

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 JUNE 24, 2022, HEARING
BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL MASTER,
UNITED STATES CIRCUIT JUDGE, taken at THOMAS F.
EAGLETON UNITED STATES COURTHOUSE, 111 South 10th
Street, St. Louis, Missouri, beginning at 9:00 a.m.

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P R O C E E D I N G S

1
2 **JUDGE MELLOY:** Please be seated. Good
3 morning, everyone. It's nice after two years to
4 finally be back together in person for a hearing.
5 I've seen a lot of you on camera, but it's nice to be
6 here, as I say, in person for a change. This is, of
7 course, in the United States Supreme Court Original
8 No. 141, State of Texas versus State of New Mexico and
9 State of Colorado with the United States as
10 intervenor. So let me start by indicating that I'll
11 take appearances. I know we do have some people who
12 are participating by telephone or are at least
13 listening in by telephone. I'm not going to take
14 their appearances because they're basically
15 spectators, but I will take the appearances of all the
16 counsel who are present. So we'll start with the
17 State of Texas. Mr. Somach?

18 **MR. SOMACH:** Yes, Your Honor. Stuart
19 Somach, counsel of record for the State of Texas.
20 With me at counsel table are Theresa Barfield and
21 Sarah Klahn with my office, and Priscilla Hubenak of
22 the Texas Attorney General's Office. In the audience
23 is Mr. Bobby Skov. He's the Texas Rio Grande
24 Commissioner.

25 **JUDGE MELLOY:** Thank you. And for New

1 Mexico?

2 **MR. WECHSLER:** Good morning, Your Honor.
3 Jeff Wechsler on behalf of the State of New Mexico.
4 With me in front of the bar we have Cholla Khoury,
5 chief deputy attorney general, Zachary Ogaz, also with
6 the attorney general's office, and Lisa Thompson from
7 Trout Raley. We also have with us the state engineer
8 and Compact commissioner, Mr. Mike Hamman, and the
9 interstate stream commission director, Dr. Rolf
10 Schmidt-Petersen.

11 **JUDGE MELLOY:** Thank you. State of
12 Colorado?

13 **MR. WALLACE:** Good morning, Your Honor.
14 Chad Wallace, counsel of record for the State of
15 Colorado. In the audience today is Michael Sullivan,
16 the deputy state engineer.

17 **JUDGE MELLOY:** And for the United
18 States?

19 **MR. LEININGER:** Good morning, Your
20 Honor. Lee Leininger for the United States, and at
21 the table with me is Judith Coleman, Department of
22 Justice, and I'm joined from the solicitor's office
23 Chris Rich and Shelly Randel, and for the Bureau of
24 Reclamation, Jennifer Faler.

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

1 Do we have anyone here from the Albuquerque Bernalillo
2 County Water Utility Authority?

3 **MR. BROCKMANN:** Yes, Your Honor. Jim
4 Brockmann, counsel of record for the Albuquerque
5 Bernalillo County Water Utility Authority.

6 **JUDGE MELLOY:** City of El Paso.

7 **MR. CAROOM:** Good morning, Your Honor.
8 Doug Caroom for the City of El Paso.

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

10 **MR. STEIN:** Yes, Your Honor. Jay Stein
11 appearing for the City of Las Cruces, the city
12 utility's director and assistant director are joining
13 remotely.

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

16 **MS. O'BRIEN:** Good morning, Your Honor.
17 Maria O'Brien and Renea Hicks for El Paso County Water
18 Improvement District No. 1.

19 **JUDGE MELLOY:** Elephant Butte Irrigation
20 District.

21 **MS. BARNCASTLE:** Good morning, Your
22 Honor. Samantha Barncastle for the Elephant Butte
23 Irrigation District.

24 **JUDGE MELLOY:** Hudspeth County
25 Conservation and Reclamation District No. 1, anyone?

1 (No response.)

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

3 **MS. DAVIDSON:** Good morning, Your Honor.
4 Tessa Davidson for New Mexico pecan growers, and I've
5 also been asked to appear for the Southern Rio Grande
6 diversified crop farmers and New Mexico State
7 University. Mr. Olsen and Mr. Utton's schedules did
8 not allow them to appear today, and they ask that I
9 speak on their behalf.

10 **JUDGE MELLOY:** I'm sorry. You're
11 appearing for New Mexico State University, as well?

12 **MS. DAVIDSON:** Yes, sir.

13 **JUDGE MELLOY:** All right. Thank you.
14 All right. I think that's all the parties. Did I
15 miss anybody?

16 (No response.)

