

1 No. 141, Original

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3
4 In the

5
6 SUPREME COURT OF THE UNITED STATES

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8
9 STATE OF TEXAS,

10 Plaintiff,

11
12 v.

13
14 STATE OF NEW MEXICO and

15 STATE OF COLORADO,

16 Defendants.

17
18 TRANSCRIPT OF IN-PERSON SCHEDULING CONFERENCE BEFORE
19 THE HONORABLE MICHAEL J. MELLOY
SPECIAL MASTER

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22 Texas:

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1 faces, I'll make appearances here for other counsel for
2 the State of Texas and ask them to stand so you can
3 kind of see who they are. Francis Goldsberry.

4 MR. GOLDSBERRY: Good morning, Your Honor.

5 THE SPECIAL MASTER: Good morning.

6 MR. SOMACH: Theresa Barfield.

7 MS. BARFIELD: Good morning, Your Honor.

8 MR. SOMACH: Robert Hoffman.

9 MR. HOFFMAN: Good morning, Your Honor.

10 MR. SOMACH: And Brittany Johnson.

11 MR. JOHNSON: Good morning.

12 THE SPECIAL MASTER: Good morning.

13 MR. SOMACH: And then I'd also like to
14 introduce you to Mr. Patrick Gordon, he's the Rio
15 Grande commissioner for the State of Texas.

16 MR. GORDON: Good morning, Your Honor.

17 MR. SOMACH: And Priscilla Hubenak who is
18 from the Texas State Attorney General's Office.

19 MS. HUBENAK: Good morning, Your Honor.

20 THE SPECIAL MASTER: Good morning. All
21 right. Thank you.

22 Why don't we turn to New Mexico. Mr. Roman,
23 Mr. Rael?

24 MR. RAEL: Good morning, Your Honor, my name
25 is Marcus Rael on behalf of the State of New Mexico. I

1 have with me today Mr. David Roman. And with me also
2 is Deputy Attorney General Tania Maestas from the State
3 of New Mexico Attorney General's Office.

4 THE SPECIAL MASTER: And then Colorado, we
5 have -- actually, you can just stay at the table, just
6 pull up the microphone.

7 MR. WALLACE: Thank you, Your Honor, it would
8 be a long way to walk for just one person. I'm the
9 attorney representing the State of Colorado, Chad
10 Wallace, pleasure to meet you.

11 THE SPECIAL MASTER: Okay. And then for the
12 United States.

13 MR. MACFARLANE: Good morning, Your Honor,
14 Stephen MacFarlane from the Department of Justice on
15 behalf of the United States, and I have with me Lee
16 Leininger from the Department of Justice.

17 MR. LEININGER: Good morning, Your Honor.

18 MR. MACFARLANE: Judith Coleman from the
19 Department of Justice.

20 MS. COLEMAN: Good morning.

21 MR. MACFARLANE: Tom Snodgrass from the
22 Department of Justice. And then we have Chris Rich and
23 Shelly Randel from the Interior Office of the Solicitor
24 and Matthew Myers from the United States Section of the
25 International Water and Boundary Commission.

1 THE SPECIAL MASTER: Okay. Thank you. Thank
2 you, everyone. Just for logistical purposes, those of
3 you who are seated at the tables have mics in front of
4 you and I think it would probably be just a little
5 easier, I'll just let you speak from the table but be
6 sure to pull the mic over in front of you from whoever
7 is speaking.

8 Unfortunately, those around the perimeter I
9 assume are mainly amicus. If you do need to speak, I'm
10 going to have to have you come to the microphone
11 because we do have a couple people on the phone as I
12 understand it.

13 Ms. Barncastle, are you on?

14 MS. BARNCASTLE: Yes, Your Honor, good
15 morning.

16 THE SPECIAL MASTER: Anyone else on the
17 phone?

18 MR. JONES: Good morning, Judge, this is
19 Alvin Jones with the Southern Rio Grande Diversified
20 Crop Farmers Association.

21 THE SPECIAL MASTER: Anyone else we are
22 missing?

23 MR. LONGWORTH: Hi, Your Honor. This is John
24 Longworth, engineer advisor for the New Mexico Rio
25 Grande Compact Commissioner and Director of New Mexico

1 Interstate Stream Commission.

2 THE SPECIAL MASTER: Anyone else?

3 (No verbal response.)

4 THE SPECIAL MASTER: All right. Are you able
5 to hear us okay?

6 (No response.)

7 THE SPECIAL MASTER: I'll take that --

8 MS. BARNCASTLE: Yes, Your Honor.

9 THE SPECIAL MASTER: I don't know if I should
10 take that as an affirmative.

11 All right. Let's, then, go around the room
12 and see who we have here from the various amici. Let's
13 start over on the far left and -- my left, your right,
14 and go that way.

15 MR. KOPP: Good morning, Your Honor. My name
16 is Michael Kopp. I'm actually working with the State
17 of New Mexico and Mr. Rael.

18 MS. THOMPSON: Good morning, Lisa Thompson
19 also working with the State of New Mexico.

20 MR. UTTON: Good morning, Your Honor, John
21 Utton, representing New Mexico State University.

22 MS. DAVIDSON: Good morning, Your Honor,
23 Tessa Davidson, representing New Mexico Pecan Growers.

24 MR. BROCKMANN: Jim Brockmann, representing
25 the Albuquerque Bernalillo County Water Utility

1 Authority.

2 MR. STEIN: Good morning, Your Honor, Jay
3 Stein representing the amicus curiae of Las Cruces, New
4 Mexico.

5 MS. O'BRIEN: Good morning, Your Honor.
6 Maria O'Brien on behalf of El Paso County Water
7 Improvement District No. 1, also known as EP No. 1.
8 With me as co-counsel is Sarah Stevenson.

9 And, Your Honor, also in the courtroom today,
10 I have the vice chair of the board of the district, Art
11 Ivey; the general manager, Jesus Reyes; and our
12 district engineer, Al Blair.

13 THE SPECIAL MASTER: Good morning. Thank
14 you.

15 Continuing on down, anyone else that are here
16 as amicus?

17 MR. MILLER: Yes, good morning, Your Honor.
18 I'm Drew Miller representing Hudspeth County
19 Conservation and Reclamation District No. 1.

20 MR. CAROOM: Doug Caroom representing the
21 City of El Paso.

22 THE SPECIAL MASTER: Anybody else?

23 (No verbal response.)

24 THE SPECIAL MASTER: All right. Thank you,
25 everyone.

1 All right. Well, we have a number of things
2 I'd like to talk about this morning, but let's start
3 with -- I'm just going to use the draft agenda I sent
4 out and we'll just go pretty much in the order of
5 what's set forth in that agenda.

6 Discovery. Let me just start by asking the
7 parties how is it going so far in terms of the exchange
8 of documents? We're about two days short of the
9 initial period for document exchange and the beginning
10 of depositions. How many documents have been
11 exchanged? What numbers are we talking about?

12 MR. SOMACH: Your Honor, this is Stuart
13 Somach, again, for the State of Texas. We're,
14 obviously, ready to make our Rule 26 disclosures on
15 Thursday, I think it is, of this week with -- with
16 discovery formally starting on September 1st.

17 At this point we have not exchanged any
18 documents. We anticipate doing that and that's one of
19 the things I think we should talk a little bit about.
20 We have agreed on a repository for all of the
21 documents. We've also agreed on a court reporter.
22 That entity is called Veritext.

23 And with respect to the deposit of documents
24 in the repository, there is a little bit of a
25 disconnect, which I think we have worked through with

1 the United States, but it might be good for
2 Mr. MacFarlane to explain the United States' issue with
3 respect to using a repository.

4 But the bottom line is, we're all ready as
5 soon as discovery starts to begin to populate the
6 repository with document production.

7 THE SPECIAL MASTER: Now, when you say
8 repository, are you talking about an electronic
9 repository or are any of these documents going to be in
10 paper or a combination of both?

11 MR. SOMACH: Our thinking is that they will
12 be electronic. But, you know, we should, perhaps, make
13 certain that everybody -- we did talk about this at our
14 initial meeting when we were putting together the case
15 management plan. I believe that's where we ended up,
16 but we should probably make sure as long as we're all
17 here that that's what we intended. That was the
18 discussion with Veritext and all of the parties have
19 talked to Veritext separately about that, but that's
20 certainly Texas' understanding that they will be
21 electronic documents that would be deposited in the
22 repository.

23 THE SPECIAL MASTER: Who will be the
24 custodian of the repository, Veritext?

25 MR. SOMACH: Veritext.

1 THE SPECIAL MASTER: I guess this gets a
2 little bit into involving amici. Who will have access
3 to the -- will the amici have access to the repository?

4 MR. SOMACH: Subject to the discussions, I
5 think all the parties have agreed that they would have
6 access to the documents. We have had some discussion
7 about how to provide notice to amici, which we could
8 either do by some kind of certificate of service that
9 we didn't need to file with the Court but that we
10 would, nonetheless, provide to all the parties as well
11 as amici, or we believe Veritext could also serve the
12 role of providing notice to amici when documents were
13 being served and being deposited in the repository.

14 THE SPECIAL MASTER: Well, and when you say
15 notice, would it be just an e-mail to all the parties
16 saying, new documents have been deposited, it's your
17 responsibility to go look at them if you're interested?

18 MR. SOMACH: That's, in short, what I'm
19 certainly anticipating and I think what we've discussed
20 the way it will be handled.

21 THE SPECIAL MASTER: And would you envision
22 that there will be an initial deposit of a fairly
23 substantial number of documents, I assume, in a few
24 dates from now, but there would be ongoing documents
25 going into that like -- well, for instance, would

1 expert reports go into the repository?

2 MR. SOMACH: Yes, I think it's our
3 anticipation that all documents would -- that were
4 produced in the context of discovery would be deposited
5 into the repository.

6 I want to come back, though, it would be
7 probably a good idea if we set a date for the initial
8 deposit of documents within the repository. That's
9 something we haven't really talked about. We certainly
10 are somewhat prepared on day one, on September 1 to
11 make that deposit, but it might be good to have a
12 common understanding, maybe, September 15th, something
13 like that, that people would make, certainly, initial
14 documents available in that way, you know.

15 And we've gotten along pretty well on this so
16 I assume if there is some additional documents that
17 roll in the next week or two after that, that folks can
18 accommodate that, but it might be good to just kind of
19 talk a little bit as long as we're here about a date
20 certain, perhaps, that we make that initial deposit.

21 THE SPECIAL MASTER: All right. And
22 Mr. MacFarlane.

23 MR. MACFARLANE: Yes, Your Honor.

24 THE SPECIAL MASTER: Do you have some problem
25 with that proposal?

1 MR. MACFARLANE: No, we have -- so Veritext
2 has a service that it calls the vault, which is a
3 cloud-based repository into which parties can upload
4 electronically scanned copies of documents or discovery
5 responses that they produce in the course of discovery.

6 The Department of Justice policy precludes
7 the United States from uploading documents directly
8 from Federal files or Federal sources into a repository
9 that has not been certified by the Department of
10 Justice.

11 There is one such online cloud-based service
12 that has been certified into which we can upload
13 documents where they would be retained for 60 days, and
14 we will provide to all parties the log-in procedures
15 and information that they can establish, counsel, when
16 we produce documents or when we make documents or
17 responses to discovery requests, they will be aware of
18 it. They can go and then download those documents, and
19 if they want to put them in the vault, as far as I
20 know, there is nothing that precludes them from doing
21 so.

22 THE SPECIAL MASTER: So if I'm understanding
23 correctly, what you're saying is that you can't put
24 them into the Veritext vault directly, but you can put
25 them into this other service and then somebody can

1 download them and put them in the Veritext vault.

2 MR. MACFARLANE: That's correct, Your Honor.

3 MR. SOMACH: And, Your Honor, we will, by
4 necessity, have to do that since they only retain
5 documents for 60 days.

6 THE SPECIAL MASTER: That's just what I was
7 going to say, so the burden is going to fall on
8 somebody to do that.

9 MR. SOMACH: And, certainly, the State of
10 Texas is willing to take on that burden. It's a matter
11 of downloading and then uploading the documents. And
12 as I said, it's not an -- would have been nice if the
13 United States didn't have all these rules, but they are
14 the United States.

15 But I think a workaround will work. You
16 know, we'll go ahead and download, upload so all of the
17 documents, including the United States' documents, will
18 be accessible through the Veritext vault for, you know,
19 for all purposes, including the United States because
20 it will have access, obviously, to the vault also.

21 THE SPECIAL MASTER: How many documents, in
22 rough numbers, have you identified that would be part
23 of your initial disclosure?

24 MR. SOMACH: We actually have about 16,000
25 documents, at least, from the State of Texas.

1 THE SPECIAL MASTER: So we're not talking the
2 kind of numbers, at least initially I think, in one of
3 their earlier pleadings, I believe, New Mexico had
4 referenced the fact that in the *Florida v. Georgia* case
5 there were -- they were in the millions? We're not
6 even to the hundreds of thousands yet, I believe.

7 Well, I didn't mean not to give you a chance
8 to speak here, Mr. Rael. What's your position about
9 all of this?

10 MR. RAEL: Your Honor, I think that
11 Mr. Somach has done a good job of characterizing our
12 agreement. I think the process will work. I do want
13 to echo his thoughts that initially it's going to take
14 some time to make sure that we're properly getting
15 documents uploaded and there's going to be bugs to work
16 out, things of that nature.

17 I will point out that in the case management
18 plan in Section 6.2.1.3, we're required to provide --
19 initially to provide a description by category and
20 location of the documents in our possession and who is
21 in custody of those but not to initially upload those
22 documents.

23 And so I think that I would echo Mr. Somach's
24 concerns that on September 1st, I don't think we're
25 going to be ready to upload those things on

1 September 1st. I think that there is going to be an
2 initial feeling out period where all the parties are
3 going to have to get comfortable with this system and
4 be able to understand it, and as I said, work out any
5 issues or bugs that are happening. But other than
6 that, I think Mr. Somach did a good job with
7 characterizing our agreement.

8 THE SPECIAL MASTER: How many documents have
9 you identified so far that you are going to be
10 disclosing?

11 MR. RAEL: Your Honor, we identified a
12 similar amount of documents to Texas, initially.
13 Although I will echo what we said in our letter that we
14 think this case will absolutely get into the hundreds
15 of thousands of documents, if not close to what Florida
16 and Georgia did because of the complexity of the case,
17 but, initially, I think we'll have an initial amount of
18 documents similar to what Texas did, you know, 15 to
19 20,000 page range.

20 THE SPECIAL MASTER: One of the issues I
21 think we're going to face is I think when we're talking
22 about using electronic documents, I believe it was New
23 Mexico filed some documents with me because I requested
24 them of old agreements from the early Twentieth
25 Century, 1906, 1908 that time frame. Some of them are

1 nearly illegible. Are we going to be able to get more
2 legible copies or are we going to have to use
3 originals? Have you given any thought to that?

4 MR. RAEL: Your Honor, I think between all
5 the parties we will hopefully be able to get legible
6 copies, and that's something we'll definitely take into
7 consideration for Your Honor's -- as a courtesy to Your
8 Honor, but also to make sure that the case is running
9 smoothly.

10 Some of those documents are very old. They,
11 you know, existed before photocopying, they are on the
12 blue lithograph paper or whatever that stuff is called,
13 but we will definitely try to do the best that we can
14 to make sure. And I think that all parties will have
15 that issue with those original old documents because
16 they are just, you know, they are old and have become
17 weathered.

18 THE SPECIAL MASTER: And you are in
19 agreement, I take it then, that all the amici will have
20 access to the vault?

21 MR. RAEL: Yes, Your Honor, as I said, I
22 think Mr. Somach did a good job of characterizing that.
23 I think that to the extent that any of the amici are
24 interested in a document, they will receive some sort
25 of notice and go and download what they think they

1 need, this way it will all be available to everyone.

2 THE SPECIAL MASTER: And will the -- what
3 about nonparties, I'm including for now as part of the
4 discussion, amici is part of this, will anyone else
5 have access to the vault?

6 MR. RAEL: Your Honor, I think that's
7 something that we need to discuss. I think -- I
8 believe Veritext requires some sort of a password so
9 that might get difficult. Although, I mean, that's
10 something we can absolutely -- New Mexico is open to
11 discussing right now, if you'd like, Your Honor.

12 MR. MACFARLANE: Your Honor, if I may,
13 Stephen MacFarlane for the United States. Our
14 understanding of the initial disclosure obligations as
15 set forth in the case management plan is similar to
16 Mr. Rael's, we're not in a position to produce
17 documents on Thursday, but we will be providing our
18 initial disclosure, which will identify categories of
19 documents and their location, and then, obviously,
20 we'll follow up with everyone.

21 THE SPECIAL MASTER: I know you haven't seen
22 the documents yet, but to what extent do you think that
23 there's going to be a lot of duplication? Is Texas,
24 New Mexico, United States, all be producing -- you
25 know, obviously, probably everybody will produce a copy

1 of the compact, but beyond that, I mean, are there
2 going to be -- do you anticipate a lot of duplication
3 of documents?

4 MR. MACFARLANE: I'm not seeing that there
5 will be a lot of duplication. I think Your Honor is
6 correct, some will be unavoidable, but given the
7 particular role and competence of the various parties
8 and the documents over which they have custody and
9 control, I think there won't, again, be an enormous
10 amount of duplication.

11 THE SPECIAL MASTER: Okay. All right. Well,
12 let's -- well, just to bring this part of it to a
13 conclusion, are you going to file something,
14 Mr. Somach, that will memorialize what we just
15 discussed or how are you thinking about doing that?

16 MR. SOMACH: That's the easiest thing to do
17 and what I can do is draft that up this week, in the
18 next couple of days, get it out to the other parties.
19 You know, if we have to massage it a little bit to make
20 sure we're all on board and then get a concurrence
21 among all of the parties, that that's how we'll
22 proceed. But it will be generally along the lines of
23 what we've described.

24 I will say that our view in terms of nonparty
25 access is that the access should be to parties and

1 amici and not be open to the world, so to speak. That
2 that starts creating a management problem that I -- you
3 know, it's going to be hard enough dealing with it.
4 Our view is that it should be limited to parties and
5 amici and not nonparties or not formally recognized by
6 the Court as friends of the Court.

7 THE SPECIAL MASTER: Well, why don't we do
8 this, why don't you include in the agreement a
9 provision that access will be given to nonparties only
10 upon motion and order, and so if somebody wants to get
11 access that's a nonparty, they can come in and file
12 something until we give each of you an opportunity to
13 respond and object if you don't think that a party
14 should have -- or nonparty should have access, all
15 right?

16 MR. MACFARLANE: That sounds fine, I will add
17 that to the order.

18 THE SPECIAL MASTER: And I'll put this in the
19 case management order. I don't know if -- I don't have
20 a calendar right in front of me. But let's set
21 September 30th, or if that's a weekend, the last
22 business day of September as the day to actually
23 deposit the documents with Veritext, or in the United
24 States case, upload them to your service.

