 14/3 15/3  multiple [1] 15/1  my [26] 6/12 7/13 8/5 8/7 8/17 9/2 9/9  9/16 9/16 16/1 16/9 17/13 18/15 18/18  20/1 20/3 20/25 21/3 22/13 23/16  23/19 24/13 25/13 25/13 30/3 31/5  myself [1] 8/4</p>	<p>Obviously [1] 12/5  off [2] 23/7 30/19  offer [1] 19/18  Office [8] 1/22 1/24 2/24 3/3 6/18 6/19  7/2 7/4  Official [3] 3/5 31/2 31/10  often [2] 9/22 24/16  Oh [1] 25/17  okay [7] 6/3 9/6 12/11 20/23 24/8 27/1  30/12  old [1] 14/5  on [81]  once [3] 19/14 22/6 26/18  one [16] 8/21 10/4 13/13 14/6 14/18  15/1 16/19 16/22 17/12 19/2 19/22  20/20 23/17 25/11 25/18 26/19  only [5] 8/2 12/23 14/20 14/24 24/22  open [9] 23/7 23/12 23/18 23/18 25/16  25/16 25/20 29/12 29/14  opening [1] 11/20  opinion [3] 19/15 19/17 19/22  opportunity [3] 5/17 17/14 18/14  opposing [2] 20/25 21/17  opposition [5] 20/11 20/13 20/18 22/10  27/16  oppositions [2] 20/10 20/16  or [21] 9/4 9/10 9/12 12/3 14/5 15/7  18/12 20/15 23/2 23/13 24/9 24/11  24/18 24/21 24/23 24/23 24/24 25/19  26/19 28/3 28/4  oral [3] 19/25 20/2 27/13  order [9] 5/7 5/19 8/19 8/20 9/14 9/25  16/12 26/21 30/7  ordered [1] 12/17  orders [1] 17/7  original [3] 1/1 8/25 20/21  Orleans [4] 3/6 5/4 18/11 18/24  other [28] 7/15 7/25 12/13 12/17 13/4  13/8 13/18 13/25 14/7 17/6 18/6 19/2  20/13 22/17 22/19 22/23 23/2 23/5  23/7 23/19 23/20 24/10 27/5 27/11  27/17 28/14 29/13 30/4  others [1] 7/10  otherwise [1] 12/22  our [20] 5/22 6/15 11/4 11/7 11/16  11/19 11/20 15/20 15/21 16/8 17/14  17/20 18/5 20/18 20/22 25/22 27/8  27/13 28/17 28/17  ourselves [1] 26/14  out [6] 8/19 11/19 13/10 15/22 19/1  28/19  outset [1] 9/7</p>
	<p><b>N</b></p> <p>N.W [1] 2/21  name [6] 5/21 6/7 7/6 7/13 16/24 16/25  nearby [1] 18/25  nearly [1] 29/10  Nebraska [1] 8/25  necessarily [1] 10/22  necessary [1] 20/3  need [5] 14/16 15/1 18/13 25/7 28/11  needs [1] 16/13  neither [1] 28/4  NEW [37]  New Mexico [18] 5/13 5/15 5/23 7/18  10/25 11/13 16/21 16/22 19/9 19/24  20/17 24/1 24/6 25/6 26/11 27/6 28/14  30/8  New Mexico's [3] 5/6 19/12 29/9  New Orleans [3] 5/4 18/11 18/24  next [3] 17/25 19/2 29/12  nice [1] 10/9  nmag [1] 6/9  no [15] 1/1 10/7 11/13 11/24 13/5 13/7  16/25 20/10 20/19 22/1 24/5 24/5  27/15 29/17 30/8  No. [2] 8/25 22/24  No. 1 [1] 22/24  No. 126 [1] 8/25  nomenclature [1] 6/6  nonparties [3] 7/16 7/25 24/10  nonparty [1] 23/20  nonspeaking [1] 23/24  norm [1] 15/3  normally [1] 21/3  not [23] 7/12 8/19 9/21 10/9 10/19  10/22 13/21 17/12 18/24 20/2 22/11  23/2 24/14 25/15 25/18 25/23 26/1  26/6 26/9 27/13 27/19 28/5 30/10  note [9] 