17 **JUDGE MELLOY:** And, of course, we have
18 present the mediator in this case, Judge Arthur
19 Boylan. First of all, I do want to thank the district
20 court here in Eastern District of Missouri, Chief
21 Judge Sippel and his staff and the clerk's office for
22 making these facilities available and all their
23 assistance in setting up the hearing this morning. I
24 guess there was a little confusion about my prior
25 order concerning a status report. I had -- when I

1 entered that order, it was on the assumption that the
2 mediation would be concluded after the session in El
3 Paso because there was some discussion that that was
4 going to be the make or break session and so I was
5 anticipating that we would know one way or the other
6 where the case stood after that mediation; however, as
7 I understand, mediation has continued up until
8 yesterday here in St. Louis. So in lieu of that
9 written report, maybe I'll ask Judge Boylan to come
10 forward and just tell us from your perspective where
11 you think you are.

12 **JUDGE BOYLAN:** Good morning, Your Honor.
13 Let me suggest the following that the summary of our
14 -- our meetings are as follows. I think we met for at
15 least 25 days. I've lost count. But we've met with
16 -- in sessions in St. Paul, Minnesota; Denver,
17 Colorado; Albuquerque, New Mexico; El Paso, Texas,
18 Minneapolis, Minnesota; Atlanta, Georgia; Fort Myers,
19 Florida; as well as St. Louis, Missouri. Amici have
20 attended some of these sessions and portions of
21 others. The parties have worked diligently and in
22 good faith in an attempt to reach an appropriate
23 resolution of the matters in litigation. I will say
24 from my own perspective, there's been a great deal of
25 goodwill. There's been a great deal of trust that's

1 been generated by the meetings that we've conducted.
2 I think it's fair to say that the parties have reached
3 tentative agreements on some principles of an
4 agreement, which could and may be finally agreed upon,
5 but we're not there yet. One of the things that I
6 think the Court is going to be asked is, by the
7 parties, what the Court's thoughts are concerning the
8 scheduling of the trial in October. I think each of
9 the parties, as I understand it in visiting with them
10 this morning, are willing to continue engaging in
11 settlement discussions. I think each of them would
12 tell you that we've made a great deal of progress. I
13 also believe that they have different opinions that
14 you'll hear expressed about whether or not that trial
15 should remain or whether -- so -- so that dual tracks
16 of settlement and trial preparation can take place or
17 whether it's impossible to have a dual track because
18 of various issues call for a party if trial is going
19 to continue to be scheduled in October that settlement
20 be pushed off to the side -- pardon me -- and that --
21 that their complete and total efforts be directed
22 towards trial. And you're going to hear, I think, the
23 parties' various views on that.

24 I have a view that I'll express, and
25 that's this: I think that the trial, if conducted in

1 October, will likely mean an end to the settlement
2 discussions. That's my view, but I'm not positive
3 that that will be true. I do think that if trial is
4 conducted, that there is still a remedies portion of
5 the trial that will have to be scheduled thereafter,
6 and that remedies schedule and the remedies that may
7 have -- may be imposed by the Court in any such order
8 likely means that it will take years to get back to
9 the spot that we're at today. I would suggest at
10 least in my own view that continued settlement efforts
11 are indeed warranted and will be fruitful if we're
12 allowed to do that.

13 **JUDGE MELLODY:** Well, one of the -- I
14 guess one of the questions that comes to mind is I --
15 I know that we -- we've had various deadlines
16 established, and in the last status conference, we
17 were talking the El Paso week was going to be the
18 make-of-break week, and now, they continue. And I
19 know it's probably impossible to say, but how much
20 more time do you think is necessary to -- to -- to
21 continue the negotiations to -- I mean, I -- how many
22 issues are still out there and how long do you think
23 it's going to take to get them resolved.

24 **JUDGE BOYLAN:** I'm not quite sure if I
25 can nail down the number of issues that are out there,

1 but I can at least give the Court some road map of
2 what I believe would be involved if we were to
3 continue settlement negotiations. I think by the end
4 of September, either we have a written agreement, as
5 opposed to all kinds of oral agreements, and that if
6 the -- if September 30th arises, and there is no
7 written agreement, then I think that the Court can be
8 told with all assurances from myself that the matter
9 should proceed to trial. If we did have a written
10 agreement by September 30th, I would foresee that that
11 would be an agreement that would call for certain
12 measures to be arrived at between September and
13 probably the first quarter of 2023, including perhaps
14 regulatory action by various parts -- parties or
15 legislative action by various parties to make sure
16 that the provisions of the settlement agreement, as
17 described in that written document, would come to
18 fruition. So it would not be a settlement agreement
19 that would be fully enforceable as of that date, but
20 would have some degree of responsible parties doing X,
21 Y, or Z between that date and the end of the first
22 quarter of 2023, and that would be to accomplish the
23 legislative changes that have to be enacted for that
24 settlement to become effective.

25 **JUDGE MELLOY:** And you would envision

1 that there would be a written agreement by -- by
2 September, if there is an agreement?

3 **JUDGE BOYLAN:** Correct.

4 **JUDGE MELLOY:** And maybe I need to
5 address this more to the parties, but would you
6 envision then at that point ultimate Supreme Court
7 approval of that agreement, which would mean, I guess
8 by necessity, notice, hearing, report from me to the
9 Supreme Court or -- or is this something that the
10 Supreme Court wouldn't have to rule upon?