25 All right. Anything more about that before

1 we move on to some other discovery matters?

2 MR. WALLACE: Pardon me, Your Honor?

3 THE SPECIAL MASTER: Yes.

4 MR. WALLACE: I just want to point out that I
5 certainly agree with the United States and New Mexico
6 as far as our position in actual production, and with
7 the State of Texas in access to the documents. It
8 might be helpful for the parties if the Court were to
9 make clear that upon motion for access to the documents
10 in the repository, any entity or individual will be
11 subject to the confidentiality clawback provisions
12 during the case management order. Those are rather
13 extensive and were negotiated amongst the parties
14 because of the high volume of documents we have. The
15 risk of having something slip through, we all thought,
16 was just too high so we had agreed on that provision.
17 I think it's important that everyone who has access is
18 bound by that as well.

19 THE SPECIAL MASTER: All right. Thank you.

20 Do you anticipate in the initial disclosure,
21 confidential documents that will have to be filed
22 separately under the confidentiality provision?

23 MR. MACFARLANE: We don't, Your Honor.

24 THE SPECIAL MASTER: I think we talked a
25 little bit about this on the phone conversation. This

1 is not a case that will probably generate a huge number
2 of confidential documents, there might be some but most
3 everything about this case is in public record or will
4 be, isn't it?

5 (No verbal response.)

6 THE SPECIAL MASTER: Everybody's nodding yes,
7 so I'll take that as an assent.

8 All right. Moving on. On the timing of the
9 other discovery, one of the things I'm cognizant of is
10 the fact that come, I think it's January, this case
11 will have been on file for five years. I presume that
12 both sides had done at least some investigation before
13 they filed the lawsuits, you're required to do that,
14 and probably already have experts who have looked at
15 this situation, maybe not to the extent they are ready
16 to testify. But we're not -- in other words, we're not
17 starting like day one where this is a normal lawsuit
18 where it's a clean slate and you're just getting
19 experts on board and, you know, you started from
20 scratch.

21 What has been done in terms of the last four
22 and a half plus years of litigation other than a motion
23 to dismiss in terms of experts and witness discovery
24 and investigation, Mr. Somach?

25 MR. SOMACH: Yes, there's been nothing in

1 terms of discovery that's been done. Certainly the
2 State of Texas has moved forward with preparation of
3 its case in terms of expert work, collection of
4 documents, and getting ready to try the case as early
5 as possible.

6 I did write to Special Master Grimsal, on at
7 least a couple of occasions, urging him,
8 notwithstanding the fact that the motions to dismiss
9 were still pending, to do what he could do in terms of
10 facilitating those things that you would normally order
11 like you do in a case that has been pending that long.

12 I indicated to him in those letters, and I
13 think I alluded to this in actually one of the letters
14 that the United States and Texas sent to you, Your
15 Honor, that when we filed this case five years ago, we
16 felt we were suffering the irreparable harm and we
17 wanted to get resolution of that as early as possible.
18 And my correspondence and discussions with Special
19 Master Grimsal were to focus on the fact that that
20 delay was not a good thing from our perspective and
21 that we needed to move forward.

22 Now, we have -- and I've made that very clear
23 to everyone, I mean, these were -- these were
24 communications and correspondence that were of record
25 in the case, and we have diligently moved forward to

1 prepare for trial at the earliest possible time.

2 The Exhibit B that we put together, and I
3 think I sent you just a short matrix showing you the
4 differences if you use the June 1 at issue date versus
5 the date that had otherwise been in the case management
6 plan, that our Exhibit B was predicated upon the fact
7 that all the parties had been involved for a long time,
8 that they were all diligently moving forward with
9 preparation for trial in this case, and so the start of
10 discovery of the expert disclosures and the end of
11 discovery were all predicated upon the notion that
12 folks were moving forward as diligently as possible
13 with this case.

14 But in terms of formal exchange, because I
15 did not get direction with Special Master Grimsal in
16 terms of, you know, we move forward with his report.
17 After his report, I even asked that New Mexico be
18 ordered to answer since they weren't -- they had given
19 up on the motion to dismiss claim, but that didn't
20 happen either.

21 That's a long way to say we have diligently
22 put forward as far as we could from our side of the
23 lectern to prepare the case. We're ready to diligently
24 move forward, and we're looking for a trial date that
25 would commensurate with the proposed Exhibit B that we

1 provided to you.

2 THE SPECIAL MASTER: Well, have you
3 identified the individuals who will be your likely
4 experts?

5 MR. SOMACH: We know who they are.

6 THE SPECIAL MASTER: And how many experts do
7 you think there are? Can you tell me the number and
8 category of experts? Are you going to have a
9 historian?

10 MR. SOMACH: We have a historian.

11 THE SPECIAL MASTER: And?

12 MR. SOMACH: We have modeling experts. We
13 have experts on agricultural use and consumption. We
14 have groundwater-surface water interaction experts.
15 We've got some water quality experts. We have economic
16 damage experts. You know, that's -- you know, that's
17 the nature as we laid out the issues. We have experts
18 where experts are appropriate in each one of those
19 areas. They have been working diligently for a number
20 of years now and are going to be ready at the earliest
21 possible time that we provided in Exhibit B to exchange
22 reports and be deposed.

23 THE SPECIAL MASTER: What about New Mexico,
24 do you have your -- have you identified your experts
25 yet?

1 MR. RAEL: Your Honor, New Mexico is in a
2 tremendous disadvantage to the State of Texas. I think
3 this is probably, in New Mexico's opinion, the most
4 important issue we're going to discuss today. Texas
5 has repeatedly told the Special Master and the parties
6 that its got its case ready to go, everything
7 Mr. Somach just said. They have everything, they're
8 ready to go, their experts have prepared, they have
9 their theories. They have the documents and the
10 experts and the reports to support those theories, but
11 New Mexico is at a disadvantage because we don't have
12 any of that and that's our major concern.

13 Texas has had the luxury with moving forward
14 with preparing everything and wants to move to trial
15 very, very quickly, but New Mexico doesn't know what
16 any of that is. They pled, you know, in their
17 complaint, very simple pleading, but it doesn't give us
18 any idea as to what their theories are and how to
19 prepare our defenses.

20 New Mexico's defense and counterclaims, Your
21 Honor, can't be fully developed until we know what
22 Texas is going to do and what Texas is going to
23 present, what their theories are, what their evidence
24 is going to be, what their experts are going to say.
25 And New Mexico can't start its defense of that.

1 We certainly, I think, have our ideas of what
2 they're going to do, what they're going to say, but I
3 can tell you from discussions that we've had, just that
4 the parties have had, I think we all have very
5 different understandings of how the project is
6 operating and what the duties are and who is violating
7 that. And that, to New Mexico, I think, is at the
8 heart of today's conference, Your Honor, is that we're
9 not in the same position that Texas is.

10 We don't have the same resources and,
11 frankly, even if we did, we don't know -- Texas has
12 repeatedly said their case is ready to go, they want to
13 go to trial quickly, but we don't know what any of that
14 is. So we haven't been able to prepare a defense or to
15 even -- we have identified, yes, a historian, we've
16 identified modeling experts, we've identified a crop
17 consumptive use expert, but they don't -- they haven't
18 been able to start work and diligently prepare, to use
19 Mr. Somach's words, because we don't know what the
20 claims are going to be and we can't fully prepare our
21 defense and either our counterclaims.

22 We put our counterclaims out there in good
23 faith doing our, you know, using due diligence, but
24 even those -- even our counterclaims can't be fully
25 developed, Your Honor, without knowing what we're going

1 to be facing from the United States -- I mean, from
2 Texas and the United States now. And that was an issue
3 that wasn't decided, as Your Honor knows, until March,
4 what the -- whether or not the United States was going
5 to be able to just state the claims.

6 So that, to us, just goes to the heart of
7 today's conference is that New Mexico really needs an
8 opportunity to see what Texas and the United States
9 have prepared. Texas isn't going to be prejudice, as
10 Mr. Somach repeatedly said, they're ready to go, they
11 want to go to trial quickly. So requiring them to
12 disclose that to us, giving us an opportunity to
13 adequately review and respond to that will not
14 prejudice New Mexico (sic).

15 New Mexico's going to be required to look at
16 not one but two expert reports, not one but two models
17 possibly. And requiring New Mexico to do twice the
18 work in the same amount of time would be highly
19 prejudicial to New Mexico. And especially because
20 Texas has all these years, had the opportunity to
21 prepare everything, whereas, New Mexico has not had the
22 opportunity to -- we've been waiting to see what's
23 going to happen.

24 We had a change in administration. We had a
25 change in counsel. I've only been involved in the case

1 about two years now, Your Honor. I know -- you know,
2 that's New Mexico's problem. However, I will say,
3 there's just -- we don't have that historical knowledge
4 that Texas has as to what their claims are, so we're
5 starting basically from scratch with our defense.

6 THE SPECIAL MASTER: Does the United States
7 anticipate having their own set of experts?

8 MR. MACFARLANE: We do, Your Honor, we've
9 identified those experts. We have them working now,
10 primarily on the modeling issues, but we'll also be
11 able to go on the expertise of folks who work for
12 Federal agencies who have relevant expertise as well in
13 certain areas.

14 I will say, you know, Your Honor does make a
15 good point when you say that the case has been pending
16 for five years. But New Mexico has significantly
17 expanded the scope of this litigation through its
18 counterclaims, which we only saw in May, so I'm
19 assuming that New Mexico must have done some work or
20 have some expert work ready to go behind -- to back up
21 the counterclaims that its asserted. Most of those
22 counterclaims are asserted against the United States.
23 And I'll address, you know, our thoughts on how those
24 claims should be resolved at the appropriate time.

25 But I think, you know, in terms of, for

1 example, the kind of experts who may be called upon to
2 discuss things like the 2008 operating agreement. That
3 has only been put squarely at issue in this case by New
4 Mexico through its counterclaims. And so there is a
5 sense in which there are many issues which have been
6 injected into the litigation where we are actually much
7 closer to day one than the main claims asserted in
8 Texas' complaint and the United States' complaint *.

9 THE SPECIAL MASTER: I don't want to
10 oversimplify because it's, obviously, a very complex
11 piece of litigation, but it's my understanding that the
12 sort of gravamen of this whole dispute is, I guess, a
13 legal issue which is who controls the project waters
14 after it is released from the reservoir, and New Mexico
15 says they do, correct?

16 MR. RAEL: Yes, Your Honor.

17 THE SPECIAL MASTER: United States says you
18 do, correct?

19 MR. MACFARLANE: We believe that's required
20 under the commonplace, Your Honor.

21 THE SPECIAL MASTER: And then, secondly,
22 water, whoever controls it, what are New Mexico's
23 obligations to not divert water from the downstream
24 flow and to what extent have they now -- are they
25 diverting water? Is that -- I mean, there's a lot of

1 other ancillary issues but is that sort of -- is that
2 sort of the central issue in this case?

3 MR. SOMACH: I think --

4 THE SPECIAL MASTER: I mean, there's
5 questions about whether -- you know, I know the
6 counterclaims that the United States isn't maintaining
7 the dam properly, there's evaporation and there's other
8 issues that's all going to go into that. Does that
9 become the central issue in this case?

10 MR. SOMACH: Your Honor, I think you've
11 articulated it and it is, you know, what can or can't
12 New Mexico do with water that's released from Elephant
13 Butte Reservoir until it reaches the Texas state line?
14 What is, in fact, occurring?

15 And is, you know, the bottom line from Texas'
16 perspective, is Texas getting what it's entitled to get
17 under the compact, which is really, in a sense, a water
18 balance or mathematical problem where you take a look
19 at the water at the top, you look at what's happening
20 in the middle, and you look at what's coming out on the
21 bottom end of it. I don't think it ever gets any more
22 complicated than simply that kind of a mathematics
23 problem. Now it's infinitely more complex because of
24 everything physically that exists, geologically that
25 exists, but at its heart, that's what it is.

1 If you put water up on the top, something is
2 happening in the middle and some water makes it to the
3 end. You compare that against what the compact said
4 was supposed to happen, and you take a look at all
5 that.

6 So I'm kind of at a loss at Mr. Rael's
7 argument that they are not ready. This is no different
8 in that sense from any other lawsuit. In a sense what
9 he's arguing is they need to complete all of their
10 discovery before we do anything else, you know,
11 it's -- they can't possibly know our case until they've
12 completed all of discovery.

13 But that's -- that's not -- that's not the
14 way you predicate cases. I mean, we filed a complaint.
15 They filed a motion to dismiss on the complaint, motion
16 to dismiss was denied, we now have a lawsuit, you know,
17 and we've pled -- we've pled the issues, and I'm
18 telling you, there are no issues that we are going to
19 bring up that aren't in the four corners of our
20 complaint. They are all there.

21 And the notion that they should wait until
22 they conduct all of the discovery of what the United
23 States and the State of Texas has got before they have
24 to do anything is just -- I don't even know how to
25 respond to that in some respects because it's so

1 anomalous to the way one would -- and at that heart,
2 this is an original action but it's also just at a
3 certain level, a trial, you know, and that's -- all
4 we're saying is we should move forward with the normal
5 and ordinary trial of this case now that a lot of the
6 super original action issues have been kind of dealt
7 with by the Court, and now we're at that point where we
8 should be -- just try this case. Let's move forward in
9 the normal ordinary course of doing that. And aside --
10 I don't actually have even a good response because it's
11 so alien to the way I understand cases get tried.

12 MR. RAEL: Your Honor?

13 THE SPECIAL MASTER: Mr. Rael, I know I
14 probably oversimplified this, but do you understand
15 that's basically the issue, of who controls the water
16 once it's released from the reservoir and what New
17 Mexico's obligations are, if any?

18 MR. RAEL: Your Honor, I think you did a good
19 job of stating part of the case, but I'm equally
20 flabbergasted as Mr. Somach is of his gross
21 oversimplification of the claim.

22 The other issue that is at the heart of this
23 matter as far as New Mexico is concerned, is what
24 actions Texas has taken and what impacts those have had
25 on the -- on the ability for the project to operate

1 smooth, and we've brought those in our counterclaims,
2 but they have not been developed in any way.

3 Texas has well fields which are pumping
4 unmetered day and night and have a large effect on this
5 matter with the way that the United States is
6 operating. And I hear Mr. MacFarlane, we're basically
7 at day one. The only reason we were even able to even
8 identify these claims is because of the litigation of
9 the 2008 operating agreement, that's where -- that's
10 where our counterclaims are coming from, and that case
11 has been stayed as Your Honor knows.

12 But I think Mr. Somach's -- any notion that
13 Mr. Somach is saying that this case is just another
14 case that needs to be litigated is to me, a little
15 absurd -- not to be insulting that it's absurd --
16 because hydrological models can have millions of
17 outputs and inputs and I think that's going to be the
18 case in this case.

19 And any argument that is no different from
20 other complex cases can be put to rest, Your Honor, by
21 simple examination of the *Kansas v. Colorado* case.
22 That case had a two-year discovery period, was much
23 more developed than ours at the time, and it had
24 141 days of actual trial. These cases are extremely
25 complex.

1 And for Texas to say, oh, this is -- I don't
2 understand why New Mexico isn't ready to just go and
3 try this thing, we don't know what impacts Texas'
4 operations are having, and of course they are going to
5 say we're not having any impact. New Mexico is not
6 going to say that. We understand what we've developed
7 between Elephant Butte and, you know, all along the
8 project.

9 We don't dispute that there's a hydrological
10 connection between groundwater and surface water, we
11 just don't know what that impact is and that hasn't
12 been developed at all.

13 THE SPECIAL MASTER: Let me ask you this,
14 there's one thing that, in looking at the pleadings,
15 I've been a little puzzled by. I can understand your
16 argument from New Mexico's standpoint that on your
17 issues of laches, unclean hands, acquiesces, whatever
18 we want to call it, that you may have an -- you may be
19 arguing that it particularly affects the United States
20 that they allowed these conditions to develop over --
21 since the compact and, maybe, before, so close to 100
22 years. And what they're doing in New Mexico -- what
23 they're doing in New Mexico, they are also doing in
24 Texas and that may have some relevance to that issue.
25 But why does it make a difference to New Mexico from a

1 hydrological standpoint of what happens to the water
2 once it gets to Texas?

3 MR. RAEL: Your Honor, I think one of my
4 experts would be better able to -- or better able to
5 prepare me to answer that question, but I think it
6 makes a difference to New Mexico because exactly the
7 same things that Texas is claiming. Texas is claiming
8 that when it leaves Elephant Butte Reservoir the
9 actions of New Mexico, that New Mexico has allowed, has
10 caused the water to diminish and the project to operate
11 less effectively.

12 It's no different when it gets to Texas that
13 Texas' actions and the actions of the United States has
14 caused the project to operate less efficiently, and
15 Texas' actions with their groundwater pumping are also
16 causing the water that they are actually receiving at
17 the end or calculating what they are receiving, to
18 diminish pretty substantially.

19 We think we are going to be able to prove
20 that Texas' actions caused the water that they are
21 receiving at their calculation point to be
22 substantially lower than it would be if it wasn't for
23 their actions, so that's why it matters to the State of
24 New Mexico, and that's something we need to develop,
25 Your Honor.

1 And that's why I'm saying, this case is going
2 to be very, very complex, and it's not going to be
3 simple litigation. We don't want to -- we don't want
4 to have the same thing that happened in, I believe it's
5 *Kansas v. Nebraska* where they rushed to trial. They
6 ended up with a model that they agreed on that had a
7 lot of errors in it, and at that point, they then had
8 to come back and relitigate the errors in the model and
9 relitigate the proceedings.

10 New Mexico wants to do this right. We want
11 to do it the first time. We want to do it right. We
12 want to make sure that we have just as much opportunity
13 to present our claims and the effects Texas and United
14 States may be having as they are having against us. Do
15 it right the first time, Your Honor.

16 Our proposed schedule is six months longer
17 than Texas and the United States. Six months longer,
18 in a case that's this complex with this many experts
19 and data points and models that nobody's agreed to, and
20 this many amici. It's very clear that an additional
21 six months isn't going to harm anybody.

22 And, in fact, the lack of that additional six
23 months and the lack of staggered experts would severely
24 prejudice New Mexico, and I think we'll end up, you
25 know, we could potentially end up back here, and I

1 don't want to make the same mistakes that we've seen in
2 other original actions.

3 And original actions are actions that the
4 Court has said have high public interest, and we have a
5 duty, not just to the citizens of the state of New
6 Mexico, United States has its duty, State of Texas has
7 its duty, Colorado has its duty. We have a duty, Your
8 Honor, to make sure that we're going to do this right,
9 that we're going to expend resources judiciously and
10 that we're not going to rush to do something just
11 because Texas may be ready.