5/17 6/6 8/24 9/1 10/12 17/11  20/8 21/8 22/4  noted [2] 6/12 20/4  Nothing [1] 30/15  notice [1] 9/11  noticed [1] 23/3  noting [1] 5/6  November [1] 9/25  November 3 [1] 9/25  now [4] 10/9 13/20 14/2 14/6  number [5] 5/17 13/17 13/24 14/7  23/11</p>	<p><b>P</b></p> <p>PA [2] 2/2 2/23  page [2] 4/2 28/12  paid [1] 9/16  papers [4] 13/13 13/17 23/10 27/17  paralegal [2] 16/1 17/20  parallel [3] 26/5 26/23 27/16  parens [1] 20/20  part [1] 9/17  participant [1] 23/24  participate [3] 12/14 23/21 23/24  participating [1] 23/14  participation [1] 24/10  particular [1] 10/7  particularly [2] 22/23 25/16  parties [32]  parties' [2] 10/5 11/22</p>
	<p><b>O</b></p> <p>O'CONNELL [4] 2/20 7/1 7/7 15/17  observations [1] 22/16  observed [1] 30/4  observing [1] 8/2</p>	

<p>P</p> <p>party [2] 10/6 16/20  Paseo [1] 2/3  Paso [2] 22/24 23/5  patriae [1] 20/20  Patrick [2] 8/8 8/11  paying [1] 10/7  payment [1] 9/20  PC [2] 1/17 2/6  Pecan [3] 3/3 8/2 23/3  Pecan Growers [1] 23/3  pending [6] 11/25 21/11 24/17 24/21 25/5 25/12  Pennsylvania [1] 2/21  people [4] 15/8 18/5 28/2 28/5  Peralta [1] 2/3  percent [2] 11/12 11/12  percentages [4] 10/6 10/14 12/2 12/18  perfectly [1] 16/10  perhaps [1] 14/20  phase [1] 24/6  phone [3] 5/17 6/2 6/16  picked [1] 8/19  plaintiff [3] 10/18 10/21 11/6  plaintiffs [1] 11/12  plan [10] 8/7 24/13 25/3 25/15 26/1 26/9 26/16 26/23 28/10 28/25  planning [1] 20/16  pleading [1] 24/6  pleadings [3] 12/21 26/11 28/24  please [5] 5/10 5/22 6/23 7/6 23/23  pleasure [2] 6/12 30/18  plus [1] 14/21  point [12] 10/15 11/23 13/1 13/19 19/18 22/7 24/24 25/2 25/17 26/14 26/15 29/11  points [2] 8/20 8/21  position [3] 11/4 11/6 11/17  possible [7] 20/11 20/14 22/19 24/9 25/24 26/8 27/3  post [4] 1/24 2/24 3/3 9/10  posted [1] 9/15  posture [1] 22/5  Poydras [1] 3/6  practice [1] 23/19  practices [2] 13/24 30/4  practicing [1] 24/15  precedent [1] 20/19  preconceptions [1] 22/16  prefer [1] 16/14  preferably [1] 18/9  prefers [1] 18/8  preliminary [2] 13/8 24/13  prep [1] 24/24  preparation [2] 25/25 26/22  prepare [3] 25/3 25/15 28/17  preparing [1] 28/24  prescribed [1] 12/21  present [4] 5/10 5/23 8/5 19/24  PRESTON [2] 2/10 6/19  presumably [2] 26/4 26/12  presumptively [1] 12/25  pretty [4] 13/10 14/3 15/3 21/20  prior [1] 21/24  probably [5] 15/20 23/10 26/7 29/18 29/23  problems [3] 14/18 18/4 18/5  procedural [1] 22/5  procedure [5] 9/19 12/22 12/25 14/2</p>	<p>27/10  proceed [1] 9/5  proceedings [11] 3/11 5/1 9/7 12/19 12/24 18/7 18/8 18/23 23/18 30/21 31/6  