11 **JUDGE BOYLAN:** I think that the parties
12 would envision that at the end of that legislative
13 action being taken, that an evidentiary hearing would
14 be scheduled before you, the experts would be
15 available to testify to the Court's satisfaction, and
16 that they would ask the Court to undertake making a
17 report and recommendation to the Supreme Court that
18 the settlement, if approved by this Court, be adopted
19 by the Supreme Court. The parties perhaps would have
20 a better handle on it as to the procedural posturing
21 the settlement would take, but I believe that that's a
22 fair -- a fair description of what would take place.

23 **JUDGE MELLOY:** Have you scheduled a
24 further mediation session at this point?

25 **JUDGE BOYLAN:** No.

1 **JUDGE MELLOY:** Okay.

2 **JUDGE BOYLAN:** We were awaiting your --
3 your decision this morning, Judge.

4 **JUDGE MELLOY:** Thank you. All right.
5 Anything else you can think of?

6 **JUDGE BOYLAN:** I don't believe so.

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

8 **JUDGE BOYLAN:** Thank you, Judge.

9 **JUDGE MELLOY:** All right. Well, I guess
10 let's start with you, Mr. Somach. Where do you think
11 we are?

12 **MR. SOMACH:** Well, I would echo Judge
13 Boylan's statement that we've spent a lot of days
14 mediating.

15 **JUDGE MELLOY:** Excuse me a second. Why
16 don't you pull that. There you go. Thank you.

17 **MR. SOMACH:** Can you hear me?

18 **JUDGE MELLOY:** Yeah.

19 **MR. SOMACH:** We've spent a lot of days
20 mediating in a lot of different locations. I think
21 everybody has acted in good faith, and I think we have
22 developed a level of trust in terms of moving forward.
23 We've also made great progress on a lot of issues and,
24 you know, from the State of Texas perspective have --
25 have hopes that if we are -- if we continue

1 discussions, that we will -- that we may well reach
2 settlement. But we are not in favor of continuing the
3 trial date. We believe that the trial date should
4 remain October 3rd. That's not to telegraph an
5 unwillingness to continue to -- to talk settlement.
6 We believe that we can do both of those things. If we
7 thought that there would be a final deal done by
8 September 23rd, we might have a different view, but as
9 you'll hear from the other parties, that, in our view,
10 is not what's being proposed. What's being proposed
11 is that there will be a tentative agreement on
12 September 23rd and then there will be need for the
13 United States to decide whether or not they're going
14 to finally agree, which will take them, they say,
15 until December, and that the agreement, even in
16 December, is predicated upon legislative action in New
17 Mexico, which is estimated by New Mexico to be
18 somewhere around April of 2023. So from -- so from
19 September 23rd in this -- this hypothetical timeline
20 when we would have reached agreement, the State of
21 Texas will basically sit on its hands until some time
22 in April with the hope that the United States will
23 approve a settlement and that the New Mexico state
24 legislature will enact legislation. We've been at
25 this since 2013. That puts a decision of settlement

1 or trial into 2023, which is a decade after we
2 initiated this litigation with absolutely no relief on
3 the part of anybody with respect to the real and
4 serious claims that the State of Texas has made.
5 Again, our view is that we should continue with the
6 trial date. We are willing to continue to talk
7 negotiation with the parties with the hope perhaps,
8 and we would propose an August either status
9 conference or, quite frankly, pre-trial hearing so
10 that we can report back to you either that we have
11 some kind of an agreement that -- that we're willing
12 to -- to endorse that would allow a continuance of the
13 trial or to proceed in the normal pre-trial hearing
14 with -- with those things that we would do.

15 **JUDGE MELLOY:** Well, where would we be
16 if the parties were able to come to an agreement that
17 was subject to these various contingencies in
18 September? Where would that leave us? Would you say
19 we'd still go ahead with the trial while the United
20 States was getting their approvals and New Mexico was
21 trying to enact their legislation or would we at that
22 point continue the trial? What --

23 **MR. SOMACH:** Yes. The latter is what we
24 were thinking because at that point, we would have
25 more -- more to evaluate from the State of Texas'

1 perspective with respect to whether or not this is a
2 true settlement or not. We just don't have -- we
3 don't have the faith. We don't have a settlement on
4 paper. We have no commitment that we will have a
5 settlement by September 23rd, and that commitment,
6 whatever it is that comes on September 23rd, won't be
7 a final commitment. It will be a conditional
8 commitment on things that we have absolutely no power
9 of. We have, quite frankly, no interest in either,
10 but -- but those are impediments to -- to our being
11 able to either go to trial or settle the case. We
12 would be willing to commit to a settlement, a final
13 settlement, on September 23rd if we could reach it,
14 but that's not what's being proposed here. That's not
15 the proposal. The proposal is we'll see if we can get
16 a final tentative approval by the 23rd, then it'll
17 have to go through the United States' approval
18 process, and there has to be legislation by the New
19 Mexico legislature, which is quite a different thing.
20 But if we continue to negotiate and have something, an
21 agreement on the 23rd of September, we would be
22 willing to sit down and reevaluate at that point the
23 best way to proceed. But at this point in time, we're
24 not prepared to give up the -- the trial date that --
25 that -- that we have, which has been deferred for any

1 number of reasons already for a great deal of time.