12 I think Mr. MacFarlane said they are at day
13 one. I think we're at day one. All that has happened,
14 Your Honor, is a Rule 12(b)(6) motion was ruled on.
15 All that says is, okay, now we go, you know. It's
16 not -- it's not just like any other complex litigation.
17 It's much more complex in the view of the State of New
18 Mexico.

19 THE SPECIAL MASTER: Well, let me ask Texas.
20 Mr. Somach, what is the continued -- you make the
21 argument that you want an early trial date because
22 Texas is continuing to be harmed by what you feel is
23 New Mexico's violation of compact. But as I understand
24 it, and correct me if I'm wrong, you're now getting
25 water pursuant to the 2008 agreement, and is

1 that -- does that ameliorate the harm, because Texas,
2 as I understand it, while you weren't a party to the
3 2008 operating agreement, didn't object to the 2008
4 operating agreement?

5 MR. SOMACH: No, we didn't. The 2008
6 operating agreement, we think is a -- you know, is an
7 element that could be used. It's a tool that could be
8 used to resolve -- at the end of the day, it could be a
9 tool to implement an appropriate remedy.

10 But the 2008 operating agreement only goes so
11 far. It's an agreement between the two districts and
12 the United States to deal with the amount of water that
13 is left to them, so to speak, after -- after all the
14 harm is done. So it never addresses the underlying
15 harm. It basically says after, you know, this,
16 obviously, goes to our proof, but after the unlawful,
17 under the compact -- the version and groundwater
18 pumping with New Mexico takes place. That is after --
19 after water that should be coming to Texas is taken by
20 New Mexico, there's an amount of water that is left.
21 It's that water that the 2008 operating agreement deals
22 with. It's a way of allocating what is left between
23 the two districts in a -- in a way that they've agreed
24 to.

25 But it leaves out only the actual

1 appportionment and it leaves out the amount of water
2 that is being unlawfully diverted and utilized within
3 New Mexico itself. So it's just a way of more
4 efficiently and better allocating the water that is
5 left between the two districts, but all the other water
6 is being utilized in New Mexico and a large portion of
7 that ought to be coming to Texas and it's not, and
8 that's where the injury is. That's where the injury
9 has always been because there's always been some water
10 coming to Texas. The operating agreement deals with
11 how best to allocate the water that is left between the
12 two districts.

13 So we don't have any problems with that, we
14 think that that's an appropriate way to go. We think
15 it has some very good elements within it. Ultimately,
16 if you're dealing with all of the water, it might even
17 be a good way of allocating all of the water. The
18 problem is just dealing with a very small part of the
19 much larger appportionment that is out there, and that
20 is where the harm is. That's where the harm is that we
21 allege back in -- when we filed our complaint. We
22 mentioned the 2008 operating agreement in our complaint
23 because obviously we were aware of it, but it does not
24 solve a problem. It goes merely to manage the water
25 that's left after all of the unlawful diversions of

1 pumping by New Mexico.

2 THE SPECIAL MASTER: Is New Mexico allowing
3 new wells to be drilled, and are they allowing new
4 diversions of groundwater since this lawsuit's been
5 filed at the current time?

6 MR. RAEL: Your Honor, the -- first of all,
7 I'd like to say that I disagree with Mr. Somach's
8 characterization of how simple the operating agreement
9 is. You know, we filed litigation in that. I also
10 would like to point out that Texas -- New Mexico is not
11 indebted to Texas. Texas has never -- has never been
12 shorted on water that they have called for. I think
13 Mr. Somach has a long way to go in order to be able to
14 prove that New Mexico is in some way not meeting its
15 obligations under the compact.

16 But New Mexico has an administrative process
17 through the Office of the State Engineer where people
18 can apply for wells down in the basin, and that is, you
19 know, being handled in the Lower Rio Grande water
20 adjudication court. I don't believe they are currently
21 allowing any new groundwater wells, but I -- Your
22 Honor, I don't have the exact answer to that question.

23 But I will also point out in response to what
24 Mr. Somach said, the parties agreed to what's called a
25 D2 Curve, and the D2 Curve took into account and

1 presumed the impact that New Mexico's groundwater
2 pumping had on -- from the reservoir, you know, down
3 through Texas, it took that into account when we agreed
4 to the D2 Curve. That's all taken into account, and so
5 for Texas to characterize it that they -- that they,
6 you know, didn't know how much this, you know, impact
7 the groundwater pumping was happening is, again, a
8 gross oversimplification. That's already been taken
9 into account.

10 The question is whether or not, again,
11 there's additional impacts from New Mexico, and if
12 there are, New Mexico will have to do something to
13 offset it, but New Mexico strongly feels that there are
14 additional impacts from the State of Texas as well as
15 operating impacts from the United States that impacts
16 severely the amount of water that is left available and
17 that is making it down to Fort Worth.

18 MR. SOMACH: If I could just add, we had our
19 expert go back out and take a look at and locate some
20 economic information from when he was originally out
21 there, and he was -- he came back and told us that he
22 estimated that since 2016, there were from 4 to
23 5,000 acres of new pecan trees under production in New
24 Mexico. The water's got to come from somewhere to be
25 able to water all of those trees.

1 They're continuing to do the thing that we
2 are complaining about and they're increasing the amount
3 of water that they're taking and intercepting between
4 the two, and it's that point, we can litigate all this
5 out at the time of trial, so you're not going to take
6 anything that I'm saying as -- I will have experts that
7 will testify to all this stuff. The mere point I'm
8 trying to make is harm is continuing and that this --
9 that the only way we're going to get to whether or not
10 we're right or wrong and what the damages are and what
11 an appropriate remedy is, is to move forward and get
12 this case tried.

13 And that, again, I think, as plaintiffs, that
14 we're entitled to move forward with our case and get it
15 tried, and that's all we're trying to do, but we are,
16 as I've said, we are being injured in the interim
17 because there's nothing that's stopping them from doing
18 what they've historically done, and if I'm accurate,
19 it's increasing. There may be a reason why it's
20 increasing in light of the fact that you get in perhaps
21 under the gun before something's done about it, maybe
22 you get to grandfather, you know, that part in as we
23 move forward.

24 And, certainly, part of the argument they're
25 making in their counterclaims about somehow we're not

1 putting them on notice or we've allowed that to develop
2 into a curve or so forth, and I want to make certain
3 that I'm articulating the fact that we think real harm
4 is occurring, that it's increasing, and that the only
5 way to get it stopped is to pursue this case as
6 diligently as possible. I don't know what else we
7 could possibly do.

8 MR. RAEL: Your Honor, if I may briefly
9 respond to two points? I just conferred with
10 Greg Ridgley, and he is here today, he's the general
11 counsel for the New Mexico Office of the State
12 Engineer, and we are not allowing any new groundwater
13 wells in the area.

14 Secondly --

15 THE SPECIAL MASTER: Let me ask you
16 something, Mr. Rael. Are you representing -- when you
17 say you represent the State of New Mexico, is there any
18 difference between that and the engineer?

19 MR. RAEL: No, Your Honor, I'm representing
20 the entire State of New Mexico, it's just that
21 Mr. Ridgley happened to be in the gallery and he
22 confirmed with me that we are not allowing any new
23 wells in the project area.

24 New Mexico also wants a speedy resolution of
25 this case. With all due respect to Mr. Somach, New

1 Mexico is also suffering harm due the actions of Texas
2 and the United States as we allege in our
3 counterclaims; yet, we recognize the importance of
4 giving all the parties and their experts enough time to
5 properly do their jobs. The livelihood of hundreds of
6 thousands of individuals are at stake here, and, again,
7 we all have that duty.

8 Adoption of our proposed schedule, Your
9 Honor, will avoid prejudice and give all the parties,
10 like I said, not just New Mexico but all the parties,
11 adequate time to review and assess the hydrologic
12 models here that are going to be huge, and as I said,
13 haven't even been completely developed.

14 We want a speedy resolution, but we're not
15 willing to compromise our ability to effectively defend
16 against Texas' claims and also to assert our claims
17 simply to move the discovery schedule up a few months.
18 It's just too -- this matter is just too important.

19 New Mexico's economy is severely depressed
20 one, that's one of our bright spots. I believe Texas
21 has a pretty vibrant economy off this area as well. We
22 owe those people a duty to do this right, and a few
23 extra months is not going to make up the
24 difference -- it will make the difference here, I'm
25 sorry. Your Honor, it will make the difference here

1 and not going to prejudice Texas.

2 And, also -- that's fine, that's all, Your
3 Honor.

4 MR. MACFARLANE: Your Honor, if I may?

5 THE SPECIAL MASTER: I was going to say --
6 just hold on a second. I'm going to give United States
7 a chance to respond to all this.

8 I did have one question about Texas' proposed
9 schedule -- I have, well, two questions. The first is,
10 if you're ready to go now with your experts, I don't
11 know that I'm inclined to give you quite as much time
12 for expert disclosures as you've requested.

13 But, secondly, you are proposing that you not
14 even start expert depositions until after rebuttal
15 experts have been disclosed and filed reports; whereas,
16 New Mexico wants to start expert depositions once the
17 experts are disclosed. Why wait until after rebuttal
18 experts are disclosed? In fact, it might be more
19 efficient, the rebuttal experts might be able to have a
20 more informed opinion if there's been some deposition
21 taken of the initially disclosed experts.

22 MR. SOMACH: The reason why we sequenced
23 it -- first of all, I will say that's the United States
24 and Texas' proposed schedule, but it was to avoid
25 double depositions. That was why it was sequenced that

1 way so that both, the initial disclosures, the rebuttal
2 disclosures, they came quite quickly. There wasn't a
3 lot of time. It was to avoid double depositions,
4 that's the reason why it was sequenced that way, but
5 they were, again, it was in a pretty compressed time
6 period but that was -- that's the reason why they are
7 the way they are now.

8 And let me just say, I don't know that the
9 United States is exactly as far along, and I think
10 Steve will -- Mr. MacFarlane will address that. And,
11 again, I want to just say that was a joint U.S. and
12 Texas time line, and so it was to accommodate both
13 entities in terms of their ability to move forward and
14 be ready to have experts ready. That's why.

15 THE SPECIAL MASTER: Mr. MacFarlane, I'll
16 give you a chance to speak.

17 MR. MACFARLANE: Thank you, Your Honor.

18 In terms of moving this case along and
19 potentially narrowing issues that we need to have
20 discovery on, we think that it would be appropriate for
21 the Court to incorporate any scheduling opportunity for
22 an early round of dispositive motions directed at New
23 Mexico's counterclaims.

24 We think some of those counterclaims,
25 basically, rely on or reflect questions of law put to

1 this -- which Your Honor will decide. They don't
2 necessarily depend upon likely discovery, or at least
3 we could test that, you know.

4 At the outset of this litigation when the
5 Supreme Court asked for views of the Solicitor General,
6 we filed an invitation in which we recommended that the
7 Court allow Texas' complaint to be filed but that New
8 Mexico also be allowed to file a motion to dismiss.

9 Well, I think with respect to New Mexico's
10 counterclaim, we're in a very similar situation. And I
11 think we would like an opportunity to test the legal
12 liability of some or all of these counterclaims, at
13 least the ones that have been asserted against the
14 United States, through appropriate dispositive motions,
15 motions of judgment on the pleadings or maybe a motion
16 for summary judgment that would allow Your Honor to
17 review legal sufficiency of these counterclaims. And
18 if Your Honor concludes that the counterclaims don't
19 have -- aren't legally sufficient, then they're out and
20 that narrows the issue and I think it can help move
21 this case along.

22 THE SPECIAL MASTER: Well, there may be more
23 than just counterclaims. I'm hoping that we can have
24 early motions and when I say early, we're probably
25 talking six months or nine months, to resolve a number

1 of legal issues. I mean, one identified at the very
2 outset when we're talking about this is who controls
3 the project of water, I mean, is there anything factual
4 about that?

5 MR. MACFARLANE: Our position, Your Honor, is
6 that that's a legal issue and it's to be determined by
7 the compact.

8 THE SPECIAL MASTER: And I think there are
9 provisions of the compact that are very key to this
10 case that, as I understand it, are legal issues and I
11 don't know why they can't be resolved early on to
12 hopefully narrow the issues in this case.

13 Do you disagree with that, Mr. Rael?

14 MR. RAEL: No, Your Honor, we agree. We have
15 no objection to the early motions practice. We agree.
16 We think it will narrow the scope of the litigation and
17 we think that the parties should have due regard for
18 how these said motions will affect the progress of the
19 case moving forward, and, especially, discovery.

20 What we do think, though, is to the extent
21 that those motions are going to dismiss any of the
22 counterclaims or, you know, and narrow the scope, then
23 allowing discovery to proceed prior to getting these
24 legal issues resolved quickly is unnecessary, it's
25 going to waste the parties' time, effort, money.

1 Especially because, you know, these models require so
2 much work, these experts require so much work.

3 And then if an issue gets resolved through
4 motions, Your Honor, then we've wasted all that time,
5 money, which we, frankly, have a duty -- because all
6 the money in this case -- all the money being spent in
7 the case is public funds. I mean, this is -- these
8 are -- it's an original action involving, also, the
9 United States, the states of New Mexico, Texas,
10 Colorado, and we have a duty to spend their money
11 wisely, and doing early motion practice and narrowing
12 the scope of the litigation and not wasting discovery
13 time, effort, and money on issues that, ultimately, may
14 not be before Your Honor is, I think -- New Mexico
15 thinks is a good -- could be a good use of judicial
16 resources.

17 THE SPECIAL MASTER: Well, maybe this is a
18 point to bring up, another issue relating to the
19 modeling. Now, you, Mr. Rael, referenced the Nebraska,
20 was it Kansas, Wyoming litigation where they had agreed
21 upon, in essence, a common model. I don't know if
22 inputs in that litigation were different or how they
23 exactly did that, but has there been any discussion
24 about that type of approach in this case where there
25 could be some agreement as to a model?

1 MR. RAEL: Your Honor, there have been some
2 preliminary discussions. I think that the biggest
3 issue is that we have to define the geographic scope of
4 the model. New Mexico thinks it needs to encompass the
5 entire project area. And there's been some discussion
6 and I don't want to -- I'm not sure what Texas and the
7 United States' position may be, but we don't think it
8 needs to be from Elephant Butte to the New Mexico state
9 line. We think it has to encompass the entire
10 geographic area of the project.

11 THE SPECIAL MASTER: How do you define the
12 project?

13 MR. RAEL: Basically, it's as it's defined in
14 the --

15 THE SPECIAL MASTER: Are you talking all the
16 way from the Colorado line?

17 MR. RAEL: No, no, no. Basically, Your
18 Honor, basically it's just part of the operating
19 agreement which is from the Elephant Butte Reservoir
20 down to Fort Lupton, Texas, not stopping at the New
21 Mexico state line but taking into account, as we said,
22 all of the impacts.

23 And that geographic scope, if we can agree on
24 that, then at that point we can argue about what the
25 inputs and outputs may be to a joint model. I think

1 that would save the Court a tremendous amount of time,
2 not having to hear all these, you know, basic data
3 points at trial because they would all be entered in
4 and agreed to.

5 We can agree to this joint model and we can
6 all argue about what we think the model means, but it
7 would save the Court a tremendous amount of time and
8 the parties a tremendous amount of money. I think it
9 would be a very good idea and New Mexico strongly
10 supports the idea of a joint model, and I don't want to
11 mischaracterize, but I believe Colorado does as well.
12 I'd like to allow Mr. Wallace a chance to talk about
13 this as well. We think it will be very, very
14 beneficial to do so, to do a joint model.

15 MR. SOMACH: Your Honor, if I can respond to
16 a couple of things. Number one, if you're briefing
17 legal issues, I don't understand why discovery has to
18 be stayed during that period of time. What I hear
19 again, is a lot of -- you stay discovery, you basically
20 stay the litigation and factual issues in the case, and
21 that's all I hear from New Mexico is that.

22 THE SPECIAL MASTER: Well, I don't mean to
23 cut you off, but I'm not going to stay discovery.
24 We're going to move ahead on this case, and I think at
25 the end of the day whether, for instance, who controls

1 the project water, whether it's New Mexico or United
2 States, may have legal significance on a number of
3 issues but I think we still need to know whether or
4 not, under the compact, the water's being illegally
5 diverted, so I don't know. I'm not planning on staying
6 discovery.

7 MR. SOMACH: I think Texas is very much in
8 favor of these early dispositive motions. I mean, it's
9 similar to, I know we've got that issue, but we think
10 that part of the compact has already been interpreted
11 and the Court has bought off on the interpretation of
12 the compact and there are other provisions that are
13 relevant to where we're going that weren't relevant to
14 the motion to dismiss that equally could be disposed
15 of, and I think that that's a -- that is an important
16 thing to do.

17 In terms of the model, I simply don't believe
18 we're going to be able to agree on a common model.
19 Most of -- most of what will be the model will come off
20 the shelf. You know, it's not like there are models
21 that folks will use, the Office of State Engineers has,
22 at least two or three of these things that they've gone
23 through.

24 It's not the model, per se, that is the
25 problem, the problem are the inputs into the model.

1 The inputs are the focus of what I believe to be the
2 dispute. It is what is happening in Southern New
3 Mexico, how do you characterize consumptive use, how do
4 you characterize urban use of water, how do you do all
5 that stuff. That will be the subject of expert
6 testimony. It will then become or it is inputs into
7 the respective models and I believe that's where the
8 rubber hits the road and that's where the dispute is
9 between, certainly, Texas and New Mexico.

10 And so while I think you can address
11 dollar-type issues, at least with some of the modeling,
12 and I think it's a good idea to have the parties sit
13 down and see if they can resolve that to minimize any
14 of those type of challenges, that at a very fundamental
15 level it's the inputs into these models that's going to
16 be the critical part, and I think we're just -- we just
17 have differences of opinions, otherwise we could have
18 resolved this outside of the courtroom.

19 And so I think it's unrealistic to believe
20 that we'll come up with a common model. I do believe
21 that once expert reports are exchanged and we're able
22 to depose the respective modelers, we may be able to
23 close at appropriate places, areas where we're not far
24 apart where we may be able to agree upon, but I don't
25 think we can do that until such time as we've moved

1 forward, have an exchange of expert witnesses, be able
2 to depose those witnesses with respect to the models,
3 and then be very open to sit down and say okay, let's
4 talk about whether or not we can close in certain areas
5 and in disagreements so that when we are disagreeing,
6 those disagreements are much more focused, at least
7 that's the Texas view.

8 THE SPECIAL MASTER: I want to give -- be
9 sure to give Colorado a chance to speak here if you
10 have anything you want to say, but one thing I do want
11 to ask about, and I don't mean to be jumping around
12 here, I'm just trying to get my arms around this
13 litigation, is, Mr. Rael, you talk about the project
14 area basically being from the reservoir down the
15 stream. But there are parties who are -- not parties,
16 amici in this case that are very concerned about the
17 effect upstream between the, basically, Colorado border
18 and the reservoir. How does any of this modeling or
19 where -- how does that play into this whole litigation
20 as you see it? Maybe I should let those amici express
21 their views. But does that get into the modeling or
22 what -- where do you see that?

