

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF MAY 3, 2022, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
11:00 a.m.

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P R O C E E D I N G S

1
2 **JUDGE MELLOY:** Good morning. This is
3 Judge Melloy. Should we get started? This is in
4 Original No. 141, Texas versus New Mexico, Colorado,
5 and the United States. Let me start -- I think we'll
6 start by asking the parties to enter their appearance.

7 Mr. Somach, who do you have on for
8 Texas?

9 **MR. SOMACH:** Yes, Your Honor. This is
10 Stuart Somach for the State of Texas. With me, or who
11 will join, are Theresa Barfield, Sarah Klahn, Robert
12 Hoffman, Priscilla Hubenak of the Attorney General's
13 Office, Grant Dorfman of the Attorney General's
14 Office, and Robert Skov, the Rio Grande Commissioner
15 for Texas.

16 **JUDGE MELLOY:** All right. And
17 Mr. Wechsler, who do you have on for New Mexico?

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

1 State Engineer and Rio Grande Compact Commissioner for
2 New Mexico, Rolf Schmidt-Petersen, the Interstate
3 Stream Commission Director, and Nat Chakeres, the
4 general counsel for the Office of the State Engineer.

5 **JUDGE MELLOY:** All right. Mr. Wallace,
6 who do we have on for Colorado?

7 **MR. WALLACE:** Good morning, Your Honor.
8 This is Chad Wallace, along with Preston Hartman, for
9 the State of Colorado.

10 **JUDGE MELLOY:** Okay. And who do we have
11 on for United States? I'm not seeing a name up there.
12 Who's appearing for United States?

13 **MR. LEININGER:** Good morning, Your
14 Honor. It's Lee Leininger for the United States.

15 **JUDGE MELLOY:** Do you have anyone else
16 on?

17 **MR. LEININGER:** Yes. We're joined with
18 -- from the Department of Justice, Judy Coleman,
19 Jennifer Najjar, and Seth Allison; then from the
20 Solicitor's Office, Chris Rich and Shelly Randel; and
21 from the Bureau of Reclamation, Ian Ferguson and
22 Michelle Estrada Lopez.

23 **JUDGE MELLOY:** I'm having a little
24 trouble hearing you, Mr. Leininger. There's a little
25 feedback or echo on the microphone.

1 All right. On the amici, Albuquerque
2 Bernalillo County Water Utility Authority,
3 Mr. Brockmann, are you here?

4 **MR. BROCKMANN:** Yes, Your Honor. It's
5 Jim Brockmann with the firm of Stein & Brockmann on
6 behalf of the Albuquerque Bernalillo County Water
7 Utility Authority.

8 **JUDGE MELLOY:** Anyone else on for your
9 side?

10 **MR. BROCKMANN:** No, Your Honor. It'll
11 just be me this morning.

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

13 **MS. MAXWELL:** Good morning, Your Honor.
14 Susan Maxwell for the City of El Paso.

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

16 **MR. STEIN:** Good morning, Your Honor.
17 This is Jay Stein, counsel of record for the City of
18 Las Cruces. I'm joined by Delila Walsh, the director
19 of the utility for the City of Las Cruces; Adrienne
20 Widmer, the deputy director, and Robert Cabella from
21 the city attorney's office.

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

24 **MS. O'BRIEN:** Good morning, Your Honor.
25 Maria O'Brien for El Paso County Water Improvement

1 District No. 1. Also on is counsel, Renea Hicks, and
2 Dr. Al Blair, the district engineer.

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

5 **MS. BARNCASTLE:** Good morning, Your
6 Honor, Samantha Barncastle for EBID, and I apologize,
7 I'm having technology issues today so if I turn my
8 video on, it crashes me. So I'll be quiet and stay
9 silent and stay off the video.

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

13 (No response.)

14 **JUDGE MELLOY:** No one. All right. New
15 Mexico Pecan Growers? I think I saw Ms. Davidson's
16 name.

17 **MS. DAVIDSON:** Good morning, Your Honor.
18 Tessa Davidson for New Mexico Pecan Growers.

19 **JUDGE MELLOY:** I think I've seen
20 Mr. Utton for New Mexico State University; is that
21 correct?

22 **MR. UTTON:** Yes, Your Honor. Good
23 morning. This is John Utton for NMSU. Thank you.

24 **JUDGE MELLOY:** Anyone else for New
25 Mexico State University?

1 **MR. UTTON:** No. I am the only one.