2 **JUDGE MELLOY:** Well, in your view -- and
3 I'll ask the other parties the same thing -- are the
4 issues that remain ones that you think are
5 surmountable or are there some pretty major obstacles
6 that are going to be very, very difficult to get over?

7 **MR. SOMACH:** From -- from the Texas
8 perspective, the issues of concern to us, we think
9 we're in pretty good shape with. And this is, of
10 course, part of the problem. It's the issues that
11 other people have posed or -- or imposed, including
12 the need for legislation, that we think we have
13 absolutely no certainty that those things are
14 surmountable. And that's part of it. If we had some
15 faith that after all of this time -- because what
16 we're talking about really is -- is April or May of
17 2023. That's -- that's essentially a year from today,
18 you know, more or less, by the time we -- if it all
19 fell apart, by the time we get back to trial. We have
20 absolutely no faith or certainty that that will occur,
21 notwithstanding what I think are the good faith
22 representations that are being made. But I just --
23 one -- one cannot predict what happens in a
24 legislative process. I'm sorry. You know, it's just
25 not something that one can rely upon, particularly

1 when it's another state's legislative process on top
2 of everything else, state that you're in litigation
3 with.

4 **JUDGE MELLOY:** Anything else you want to
5 say?

6 **MR. SOMACH:** No, Your Honor.

7 **JUDGE MELLOY:** All right. Thank you.
8 What's your view, Mr. Wechsler?

9 **MR. WECHSLER:** Your Honor, we talked
10 about this and thought it might be easier for you to
11 understand if the United States went next.

12 **JUDGE MELLOY:** All right.
13 Mr. Leininger?

14 **MR. LEININGER:** Thank you, Your Honor.
15 Good morning. As -- as Judge Boylan stated, we do --
16 the parties do have different views on the likelihood
17 of success of this settlement effort. It has been a
18 long road. We have had at least 25 in-person days.
19 What Judge Boylan didn't mention, we've also had
20 numerous Zoom conferences for this effort. We feel at
21 this point that delaying the trial, postponing the
22 trial, is the right path because what we are proposing
23 is that in September -- we want to put a date on that,
24 September 23rd -- Friday, September 23rd, we have a
25 complete settlement, proposed decree with appendices,

1 ready for respective lines of approval. So they would
2 go up through various states, and in our case, we have
3 certain federal regulatory statutory requirements. So
4 we have discussions with the SG. What would be
5 required would be approval from Department of
6 interior. It would have to go up through DOJ and the
7 SG's office. That process would take approximately
8 three months. So that's where we land on the end of
9 this year for purposes of signing this document. The
10 effective date continued on the legislation is because
11 the New Mexico legislation does not go into session
12 again until January. So we have a few items that
13 would require legislative approval. I think all the
14 parties agree on that, and that would be addressed in
15 the legislative session. So the conclusion of this
16 process we see in April of next year. We are complete
17 with this process. The problem we have with trying
18 this dual track of continuing negotiations and
19 preparation for trial is that we just don't have the
20 resources to do this. We cannot commit the -- the
21 amount of manpower and hours that are required to
22 prepare for this trial. This trial has over 25
23 witnesses, most of whom are expert witnesses. So the
24 preparation for an October 3rd trial needs to
25 commence, and it needs to be the primary focus. So

1 being able to do that and complete our settlement
2 negotiations with this September 23rd deadline is just
3 unattainable in our view.

4 **JUDGE MELLOY:** Well, I kind of hear two
5 things about the settlement. One is you need time to
6 document it, and I anticipate that that would happen.
7 In fact, at the last status conference, I know Judge
8 Boylan had indicated that he hoped that at some point,
9 we could at least have a term sheet that everybody
10 would tentatively agree upon but then it would take
11 two to three months to reduce whatever is agreed upon
12 to a final written agreement that would be signed and
13 subject to court approval, but I guess I'm not -- it's
14 not clear to me where you think we are. Are we still
15 in a phase where we've got to get to that term sheet
16 stage and then do the final agreement or do you think
17 you're basically at an agreement that you can start
18 drafting?

19 **MR. LEININGER:** The latter. I think we
20 have made remarkable progress in this -- in this case,
21 especially this week. I mean, nothing like -- nothing
22 like this status conference which allowed the parties
23 to focus on their real efforts. So, yes, I think
24 we're -- we're at that stage where putting it to pen.