23 MR. RAEL: Not as its being pled now, Your
24 Honor, no. But I think you should let the amici
25 address the issue to the extent that they think it

1 does.

2 THE SPECIAL MASTER: Because as I understand
3 it, no one is arguing at this point that you're not
4 meeting your obligation to deliver the agreed upon
5 amount of water to the Elephant Butte Irrigation. I
6 mean, we all agree on that, right?

7 MR. RAEL: That is correct.

8 THE SPECIAL MASTER: I don't think there's
9 any dispute about that.

10 MR. RAEL: Right.

11 THE SPECIAL MASTER: And so it's what happens
12 after it leaves the reservoir. So I'm not -- well, let
13 me ask, any of the amici representing upriver entities
14 if you want to be heard, I'll give you a chance to tell
15 me where you think -- where you think your interests
16 are impacted upon what we're talking about here this
17 morning.

18 MR. BROCKMANN: Your Honor, Jim Brockmann
19 with the Albuquerque Bernalillo County Water Utility
20 Authority.

21 As we set forth in the amicus brief in
22 support of New Mexico's exception, the concern in the
23 Middle Rio Grande is that the way the compact is
24 structured and the way it's been operated historically,
25 Article IV, Article III has delivered obligations from

1 Colorado to the state line. Article IV has delivery
2 obligations set forth from New Mexico into Elephant
3 Butte Reservoir. Those are based on inflow-outflow
4 measurements and index gauges, so they're variable by
5 year every year and there's also a system of credits
6 and debts, so it's very flexible compact in terms of
7 deliveries that is not set.

8 The concern in Middle Rio Grande and why the
9 Water Authority filed a brief is they are concerned in
10 Texas' complaint, and I believe it's paragraph 18,
11 excuse me, that they say there is a state line delivery
12 obligation that is fixed based upon 1938 condition. So
13 when you combine a fixed delivery obligation downstream
14 based upon a 38 condition with a variable apportionment
15 upstream, the concern is what happens then if that
16 theory holds, if Texas' theory hold what happens
17 upstream, does that some somehow change the
18 apportionment into Elephant Butte Reservoir. So that's
19 the concern is as Texas has put it, a fixed delivery
20 obligation at the state line based upon a 38 condition.

21 If it ends up as the case develops that the
22 apportionment to EP No. 1 is variable and it's not
23 based upon the 38 condition, I think upstream will be
24 fine. But that is the concern that the Water Authority
25 has.

1 THE SPECIAL MASTER: All right. Thank you.
2 I said I'd give Colorado a chance to speak to anything
3 about these issues. Please, go ahead.

4 MR. WALLACE: Thank you, Your Honor.

5 I think the parties have pointed out there's
6 some potential preliminary legal issue, and I'll leave
7 it to those who have asserted claims and defenses to
8 define for themselves what the scope of those are.

9 But I would like to aid the Court, the
10 Special Master, in discussing of modeling and only the
11 modeling portion the experts might engage in amongst
12 all the parties in this case. And, essentially, what
13 the modeling is striving to do is to help predict the
14 physical impacts within a given geographic area that
15 are not susceptible to direct measurement.

16 In other words, the model, computer model is
17 creating predictions of things that we can't see or
18 measure at all. And that's the real trick, is to
19 gather up enough actual measurements in data and
20 reliable presumptions to put into the model so it
21 becomes useful for the Court to use it as a factual
22 basis in making any of its factual determinations as
23 far as what I see as the impact portion of this case,
24 which is what is happening to the water in the Rio
25 Grande and water hydrologically connected to the Rio

1 Grande.

2 And so, really, in more modern times, folks
3 involved in water disputes have turned to computer
4 groundwater models to do that. And Mr. Somach has
5 alluded to off-the-shelf-type models that might be a
6 reference to some of the models put out by the USGS
7 Geological Survey. MODFLOW is a very commonly used
8 one. However, having that software code available does
9 not a model build.

10 What needs to be done is a wide variety of
11 experts in hydrogeology, agricultural use, service
12 water modeling need to take available data, need to
13 generate data and need to make expert presumptions
14 about how to put that information into modeling and
15 that's the real trick.

16 In going towards model building, certainly
17 the parties are free to construct their own model. The
18 Special Master may then have three or more models with
19 which to deal. Each of those models would potentially
20 be designed to answer specific questions that each of
21 those parties are interested in answering; however,
22 it's unlikely that any one of those models would be
23 able to answer for the Court all of the questions that
24 it seeks an answer to and that's part of the problem
25 with the models is that you can't take part of one and

1 part of another, they are not interchangeable. They
2 are generally an all or nothing proposition.

3 The Court is certainly free to take any one
4 given model to answer any one given question for which
5 it was designed. It may run into a problem, though,
6 that there would be no unique solution. That's
7 something the models strive for is to try and identify
8 a most reliable answer rather than a wide variety of
9 potential answers with respect to impacts to a water
10 system.

11 Given that, if the Court is faced with using
12 multiple models, it may not be able to put together a
13 factual and consistent answer to all of the questions
14 in front of it. That's something the Court certainly
15 can take up and decide what it wants to do with that
16 situation.

17 However, Colorado is certainly ready to
18 review original jurisdiction cases before and conflicts
19 regarding interstate waters. Some of the parties had
20 mentioned Rio Grande -- not the Rio Grande, but the
21 Republican River Basin, that is *Kansas v. Nebraska and*
22 *Colorado*, and in that case, the parties decided
23 collectively to work on a joint model, one single
24 model, and in doing that, they started with the USGS
25 base model and took the framework, the spacial

1 geographic framework for that model, and decided to
2 cooperatively work together. Essentially, each of the
3 three states went back to their own records, gathered
4 the data that was necessary and in using a joint
5 technical team, input all that data at once into a
6 single joint model. And in doing so, they were able to
7 come up with just the modeling factual portion of that
8 case, and the Special Master was able to use that to go
9 forward separately deciding legal issues, separately
10 deciding issues such as economic damages.

11 Just using that modeling, I think as the
12 Court has pointed out, having different models with
13 conflicting experts present for additional questions
14 for this Court, whether it's in Daubert-type motions,
15 certainly we can engage in that. One of the benefits
16 of having a joint model is it actually ends up being
17 much more streamlined and quick.

18 As I mentioned, parties will, of course, have
19 differences of opinion in building a joint model.
20 Those differences, if they are concrete enough, could
21 be brought to the Court and the Court can decide how to
22 move forward. But in doing so, in using the Republican
23 River as a base, the parties took about one solid year,
24 12 months, to put that model together with an existing
25 USGS base. That is significantly shorter than the time

1 right now in either of the proposed schedules in the
2 case management plan.

3 I think we're dealing with, I think, the
4 Texas/U.S. joint proposal had one expert report due in
5 525 days. New Mexico and Colorado propose 600 days.
6 Recognizing that this is just a modeling issue, I think
7 there's still a great opportunity to shorten that
8 amount of time that the parties are able to work
9 together on that.

10 Another good example in the original actions
11 is Kansas and Colorado against the Arkansas River
12 Compact. Several years of litigation about models
13 themselves. Kansas and Colorado each had competing
14 models, model roots they were using. Special Master
15 heard arguments for years over that. Eventually
16 Colorado conceded to the use of the Kansas models, an
17 H-I model, which we still use today in compact
18 administration and that helped speed that case up.

19 Another bonus in being able to use a joint
20 model is that that same model can be used in potential
21 settlement discussions for mediations, gives a common
22 platform for the facts, and could also potentially be
23 used in administration among the states after the case
24 is over because, again, they establish a single
25 physical platform that helps predict water impacts. So

1 if the Court decides -- what the compact requires in
2 the states of the United States yet be another tool for
3 the parties to use going forward.

4 That's -- I just offered that really by way
5 of trying to help the Court. There's a lot that can be
6 decided today and that is one thing that would actually
7 help the parties.

8 THE SPECIAL MASTER: Well, you know,
9 obviously I can't force the parties to agree upon
10 anything, within limits, but I -- or to the extent
11 there could be any agreement, I think that, hopefully,
12 facilitates trial and ultimately a resolution of the
13 case, but that needs to be developed.

14 Before we bring this issue to a close, is
15 there in anybody else who wants to be heard, and I'll
16 give the amici, anybody at this point want to be heard
17 at these issues dealing with discovery?

18 Yes.

19 MS. O'BRIEN: Yes, Your Honor, Maria --

20 THE SPECIAL MASTER: Could you come forward.
21 We do have a couple people on the phone.

22 MS. O'BRIEN: Yes, Marie O'Brien of El Paso
23 County Water Improvement District No. 1.

24 If we're going to talk about enhanced roles
25 of amici, I think I can talk about participation in

1 discovery and that context. There are a couple
2 clarifications that I wanted that I can either address
3 now or when you take it up, the more realistic issue of
4 participation of amici in the case as a general matter.

5 THE SPECIAL MASTER: Why don't we hold that
6 discussion. I want to bring the issue of the timing
7 and sequencing, bring that to a close and then we'll
8 talk about who's going to participate and the role of
9 amici.

10 MS. O'BRIEN: Okay. And on that, Your Honor,
11 we support the position of the United States and Texas.

12 THE SPECIAL MASTER: Okay. Did you have
13 something that you wanted to say, Mr. MacFarlane?

14 MR. MACFARLANE: Your Honor, just to move
15 things along, it seems to me that we could
16 simultaneously have a period of discovery focused on
17 the claims of the United States and Texas and then
18 running concurrently with legal briefing on issues
19 related to New Mexico's counterclaims, and those could
20 be going on simultaneously so there would not need to
21 be a complete cessation of discoveries, as New Mexico
22 has indicated, and that we, you know, based upon how
23 the motions regarding New Mexico's counterclaims shake
24 out, then discovery, there may or may not be
25 counterclaims left on which there could be discovery,

1 and that can be dealt with at that time.

2 THE SPECIAL MASTER: All right. Anything
3 further?

4 MR. RAEL: Your Honor, bringing to close the
5 issue of staggering discovery, I'd just like to make a
6 couple of quick points.

7 THE SPECIAL MASTER: Go ahead.

8 MR. RAEL: New Mexico strongly believes that
9 expert disclosures and discovery need to be staggered.
10 As I pointed out to you in our letter, staggered expert
11 disclosures are the norm in other original actions.

12 THE SPECIAL MASTER: Let me -- let me just
13 stop you, Mr. Rael. I don't mean to cut off your
14 argument, but I am going to sequence the expert
15 discovery, but it's probably not going to be as much
16 time as you're asking for.

17 I mean, I looked at these other orders, 60,
18 90 days seems to be the norm for sequencing of
19 discovery, and I'm probably going to be closer to one
20 of those numbers than 300 days.

21 MR. RAEL: If I may just quickly distinguish,
22 taking less than 30 seconds, Your Honor. If you
23 look at *Montana v. Wyoming* and *Kansas v. Nebraska* which
24 are the two that we talked about on the call about how
25 quickly the discovery was done in those.

1 In *Montana v. Wyoming* it was a very, very
2 narrow issue. It only had to do with irrigated
3 acreage. It was a very, very small issue, and so to
4 limit that to 60 to 90 days was easily doable.

5 And you look at *Kansas v. Nebraska*, they
6 already had a model in place by the time that the Court
7 ruled on the sequencing and the amount of time in
8 between.

9 That's not the case here, Your Honor. And
10 while Texas may think that New Mexico is simply trying
11 to delay, we would be extremely prejudiced because
12 we're not in the same position as those other original
13 actions.

14 Sequencing is appropriate, but New Mexico
15 does need a substantial amount of time to be able to
16 review these models. They are highly complex. The
17 data points are highly complex, and, again, we have
18 millions of inputs, Your Honor, and we're not in the
19 same position that those other original actions were in
20 when they granted the 60- to 90-day window, and that's
21 why we're proposing a ten-month window, and we think
22 that will be tight.

23 We think that Texas' proposal, you know,
24 frankly, is unrealistic and it's likely will need to be
25 extended if you adopt their proposal because we are not

1 in the same position as those other original actions.

2 THE SPECIAL MASTER: Hasn't New Mexico
3 already done some modeling of the river?

4 MR. RAEL: Your Honor, we have done some
5 modeling of the river, but to echo both Mr. Somach and
6 Mr. Wallace, Mr. Somach said we can take that modeling
7 off the shelf, that's just not true because we don't
8 know what their claims are going to be, what their data
9 points are going to be.

10 And I echo Mr. Wallace's concerns that just
11 because there's some data, doesn't make a model. And,
12 Your Honor, we don't know what they're going to be
13 claiming so we don't know what data input -- inputs and
14 outputs there are and whether or not those even exist
15 yet, and so that's why it's so important to not
16 prejudice the State of New Mexico and not put the
17 litigation at risk by further delaying, by simply
18 allowing us a little more time, Your Honor. We're not
19 in the same position as those other original actions.

20 MR. SOMACH: Your Honor, if I could ask a
21 question? The first thing I want to state, that some
22 of those sequencing cases actually had 30 days. So
23 that we certainly, if we're sequencing, we'd like to
24 see it closer 30 to 60 days than 60 to 90 days.

25 But my assumption is that those initial

1 disclosures will be on our complaint and their
2 counterclaims also, because their counterclaims
3 are -- there's no reason to distinguish between
4 counterclaims and claims in our complaint in terms of
5 expert disclosures, is there? I mean, I'm not asking,
6 I'm just stating, I don't see the reason for
7 distinguishing.

8 Presumably when they drafted their
9 counterclaims to the extent it had factual predicates
10 in it. They investigated before they pled those
11 things, and so I think we're entitled to get their
12 expert disclosure at the same time we provide our
13 disclosures on our complaint. They should be obligated
14 to provide their expert disclosures on their
15 counterclaims. So I'm kind of asking but kind of also
16 articulating a view of that's the way it should be.

17 MR. MACFARLANE: And, Your Honor, the United
18 States agree with that. This is a major distinction
19 between the cases that New Mexico cited in its letter
20 to you, *Florida v. Georgia*, *Kansas v. Nebraska* and
21 *Montana v. Wyoming*. None of those cases involved
22 counterclaims, this one does.

23 So we would echo Mr. Somach's observation
24 that having asserted counterclaims that presumably have
25 some factual bases so New Mexico should come forward

1 and disclose the experts upon which it relied.

2 MR. RAEL: Your Honor, as I said earlier, our
3 defense and our counterclaims are part and parcel with
4 one another and we can't fully develop our defenses or
5 our counterclaims without knowing what we're facing,
6 and, again, we're going to be facing two different sets
7 of experts, two different possible models, two
8 different sets of information.

9 But, New Mexico -- we were able to develop
10 our -- I mean, not develop, we were able to state what
11 our counterclaims are, and we did so in good faith and
12 with due diligence. But, again, it's limited because
13 we're not in the same position that -- we don't have
14 the luxury that Texas has had of sitting there for four
15 years, developing their complaints, and developing
16 their models, we just don't have that data yet.

17 We would be severely prejudiced if you
18 ordered the State of New Mexico to do its expert
19 disclosures on its counterclaims at the same time.
20 That's why our proposal is a reasonable one, Your
21 Honor. We need to see the data and then we will be
22 glad to, at that point then, disclose our experts on
23 both defense and counterclaims.

24 And at that -- I don't think there's a risk
25 of duplication of, you know, double depositions, as

1 Mr. Somach's said. I think any secondary depositions
2 would only be on new information which is the standard
3 as Your Honor knows, but New Mexico is just simply not
4 in the position to be able to do what Texas and the
5 United States are asking. We will be severely
6 prejudiced because we just have not had the opportunity
7 to do what Texas has done.

8 MR. SOMACH: I don't think we're asking
9 anything other than what Rule 11 requires. You know,
10 when you file a counterclaim or a complaint, you've got
11 to -- you can't just file and then say, we'll wait
12 until later to figure out what all that means. Again,
13 I think that the rule is they ought to be disclosing on
14 the counterclaim what we disclosed on our complaints.

15 MR. RAEL: And, Your Honor, the rules are
16 guideline here and, again, this is not your simple
17 run-of-the-mill complex case.

18 THE SPECIAL MASTER: Okay. I think
19 we've -- we've probably exhausted this at this time.

20 Let me tell you where I think I'm at and I
21 will get out an order sending out a schedule within the
22 next week. My goal here will be to try to get the
23 discovery in this case completed by July 1st of 2020.
24 That will be 25 months from the date of the case was
25 entered. I think that's a reasonable amount of time to

1 get that to complete discovery. It's probably somewhat
2 closer to New Mexico but not entirely of what you're
3 asking for.

4 And my hope is then to have about a
5 three-month window to file *Daubert* motions, motions for
6 summary judgment. Although, I will tell you -- and
7 anything I'm saying at this point is just very
8 preliminary -- you know, I'm cognizant of the fact that
9 whatever I do I'm -- you know, I'm serving the nature
10 of a magistrate judge for the Supreme Court. I'm going
11 to have to file a report of recommendation. And I know
12 that -- or I don't know, but I think my understanding
13 of what the Supreme Court wants is they don't want to
14 see the case bouncing back and forth. So it's very
15 possible that a dispositive motion may be taken with
16 the case and be part of any final order so that if
17 it's -- if it really does resolve the whole case, it
18 can go up to the Supreme Court just one time, and I
19 don't think that they are going to want -- to be very
20 happy if we're sending them reports every six months or
21 a year and then wait.

22 So my goal is to try to get this case to
23 trial by the fall of 2020. And I know it's way too
24 early to be talking about trial schedule, but I
25 understand that these cases can be very lengthy. They

1 can go on for multiple weeks in some cases. Hopefully
2 this one won't be that long, but I fully understand
3 that that's a very real possibility that we can be
4 trying this over the course of a fairly lengthy period
5 of time.

6 I don't think I probably have the energy to
7 do a six-week trial nonstop. It would probably be in
8 some segments or whatever it turns out to be but we'll
9 at least get it started. Hopefully, my goal is try to
10 get it started by the fall of 2020, and I'm going to
11 put out a schedule and that we'll allow us to work
12 towards that objective.

13 So with that, that sort of, I think, takes
14 care of the problem.

15 MR. SOMACH: There was one other issue that
16 was raised in the agenda and that scheduling conference
17 frequency and whether it should be in person.

18 THE SPECIAL MASTER: Yeah, so let's take that
19 up. My thought is that probably every 90 -- or every
20 30 days, we'll have a telephonic conference sometime
21 around the first week of each month and address any
22 issues that may have come up during discovery, and I'm
23 not wedded to this schedule. If it turns out that
24 that's not needed, we can modify it every 60 days. You
25 know if it turns out there's a lot of fights, we need

1 to do it every week, we'll do it every week. But let's
2 start on that basis and then probably do an in-person
3 about every three months and try to get everybody
4 together.