2 Thank you.

3 **JUDGE MELLOY:** And Southern Rio Grande
4 Diversified Crop Growers Association. I think I saw
5 Mr. Olsen. Are you on?

6 **MR. OLSEN:** Yes, Your Honor. Good
7 morning. A.J. Olsen on behalf of the Southern Rio
8 Grande Diverse Crop Farmers.

9 **JUDGE MELLOY:** I should note that our
10 mediator, Judge Arthur Boylan, is on the -- on the
11 call or on the hearing. Have I missed anybody that we
12 haven't discussed?

13 (No response.)

14 **JUDGE MELLOY:** All right. We're here
15 this morning for the status conference both as to the
16 status of settlement discussions, and if necessary,
17 the setting of a trial date. So maybe I'll just start
18 by asking Judge Boylan where -- where are we on the
19 negotiations, Judge?

20 **JUDGE BOYLAN:** Good morning, Judge.
21 Thank you. We're not there yet, but I do believe that
22 we're making progress. I have to confess that this is
23 the most complex matter I have ever handled, and it is
24 hard work, but each of the parties and each of the
25 amici, I believe, are working hard towards a

1 resolution. That being said, I do believe that it
2 would be beneficial for all the parties, and I think
3 each of the parties, and I believe each of the amici
4 would probably agree, as well, for the Court to
5 consider setting a -- a firm trial date for some time
6 this fall, mid-to-late fall. The parties continue to
7 work towards settlement. My thought is that we have a
8 plan in place to meet in El Paso, Texas the week of
9 May 23rd through the 27th. We'll be likely meeting
10 for three days there the Tuesday, the 24th, Wednesday,
11 the 25th, and Thursday, the 26th, and I'm hoping that
12 we'll be at a place or very close to a place where the
13 parties could agree on a term sheet. And by that, I
14 don't mean a -- a document that would be binding upon
15 the parties, but instead be an outline of the
16 settlement, which they've tentatively agreed with a
17 lot more work to be done thereafter to fill in some of
18 the technical blanks, if you will, on the settlement
19 itself with the thought that after some work by the
20 technical and legal teams, that a final and full
21 settlement document would be placed before you hoping
22 that you would be willing to recommend to the Supreme
23 Court the adoption of the settlement as -- as agreed.
24 And that's the road map that I think each of the
25 parties is intent on pursuing. We're hoping that the

1 Court would agree to do that, with an added position,
2 and that is that a -- a separate status conference be
3 scheduled by the Court, and this time requiring people
4 to appear before you in person, and we are hoping that
5 perhaps your calendar, either in St. Paul or St.
6 Louis, would accommodate such a meeting a few weeks
7 after our El Paso meeting in the end of May. So
8 towards the end of June, perhaps mid June, would be
9 something that we're hoping the Court would be able to
10 accommodate us.

11 **JUDGE MELLOY:** Okay. All right. Do you
12 -- do you think that -- that you will know after the
13 May meeting or conference if it's -- it's a go/no-go
14 situation?

15 **JUDGE BOYLAN:** I think the parties,
16 Judge, have determined that if not in May, certainly
17 by the end of June. They're going to have to -- using
18 a phrase, fish or cut bait on either getting ready for
19 trial or using the -- their time and efforts towards
20 the settlement. Right now, all of their technical
21 teams, virtually everybody who's been involved, have
22 been really busy focusing on settlement efforts, and
23 it's been a handful. I have to hand it to the
24 technical people. It's hard work, and it's -- it's
25 work that is not easily, I think, found to be in quick

1 agreement with each other. But nonetheless, they've
2 been proceeding with the thought that settlement is
3 the ultimate goal, and they've been doing a great deal
4 of work. But in answer to your question, perhaps not
5 late May, but certainly by mid to the end of June,
6 certainly they're going to have to determine whether
7 they're going to court in trial or whether they're, in
8 fact, going to be able to settle it. And if they are
9 in settlement mode, I think that has to be evidenced
10 by written term sheet that at least sets out the broad
11 parameters of the settlement that they've agreed upon.
12 And without that term sheet in place, I think I would
13 suspect that each of the parties will come to the
14 realization that perhaps despite their best efforts,
15 that trial is inevitable and that their efforts will
16 be better directed towards that.

17 **JUDGE MELLOY:** Do you think you're close
18 to getting such a term sheet outlined?