25 **JUDGE MELLOY:** Well, Mr. Somach

1 indicates that basically Texas seems to be on board
2 with -- with their issues. Are you on board with your
3 issues with -- with all the other parties? I mean, I
4 know subject to the various levels of approval, but I
5 assume you've been talking to people in the SG's
6 office and the Department of Interior and Reclamation
7 and whoever else you have to -- I mean, I assume if --
8 if somebody had a big problem with this, you'd know it
9 by now, wouldn't you?

10 **MR. LEININGER:** Absolutely. I mean,
11 this -- this case has been remarkable in my career the
12 amount of communication that we've had with our
13 advisors and superiors, including in the SG's office.
14 So, yes, it's -- it's -- what -- what is being
15 discussed and envisioned for settlement purposes will
16 not come as a surprise to anyone at our -- at our
17 approval chain. So we do feel that at this point, the
18 effort should be devoted toward drafting that final
19 proposed decree. We have experts also that have put
20 in considerable efforts on this so it's complex, and
21 that part of it is also ongoing, which would be
22 attached to this proposed decree so that we have a
23 final settlement for this -- for this case, for this
24 Compact case.

25 **JUDGE MELLOY:** Do you envision -- what

1 do you envision the procedure to be as far as the
2 Supreme Court is concerned? What's the involvement of
3 the Supreme Court, this settlement?

4 **MR. LEININGER:** Well, I -- I think at
5 this point what we are envisioning is just as Judge
6 Boylan mentioned, that we would have an evidentiary
7 hearing so that we can present to you all of the facts
8 that support what we are proposing in a settled decree
9 amongst the parties, that that would then be subject
10 to your report for purposes of the Supreme Court.
11 Alternatively, if we go to trial and you issue your --
12 your order and -- some party will take exception. I
13 think there's no -- no doubt we would likely have
14 exception, exceptions will be taken, have to go up, a
15 couple of years, we're back then to proceed under a
16 ruling in which we'll try to draft a remedy. So we
17 are looking at -- at years more of this case versus
18 the settlement route, which ideally could be complete
19 next year.

20 **JUDGE MELLOY:** Well, just so I
21 understand, you believe that come Monday, the parties
22 can sit down and start putting together an agreement
23 that you have agreed upon?

24 **MR. LEININGER:** Right. In writing, yes.
25 Writing the language for the proposed decree.

1 **JUDGE MELLOY:** Do you -- do you believe
2 that you could sit down today and write out a term
3 sheet that basically outlines what the agreement is?

4 **MR. LEININGER:** We have -- everything is
5 based upon the terms of -- of the agreement, but the
6 direction that we have had -- and it's a very good
7 question because the other parties have asked it, and,
8 in fact, Judge Boylan has asked that question, but
9 that is not -- the United States doesn't have an
10 agreement until it has an agreement. So we need to
11 have all of these pieces in place and ready for our
12 recommendation that then goes up to the SG's office
13 and to our superiors at -- at Department of Justice.
14 And, again, as you -- as you asked, we have -- have
15 weekly, sometimes even more often communication with
16 all those entities to make sure we are on a path that
17 we think that we have some assurance we can reach
18 final settlement.

19 **JUDGE MELLOY:** Well, what happens -- I'm
20 curious. Let -- do each of these entities within the
21 federal government have veto power over a settlement
22 or is it if Interior says yes and SG says no or SG
23 says yes and Interior says no, one has -- one has --
24 can outvote the other? How does that work?

25 **MR. LEININGER:** The SG has -- has

1 ultimate authority. We -- we, as the line attorneys
2 who have been involved in this case, in my case for
3 six years or more, write our -- our recommendation,
4 which is then -- has to be approved. We have to do it
5 in conjunction with Department of Interior so their
6 approval is required. That package then is likely at
7 that point from our assistant AG level to go to the
8 Solicitor General's Office for -- for -- ultimately
9 for the SG.

10 **JUDGE MELLOY:** And does the Solicitor
11 General herself, is that the person who has to
12 ultimately sign the agreement?

13 **MR. LEININGER:** I believe that's
14 correct.

15 **MS. COLEMAN:** Ultimately has to approve
16 it. I'm not sure about signing.

17 **JUDGE MELLOY:** Who signs on behalf of
18 the United States? Does the attorney general himself
19 have to do that or does the solicitor general or chief
20 of the civil division or who?

21 **MR. LEININGER:** I honestly don't know
22 the answer to that question. The -- the person that
23 we're dealing with on a regular basis is -- is the
24 deputy solicitor general, and he has brought this case
25 to the attention numerous times of the SG. But I -- I

1 don't know who ultimately would sign this.

2 **JUDGE MELLOY:** Well, I guess I want to
3 make clear, though, as far as you're concerned, there
4 are no terms that need to be negotiated yet that --
5 that would prevent you from starting to draft an
6 agreement today?

7 **MR. LEININGER:** That is -- that is
8 correct. There are still some terms and some values,
9 which we think have to be completed in our
10 negotiation. That would be part of the process, as we
11 -- as we continue -- as we put this settlement to
12 paper.