process [3] 9/8 19/14 23/6  professional [1] 13/10  proper [1] 17/17  provide [3] 12/20 17/7 21/4  Provosty [1] 17/21  prudent [1] 29/18  public [3] 9/7 23/12 23/18  purposes [1] 14/17  put [1] 26/16  putting [1] 26/4</p>	<p>responsive [1] 10/6  responsive [2] 24/6 26/11  review [1] 25/9  Rick [1] 8/12  right [10] 8/3 14/10 17/15 17/20 23/22 24/8 25/18 28/20 29/17 30/2  road [1] 9/18  ROBERT [1] 1/18  roll [1] 5/8  room [2] 3/6 18/17  rooms [1] 18/12  rule [2] 13/2 24/22  Rule 26 [1] 13/2  ruled [4] 21/14 26/19 27/9 27/23  rules [7] 12/19 12/20 12/21 12/22 12/23 12/24 12/25  ruling [1] 26/20  run [2] 26/5 26/23</p>
	<p>Q</p> <p>qualified [1] 18/21  question [7] 10/4 14/11 14/16 16/22 22/25 23/16 28/4  questions [3] 13/4 13/8 24/11  quickly [3] 25/24 26/7 27/3  quite [1] 15/23</p>	
	<p>R</p> <p>raise [2] 14/16 16/4  raises [1] 22/25  raising [1] 23/16  Raley [1] 2/5  range [1] 8/23  rate [3] 9/1 9/2 9/2  rates [5] 8/17 8/18 8/20 8/23 9/4  rather [1] 11/23  reached [1] 10/8  reading [2] 27/22 27/25  really [2] 22/9 26/8  reason [1] 14/20  reasonable [3] 21/13 22/8 27/20  reasons [1] 25/4  receive [1] 8/22  received [1] 18/7  receiving [1] 16/2  record [15] 5/5 5/9 5/15 7/10 8/10 9/7 9/11 9/15 10/25 13/11 15/7 16/18 18/15 30/19 31/6  recorded [1] 3/11  redundant [1] 14/21  refer [1] 20/14  referred [2] 21/12 22/7  regard [1] 30/3  regarding [2] 12/15 16/3  regular [1] 18/19  reimbursement [1] 9/18  reluctant [2] 29/7 29/11  remaining [1] 28/18  reply [1] 11/7  report [10] 18/10 19/19 25/8 27/24 28/3 28/7 28/16 28/23 29/23 29/25  reporter [11] 3/5 6/14 6/15 9/8 9/14 10/2 15/12 18/19 18/20 31/3 31/10  reporter's [1] 9/16  represent [2] 20/18 20/20  representing [3] 7/18 7/23 24/1  request [5] 11/20 17/4 17/5 17/6 20/4  required [1] 21/1  resolution [2] 11/24 27/7  resolve [1] 13/14  resolved [2] 10/4 27/11  resources [2] 25/1 25/20  respect [2] 24/12 25/5  responding [1] 14/18</p>	<p>S</p> <p>Sacramento [2] 1/20 2/18  Sam [1] 6/8  same [5] 16/6 19/3 21/14 22/8 28/12  Santa [2] 2/4 2/25  Sante [1] 1/24  SARAH [12] 1/22 5/14 10/24 13/7 15/13 16/21 19/9 19/23 20/18 27/6 28/13 30/8  satisfied [1] 14/15  say [4] 11/24 24/15 27/24 28/9  says [1] 25/17  scanning [1] 14/7  schedule [4] 26/21 26/22 27/20 28/24  second [2] 24/24 25/8  see [6] 13/2 14/24 16/13 16/24 26/13 29/14  seems [6] 11/17 12/3 12/6 16/16 29/8 29/9  seen [2] 18/4 20/12  sense [1] 12/4  sensitive [1] 24/25  sent [3] 14/4 14/19 17/16  serve [3] 13/15 13/18 15/6  served [2] 13/24 16/19  service [12] 14/17 14/22 