19 **JUDGE BOYLAN:** I do. But -- but I have
20 to add, Judge, it's -- there's a lot of work yet to be
21 done on that, but I would suspect -- I'll let each of
22 the parties address this themselves. I had asked a
23 similar question on Friday morning to some of the
24 litigants, and each of them, I think, expressed an
25 optimism towards an eventual resolution, but each with

1 cautionary words that much work has to be done yet.

2 **JUDGE MELLOY:** All right. Well, I think
3 your suggestion of an in-person status conference
4 maybe towards -- I was looking here, maybe the week of
5 June 20th might work. I could do it any time in June
6 quite frankly, but give it an extra couple weeks. I
7 would probably request that you file some kind of
8 written status report after the May negotiation
9 session so at least I know if you're still talking or
10 if -- which way we're likely to be going. Until
11 there's an agreement, I don't know that it makes a lot
12 of sense to get into the mechanics of how we would
13 both memorialize and approve a settlement agreement.
14 And, actually, one of the fundamental questions, I
15 guess, would be whether a settlement agreement would
16 need approval by the Supreme Court or is it a private
17 agreement between the parties. I mean, I think those
18 are all issues that'll have to be hashed out if we get
19 to that point, but -- but --

20 **JUDGE BOYLAN:** I think we talked
21 preliminarily -- and I'll let the parties address
22 this, Judge, that maybe a combination of both a
23 private agreement and perhaps an agreed-upon decree
24 that they would suggest the Court recommend that be
25 placed before the Supreme Court, and there may be

1 other companion cases that the parties may be
2 interested in addressing that may result in other
3 settlement documents being applied in each of those
4 matters. There's a number of companion state cases
5 that may or may not be resolved if they can resolve
6 this case.

7 **JUDGE MELLOY:** And I'm -- I'll let the
8 parties address this, but I'm assuming that you're
9 trying to structure the settlement agreement, if there
10 is one, in such a way as to not require congressional
11 authorization for an amendment to the Compact; is that
12 right, or would we be affecting the Compact?

13 **JUDGE BOYLAN:** No, I think that's a fair
14 statement, Judge. And I'll let, again, the parties
15 weigh in on that, but I think that's exactly correct.

16 Judge, can I ask a question? If you
17 want a written status report following the May El Paso
18 meetings, are you asking that that would be filed by
19 the parties or do you want me to file something as the
20 --

21 **JUDGE MELLOY:** Why don't you file it?
22 If you don't mind, why don't you file it?

23 **JUDGE BOYLAN:** Okay. I will do so, but
24 I will assure the parties that before that is filed, I
25 will review that with each of them and make sure that

1 we're all on the same page because I would not want to
2 speak to the detriment of one particular party or
3 another, including amici for that matter.

4 **JUDGE MELLOY:** All right. Sounds good.
5 Thank you.

6 Mr. Somach, what's your thoughts, if
7 any, on all of this?

8 **MR. SOMACH:** Well, I -- they are as
9 Judge Boylan has articulated. We certainly concur
10 with what he has laid out there and what he's
11 recommending. I will say two things, that we do
12 believe that at least a portion of what we're doing
13 will require a Supreme Court decree and so we will be
14 looking for a recommendation from you to the Court to
15 that effect. While we are still in the process of
16 drafting, it does look like there will be a number of
17 technical materials that will need to be produced and
18 -- and submitted, along with the decree, and that --
19 that will require some kind of a hearing before you in
20 order for you to take a look at that stuff and
21 understand what it is that we're proposing. We
22 believe the consistency of that with the Compact, and
23 as Judge Boylan indicated, there will be another suite
24 of -- of issues that will be resolved outside of the
25 decree. They involve other pieces of litigation, and

1 we're trying to work through the procedures and the
2 process for doing that. That said, you know, we
3 haven't reached agreement. You know, there -- you
4 know, that's what we're trying to do, so I don't want
5 to, you know, say anything other than we're encouraged
6 by the good faith of the parties, and I -- I mean that
7 sincerely. I think everybody has really been working
8 very hard toward a -- a resolution. I will underscore
9 something Judge Boylan said at the beginning. It will
10 be helpful for a number of reasons to have a trial
11 date. One of the things that we're concerned about is
12 slippage. We've already -- some of that, because of
13 my situation, but some of it just simply by the nature
14 of what we're dealing with, and so getting a hard
15 point in the fall so that we know that -- that
16 something is going to happen then, I think, would be
17 helpful in terms of moving forward. But other than
18 that, I have nothing to add.