13 **JUDGE MELLOY:** Now, what do you mean by
14 terms and values?

15 **MR. LEININGER:** There are certain
16 parameters to this complex case, and it's all related
17 to how -- how the water would be distributed and how
18 the water would be divvied up really between we're
19 looking at the project deliveries to Texas, New
20 Mexico's use of water. So there are some values that
21 had been discussed in terms of a range. I don't think
22 any of the parties have recognized that we are at --
23 at some divisive moment. We're not going to
24 ultimately agree on a value that's going to go into
25 the settlement.

1 **JUDGE MELLOY:** I'm sorry. Say that
2 again. So what needs to be agreed upon?

3 **MR. LEININGER:** There -- there are
4 certain figures, values that have been generated and
5 discussed by our respective engineers. That would be
6 plugged into portions of this written settlement
7 agreement. So the -- the outline of this agreement is
8 complete. We have the means to settle this case, and
9 I -- I -- for one -- I won't speak for all the
10 parties, but I think the United States is confident
11 that we can reach a final settlement by the end of
12 September.

13 **JUDGE MELLOY:** Well, when you talk about
14 these values, if you're talking about the water, I
15 mean, that's the whole case. I mean, are these values
16 the type of thing that could potentially become, as I
17 used the term before, insurmountable obstacle to a
18 settlement?

19 **MR. LEININGER:** No, no. We don't see it
20 that way whatsoever. There -- there's certain levels
21 of water use that, for lack of a better term, may be
22 viewed as interference with -- with the project. So
23 there's certain levels of water use that we have to
24 agree for project purposes, and our interest in this
25 is the project and viability of the project. So

1 there's -- there are certain levels that we will put
2 in the settlement agreement, which recognize the
3 protection of the project, the viability of the
4 project, and those are sort of the threshold values
5 that have been discussed. We just need to have the
6 engineers give us final figures.

7 **JUDGE MELLOY:** All right. You've
8 indicated that -- that you've been in continuous
9 contact with the people, Interior, Solicitor General's
10 Office, and other officials, and you don't anticipate
11 any opposition. What about the other interested
12 parties? Do you anticipate there's going to be
13 opposition, and I'll let the amici speak for
14 themselves, but do you anticipate any opposition from
15 any interested party?

16 **MR. LEININGER:** No. I think the
17 frustration that's being expressed by -- by Texas is
18 more a frustration that keep the thumb on all the
19 parties for purposes of this October 3rd start of
20 trial, and we -- we have -- we cannot express in more
21 direct terms that we don't think that that is the
22 right course here, that we've had successful
23 negotiations with all the parties in this case. So,
24 no, we don't see any deal breakers.

25 **JUDGE MELLOY:** I'll circle back to

1 Mr. Somach and let him speak again and address this
2 issue, which I didn't ask him about, but I want to
3 hear from Mr. Wechsler first. But Mr. Somach
4 indicated that one of his frustrations is that this
5 case has been going on for nearly ten years, and Texas
6 has gotten no relief. Is that entirely true in the
7 sense that Texas is getting water under the operating
8 agreement, which, of course, New Mexico says is
9 contrary to what the Compact provides for? Is Texas
10 still getting arguably more than its share of water
11 under the operating agreement?

12 **MR. LEININGER:** Well, we -- we wouldn't
13 put it as more.

14 **JUDGE MELLOY:** I used the word arguably,
15 but they're still getting some relief under the
16 operating agreement?

17 **MR. LEININGER:** Right. Yes, sir.

18 **JUDGE MELLOY:** And the operating
19 agreement still is governing the distribution of the
20 water?

21 **MR. LEININGER:** Yes, sir.

22 **JUDGE MELLOY:** Okay. Anything else you
23 want to add?

24 **MR. LEININGER:** Nothing other than that,
25 Your Honor.

1 **JUDGE MELLOY:** All right. Mr. Wechsler?

2 **MR. WECHSLER:** Thank you, Your Honor.

3 I'll start by saying -- reminding everyone, this is a
4 very complex dispute that has lasted decades, has a
5 very long history. By our count, it's 35 days of
6 mediation and hopefully counting. The parties have,
7 as you've heard, identified the major issues. We
8 believe there have been tentative agreements, at least
9 on the general contours. We do agree that there are
10 details to be worked out. I think we agree with the
11 United States, and if I heard correctly from Texas,
12 that there are no insurmountable details, but I
13 wouldn't represent that all of those details are
14 worked out. But we are confident, based on those 35
15 days of discussions over all of those issues, that
16 ultimately we would reach a resolution. And so for
17 that reason, we support the United States' proposal
18 that you give us a deadline of September 23rd in order
19 to present a settlement -- a written settlement in
20 front of you. We think that's an ambitious deadline.
21 If the parties are committed, we think it's
22 achievable. As I said, there are a number of details
23 that will need to go into that settlement.