15/20 16/4 16/5 16/11 16/16 16/17 17/5 17/7 17/11 17/24  services [1] 18/22  serving [1] 15/15  set [6] 8/18 8/20 17/25 18/2 29/7 29/12  sets [1] 8/22  setting [2] 27/16 29/17  several [2] 7/19 25/3  SG's [1] 7/2  shall [1] 13/15  shape [1] 24/23  she [3] 7/2 18/21 24/22  Shelby [3] 8/8 8/11 9/3  should [8] 6/8 7/10 11/8 11/16 13/16 17/12 23/13 30/5  significant [1] 22/10  significantly [1] 24/23  similar [4] 10/3 21/9 22/5 22/17  Simmons [1] 1/17  simply [3] 14/17 16/13 23/11  since [2] 9/24 11/13  sir [2] 15/10 24/2  sit [2] 26/8 26/16  sitting [1] 18/17  situation [2] 21/9 24/16</p>

<p><b>S</b></p> <p>situations [1] 22/17  six [2] 9/22 9/24  snail [1] 16/24  so [29] 5/7 6/7 6/11 6/15 9/3 9/22 9/24  11/19 11/25 12/15 12/17 14/11 14/20  15/22 16/13 18/5 19/2 21/13 23/21  25/13 25/24 26/13 26/15 28/11 28/16  28/23 29/11 29/21 30/5  software [1] 3/11  Solicitor [2] 7/4 15/18  Somach [18] 1/17 1/17 5/11 5/12 7/9  7/14 10/16 14/14 15/15 19/7 20/24  21/7 22/21 23/15 25/21 26/17 29/2  29/16  some [12] 8/20 10/8 11/2 11/3 12/1  12/2 12/7 13/17 21/15 23/10 23/13  27/8  something [3] 14/19 28/19 29/17  sometimes [1] 15/23  somewhere [1] 10/1  soon [1] 19/22  sorry [3] 6/4 15/11 17/22  sort [9] 10/8 12/1 12/2 12/8 13/17  23/17 28/2 28/4 29/13  sorta [1] 11/4  sounds [1] 30/9  South [1] 2/15  speak [1] 6/13  special [14] 1/13 8/6 8/21 8/22 8/24  16/6 16/18 18/18 19/25 20/13 21/13  22/7 23/20 30/4  speedy [1] 27/7  spelling [1] 6/7  split [1] 11/11  splitting [1] 12/16  spoke [1] 10/25  spot [1] 19/3  staff [1] 8/5  stand [2] 11/8 25/19  standard [4] 9/1 9/2 9/2 13/24  standing [1] 26/20  start [4] 5/8 11/4 11/16 25/18  state [16] 1/6 1/8 1/9 1/17 1/21 1/21  2/2 2/5 2/9 12/14 13/1 19/6 20/25  22/22 24/6 26/10  STATES [20] 1/4 2/13 2/17 2/20 6/23  6/25 10/17 10/23 11/1 11/7 11/15  17/10 19/5 19/13 21/9 21/17 22/4  26/10 30/10 31/3  stating [1] 5/5  status [2] 1/12 19/20  Stein [7] 2/23 2/23 7/17 7/21 7/23  23/25 24/8  stenography [1] 3/11  STEPHEN [5] 1/23 2/17 5/24 7/1 17/9  Steve [1] 15/19  still [1] 24/4  Stream [1] 6/1  Street [4] 2/7 2/14 2/18 3/6  STUART [12] 1/17 5/11 7/9 10/16  14/14 15/15 19/7 20/24 22/21 25/21  29/2 29/16  Stuart's [1] 16/3  stuff [1] 15/5  subject [1] 25/9  submit [1] 17/4  submitted [1] 9/17  submitting [1] 11/23</p>	<p>subsidiary [1] 22/25  such [1] 26/20  sufficient [1] 15/16  suggest [5] 11/11 11/21 11/25 12/2  26/2  suggested [2] 11/7 11/15  suggesting [1] 11/9  suggestion [1] 26/18  Suite [4] 1/19 2/7 2/15 2/18  Sullivan [1] 6/20  summary [1] 24/21  