19 **JUDGE MELLOY:** This may be a very
20 difficult question to answer, but in light of what
21 testimony has already been received in this case, what
22 do you think we're looking at, six weeks?

23 **MR. SOMACH:** Yeah, six weeks, eight
24 weeks, somewhere in that ballpark. I mean, I can't
25 estimate entirely what New Mexico's case is, although

1 I -- I -- just like they know our case, I have a good
2 idea. We were looking, if you -- if you used a late
3 October date, mid-to-late October, like you had
4 suggested, we thought we would be done before
5 Christmas. In light of the holidays, that
6 unfortunately kind of intrudes there so I'm not sure
7 that that's a pure, you know, days because we assume
8 there will be some breaks at Thanksgiving and -- and
9 so forth, but we figured we could -- at least we
10 figured we could be done before -- before Christmas.

11 **JUDGE MELLOY:** Mr. Wechsler, what's your
12 thoughts about all this?

13 **MR. WECHSLER:** Thank you, Judge. I
14 agree with what's been said by both Judge Boylan and
15 Mr. Somach. I would first say that we very much
16 appreciate the patience and good work of Judge Boylan.
17 New Mexico, like Texas, has encouraged by the parties'
18 willingness to work through some very difficult
19 issues, and I do agree with Judge Boylan that there's
20 been a commitment to the process, and we have been
21 making progress. That being said, as Mr. Somach
22 indicated, obstacles remain. We still have some
23 issues to work through and some hurdles to overcome,
24 and while New Mexico remains cautiously optimistic
25 that a settlement is achievable, it will be very

1 helpful to have that trial date set in -- in October.
2 I am confident that by the middle to the end of June,
3 the parties will know whether or not we're going that
4 route. Again, I think we're all cautiously
5 optimistic, but we all feel, also, that if we haven't
6 achieved that by that time, it's -- it will be time to
7 turn to trial preparation. As to the -- the length of
8 the trial, I think Mr. Somach's probably correct. I
9 would put it on the higher end, probably closer to the
10 eight weeks. My recollection -- and this is just off
11 the top of my head -- that there are three fact
12 witnesses that remain, and maybe a total of 27 expert
13 witnesses so a total of -- of 30 witnesses. And as
14 you know, the expert witnesses are -- are the
15 lengthiest of those. So I would say something closer
16 to the eight weeks is the right amount of time.

17 **JUDGE MELLOY:** All right.

18 Mr. Leininger, do you want to -- do you have anything
19 to say about all this?

20 **MR. LEININGER:** Well, Your Honor, we
21 concur with all these comments of counsel and Judge
22 Boylan. Judge Boylan pulled us together the last day
23 of the meeting in Minneapolis, and we went over these
24 proposals so we were all in agreement with regard to
25 the need to set trial in late fall. I think we hadn't

1 really landed on specific weeks, but late
2 October/early November for a six-week trial, I think,
3 is what we were envisioning. I'm also echoing his
4 comments putting together the caution and the optimism
5 to agree that we are cautiously optimistic going into
6 our -- our next settlement session that will occur in
7 El Paso. With regard to some of your questions on
8 amendment to the Compact, that certainly is something
9 we are trying to avoid so we are working not only in
10 this Original Action to reach a settlement, but the --
11 the other cases, related cases, that Judge Boylan
12 mentioned exist not only in state court but also in
13 federal court. There are pending but stayed federal
14 actions related to this water in the Lower Rio Grande
15 and New Mexico so we are trying to negotiate a lot
16 here. I think we've made progress. We're, again,
17 cautiously optimistic going into the El Paso session,
18 and we think that a meeting in June, before you, in
19 Cedar Rapids is advisable, and at that point we should
20 either have the term sheet available in which we're
21 going to settle this case or proceed to trial.

22 **JUDGE MELLOY:** All right. Mr. Wallace,
23 do you have anything you want to add?

24 **MR. WALLACE:** Yes. Thank you, Your
25 Honor. I would concur with the rest of counsel and

1 Judge Boylan. The parties are progressing in good
2 faith. I am also cautiously optimistic about the
3 progress we're making. I will say that much work
4 needs to be done yet at this point. I think everybody
5 does recognize that. I -- I think the form of a final
6 settlement agreement has yet to be determined. We
7 need to see what all the pieces are and how those best
8 fit together for being memorialized. Colorado will
9 defer to the other parties regarding the timing and
10 need for a trial setting.