24 **JUDGE MELLOY:** Tell me about this
25 legislation. What is the legislation, and have you

1 been in contact with the governor's office and the
2 legislative leaders to know that -- have some
3 confidence that it'll be enacted?

4 **MR. WECHSLER:** So, Your Honor, the final
5 contours of -- let me back up and say there are parts
6 of the settlement that all of the parties would have
7 to do. In fact, in my experience, both in these types
8 of cases, as well as complex litigation in general,
9 it's not uncommon to have a period where you enter
10 into a settlement and then there are a number of
11 contingencies that have to be accomplished. That's
12 true here, as well. There are things that the United
13 States and Texas would have to do. The exact contours
14 of any possible legislation in New Mexico haven't been
15 identified. One possible one is funding for fallowing
16 of land, but, again, I don't want to go into the
17 details of a -- of a settlement. In terms of your --

18 **JUDGE MELLOY:** Let me ask you this: The
19 -- I read an article, oh, three or four years ago now,
20 I guess, that New Mexico was going to enter into a
21 pilot program to fallow property, and they were going
22 to, in essence, buy out water rights, and they had
23 appropriated a couple million dollars for it, I
24 believe. Is that -- without getting into the weeds of
25 the settlement, is that at least something that's on

1 the table as expanding that type of a program?

2 **MR. WECHSLER:** So, Your Honor, in terms
3 of the pilot program, that actually did occur, and New
4 Mexico has had now, I think, going on three years of a
5 pilot program there. There's also, actually,
6 fallowing in the middle Rio Grande, as well, which
7 doesn't impact this case. You know, again, without
8 talking about the details of the settlement, we do
9 anticipate that there would be continued --
10 continuation of that project from New Mexico's
11 perspective. That fallowing is likely to continue
12 whether or not there's a settlement because we're
13 interested in simply good groundwater management. So
14 I think I feel comfortable saying there will be
15 fallowing down there, and there certainly have been
16 discussions about that as part of the settlement. You
17 asked have we kept the decision makers informed. I
18 mean, you have here in the courtroom the state
19 engineer, who is the chief water official of New
20 Mexico, as well as the interstate stream commission
21 director, who is another one of the primary water
22 officials in New Mexico. Both are appointed by the
23 governor, and so there is a direct link to the
24 governor's office. As you know, any settlement has to
25 be -- in New Mexico is ultimately the decision of the

1 attorney general, who has been kept informed on a
2 weekly, sometimes daily, basis of our ongoing
3 discussions. You have in the courtroom our chief
4 deputy, who has been delegated authority to negotiate
5 and make a decision. So I'm quite confident in saying
6 our decision makers are -- are well aware. There has
7 been some briefing of the legislature. I don't
8 disagree that a legislature can always be predictable,
9 but, again, we wouldn't be entering a settlement that
10 we weren't confident we could ultimately accomplish.
11 So we don't agree that there's any sort of -- we don't
12 agree that it's unlikely in any way, shape, or form.
13 I take Texas' point to be they have concerns about the
14 timing. I would echo what Judge Boylan and the United
15 States said, and that is in the event that we simply
16 litigate this case, you're likely looking at a much
17 longer period of time before there's any resolution.
18 One of the things that I -- I want to express on
19 behalf of New Mexico is that we -- we agree with the
20 United States that if -- if you maintain the October
21 trial date, it will be very challenging to take a dual
22 path. I mean, all of the parties have limited
23 resources. New Mexico is willing to do that. We
24 think it will be very hard. We are willing to do it.
25 The reason that we are willing to do it is that the --

1 the Court itself has often expressed that these cases
2 are best resolved by the parties themselves, and we
3 think that that's true because the parties understand
4 the issues and the nuances of the issues better and
5 ultimately can reach a -- a lasting resolution that
6 will avoid disputes and make sense for all of the
7 many, many parties that are involved. The other thing
8 I would say about that is, you know, we feel like
9 there has been a -- a large amount of trust and
10 goodwill built up. We feel confident that we're
11 moving towards -- we can see the -- a potential
12 resolution and are confident we can get there. We're
13 less confident that that would happen should we wait
14 some period of months, whether that's political
15 changes or simply changes in the case, and so it's our
16 view that we should postpone the -- the trial, set a
17 date of September 23rd as a time to -- to put forth a
18 settlement agreement. Again, that's ambitious, but
19 we're willing to work towards that.

20 **JUDGE MELLOY:** Do you envision any
21 amendment to the Compact by the settlement?

22 **MR. WECHSLER:** No.

23 **JUDGE MELLOY:** Do you -- do you
24 anticipate that you'll be asking the Supreme Court to
25 obtain any jurisdiction over the course?