support [1] 18/15  SUPREME [8] 1/4 8/22 9/23 12/20  18/7 20/11 21/23 25/10  Supreme Court [1] 8/22  supremectbriefs [2] 15/18 15/21  sure [16] 5/8 10/22 14/18 15/12 16/1  16/9 16/12 17/1 17/18 18/3 21/5 26/17  27/20 28/5 28/11 28/19  system [1] 16/7</p>	<p>15/19 16/4 17/16 20/19 24/21 25/14  25/22 25/24 26/14 27/2 27/12 28/3  28/4 28/11 29/17 30/5  thinking [3] 11/2 28/6 29/17  Third [1] 25/11  this [69]  THOMPSON [2] 2/6 6/2  those [7] 8/20 9/4 17/5 17/6 18/24  25/13 26/23  though [1] 21/23  thought [2] 20/2 23/13  thoughts [6] 8/17 10/5 13/22 24/13  25/17 29/15  threshold [1] 13/1  through [1] 27/15  time [10] 9/15 12/6 13/3 20/2 24/25  25/16 25/19 27/14 28/16 29/8  timeframes [1] 27/16  timeline [1] 26/5  times [2] 15/22 24/4  timetable [1] 29/24  today [1] 18/18  together [1] 26/16  Toni [5] 3/5 18/19 31/2 31/9 31/9  too [2] 5/21 19/7  touch [1] 8/16  town [1] 18/25  tracing [1] 14/19  transcript [7] 1/11 9/8 9/10 9/11 9/13  9/15 31/5  transcription [1] 3/11  trial [3] 24/20 24/23 24/23  Trout [1] 2/5  true [1] 31/4  try [2] 13/16 29/11  trying [1] 23/11  Tusa [5] 3/5 18/19 31/2 31/9 31/9  two [5] 8/6 11/12 19/1 23/9 23/11</p>
	<p><b>T</b></p> <p>table [1] 20/4  take [3] 5/17 11/19 18/14  taken [1] 30/3  talk [1] 30/18  talking [2] 28/2 28/5  talks [1] 12/15  task [1] 29/8  team [1] 15/7  telephone [1] 23/2  tells [1] 22/11  terms [1] 14/17  Terrace [1] 2/15  TESSA [2] 3/3 8/1  TEXAS [14] 1/6 1/17 5/10 11/1 11/10  19/7 19/13 20/25 22/22 22/23 23/5  23/10 26/10 30/12  Texas' [1] 11/9  than [2] 9/22 11/23  Thank [22] 5/12 5/16 6/11 6/12 6/22  7/8 7/14 7/21 7/24 8/3 13/12 20/6  21/19 23/16 24/8 27/18 29/5 29/20  30/9 30/10 30/15 30/20  thanks [4] 7/5 18/18 19/11 30/17  that [170]  that's [19] 10/22 11/20 14/24 15/2 15/5  16/8 16/22 17/11 19/4 19/9 19/20 21/5  21/7 23/15 28/11 28/16 28/20 29/5  30/1  their [2] 8/9 11/7  them [7] 7/11 7/13 8/9 11/14 17/15  18/13 23/7  themselves [1] 8/10  then [7] 14/11 14/22 15/7 22/6 26/20  29/23 29/24  theoretically [1] 23/18  there [15] 7/15 9/4 10/12 10/14 16/25  17/1 18/25 20/13 20/19 21/9 21/10  22/5 23/9 24/17 27/8  there's [9] 11/24 11/24 15/22 20/8  22/10 23/13 24/20 25/11 29/22  these [6] 9/7 13/23 17/14 23/1 23/17  24/10  they [8] 9/21 11/9 11/13 13/3 17/18  22/9 22/13 28/15  thing [4] 21/14 22/9 26/1 29/18  things [6] 13/10 13/14 14/3 15/4 15/22  16/1  think [21] 10/19 12/20 13/8 14/1 15/2</p>	<p><b>U</b></p> <p>U.S [3] 2/13 2/17 2/20  under [1] 20/22  understand [3] 21/22 26/18 29/22  understanding [6] 21/1 21/22 23/11  