5 I don't know where I'm going to do them. I
6 may be doing them back in Iowa, but we'll at least
7 start -- is Denver the most convenient location for
8 everybody, do we think?

9 MR. MACFARLANE: It is for the United States,
10 Your Honor.

11 MR. RAEL: Same for New Mexico, Your Honor,
12 it would be much more convenient.

13 MR. SOMACH: It's convenient for Texas also.

14 THE SPECIAL MASTER: Pardon me?

15 MR. SOMACH: It's also convenient for Texas.

16 THE SPECIAL MASTER: It's easy enough for me
17 to get here and the Tenth Circuit has been fantastic in
18 making their facility available and I don't want to
19 impose on their hospitality too much. So we'll
20 probably do the scheduling in person, at least,
21 initially, but I anticipate the trial will not be here.
22 It will be either back in Iowa or in my own court in
23 St. Louis.

24 MR. MACFARLANE: Your Honor, may I ask a
25 question about your -- what you've now ordered, in

1 terms of a telephonic conference every 30 days, would
2 that be in lieu of the monthly reports that are
3 currently contemplated?

4 THE SPECIAL MASTER: No, probably be just a
5 supplement. That's why I'm saying, I'm thinking the
6 first week we'll do the monthly reports and then we
7 will have a telephonic conference and talk about any
8 issues that are identified in the report.

9 Any other questions about any of that or the
10 Court will move on?

11 (No verbal response.)

12 THE SPECIAL MASTER: Actually, it's 20 to 11,
13 why don't we take about a ten-minute break and then
14 we'll come back. All right.

15 (A recess was taken.)

16 THE SPECIAL MASTER: Please be seated.

17 I think that we can move through the rest of
18 this maybe a little more quickly. I'm going to skip --
19 the next thing I had in the draft agenda was the role
20 of amici, but I'm going to skip all that for a minute
21 and talk about Colorado's Motion to Approve a
22 Non-waiver Agreement.

23 What do you see as your role in this,
24 Mr. Wallace?

25 MR. WALLACE: Yes, Your Honor, that's a very

1 good question. Colorado is here today as a party. It
2 has asserted no claims against any of the other parties
3 and has no claims really asserted against it yet.

4 A bit tongue and cheek, but Colorado will
5 probably be fine being dismissed from the action
6 altogether. I'm not sure all the other parties will
7 consent to that. The reason being, if I can presume,
8 is that they want Colorado to be bound by whatever the
9 ruling is interpreting how the Rio Grande Compact
10 operates its obligations under several states. Given
11 that, there is some potential for Colorado having an
12 interest in what that interpretation might be.

13 You asked earlier of some of the other
14 parties, those in the Middle Rio Grande district why
15 would they be concerned, talking about water
16 essentially from the Elephant Butte Reservoir down at
17 the end of the compact section of Rio Grande River in
18 Texas. Colorado's interests are not exactly the same.

19 But we do have some concern, hypothetical at
20 this point, which is why we have not tried to assert
21 any claims at this stage. And those hypothetical
22 concerns deal with the accumulation of credits and
23 debits under Article VI, how those are handled at the
24 Elephant Butte Reservoir. It's possible that a ruling
25 could influence how those credits and debits are

1 accounted for.

2 Article VII of the compact might impose
3 storage limits within Colorado's own storage reservoir
4 depending on the amount of water within the project
5 storage. So, again, how that works out has the
6 possibility of affecting Colorado.

7 Under Article VIII of the compact, Texas, in
8 some circumstances, may demand the lease of storage
9 water to bring the project storage up to certain levels
10 under the compact. And, again, I say these are all
11 hypothetical situations, so if we are to remain as a
12 party, we are monitoring with those as our interest.

13 In the proposed agenda this Court asked
14 questions regarding what is Colorado's interest and
15 expressed some concern regarding extended discovery.
16 At this point in time, I do not think that is a very
17 realistic risk. All of these items under Article VI,
18 VII and VIII of the compact, I anticipate being covered
19 thoroughly by all the other parties who are actively
20 engaged in the discovery.

21 When they are building groundwater models,
22 looking at administration of the Rio Grande project, I
23 anticipate the United States and Texas and New Mexico
24 to thoroughly hash that out, and through that, Colorado
25 should be able to inform its own interest to see if

1 there's a potential impact there, so I do not see us
2 coming in later in these proceedings bringing up new
3 interests the other parties have not yet raised or
4 trying to conduct discovery that has not already been
5 done.

6 THE SPECIAL MASTER: Do you see Colorado
7 having any concern about the 2008 operating agreement?

8 MR. WALLACE: At this time I will just say it
9 may be difficult to fully answer. It's an agreement
10 that did not involve Colorado in an area of the Rio
11 Grande that we do not take any delivery from. My
12 understanding of that agreement is it's an agreement
13 about the management operation of the Bureau of
14 Reclamation Project vis-à-vis the two contracting
15 irrigation districts.

16 The agreement, in and of itself, I don't
17 think presents a great interest to Colorado, but the
18 interplay, if any, between the agreement and compact
19 obligations to the states in line. So it's not the
20 agreement itself, it, again, raises to what does this
21 Court do when it interprets the compact. That's where
22 our interest lies, not in the administration solely a
23 reclamation project.

24 THE SPECIAL MASTER: Well, and I would assume
25 that if at some point the parties could come to some

1 agreement, and I don't know if that's even possible in
2 this case, that might result in the modification of
3 compact. Obviously, the compact would have to be a
4 party in any such agreement. Even if it didn't impact
5 Colorado's obligation, it already affected the
6 off-stream obligations, you still, as an original
7 party, would have to agree, I assume.

8 MR. WALLACE: Your Honor, I think if the end
9 result was to be an amendment of the 19 -- of the
10 existing Rio Grande Compact, I would agree. As an
11 original compact, the State of Colorado would need to
12 consent to that amendment.

13 If it were a separate compact, I'm thinking
14 along the lines of the Colorado River Compact, which a
15 portion of the water comes from a number of lower basin
16 states. Decades thereafter, the upper basin states
17 among themselves entered into a separate Upper Basin
18 Compact. If there were a separate compact among Texas
19 and New Mexico, I think we would need to take a look at
20 that. And whether we would call it an amendment or
21 simply a separate compact.

22 Just to inform Your Honor, we have, as
23 between Colorado and New Mexico, the amended Costilla
24 Creek Compact. Costilla Creek is a tributary to the
25 Rio Grande that lines its way between Colorado and New

1 Mexico several times. That is, if you will, an
2 overlying compact within the greater Rio Grande basin
3 that the states of Colorado and New Mexico amongst
4 themselves only decided how to split that.

5 THE SPECIAL MASTER: Well, as I understand
6 it, as between New Mexico, Texas and the United States,
7 you have no objection to the proposed agreement of
8 nonparticipation agreements, you've all agreed to it;
9 is that right?

10 MR. SOMACH: We have.

11 MR. MACFARLANE: That's correct, Your Honor.

12 MR. RAEL: Yes, Your Honor.

13 THE SPECIAL MASTER: All right. Well, then
14 I'll sign the proposed order you submitted and get that
15 out.

16 Let me ask this, in terms of parties to the
17 litigation, are there any Native American interests
18 that have an interest in this litigation?

19 MR. MACFARLANE: Your Honor, we're not aware
20 of any.

21 THE SPECIAL MASTER: Because I know -- I know
22 that they -- there's been various Native American
23 tribes have had claims involving other rivers and other
24 water rights issue, but there's none in this case?

25 MR. MACFARLANE: That's correct, Your Honor.

1 THE SPECIAL MASTER: Okay.

2 MR. SOMACH: I believe that to be the case
3 because the focus of the litigation is below the
4 reservoir. The independent interests are in the Middle
5 Rio Grande and above, and other than the hypothetical
6 situations that Mr. Wallace has perhaps articulated,
7 you know, this is pretty much isolated to what's
8 happening in the middle of the Elephant Butte
9 Reservoir.

10 THE SPECIAL MASTER: All right. Well, going
11 back then to the amici. As I look at this issue, it
12 would appear that there's at least two different types
13 of amici in this case. One, you have the two water
14 districts which are actually contract parties which the
15 Supreme Court says have been incorporated into the
16 compact. And that would seem that they would have an
17 interest that would be different or more enhanced than
18 the interest of, say, the City of Albuquerque which is
19 more monitoring the litigation to make sure that
20 something doesn't happen that might be adverse to them.

21 Assuming that's correct, how we accommodate
22 those two different interests is something I'm not
23 entirely sure is not already handled with, I guess,
24 welcoming comments or suggestions. Certainly when it
25 comes to the 2008 operating agreement, the El Paso and

1 Lower Butte of the two water districts are parties to
2 that agreement. I certainly would think they would
3 have a lot more say about its validity than, say,
4 somebody who's a stranger to the agreement.

5 But anyway, so let me see, I'm sorry, your
6 name again?

7 MS. O'BRIEN: It's okay. I'm Maria O'Brien.

8 THE SPECIAL MASTER: You wanted to speak
9 about -- you represent El Paso, right?

10 MS. O'BRIEN: That's correct.

11 THE SPECIAL MASTER: All right. Do you want
12 to come forward?

13 MS. O'BRIEN: Sure. So, Your Honor, we
14 completely agree that there is a distinct interest
15 of -- well, EP No. 1, El Paso County Water Improvement
16 District No. 1, the Elephant Butte Irrigation District,
17 EBID, that are really the beneficiaries of the Rio
18 Grande project, which the Court, the Supreme Court has
19 already recognized in this case as intertwined, the
20 project and the compact are intertwined, as well as
21 those contracts relating to the project. We're a party
22 to the contract, the irrigation districts, EP No. 1 and
23 EBID and the United States.

24 And the districts are not mere bystanders
25 with regard to the operations of the project that

1 currently have a 2008 operating agreement, which is
2 absolutely vital to the operation of the project and
3 ensuring delivery of water, testing compact water to
4 the project -- to EP No. 1 downstream.

5 The districts hold title to a myriad of
6 project works and are also parties to other contracts
7 that Your Honor has mentioned. And, indeed, Your
8 Honor, it has been referenced today, and I know you've
9 reviewed them, some of those contracts have now been
10 put directly at issue by the State of New Mexico's
11 counterclaims.

12 In fact, New Mexico seeks to void the 2008
13 operating agreement as well as a contract that EP No. 1
14 has with the United States and the City of El Paso and
15 what we call the Miscellaneous Purposes Act allowing
16 project water to be used for admissible purposes for
17 the City of El Paso.

18 Moreover, the bulk of the counterclaims, and
19 Mr. Rael and half the State of New Mexico references
20 this, the bulk of those counterclaims are taken from a
21 case that is stayed in Federal District Court in New
22 Mexico to which EP No. 1 and EBID are actually parties.
23 We are in that case defending the claims that New
24 Mexico has now brought here, so we cannot sit by
25 without more enhanced, as Your Honor has called it,

1 participation and enhanced role in this litigation.

2 And I believe Your Honor is aware that, you
3 know, in these very unique cases -- original action
4 cases, Special Masters have often fashioned more active
5 roles for a certain kind of amici. Like *Nebraska v.*
6 *Wyoming*, Original 037 is a good example where there was
7 enhanced participation of the amici in that case.

8 Your Honor, based on the counterclaims that
9 we now have pending in this case, EP No. 1 actually may
10 be compelled to file a motion to intervene to defend
11 its interest in the contracts and the interest that it
12 has that have now been challenged by the State of New
13 Mexico.

14 I know Your Honor's aware that we moved
15 previously to intervene. The Special Master, based on
16 the posture of the case at that point in time, denied
17 that motion to intervene. But the case has markedly
18 changed as we now have the counterclaims before Your
19 Honor. We don't know exactly how those are going to be
20 prosecuted.

21 We certainly support the suggestion or the
22 proposal of the United States and Texas with those
23 counterclaims be subject to early motions, a 12(c) or
24 motion for summary judgment. Regardless, as long as
25 those counterclaims remain pending and also by virtue

1 of the district's distinct interest in the project and
2 project operations, we believe that EP No. 1 and EBID
3 require an enhanced role, a more active role in this
4 case than one might otherwise see in an amici try to
5 take part in.

6 And to break that down as a practical matter,
7 we fruitfully acknowledge and respect concerns about
8 logistics. But we believe that we need to structure
9 things to allow the two districts to protect their
10 interest without placing a burden on other parties and
11 allow things to proceed expeditiously.

12 So I think one major category is the ability
13 of the districts to file briefs or other pleadings they
14 feel are necessary or germane to their interest without
15 seeking leave of the Court. I think that can be done
16 without burdening the parties.

17 With regard to discovery and breaking that
18 down, we have document production, we have written
19 discovery and we have depositions. I think with regard
20 to document production and written discovery, that has
21 already been addressed in large part, and I think that
22 what I understand the proposal to be is that there will
23 be a repository or repositories that are accessible to
24 all the amici, so all amici will have access through
25 those repositories. The one point of clarification I

1 did want on that was there was talk of notice, how
2 would amici get notice that discovery was propounded
3 and/or responded to.

4 I think that we do need more than simply a
5 notice that there's new documents available. I think
6 that certificates of service along with, I would
7 propose, the actual discovery request, and then
8 certificate of service saying that a discovery request
9 has been responded to. I don't think that would pose
10 any significant burden or really any burden on the
11 parties with regard to that.

12 Again, I just think Your Honor does not care
13 or feel it necessary to file those certificate of
14 services, but to serve on parties in amici, the
15 certificate of services along with the request and then
16 when responses are filed, what those are. I think that
17 would adequately cover the need on the written
18 discovery as well as document production.

19 THE SPECIAL MASTER: Are you asking for any
20 rights to propound discovery yourself?

21 MS. O'BRIEN: Your Honor, not at this point
22 in time. I believe that we are sufficiently aligned
23 with the United States and Texas that we will be able
24 to work with those parties to address any discovery
25 concerns. But going back to my first item about the

1 ability to file briefs and/or any other necessary
2 pleadings with the Court without leave if something
3 arose that we cannot foresee at this point in time.
4 Certainly, a motion for protective order on our own
5 behalf, but also with regard to the need to file
6 discovery if it did arise, a diversion of interest with
7 regard to the United States and Texas.

8 So what I'm asking for, I think, is
9 flexibility with regard to that, not completely
10 open-ended, but I'm asking the door not to be shut,
11 Your Honor, as the case evolves because of the
12 significant interest of the district. So we're seeking
13 to thread the needle, if you will, to ensure the case
14 moves forward expeditiously and efficiently while at
15 the same time enabling the district to fully protect
16 their very distinct and unique interest in this case.

17 THE SPECIAL MASTER: Is the Elephant Butte
18 District and the El Paso District sufficiently aligned
19 that you could file joint -- a joint brief, or would
20 you be looking at each if you file your own individual
21 brief or what are you asking for now?

22 MS. O'BRIEN: Your Honor, Ms. Barncastle is
23 on the line so she can amplify or add to what I'm going
24 to say. I would say that the districts are very much
25 aligned. That said, historically in this case, we have

1 filed separate briefs where there's been overlap, so I
2 think we would anticipate that we would be filing
3 separate briefs, but we certainly would continue to
4 work together to be sure that we're not creating, you
5 know, unnecessary filings that, indeed, would
6 articulate the same facts.

7 THE SPECIAL MASTER: So you've talked about
8 written discovery, what's your request regarding
9 depositions?

10 MS. O'BRIEN: On depositions, Your Honor,
11 specifically, we would request that we be allowed to
12 attend and participate as necessary in depositions. By
13 participate, I mean, ask questions, and if it were
14 necessary, based on the particular witness, with regard
15 to categories of issues relating to project operations,
16 the 2008 operating agreement, and any other contracts
17 that the districts are a party to.

18 And on that, again, we certainly would ask
19 for some flexibility to request attendance at other
20 kinds of depositions if there were some spillover.
21 Again, Your Honor, this case, in terms of the
22 discovery, at least, is just commencing. New Mexico's
23 counterclaims are only relatively recently filed, we
24 don't know how those are going to be prosecuted. I
25 think we'll know a little bit more after we have

1 initial disclosures, but at this point we're
2 specifically asking for participation and attendance at
3 those kinds of depositions I noted, whether they be
4 expert or fact, with the ability to request additional
5 participation if the need arises.

6 THE SPECIAL MASTER: If you -- if there are
7 depositions that you feel you want to attend and
8 possibly even question a witness, do you anticipate any
9 reason why you could not give advance notice as to what
10 you plan at those depositions?

11 MS. O'BRIEN: No, Your Honor, we would be
12 more than willing to give advance notice within that
13 regard, so the answer is yes.

14 THE SPECIAL MASTER: All right.

15 MS. O'BRIEN: And, Your Honor, just looking
16 down the road, I think in terms of, you know,
17 participation at trial, at this point I would say it's
18 to be determined because there's a lot that will come
19 forward that will evolve in terms of the claims that
20 remain at issue and how the case evolves. We're not
21 asking for any particular kind of participation, we
22 would leave that open.

23 We would note, however, if at some point this
24 case were to be ordered to mediation or otherwise take
25 that course, we believe that, certainly, the districts

1 are essential participants in any mediation to resolve
2 the disputes that have been brought forward.

3 THE SPECIAL MASTER: Anything further?

4 MS. O'BRIEN: That that's all I have right
5 now, Your Honor, thank you.

6 THE SPECIAL MASTER: Before I let any of the
7 other parties -- Ms. Barncastle can you still hear us?

8 MS. BARNCASTLE: Yes, Your Honor, I'm here.

9 THE SPECIAL MASTER: Is there anything you
10 want to add from Elephant Butte's perspective?

11 MS. BARNCASTLE: Please, Your Honor, thank
12 you.

13 I would just first start off by echoing
14 Ms. O'Brien's comments. At this point we have
15 discussed these issues at extreme lengths and we are
16 not set on the historic issues, the issues raised with
17 that, and the EBID has no deviation from what, you
18 know, El Paso District would seek to do in moving
19 forward with depositions or written discovery or even
20 just engagement at the point.

21 So as long as the operating agreement is at
22 issue and the Federal District Court case is basically
23 being tied to this case, we certainly believe we are in
24 an enhanced role. There are multiple circuit court
25 precedents that says that so long as a compact is at

1 issue, all parties through that compact are necessary
2 and indispensable, so that's one of the primary reasons
3 we were looking at, and potentially are still looking
4 at, a new -- a renewed motion to intervene, but at this
5 point in time -- and our participation might take care
6 of that issue, my main concern is that, depending on
7 how these issues are sorted out, Your Honor may have a
8 problem when it comes to a final order if the two
9 districts are not parties to this litigation. However,
10 EBID, and I believe El Paso No. 1, will be supporting
11 the United States and Texas on these early motions to
12 deal with some of these issues, and if we prevail, that
13 won't be an issue.

14 As far as filing together versus separately,
15 EBID and EP No. 1 has coordinated consistently in the
16 past, so that when it's meaningful, we do file
17 together. An example of that is one of our recent
18 letters to Your Honor. So, you know, we have the
19 ability, and certainly do have the interest in filing
20 together when it's possible.