11 **JUDGE MELLOY:** Any amici want to be
12 heard on any of these issues? Do speak up.

13 (No response.)

14 **JUDGE MELLOY:** All right. And I do
15 understand, Judge Boylan, that a number of the amici
16 were participating last week, that's the reason you
17 moved it out of the courthouse; is that correct?

18 **JUDGE BOYLAN:** Yes, they were, Judge.
19 The plan was to give the amici a bit more ownership in
20 the process, frankly. The first day that we're
21 meeting in El Paso, I committed to them that that will
22 be the amici date, and placed it in their hands in
23 reference to proceeding and how to tee up the things
24 that are of concern to them. They've been very
25 patient and hard working in every respect, and they've

1 been allowing their technical people to be available
2 to -- to all of us in reference to the settlements and
3 so I think in person and will do so again now. Judge,
4 I just wanted to comment on the June 20th week. If
5 possible, if -- if indeed you do have some
6 availability that week, can I suggest that any status
7 conference would be towards the end of the week? It
8 might afford us the ability then to meet earlier in
9 the week, wherever that location may be, and devote
10 additional time towards whatever discussions we may
11 have before we see you in person.

12 **JUDGE MELLOY:** Do we want to do it on
13 Friday that week? Do you want to have the whole week
14 available?

15 **JUDGE BOYLAN:** That's fine with me. I'm
16 not sure about the other parties, though, Judge.

17 **JUDGE MELLOY:** Does that -- does that
18 work for everybody?

19 (No response.)

20 **JUDGE MELLOY:** All right. Well, let's
21 set it for Friday. I'll let you know if it's going to
22 be here or St. -- I probably wouldn't do St. Paul, but
23 I might do St. Louis. But let me -- I'll let you know
24 on that. That'll be Friday, June 24th, and let's just
25 set it for 9:00, and that way hopefully everybody can

1 get out, get that afternoon, get home and not have to
2 stay over into Saturday.

3 As far as a trial date is concerned, I
4 would rather start it sooner rather than later, if
5 possible. What -- let me tell you -- let me just
6 mention this. I -- I don't have any real scheduling
7 issues in October and November. I'm supposed to sit
8 with the 8th Circuit in December, but I can punt on
9 that if I have to. I do have a -- with one exception,
10 I do have a commitment for the latter part of the week
11 of October 31st, and I don't know if we will take the
12 whole week off. I don't have to be gone the whole
13 week, but I don't know if we want to do just one or
14 two days that week. But would the parties object to
15 starting on October 3rd?

16 **MR. SOMACH:** Texas would have no
17 objection to starting early in October. We'd been
18 looking at it from October. The reason we looked at
19 late October is we had thought you had indicated that
20 was your availability, but starting at the beginning
21 of October would be just fine.

22 **JUDGE MELLOY:** All right. Anybody have
23 a problem with that? All right. If not, let's plan
24 on that, and I'll, sometime in the next week or two --
25 I'm getting ready for a court session next week, so it

1 may be the week after. I'll get out a more detailed
2 order sending out some deadlines on pretrials, and
3 since you've already started the case, it won't be
4 quite like a normal trial, but I'll get out some --
5 I'll get out some deadlines for an October 3rd trial
6 date.

7 Anything else we need to talk about
8 today?

9 (No response.)

10 **JUDGE MELLOY:** All right. Well, then I
11 guess I'll -- again, I'll ask Judge Boylan that we
12 would put together, in consultation with the parties,
13 a status report after the El Paso session, and I'll
14 plan to meet with the parties, hopefully, to talk
15 about the mechanics of getting the settlement
16 finalized on the 24th of June, and if not, about what
17 we're going to do for trial.

18 Any -- anything else then?

19 (No response.)

20 **JUDGE MELLOY:** If not, thank you,
21 everyone.

22 (The proceedings adjourned at 11:27 a.m.)
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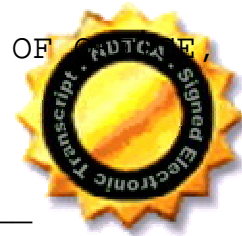
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CERTIFICATE

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

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

GIVEN UNDER MY HAND AND SEAL OF OFFICE
on this, the 7th day of November, 2022.



Heather L. Garza
HEATHER L. GARZA, CSR, RPR, CRR
Certification No.: 8262
Expiration Date: 04-30-24

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