23/16 23/19 31/5  understood [1] 28/9  unilaterally [1] 23/7  UNITED [20] 1/4 2/13 2/17 2/20 6/23  6/25 10/17 10/23 11/1 11/7 11/15  17/10 19/5 19/13 21/9 21/17 22/4  26/10 30/10 31/3  United States [14] 6/23 6/25 10/17  10/23 11/1 11/7 11/15 19/5 19/13 21/9  21/17 22/4 26/10 30/10  unopposed [1] 22/12  until [3] 24/5 27/23 27/24  unusual [1] 11/5  up [4] 18/1 18/3 25/16 29/17  updated [1] 17/17  upon [3] 10/20 27/9 28/22  us [14] 11/17 15/6 20/14 21/19 23/21  23/23 23/23 26/7 26/8 26/20 27/2 29/9  29/24 30/9  use [1] 18/12  used [1] 17/12  using [2] 3/11 18/4</p> <p><b>V</b></p> <p>venue [1] 18/6  Verrilli [1] 15/18  versed [1] 14/2</p>

V	wouldn't [1] 24/22 wrong [1] 17/14
very [2] 18/22 24/25 visit [1] 18/25	Y
W	yeah [1] 25/17 Yes [20] 5/11 5/14 5/24 6/17 12/10 13/6 15/10 17/22 19/6 20/17 21/7 22/22 24/2 26/25 28/6 28/20 29/1 29/2 29/4 30/13 you [62] you're [2] 20/7 24/20 your [57] Your Honor [39] yourselves [2] 6/15 10/11
WALLACE [7] 2/9 6/17 6/22 12/12 15/24 21/21 22/1 want [11] 9/21 12/13 13/18 14/4 15/6 15/20 21/5 23/6 25/18 25/19 28/15 wanted [7] 8/16 15/11 16/11 17/1 18/3 23/1 25/16 wants [3] 9/12 14/12 22/3 was [22] 9/1 9/25 10/22 11/4 11/16 14/19 15/12 15/13 16/9 20/10 21/9 21/10 21/10 21/11 22/5 22/6 24/17 24/19 27/20 28/1 28/6 30/18 Washington [1] 2/21 wasn't [2] 17/1 23/6 waste [2] 25/19 25/20 wasting [1] 24/25 Water [1] 6/21 way [5] 6/3 6/13 11/18 21/14 25/19 we [89] WECHSLER [2] 2/3 6/2 welcome [1] 20/7 well [11] 5/25 6/9 11/1 11/21 14/2 17/3 17/7 19/10 20/14 21/17 25/21 well-versed [1] 14/2 went [1] 10/23 were [8] 8/19 11/9 19/24 23/3 24/7 26/11 28/2 28/5 what [16] 12/3 16/13 20/12 21/4 21/5 21/15 22/2 22/9 22/15 23/19 24/14 25/5 26/15 28/14 28/21 29/14 what's [4] 7/5 21/20 22/17 29/14 whatever [2] 22/3 26/10 when [9] 6/13 7/13 14/19 16/6 18/2 18/23 22/14 23/1 24/14 where [5] 13/2 18/3 24/16 24/17 26/13 whether [5] 14/4 23/2 23/12 23/13 28/2 which [10] 8/22 8/25 10/4 13/14 16/4 20/22 22/14 24/15 27/24 28/5 whichever [1] 19/2 while [3] 9/1 11/22 21/10 who [15] 5/25 6/15 8/5 8/7 9/12 10/17 11/7 14/11 15/19 18/19 18/19 20/20 22/24 23/13 23/21 whole [1] 16/9 whom [2] 17/5 17/6 whomever [1] 26/12 whose [1] 18/20 why [1] 28/11 will [43] window [3] 9/13 9/13 19/1 wish [1] 28/15 wishes [1] 23/21 within [1] 16/7 without [1] 27/19 Witwer [1] 2/5 won't [1] 27/23 wondering [1] 28/2 work [6] 13/9 18/20 27/15 28/19 28/23 30/5 workable [1] 27/21 working [5] 9/8 19/14 19/20 25/18 30/19 works [1] 19/6 worth [1] 11/22 worthwhile [1] 16/5 would [51]	
	Z
	zero [1] 11/13