21 Occasionally our interests are not completely
22 aligned due to the fact that we are operating two
23 separate portions of the district. And EBID, for
24 example, doesn't have a third-party contract with a
25 municipality for use of water other than for

1 irrigation, so there are occasionally differences.

2 I would request that we have the ability to
3 be flexible and that while we do seek intent status, we
4 would want the ability to have some sort of expedited
5 manner of approaching the Court with the ability to
6 deviate in certain circumstances, say, for example, we
7 decide we need to seek our own deposition to protect
8 our own interest, I would certainly doubt that would be
9 the case, I think we are going to remain completely
10 aligned with the United States and Texas on our issues
11 related to the operating agreements, however, if for
12 some reason we don't, we would want the ability to
13 approach Your Honor quickly so that we can protect our
14 interest moving forward.

15 Otherwise, Your Honor, I have nothing further
16 to add other than that, again, I would reiterate
17 everything Ms. O'Brien said, EBID is completely on
18 board with at this point.

19 THE SPECIAL MASTER: Well, let me summarize
20 what I think -- what I think we may be adding in terms
21 of the amici, and then I'll give the other amici and
22 any of the parties a chance to address what I think I'm
23 hearing, which is that all amici will have access to
24 the vault that we previously discussed and will have
25 access to all documents.

1 As to the -- and that none of the amici, with
2 the exception of the Elephant Butte Water District and
3 El Paso No. 1, would participate in depositions. But
4 that El Paso and Elephant Butte will be allowed to
5 participate in those depositions where their interests
6 are directly at stake, but they will have to file a
7 notice of intent to participate sufficiently in advance
8 of the deposition so that the parties will have an
9 opportunity to object if they feel that they're abusing
10 that privilege or for some other reason shouldn't be a
11 participant. But that they would not propound or be
12 involved in any of the written discovery except upon
13 application of leave of the Court.

14 And that as far as the other amici are
15 concerned, if they feel that there is a particular
16 deposition or a particular proceeding that they wish to
17 be a participant in and ask questions, that they would
18 always have the right to seek permission in a
19 particular situation. It's a general rule that without
20 leave of the Court, that they would not be a
21 participant in the depositions.

22 As far as briefing's concerned, I guess I'm
23 not sure where we are with all the various parties. I
24 would think that all the amici would have some right to
25 file briefs if they feel their interests are being

1 affected by whatever is being discussed.

2 Certainly, we talked a little bit about the
3 City of Albuquerque and in most cases, I assume, they
4 would not be interested in filing briefs, but if there
5 is something, I can't think of any other way to bring
6 it to my attention by filing a brief, so I would
7 probably not preclude their right to file something if
8 they think their interests are being affected so
9 everybody knows what their position is.

10 Sort of having outlined that, is that -- is
11 that pretty much what you're asking for, Ms. O'Brien?

12 MS. O'BRIEN: Your Honor, at this point, I
13 think that sounds appropriate, and I appreciate your
14 consideration.

15 THE SPECIAL MASTER: Okay. What about the
16 other amici, anybody want to speak for them or you have
17 a problem with where you would fit into this whole
18 scenario?

19 MS. DAVIDSON: Your Honor, I'm Tessa
20 Davidson, I represent New Mexico Pecan Growers. I do
21 think, as just a general comment, we would -- and I
22 have concerns with the other New Mexico amici and I'm
23 going to give you, hopefully, our combined responses on
24 these issues.

25 We would actually stand for the proposition

1 that if a party is allowed to intervene in this case
2 and participate as a party on operating agreement
3 issues, then they can act like a party.

4 THE SPECIAL MASTER: One second. I'm having
5 a little trouble with the feedback. The acoustics in
6 this room are not great.

7 MS. DAVIDSON: Does it help if I don't use
8 the microphone?

9 THE SPECIAL MASTER: No, you have to use
10 that.

11 MS. DAVIDSON: Okay.

12 THE SPECIAL MASTER: There you go.

13 MS. DAVIDSON: I'll restate our position. I
14 have conferred with New Mexico amici and I'm going to
15 give you combined responses to this issue on this
16 proposition for the enhanced goal for the irrigation
17 districts. We do believe that particular amici in this
18 case, that are already before the Court, will be
19 helpful potentially on specific matters.

20 And, yes, on the operating agreement issue
21 that has now come into play with the counterclaims, we
22 do see that there is a different concern than what was
23 raised and evaluated by the Special Master, the first
24 Special Master in the first report in response to
25 United States' and Texas' claims. And if you'll

1 remember in that first Special Master report, he
2 actually said it's quite possible that EBID actually
3 has less of an interest in this case, if any interest
4 at all, than other affected Rio Grande water users who
5 are claimants of New Mexico, and those are my clients,
6 Your Honor. They are groundwater users, they use
7 surface water supply and groundwater. And at the time
8 only Texas and United States complaints were at play,
9 that was the perception at that time.

10 We've heard Mr. Somach today, for example,
11 talk about the acreage amounts, the consumptive
12 irrigation water requirement amount. Those kind of
13 issues are very important to my client and it would be
14 also a utility use of water and Los Cruces' use of
15 water is the water agreement of the Rio Grande. Those
16 are the kind of issues, those particular matters, that
17 will be very important for them to be able to attend
18 depositions, and not necessarily participate. I really
19 have a little bit of trouble with the concept of an
20 amici being able to ask questions at depositions, set
21 depositions, without really being a party and being
22 bound as a party would be bound in litigation. I think
23 there's a little bit of a slippery slope there.

24 We would ask that all amici be treated
25 equally in whatever the Court decides. We would ask

1 for the right to attend depositions. Under the Federal
2 Rule of Procedure 26, there is no automatic right to
3 exclude folks from attending depositions.

4 If a party wants, say, New Mexico Pecan
5 Growers, to attend a deposition to potentially assist
6 and ask some questions in eliciting facts regarding
7 pecan acreages, we should be allowed to attend.

8 Parties have the opportunity to file motions
9 for protective orders if they think and they can show
10 cause that our attendance would harass or be an undue
11 burden on them, but I think an automatic prohibition
12 isn't contemplated by the rules, and I think we should
13 be allowed to attend with, of course, accommodations
14 for trying to streamline this and keep things efficient
15 and robust.

16 THE SPECIAL MASTER: My one concern, or maybe
17 more than one, is I don't want the discovery, however,
18 to get bogged down over issues of scheduling. It's
19 going to be difficult enough to schedule between the
20 named parties. If the amici are going to have some say
21 in when a deposition's going to be held or something of
22 that nature, I just don't want the case to get bogged
23 down on the logistics because there's just so many
24 parties and so many moving pieces in trying to schedule
25 something.

1 MS. DAVIDSON: And I understand, Your Honor,
2 and we're not proposing that we would have any say in
3 scheduling. It's just that we be allowed to
4 participate if we can, given the schedules. In
5 consulting with the State, we understand if there are
6 some ideas to have some remote Skype-type instantaneous
7 transcript electronically during depositions, and all
8 of those accommodations, we certainly would cooperate
9 on the logistics. It's not our intent to make this
10 more burdensome on the parties.

11 We're not asking for party status on
12 scheduling depositions, just that we be provided notice
13 of upcoming depositions and to the extent our clients'
14 interest are at stake, that we have the opportunity to
15 attend.

16 THE SPECIAL MASTER: Well, and I think, as
17 I've always said, I think all the amici should have the
18 right to file briefs or motions or protective orders.
19 If they think their interests are being affected, I
20 think they should have every right to tell me that and
21 I don't know of any other way to do it but to allow you
22 to file a brief or protective order or whatever it
23 might be. I think that's -- I think that's definitely
24 going to be the Court's (concern) attitude so, but you
25 also want the right to attend any depositions as an

1 observer, not a participant?

2 MS. DAVIDSON: Yes, Your Honor, thank you.

3 THE SPECIAL MASTER: Okay. Any other amici
4 want to speak before I ask the parties for their views?
5 Go ahead.

6 MR. STEIN: Good morning, Your Honor. My
7 name is Jay Stein, I'm counsel of record for the City
8 of Las Cruces, New Mexico. I have some remarks to make
9 with respect to the discovery provisions in the case
10 management plan.

11 Let me say that the New Mexico amici had met
12 amongst themselves and have agreed on the points that
13 I'm going to bring out, and those amici are the City of
14 Las Cruces, the Albuquerque Bernalillo County Water
15 Utility Authority, it's essentially the City of
16 Albuquerque, and New Mexico Pecan Growers, and the New
17 Mexico State University agreed on these points.

18 The first issue I wish to address would be --
19 bring the Court's attention to is Section 7, and
20 specifically Sections 7.2 and 7.3, which deal with the
21 time frames for responding to the request for
22 production of documents. The time frame under
23 Section 7.2 for parties allows 45 days for objections
24 and then 90 days for the actual production; whereas,
25 the time frame for amici is 30 days for objections and

1 then 45 days for production of documents.

2 The request that we make, Your Honor, is that
3 the amici be given the same time frame as the actual
4 parties in 7.2, which is 45 days for objections and
5 90 days for production. And the reason that we request
6 this, Your Honor, is that the -- with the exception of
7 the City of Albuquerque, the amici in the Lower Rio
8 Grande are actual water users. We expect there's going
9 to be discovery that will be directed against us and
10 there may be several number of documents that we have
11 to organize and provide electronically as Your Honor
12 sets forth in rule propose 7.2.1.

13 Secondly, Your Honor, Section 7 also has a
14 number of provisions that relate to privilege, and
15 those are in Section 7.2.3, and they relate to the
16 retention of privilege for attorney-client matters and
17 work product as well as addressing inadvertently those
18 documents and retaining the privilege for those, and we
19 put requests that those same provisions also apply to
20 the amici which may be the targets of discovery in this
21 proceeding.

22 So, essentially, two requests under Section 7
23 that the amici be given the same time for objections
24 and productions as the parties, and that it's clear
25 that the protective provisions of 7.2.3 also apply to

1 amici, and as well, the provision in Rule 10, which is
2 the provision related to privilege logs and that amici
3 may be filing motions on.

4 Ms. Davidson has addressed the issues related
5 to amici participation or attendance at depositions,
6 and we would reiterate just what she said, that there
7 may be individual or particular depositions that are of
8 specific interest to an amicus that we would like to
9 attend or observe, but if -- but it's our belief that
10 amici participation in depositions should not -- should
11 not differentiate amongst amici, that if one group is
12 allowed to participate, others that are attending may
13 participate, but at a minimum, those with
14 particularized interest may be allowed to attend.

15 Finally, Your Honor, the case management plan
16 provides a provision in Section 12 for subpoenas to be
17 issued for -- to nonparties, for deposition of
18 witnesses, that's in Section 12.3.2, and the subsequent
19 paragraphs in that section provide for the process for
20 objections, and Section 12.1 is mentioned.

21 The point I'd like to make is that amici or
22 nonparty depositions also have the dispute provisions
23 of 12.2 incorporated for them as well.

24 THE SPECIAL MASTER: So let me make sure I
25 understand, you're saying that that's where in 12.2, it

1 would refer to a dispute involving a party, that that
2 be changed to read dispute involving party and/or
3 amici?

4 MR. STEIN: I'm sorry, which provision are
5 you referring to, Your Honor?

6 THE SPECIAL MASTER: Well, I guess what I'm
7 asking is what you're referring to. I'm looking at
8 12.2.2, and I guess I'm trying to understand what are
9 you asking.

10 MR. STEIN: You have in 12.3.2 -- 12.3.2
11 there's a provision that relates to subpoenas for
12 depositions. I assume from nonparties, such as amici,
13 and you reference a dispute provision in 12.1. We
14 would also like the dispute provision in 12.2 included,
15 and that is the one that refers to disputes that occur
16 during the course of depositions itself.

17 THE SPECIAL MASTER: Okay. All right.

18 MR. STEIN: What we're trying to do here,
19 Your Honor, simply is to conform a number of discovery
20 provisions that the amici or nonparties may deal with
21 with the -- with those that apply to actual parties.
22 Thank you, Your Honor.

23 THE SPECIAL MASTER: Thank you, Mr. Stein.

24 Was there someone -- do you want to be heard,
25 sir?

1 MR. CAROOM: Yes, Your Honor, Doug Caroom for
2 the City of El Paso. El Paso gets roughly 50 percent
3 of its water supply, depending on the year, through the
4 project, through these miscellaneous purposes contracts
5 that have been mentioned and are challenged by the New
6 Mexico counterclaims, so I would submit that El Paso
7 has an enhanced interest in that particular
8 counterclaim.

9 The other half of El Paso's water comes
10 largely from pumping groundwater, and that is what is
11 challenged, as we heard from counsel of New Mexico
12 today, as having a significant impact in New Mexico, so
13 we're anticipating significant discovery on those
14 issues. I endorse the suggestions that have been made
15 by New Mexico amici regarding paragraph 7 and
16 paragraph 12 in the case management claim. We believe
17 that those are appropriate protections for the amici
18 also.

19 So we would seek the possibility of enhanced
20 participation on those two counterclaims by New Mexico
21 to the extent they stay in the case and endorse
22 significance regarding management, regarding
23 modification of the case management plan for discovery
24 for amici.

25 Thank you, Your Honor.

1 THE SPECIAL MASTER: Thank you.

2 Any other amici?

3 MR. MILLER: Good morning, Your Honor. I'm
4 Drew Miller, I'm counsel for amicus party Hudspeth
5 County Conservation and Reclamation District No. 1. My
6 general comment is that I think the approach that you
7 tentatively set forth a few minutes ago, I think it's
8 fair, it makes sense. I also want to say that my
9 client has no objection to enhanced roles that are
10 being requested by the two districts, El Paso County --

11 THE SPECIAL MASTER: Who do you represent?

12 MR. MILLER: Hudspeth County Conservation and
13 Reclamation District No. 1, a little subdivision in the
14 State of Texas.

15 And, again, we have no objection to the
16 enhanced role or roles being sought by the two primary
17 districts, the El Paso County Water Improvement
18 District No. 1 and the Elephant Butte Irrigation
19 District.

20 I'd like to just -- I know I'm maybe echoing
21 Ms. Davidson, but I'd like to ask or reiterate a
22 request for one adjustment or perhaps clarification to
23 the tentative approach you're suggesting; that is, I
24 would request that all amicus parties be allowed to
25 attend depositions, not to participate but to attend

1 and observe depositions, with the proviso that we're
2 not going to interfere with scheduling or, certainly,
3 rights to determine or help determine schedule.

4 So with that -- with that additional request,
5 I will support your approach.

6 THE SPECIAL MASTER: Thank you, Mr. Miller.

7 MR. BROCKMANN: Your Honor, I guess, first of
8 all, I'd just like clarification. You had indicated
9 earlier that you did not -- weren't too concerned with
10 amici filing briefs in this matter, as I understood --

11 THE SPECIAL MASTER: I wasn't too concerned
12 with what.

13 MR. BROCKMANN: -- amici filing briefs in
14 this matter on interests that they're concerned about.

15 THE SPECIAL MASTER: I mean, I'm assuming --
16 you know, I'm not inviting them to file briefs on every
17 issue, but to the extent that they feel that their
18 particular interests would be impacted by something
19 that's being adjudicated.

20 You know, as an example, I assume the Pecan
21 Growers would be very interested in the validity of the
22 2008 operating agreement, and if they want to be heard
23 on that issue, I would not cut them off from doing so.
24 You may be too, you probably have less interest in that
25 issue than, say, the Pecan Growers.

1 MR. BROCKMANN: No, you're absolutely
2 correct, Your Honor, that each of the amici, I think,
3 have a particular interest. As you indicated, the
4 Pecan Growers are going to look at CIR, and the City of
5 Las Cruces and Albuquerque are more concerned with
6 municipal water supplies and effects that way.

7 The question that I had is the case
8 management plan in paragraph 3.3, amici are allowed to
9 file briefs with leave of the Master, and I'm not sure,
10 based upon your comments today, whether we still have
11 to file a motion for leave to file a brief. I do think
12 they will be limited to something that particular amici
13 is interested in.

14 But right now under the Supreme Court
15 Rule 37(4), already the amici, when you represent a
16 city, town, or a county or similar entity, do not have
17 to file a motion for leave to file a brief. And I
18 guess I would request that the case management plan be
19 amended so that we don't have to file a motion for
20 leave to file a brief when the Supreme Court rule right
21 now gives us that right without motion for leave to
22 file. I do think the amici have done circumspect in
23 the past in trying to limit their comments, and we
24 definitely intend to continue to do so.

25 THE SPECIAL MASTER: What I'm suggesting, and

1 I'll hear from the parties as to whether they have an
2 objection, what I am suggesting is all amici have a
3 right to file based upon their interests.

4 MR. BROCKMANN: We would absolutely agree
5 with that, Your Honor.

6 THE SPECIAL MASTER: Okay.

7 MR. BROCKMANN: As to the last matter, I just
8 want to reiterate, again, we had involvement with the
9 Nebraska-Wyoming case, and in that case, there is some
10 real similarities of what we have here. We had a
11 Federal irrigation project that went across state lines
12 with some irrigation districts in Wyoming, some in
13 Nebraska. We had irrigation districts that were amici
14 public power, and irrigation districts that were amici,
15 environmental groups that were amici. And in each of
16 those cases all of the amici were treated the same,
17 Special Master Olpin coined the phrase "litigating
18 amici." And, basically, the participation is pretty
19 similar to what you've outlined, I believe, here today
20 when the parties, the amici were allowed to file briefs
21 including, in some cases, implied briefs. They were
22 allowed to attend depositions. I don't recall that any
23 participated. They usually went through their state
24 counsel for questions that they may have, but they were
25 allowed to attend depositions. And when we got to

1 status conferences or even hearing, they were allowed
2 to speak, usually, with a reduced time limit from the
3 parties.

4 But in that case, clearly, we had, again,
5 irrigation districts across state line, all amici were
6 treated equally, and there was no really enhanced
7 roles, and I still think that can serve as a good guide
8 for efficiency in this litigation.

9 THE SPECIAL MASTER: How many amici were
10 involved in that lawsuit?

11 MR. BROCKMANN: Right off the top, it was
12 somewhere between five or six or seven.

13 THE SPECIAL MASTER: Okay. Thank you.

14 MR. BROCKMANN: Thank you.

15 THE SPECIAL MASTER: Any of the other amici
16 want to be heard?

17 (No verbal response.)

18 THE SPECIAL MASTER: Parties, do you have
19 anything you wanted to say about what we were
20 discussing?

21 (No verbal response.)

22 THE SPECIAL MASTER: Mr. Somach, you're
23 nodding your head.

24 MR. SOMACH: If I could, a couple of things.
25 Let me start with the case management plan. I do not

1 have any problem with the suggestion in terms of
2 Section 7. I don't actually understand why the dates
3 were different upon reflection.

4 On Section 12, and that's the dispute
5 provision, as I read it, the case management plan does
6 provide the same ability to appeal to the Special
7 Master, that's the reference in Section 12.1, which is
8 in each one of the paragraphs of each Section 12, so
9 I'm not sure that any adjustment needs to be made
10 there.

11 On the broader issue, let me -- you know,
12 it's a difficult issue in some respects because where
13 we were when we came back from the Supreme Court was a
14 determination that this was a compact case, it dealt
15 with compact issues, and that the state parties and the
16 United States sufficiently represented their
17 constituents so that intervention was inappropriate.

18 The counterclaim does kind of change that,
19 you know, because it puts directly in front of you, the
20 issues associated with contracts and operating
21 agreements, all kinds of issues to which EBID and EP 1
22 were having a unique and special relationship. Our
23 view, those issues don't belong in the case at all, and
24 that's, of course, the reference to 12(c) motions,
25 Rule 56 motions, and the desire to dispose of those

1 issues early on to put ourselves back where we ought to
2 be, and that is, in a compact case where all of the
3 amici, in a sense, are treated the same.

4 Until that happens, however, you know, there
5 is this situation that's been posed by the counterclaim
6 where, again, issues we don't think are appropriate in
7 a compact case, are all of a sudden there until they
8 are disposed of, they are there.

9 THE SPECIAL MASTER: Well, let me ask if I'm
10 understanding your position correctly, are you saying
11 that the 2008 operating agreement is not at issue in
12 this case?

13 MR. SOMACH: I don't think that it is
14 directly at issue in the Texas compact case. I think
15 it is a background document at issue that will be
16 looked at, but I don't see any reason why that document
17 ought to be affected one way or another, by a
18 resolution of the compact dispute between Texas and New
19 Mexico.

20 MR. MACFARLANE: Your Honor, the United
21 States agrees with that. I mean, frankly, we don't see
22 the operating agreement as a compact issue. And,
23 obviously, New Mexico disagrees with that, but under
24 our understanding of the compact, which was interpreted
25 by Special Master Grimsal as we believed the Supreme

1 Court endorsed in the Gorsuch ruling, the operating
2 agreement simply is as, Mr. Somach mentions, a
3 background document. It's how the project currently
4 operates.

5 But on issues of the delivery of compact
6 water to open reservoirs and what New Mexico's
7 obligations are once it makes that delivery, those are
8 issues that are decided -- we believe, have been
9 decided by the Special Master in the Supreme Court and
10 don't involve the operating agreement.

11 So we do see New Mexico's counterclaims as
12 injecting a whole new set of issues into the compact
13 dispute which, frankly, I, again, agree with
14 Mr. Somach, don't belong here, but, obviously, there's
15 disagreement with that. We hope we can address that
16 early on.

17 THE SPECIAL MASTER: Well, at least as long
18 as the compact issues aren't in play -- or not the
19 compact, the operating agreement issues, 2008 operating
20 agreement issues are in play. Do you agree that the
21 two water districts then have some -- are in somewhat a
22 different position than the other amici?

23 MR. MACFARLANE: I do. Let me -- let me
24 clarify that a little bit and say that, you know, in
25 terms of filing briefs, in terms of participating in

1 status conferences, we have no objection to the
2 proposal that Your Honor suggested and counsel for
3 amici, particularly Ms. O'Brien's reference.

4 The problem for us comes with depositions.
5 It's not simply a question of scheduling. If we
6 contemplate the physical appearance of attorneys and
7 their client representatives at any given deposition
8 where the parties are also, we can -- we're talking
9 about doubling, possibly tripling the number of people
10 who are physically present in a room where the
11 deposition is taking place.

12 Now, we believe there are ways to accommodate
13 their interest in listening to a deposition as it's
14 taking place. We are open to video or
15 audioconferencing, but I think there's a serious
16 logistical question which, you know, simply saying, you
17 know, amici agreeing that they won't participate in
18 scheduling, does not truly take care of.

19 Now, with respect to the two districts, I
20 have to agree, they are parties, obviously parties to
21 the operating agreement. They are also parties to --
22 or at least EP No. 1 is a party to one of the
23 Miscellaneous Purposes Act agreements with the United
24 States and the City of El Paso. To the extent that
25 depositions may touch upon those interests, we do

1 believe and would agree that the counsel for the
2 districts should have a right to appear physically and
3 participate fully in depositions that address those
4 specific issues.

5 THE SPECIAL MASTER: Okay. I notice -- were
6 you done, Mr. Somach? Did you have anything further
7 you wanted to say?

8 MR. SOMACH: What I'm concerned about and I
9 will say this, is if it's appropriate to treat the
10 districts separately, and I think there is under the
11 current -- the way the four corners are currently,
12 there certainly is because those issues are out there.

13 I don't -- I would not like that to open the
14 gates to all amici to be treated in that fashion
15 because I think that will create any number of issues.
16 I echo what Mr. MacFarlane said about logistics and
17 here I'm just talking about getting a room to hold a
18 deposition in that we can do videoconferencing, we can
19 have live transcripts, we can have telephone
20 conferences available.

21 I am a bit concerned, also, about even the
22 districts being able to participate in terms of
23 questioning witnesses, and I think that that might be
24 addressed by having some advanced -- when there's
25 notice that they want to participate also, some orders

1 being put on the nature and extent of that fairly
2 unusual participation to the extent that they want to
3 question witnesses. I don't think we should go into
4 those types of depositions open-ended. My sense is
5 that those depositions will not be so focused that they
6 only might be about the operating agreement or the
7 contracts, but they will be much broader.

8 There should be some rule that, to the extent
9 they participate, they participate in a very focused
10 surgical manner on those issues. You know, but that's
11 all I have to say.

12 THE SPECIAL MASTER: Mr. Rael, what's your
13 position on the all that?

14 MR. RAEL: Your Honor, the State of New
15 Mexico thinks that all of the amici should be treated
16 equally. I mean, it's no surprise that Texas and the
17 United States want support from districts that support
18 them and have filed, you know, friend of the Court
19 briefs in support of them, but we think that they
20 should all be treated equally.

21 We have a real problem with, I think, the
22 fact that EBID and EP No. 1 are parties to the
23 operating agreement, doesn't -- it justifies their
24 participation as amici, but it doesn't justify any
25 special role for them. If there are targets of

1 discovery, they will be entitled to attend and
2 participate in those depositions. If other entities
3 are targets of discovery, there's no reason for them to
4 participate or ask questions, in our opinion.

5 Granted, the districts, the EBID and EP No.
6 1, have special status and enhanced status, as Your
7 Honor put it, it effectively allows them to intervene
8 in this case despite the fact that they filed motions
9 to intervene. They made, basically, the same argument
10 which Ms. O'Brien knew they were going to make now.
11 Special Master denied their motions to intervene and
12 they took no exception to the denial of their motions
13 to intervene at that time. That was the proper time
14 for them to raise that concern. So there's
15 no -- there's no need to give the districts special
16 status here. We think that all amici need to be
17 treated equally.

18 And I would raise another issue, Your Honor,
19 that I think will, maybe, save us some time later here,
20 and that is, I don't think that because of -- because
21 of sovereign immunity, I don't think that the districts
22 could, for example, try to set a deposition of anybody
23 in the State of New Mexico. I don't think that they
24 would be allowed to do that and I would anticipate a
25 lot of briefing and arguing about that come later on,

1 so I don't think --

2 THE SPECIAL MASTER: I'm sorry, can you say
3 that again, you don't think they have a right to do
4 what?

5 MR. RAEL: To try to notice a deposition in
6 the State of New Mexico.

7 THE SPECIAL MASTER: I don't think they asked
8 for the right to notice a deposition, but I may be
9 wrong. I think they're asking only for the right to
10 participate in a deposition that was noticed by one of
11 the main parties. And, probably, what they'll do, I'm
12 assuming, is they will go to Mr. Somach and say, would
13 you notice them.

14 MR. RAEL: I agree that that may happen and
15 we can run into that problem where I don't think
16 they -- they're not parties. You would essentially be
17 allowing them to intervene, and I don't think they have
18 the ability to ask questions at a deposition.

19 . I think we're going to run into a lot of
20 issues. I think this is going to severely complicate
21 the case if you're giving them special status. I think
22 they should be treated the same as what I'll call the
23 New Mexico amici, there's the Texas amici and the New
24 Mexico amici. You know, our amici should have the same
25 rights that theirs do, and it's, like I said, no

1 surprise that they want special status for amici that
2 support their positions, Your Honor.

3 THE SPECIAL MASTER: All right. Let me say
4 this: First of all I'd ask Mr. Stein, would you put in
5 writing the changes that you want made to the case
6 management agreement so that I can make sure -- I have
7 notes, but I want to make sure I get right.

8 MR. STEIN: Yes, Your Honor, I'll be happy to
9 do it.

10 THE SPECIAL MASTER: And subject to review,
11 that's -- I didn't hear any real objection and we'll
12 adopt those changes that you've requested.

13 As far as the two water districts are
14 concerned, I do believe that they should have some
15 enhanced role at least as it relates to the operating
16 agreement. Whether it goes beyond that, I think we're
17 going to have to probably see how that develops. I'm
18 not sure where we're going to be but, you know, we're
19 still early in the litigation and I'm sure a lot of
20 these issues will be refined and changed as we go along
21 further.

22 I am concerned about the logistics of having
23 this many people, for instance, attending a deposition.
24 I don't know that that's going to happen, but at least
25 as of this point, I'm not prepared to say that any of

1 the amici be precluded from attending depositions, I
2 think we're just going to have to see how that
3 develops. If it becomes unwieldy, we may have to come
4 up with some other system, whether it be
5 videoconferencing, some audio participation, whatever.
6 Like I said, I think we're -- it's a little early in
7 the process to really know how that's going to work
8 out. Like I said, everything about this is somewhat
9 subject to change.

10 As far as the two water districts are
11 concerned, if they want to participate beyond observer
12 status in the deposition, they will have to give notice
13 in advance and with the parties then having an
14 opportunity to object or to try to cap their
15 involvement, whatever, whatever they want to do.

16 And, likewise, you know, any parties -- or,
17 excuse me, any amici, you know, is always free to file
18 a motion if they think there is something that's unique
19 to their situation or that they feel they need to do
20 something beyond just observe, they can always file a
21 motion. So the default rule will be observe but not
22 participate. And if I hadn't said it already, any
23 amici will have the right to file a pleading whether
24 it's a motion, a brief without leave of the Court.

25 I think that kind of covers what we talked

1 about here.

2 MR. MACFARLANE: Your Honor, may I address
3 one small topic regarding amici? The -- I don't know
4 whether the universal potential of amici in this case
5 has been identified. What I would ask is that in your
6 case management plan, that you specify that any party
7 that has not previously been granted leave to appear as
8 amici must move for leave to participate.

9 THE SPECIAL MASTER: Well, I think that's
10 implicit in this, certainly, whole amici process, to
11 the extent it isn't, I will include that in the order.

12 MR. MACFARLANE: Thank you, Your Honor.

13 THE SPECIAL MASTER: Anything further on that
14 issue?

15 (No verbal response.)

16 THE SPECIAL MASTER: I think we've covered
17 the most contentious issues -- not contentious, but the
18 ones that require the most discussion.

19 We've already talked briefly about the issues
20 that can be decided pretrial, both Texas and United
21 States have indicated the desire to try to have an
22 early adjudication on some or all of New Mexico's
23 counterclaim.

24 You know, I've identified two issues that I
25 thought might be subject to some pretrial adjudication.

1 One is what's the res judicata issue that goes to the
2 fact of the state court rulings in New Mexico in the
3 case involving the United States, and then what issues
4 the parties think have been resolved by the Supreme
5 Court in the case that was -- that came out in March.

6 I would like to think that we can maybe set a
7 deadline of about six months to get those at issue.
8 Does that sound realistic? And I probably have not
9 even begun to exhaust the universe of issues that we
10 might get resolved pretrial, but at least some of those
11 issues, if we can get them -- Rule 56 motions or
12 motions to dismiss the counterclaim, whatever the
13 procedural vehicle is that we get those at issue, then
14 within about six months, we can, maybe, get some --
15 narrow the scope of trial and we narrow the scope of
16 the issues, does that sound realistic?

17 MR. SOMACH: Your Honor, I have a question.
18 Certainly, with respect to issues that have not been
19 resolved that are at play, I think I'd almost like to
20 suggest we do it sooner than six months.

21 But the issue with respect to the fundamental
22 compact interpretation, I'm not sure how to brief that
23 argument because we think it's been fully briefed and
24 decided already by the Supreme Court.

25 My general view is if that issue, which was

1 fundamental to all of what happened before the Court,
2 hasn't been decided, it ought to be decided immediately
3 because -- because if that foundational determination
4 was that the compact was unambiguous, that is a matter
5 of law, we interpret it this way, that the exceptions
6 that New Mexico raised on those issue weren't overruled
7 by the Supreme Court's March order, we ought to know to
8 know that immediately.

9 And I, for the life of me, have thought about
10 how do I brief that issue when it's already been fully
11 briefed and finally resolved and argued by the Court,
12 so I'm not sure. That is the most critically important
13 issue I think in terms of moving this case along in an
14 orderly fashion.

15 We believe it's been decided, but if the
16 Court believes it hasn't been decided, maybe giving us
17 some guidance as to how to get that finally decided
18 would be very helpful. And I point to New Mexico's
19 exceptions to the Special Master report where they
20 enumerate the very issues that we've talked about, and
21 I think that I wrote in my original letter to you as
22 exceptions, and that's what they briefed as exceptions.

23 And the Supreme Court, you know, in that
24 final opinion said the United States' exceptions is
25 sustained, all other exceptions are overruled and the

1 case is remanded to the Special Master for further
2 proceedings consistent with this opinion.

3 And so if the original Special Master ruled
4 as a matter of law on these compact interpretations as
5 we believe he did, and if New Mexico took specific
6 exception to those exact rules, and the Supreme Court
7 overruled every exception except for the United States,
8 I'm not certain where that leaves us other than those
9 fundamental issues have been decided and they don't get
10 to get relitigated.

11 But as I say, if you disagree with that, I
12 think those issues need to be resolved immediately
13 because they define where we go in almost all aspects
14 with respect to this case.

15 MR. MACFARLANE: Your Honor, I want to
16 interject and make it clear that the United States
17 agrees with that position as well. We think this is of
18 critical threshold issue. A lot of the arguments that
19 we would make regarding New Mexico's counterclaims I
20 think are to, a significant degree, predicated upon a
21 view of the compact as articulated in Special Master
22 Grimsal's report that we believe was essentially
23 approved by the Supreme Court.

24 The Supreme Court has, in the past, summarily
25 affirmed Special Master rulings, and in a subsequent

1 report and decision, indicated that, you know, that
2 summary affirmance really did represent agreement with
3 the Special Master. This happened in *Kansas v.*
4 *Nebraska*.

5 And I would also observe that the Supreme
6 Court knows how to overrule an exception and leave the
7 door open for further development or for
8 re-argumentation. The Supreme Court did that in *Kansas*
9 *v. Colorado* when it denied Colorado's exception without
10 prejudice to renewing them at a subsequent point of
11 litigation.

12 The Supreme Court did not do that in this
13 case. The Supreme Court overruled full stop all other
14 exceptions. So I have to say, we're entirely in
15 agreement with Texas on this point and if this is
16 still -- if Your Honor still believes it's an open
17 issue, we really need to get it resolved up front.

18 THE SPECIAL MASTER: Well, I don't -- it
19 isn't really so much what I believe, it's what the
20 State of New Mexico believes because they believe it's
21 an open issue, and I think they have a right to argue
22 that it's an open issue. Whether they're right or
23 wrong is, I guess, what we'll have to decide.

24 But I think the briefing would be addressed
25 to sort of two overarching issues and that is under

1 Supreme Court precedent dealing with original actions
2 that you've made reference to, Mr. MacFarlane, you
3 know, what has the Supreme Court said in the past about
4 their overruling objections.

5 And, secondly, something I've taken several
6 preliminary looks at is what's the effect when -- you
7 know, New Mexico made the decision to put these matters
8 at issue through a motion to dismiss. What's the
9 effect when they lose the motion to dismiss at the
10 early stages of litigation. And that, you know, there
11 is a fair body of law that deals with that particular
12 subject and I think those are the two sort of legal
13 issues that have to be overarching issues.

14 As I see it, just so we're understanding, you
15 talk about what the compact means, Mr. Somach. I went
16 through the Supreme Court opinion again and identified,
17 at least for my sake, ten statements the Supreme Court
18 made about this case, and whether you want to call them
19 holdings or whether the victim may be somebody we'll
20 argue about.

21 But this is what -- I think the ten points
22 that I think the Supreme Court made about this case,
23 some of which are not particularly disputed. First,
24 United States agreed by treaty to ward 60,000 acre feet
25 of water annually to New Mexico upon completion of the

1 new reservoir. I don't think anybody disputes that.
2 And I assume that that obligation, Mr. MacFarlane, is
3 being complied with, right?

4 MR. MACFARLANE: Yes, Your Honor.

5 THE SPECIAL MASTER: Secondly, that in
6 return, the water district agrees to pay charges for
7 the construction of the reservoir, that 57 percent of
8 the water will be accrued to New Mexico, 43 percent to
9 Texas, and the Supreme Court will call those the
10 downstream contracts.

11 Then they talk about the fact that there's no
12 obligation to deliver a certain amount of water at the
13 border between New Mexico and Texas, but that that
14 choice made sense -- and this is the third point --
15 because simultaneously, the downstream contracts were
16 negotiated that promised Texas a certain amount of
17 water every year from the reservoirs.

18 It talks about exceptions being filed, and
19 then this is one I think is very key and maybe
20 somewhat -- probably controversial, that the compact
21 and downstream contracts effect an equitable apportion
22 of the waters in the Rio Grande between the effected
23 states, principally in this case, Texas and New Mexico,
24 yet an achieved effort was only because by the time the
25 compact was executed and enacted, United States had

1 negotiated and approved the downstream contracts for
2 which the United States assumed the legal
3 responsibility to deliver water.

4 And I guess the question is, does that mean
5 then that the United States has responsibility for the
6 downstream water if it's got the legal obligation to
7 deliver, and I understood New Mexico would say, no,
8 they do not.

9 But in the fifth point Justice Gorsuch made
10 was that he adopted the analogy that Texas used, that
11 the United States, in essence, became the agent of the
12 compact assuring the compact's equitable portion of it
13 to Texas and New Mexico.

14 The sixth point he makes is the compact
15 implicitly incorporates the downstream contracts.

16 Seventh, that a breach of the compact would
17 jeopardize the government, the Federal government's
18 ability to satisfy its treaty obligations with New
19 Mexico.

20 The eighth point was a failure by New Mexico
21 to meet its compact obligation which directly impaired
22 the Federal government's ability to perform its
23 obligations under the treaty.

24 And then he made a couple points and made a
25 point about, This will not expand the litigation by

1 allowing the United States to intervene, and then,
2 finally, the language that Mr. Somach quoted which is,
3 United States' exceptions are sustained, all other
4 exceptions are overruled.

5 And as I said, I thought the key points,
6 without getting -- that the Special Master made were
7 that the ones that were set out on pages 195 through
8 about 209 of his report, and the one maybe that's most
9 at issue here is that he stated that at 195, The text
10 of the 1938 compact requires New Mexico to relinquish
11 its control of project water permanently once it
12 delivers water to the Elephant Butte Reservoir, and you
13 disagree with that; is that correct?

14 MR. RAEL: Yes, Your Honor, very strongly. I
15 think -- I think this can be resolved simply with
16 simultaneous briefing to the Court. I mean, we're not
17 extending -- just do simultaneous briefing.

18 I think the most important thing, Your Honor,
19 is everybody's missing the most important thing that
20 Justice Gorsuch said in his opinion, and that is at the
21 very beginning he said, The Court's opinion expressly
22 states that it addresses only a preliminary and narrow
23 question, may the United States assert, essentially,
24 the same claims Texas already has. That's the only
25 thing that his opinion addresses. He says it at the

1 very beginning. Everything else in that opinion should
2 be regarded as dicta, and we'll -- I'm sure we'll get
3 into this, Your Honor, you know, the Court has already
4 said it shouldn't be bound by dicta. They signed that
5 in *Kitsaeng v. John Wiley & Sons*, which is at 568 U.S.
6 519.

7 To respond to Mr. MacFarlane's find, the
8 United States didn't do what he said. The United
9 States also knows how to adopt a Special Master report,
10 and they've done that on numerous occasions.

11 I'll give you an example, Your Honor, that's
12 in *Texas v. New Mexico*, No. 65, the Pecos River case --
13 Pecos River Compact. In its decision, the Court
14 indicated that the report is in all respects confirmed
15 and the rule of the Special Master is approved. It was
16 very, very clear, very concise. They know how to adopt
17 a Special Master's report if they want to do that.

18 In this case there's nowhere in the opinion
19 where they adopted the findings of the Special Master,
20 and that's, I think, very important. I think that
21 needs to be briefed simultaneously to Your Honor.

22 One other thing --

23 THE SPECIAL MASTER: I just want to say, I'll
24 let you go on. But just so you understand, Mr. Rael,
25 as the Special Master doing -- when you say, well,

1 everything else the Supreme Court says is dicta, you're
2 pushing a big boulder uphill to say, ignore what the
3 Supreme Court said in an opinion that's nine to zero
4 about an issue that you briefed. I'm not saying you
5 can't convince me, but, you know, I'm -- when the
6 Supreme Court says something, I'm pretty inclined to
7 accept that they knew what they said when they said it.

8 MR. RAEL: Your Honor, I'll agree with you
9 and I'll respond to that before I go on with my other
10 points and that is that Justice Gorsuch, again,
11 himself, was very clear on what he relied on in his
12 opinion. He said, I took into account four
13 considerations and four considerations only. He also
14 said that to the extent any other considerations are
15 assumed to have been considered, they weren't. And
16 those four considerations were that the compact is
17 inextricably intertwined with the Rio Grande project;
18 that, secondly, the United States plays an integral
19 role in the compact's operations; third, he stated that
20 breach of the compact could directly impair the Federal
21 government's ability to conform its obligations under
22 the treaty; and, fourth, that the Court -- that the
23 United States is seeking substantially the same relief
24 as Texas without Texas' objection.

25 He was clear on what he relied on, the four

1 considerations, to use his words, that he relied on to
2 come to that conclusion to answer it again, using his
3 words, a narrow and specific question.

4 He was -- Mr. Somach is relying on the very
5 last sentence of Justice Gorsuch's opinion and ignores
6 the rest of it, and I think it's very important that
7 that point be made. Justice Gorsuch said what he was
8 relying on, what considerations he was relying on, and
9 he also said he wasn't relying on any others.

10 THE SPECIAL MASTER: He also did, though,
11 say, and I think he was very clear about this, that it
12 was the United States' legal obligation to make sure
13 that Texas got the water that it was entitled to under
14 the compact, which I think gets back into the issue of
15 who controls the water once it leaves the reservoir.
16 If Texas has the legal -- or, excuse me, if the United
17 States has the legal obligation to ensure delivery to
18 Texas.

19 MR. RAEL: You're right, Your Honor, he did
20 say that. We need to brief what that means and that
21 simultaneously briefing will likely do that.

22 I'd also just like to finish with my earlier
23 point, Your Honor, and that is that the Court has made
24 it very, very clear that they favor full development of
25 cases in original actions. They said that in the

1 *United States v. Texas*, 39 U.S. 707, that they prefer
2 full development of cases. All that's happened in this
3 case, Your Honor, is a 12(b)(6) motion was denied,
4 that's all that happened.

5 The Court has decided and, again, as Justice
6 Gorsuch put it, he didn't even do that in that opinion.
7 The Court did that previous to the oral argument in
8 October of 2017, and they noted that they did it
9 without further comment. They denied our motion to
10 dismiss because there was no opposition and they denied
11 it without further comment. So all Justice Gorsuch did
12 in his opinion then is state that the United States can
13 stake claims.

14 THE SPECIAL MASTER: Well, let me ask you
15 something, Mr. Rael. I should go back and I'll review
16 the document, itself, I should know this, but did you
17 withdraw your motion to dismiss or did you just not
18 oppose --

19 MR. RAEL: We gave notice to the Court that
20 we were not opposing -- I mean, we didn't technically
21 withdraw the motion, Your Honor.

22 THE SPECIAL MASTER: So it had to be
23 overruled and then withdrawn?

24 MR. RAEL: Right. And they did so, they
25 noted that it was not opposed and they did so without

1 further comment, and they did it prior to the oral
2 argument. So that's very important to know.

3 The only thing they heard argument on was the
4 United States' exception and one of Colorado's
5 exceptions, and then they, I think again, they very
6 clearly stated that they were answering a specific -- a
7 narrow and specific question.

8 And what's happening here is Texas is trying
9 to bind the parties -- and the United States, they are
10 trying to bind the parties to the reasoning of the
11 first interim report, much of which was gathered sua
12 sponte by the prior Special Master without input from
13 the parties, and really without the knowledge of the
14 parties.

15 THE SPECIAL MASTER: I'm not concerned about
16 that part of it because it's clear in the 12(b)(6)
17 motion that you assume facts and they're not binding
18 for the Court, but it's the legal rulings that I think
19 we're really talking about here.

20 MR. RAEL: Right. So, Your Honor, if you
21 take Mr. Somach and Mr. MacFarlane's arguments, you're
22 going to set a very, very dangerous, troubling
23 precedent, and that is it would effectively force
24 parties to present and defend their entire case at the
25 motion to dismiss stage and that is not what happened

1 here.

2 It was a motion to dismiss, there was an
3 interim report. I want to point out, the Court was
4 very specific, they never adopted the report. If they
5 wanted to do that, they've done it plenty of times and
6 they could have done that, they did not do that. That
7 report didn't mean anything. The motion to dismiss was
8 denied.

9 THE SPECIAL MASTER: No, that's not, I don't
10 think, a correct statement of civil procedure. A
11 motion to dismiss assumes all well-pled facts are true.
12 And you say if you're the moving party, there is a
13 legal impediment to this case going forward. You know,
14 there's a three-year statute of limitations, you fight
15 another five years to that. And the Court then says,
16 well, no, there isn't a legal impediment because you
17 got the law wrong.

18 Now what's the effect going forward? Can you
19 revisit that issue or does that become the law of the
20 case for the rest of the litigation? And I'm not
21 making a decision on that, but I think those are the
22 issues that we need to have briefed is what exactly was
23 the effect of your motion and what's the effect of it
24 being overruled and what's the effect of the language
25 the Supreme Court used in the context of the original

1 briefs.

2 And if we want to seat a briefing schedule
3 today, I'd be happy to do that. Do you think -- you
4 all said early, is 60 days -- simultaneous briefs filed
5 in 60 days, does that make sense?

6 MR. RAEL: I think that's very reasonable,
7 Your Honor.

8 MR. MACFARLANE: I think that will work, Your
9 Honor. I would suggest, just throwing this out there,
10 I think a staggered briefing may actually be more
11 effective because, you know, Texas and the United
12 States could go first, and then New Mexico could file
13 its response, and then we could file a reply, and then
14 New Mexico could file its reply. It avoids the ships
15 passing in the night phenomenon which simultaneous
16 briefing often results in.

17 THE SPECIAL MASTER: I assume you have no
18 objection, Mr. Rael?

19 MR. RAEL: As long as we get the surreply
20 that Mr. MacFarlane was talking about, we have no
21 objection.

22 THE SPECIAL MASTER: How much time do you
23 want for your initial briefing?

24 MR. MACFARLANE: 60 days.

25 THE SPECIAL MASTER: How about 60, 30 for New

1 Mexico, is that enough time?

2 MR. RAEL: Your Honor, in our response, I'd
3 ask for more because I think I asked for simultaneous
4 briefing, I thought that would work. So I would ask
5 for the same amount of time just on our response.

6 THE SPECIAL MASTER: I'll give you 45 days,
7 15 days and 15 days reply and then surreply, okay?

8 MR. RAEL: Thank you, Your Honor.

9 MR. SOMACH: You articulated just a moment
10 ago, Your Honor, a couple of three questions, would it
11 be -- I'm trying to think of how to effectively make
12 sure we're getting exactly where we need to go. Would
13 you like to define those questions? I'm not exactly
14 sure -- I know exactly where we want to go.

15 THE SPECIAL MASTER: I'll take a shot at it.

16 MR. SOMACH: Okay.

17 THE SPECIAL MASTER: You may redefine them by
18 when you brief them.

19 MR. SOMACH: We're certainly okay with that.

20 MR. MACFARLANE: Just to be the clear, will
21 the 60 days begin to run from when we get your list of
22 questions you want us to address?

23 THE SPECIAL MASTER: Exactly. And I
24 have -- I'm going to have to go into the rules of civil
25 procedure and figure out exactly what rule we're doing

1 this under.

2 MR. SOMACH: Well, it's the Supreme Court,
3 you can make up a rule.

4 MR. MACFARLANE: I think, frankly, it's a
5 motion for partial summary judgment. We can dispense
6 of the plea, you know, requirement of the statement of
7 material facts not in dispute. It could be understood
8 that we're all talking about legal issues and trying to
9 use a Rule 56 as a vehicle to resolve those, and that's
10 not all talk.

11 MR. RAEL: Your Honor, will New Mexico get an
12 opportunity to comment on your interpretation of what
13 the facts and conclusions were that were reached by the
14 Supreme Court? Because the Supreme Court's made it
15 very clear that they're the only ones that can come up
16 with, you know, legal facts and conclusions. Will we
17 be able to, if we think your scope is too narrow, for
18 example, would we be able to comment on that before the
19 briefing period starts?

20 I just -- I'm concerned that Mr. Somach is
21 trying to allow you to set forth what you believe the
22 issues are when I think our review of what Mr. Somach's
23 issues are, are going to be different, clearly. So I
24 want to make sure that the parties can define what they
25 think the issues are based upon the historical

1 documents.

2 THE SPECIAL MASTER: All right. I'll give
3 you ten days to comment.

4 MR. RAEL: Okay. Thank you, Your Honor.

5 THE SPECIAL MASTER: All right. I think
6 that -- what did I do with the agenda here? I think
7 that pretty much covers everything.

8 I have put down two issues which I think are
9 probably very premature to be discussing. One is
10 whether or not you want to -- or whether this would be
11 a case that would be appropriate for bifurcation, but I
12 assume that that's -- we're a way -- that that's an
13 issue we'll deal with as we get a lot closer to trial
14 and issues develop.

15 And I also had asked about mediation.
16 Is -- I assume there have been discussions?

17 MR. RAEL: There have, Your Honor. We're --
18 New Mexico is open to mediation on all fronts,
19 especially, we think on trying to develop a model. We
20 think that if the parties met with a mediator and a
21 mediator really informed itself on the issues, I think
22 it could really help us narrow down what a model should
23 look like, which we think could save the Court and the
24 parties, frankly, an immense amount of time and money.
25 So we are very supportive of doing a meeting with a

1 mediator regarding a model and doing so quickly because
2 we think it will help save a lot of time, effort, and
3 judicial resources.

4 THE SPECIAL MASTER: And let me ask, New
5 Mexico just really does not like the 2008 operating
6 agreement, that you don't feel that that's a basis for
7 resolving this case in any way?

8 MR. RAEL: Right, Your Honor. We
9 weren't -- we weren't a party to the 2008 operating
10 agreement, we don't think they had the power and
11 authority to enter into it, so, yeah, we don't like it,
12 we don't think it's a basis to resolve it, yes.

13 MR. SOMACH: Let me comment, Texas always
14 wants to talk about some mediation, you know. We
15 are -- I am not in favor of sitting down and getting a
16 mediator involved on a model with the parties. I've
17 already expressed my views on the model. It's
18 premature, and so I just want to reiterate the point
19 that I think that would not be a productive area for
20 discussion at this point in time.

21 In terms of settlement, you know, we're
22 always willing to sit down and have that conversation.

23 THE SPECIAL MASTER: But I assume it's
24 probably premature to start talking about that at this
25 point. I mean, if you want to, that's fine, but I

1 assume -- United States have any opinions on that?

2 MR. MACFARLANE: We're always open to sitting
3 down and talking about settling the case. I think it
4 is premature to talk about mediation with respect to
5 model issues because I just don't think any parties are
6 ready yet to address that, whether that might be a
7 fruitful area of discussion at a later point in the
8 case, we can revisit that issue at that time.

9 THE SPECIAL MASTER: Is it the position of
10 the United States -- you know, one of the arguments
11 that New Mexico makes is that United States acquiesced
12 and maybe even encouraged the groundwater drilling and
13 diversion of water, if you want to call it diversion of
14 water, on both Texas' and New Mexico's side of the
15 border. Is it your position that every one of those
16 wells has to now go back and get a permit from the
17 United States government to continue to operate?

18 MR. MACFARLANE: I'm not sure I'm prepared to
19 say that that's our position. We discussed earlier, I
20 think, Mr. Rael brought it up, the D2 Curve, which is
21 used as part of the operating commitment. The D2
22 Curve, it is true, was a curve that incorporated the
23 groundwater development, which had occurred in New
24 Mexico in the 1950s and '60s.

25 Our concern is that in more recent years,

1 there has been a great expansion of groundwater pumping
2 which has impaired project operations. Whether
3 groundwater pumpers need to get a contract with the
4 Bureau of Reclamation to pump water, I think is an
5 issue that may come up later in this case.

6 I think by analogy to *Kansas v. Nebraska* and
7 *Kansas v. Colorado* where, in both instances, the
8 impairment of surface water flows by groundwater
9 pumping was found to be a violation of those respective
10 compacts. I think this is a very similar kind of case.

11 And so our concern really is not so much that
12 groundwater pumping without a reclamation contract has
13 taken place, we're more concerned with the fact that
14 groundwater pumping has been allowed by New Mexico to
15 occur without requiring offsets for impacts of that
16 groundwater pumping on project operations.

17 THE SPECIAL MASTER: Well, and I know that
18 Texas has indicated in its complaint and its arguments
19 that it is looking for compensatory damages of some
20 kind, whether it be in water or money, I think is the
21 way you put it. But I also think it would seem a big
22 part of this case, you know, the situation is what the
23 situation is, I mean, we're not, you know, to a certain
24 extent I think we changed, but it's more -- it would
25 seem more to what's going forward. How are we going to

1 address these issues in 2019 going forward as opposed
2 to what happened 30 years ago.

3 MR. SOMACH: Yes, I will simply say that
4 that's our view of the rule also, is that we first
5 start looking forward. How do we -- first of all, is
6 there a problem and then what is the nature and extent
7 of the problem. How do you address that problem.
8 Which is a conjunctive remedial type of problem. Our
9 fear is it may take a long time to get there and that's
10 been the history of other cases. There may be some
11 perspective damage-related issues while the ship is
12 getting righted.

13 The last issue is the question of looking
14 backwards, whether it's appropriate, how far back would
15 you look. Was there a time when New Mexico clearly was
16 on notice that they ought to have been doing nothing
17 and they did it anyway and then they were enriched by
18 what they did.

19 I mean, my statement earlier, if I'm correct,
20 that since the lawsuit has been put in place, added 4
21 to 5,000 acres of pecan trees with associated use of
22 water, that's the type of looking backward damages that
23 we may want to focus on at some point in time.

24 But you're absolutely right. What we want to
25 do now is right the ship as quickly as possible.

1 Figure out how long it's going to take to fully
2 remediate the situation. That's our -- that's the
3 prime directive, that's where we're headed first. In
4 terms of past damages, it's much more focused and it's
5 much more finite in terms of a time period.

6 THE SPECIAL MASTER: I assume there were
7 periods, I don't want to go on a rampage, but periods
8 where there was enough water where nobody cared.

9 MR. SOMACH: Yes, there were. There were a
10 number of very wet years, very wet decade.

11 THE SPECIAL MASTER: A lot of rain would
12 solve a lot of problems.

13 MR. SOMACH: We could solve them right now if
14 we had a lot of rain.

15 THE SPECIAL MASTER: It's unfortunate that's
16 not the situation.

17 All right. I think we have pretty well
18 exhausted the topics, is there anything anybody wants
19 to bring up before we adjourn?

20 (No verbal response.)

21 THE SPECIAL MASTER: If not, we'll get some
22 written orders out and schedule our next telephone
23 status conference. Thank you.

24 MR. MACFARLANE: Thank you, Your Honor.

25 MR. SOMACH: Thank you, Your Honor.

1 WHEREUPON, the within proceedings were
2 concluded at the approximate hour of 12:33 p.m. on the
3 28th day of August, 2018.

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)
3) ss.
4 CITY AND COUNTY OF DENVER)

5 I, RICHAEAL M. SILVIA, Registered
6 Professional Reporter, Certified Realtime Reporter,
7 Colorado Realtime Certified Reporter and Notary Public,
8 State of Colorado, do hereby certify that the said
9 proceedings were taken in machine shorthand by me at
10 the time and place aforesaid and was thereafter reduced
11 to typewritten form, consisting of 145 pages herein;
12 that the foregoing is a true transcript of the
13 questions asked, testimony given and proceedings had.
14 I further certify that I am not employed by, related
15 to, nor of counsel for any of the parties herein, nor
16 otherwise interested in the outcome of this litigation.

17 IN WITNESS WHEREOF, I have affixed my
18 signature and seal this 21st day of September, 2018.

19 My commission expires September 18, 2021.
20

21
22 s/ Richael M. Silvia
23 Richael M. Silvia, RPR, CRR, CRCR
24 Certified Realtime Reporter
25 Commission No. 20054027487