1 **MR. WECHSLER:** We agree with the United
2 States. I'm not sure if you asked Texas that
3 question, but we do agree with the United States that
4 this would be presented to you as a -- for approval of
5 a settlement with hopefully a decree from the Supreme
6 Court. Again, my experience in almost all of those
7 decrees, the Court retains jurisdiction at the foot of
8 the decree really for any disputes, but there have not
9 been any discussions for anything beyond that, and I
10 think that's par for the course in terms of the way
11 decrees are phrased by the Court.

12 **JUDGE MELLOY:** All right. Anything
13 else?

14 **MR. WECHSLER:** Nothing further. Thank
15 you.

16 **JUDGE MELLOY:** All right. Thank you,
17 Mr. Wechsler.

18 Mr. Wallace, I'll give you a chance to
19 speak.

20 **MR. WALLACE:** Good morning. Thank you,
21 Your Honor. Colorado continues its position of
22 supporting settlement talks as the best way to resolve
23 the dispute. Echoing the comments from all the other
24 parties, we believe that over the course of
25 discussions, we've built up a good deal of goodwill,

1 understanding, and frankly very good working
2 relationship among all the parties, their experts, and
3 clients through this, and we'd really just hate to see
4 that break down at this stage. As far as the
5 September 23 deadline, Colorado feels that that is
6 ambitious, not that it's not attainable, but there are
7 a good number of details, and as Your Honor is well
8 aware, lawyers can be particular about putting things
9 into writing and what those terms may -- may mean.
10 For Colorado's part, our interest lies primarily in
11 how a final settlement is reduced to writing with
12 particular emphasis on how any of the terms might
13 actually relate to a Compact obligation. So that --
14 that is what Colorado will be looking for. We're much
15 less interested in -- in values, as the United States
16 put it, and more interested in how -- how those terms
17 might relate or not relate to the Compact itself.

18 **JUDGE MELLOY:** Is it at least your
19 understanding at this point that the settlement would
20 not effect Colorado's rights or obligations, and
21 you're going to be looking to make sure that's true in
22 the written agreement?

23 **MR. WALLACE:** That is our goal, Your
24 Honor. That's what we're going into these talks with
25 an aim to achieve is that it really doesn't affect us,

1 both on a direct water level and on a -- a larger
2 juris prudence interpretation of Compact level, to
3 make sure it doesn't impact this Compact, the Rio
4 Grande Compact, or leads to unwanted interpretations
5 of other existing Compacts. That's not to say that
6 we're at that point, but that is the goal that we have
7 through these talks.

8 Like some of the other parties, we're
9 not really in a position to dedicate all of our
10 resources both to settlement talks and trial
11 preparation at the same time. That said, Colorado is
12 deferring to the other parties, who admittedly have a
13 much larger role in the trial as to what their
14 resource allocation is or is not with regard to trial
15 date.

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

17 I want to give Mr. -- I'd like to hear
18 from Mr. Somach one more time, and then I'll give the
19 amici a chance to speak if they care to. I guess I --
20 I sort of threw out that issue of the operating
21 agreement giving you some relief so I'll give you a
22 chance to respond to that. And, also, let me ask you
23 this: If a settlement is achieved along the lines
24 that have been discussed, would that supplant the
25 operating agreement?

1 **MR. SOMACH:** Let me start with the
2 operating agreement just to indicate that the
3 operating agreement was in existence prior to the time
4 we -- we brought the lawsuit and --

5 **JUDGE MELLOY:** But you brought the
6 lawsuit because Colorado -- I mean, New Mexico is
7 challenging the operating agreement.

8 **MR. SOMACH:** No, that's what New Mexico
9 has alleged. That was not the reason why we brought
10 the lawsuit. It certainly was a factor, but -- but
11 the lawsuit had been contemplated as far back as the
12 early 2000s, in fact, 2000 and before that. The
13 operating agreement provided some relief, but we filed
14 the lawsuit because it didn't -- it didn't provide the
15 relief that we thought we were entitled to under the
16 Compact. And so I wouldn't deny that the operating
17 agreement does provide some relief, but that relief
18 preexisted the filing of the lawsuit. And as you
19 know, what we've argued in the lawsuit is
20 significantly greater in terms of what Texas is
21 entitled to than what the operating agreement
22 provides. With respect to whether or not the
23 settlement -- the settlement does not -- the proposed
24 settlement would not affect the operating agreement
25 itself. It would affect the operating manual in

1 various ways, which is, in a sense, where the rubber
2 hits the road. But going into the details, we could
3 be going into the details of what is being talked
4 about in the settlement. And, again, I think that,
5 you know, you'll see that when we go to trial, if we
6 go to trial, that is that there is a difference
7 between the operating agreement and this operating
8 manual. I think there's been some testimony to that
9 already. But most of the focus in terms of the terms
10 of the settlement really focus more on the manual than
11 they do the -- the agreement itself.

12 With respect to -- I just want to make
13 clear that -- that, you know, we're not unwilling to
14 sit down and continue settlement. You know, we think
15 that should occur, you know. It's just that with the
16 -- we don't have the same level of certainty and
17 comfort that the other parties apparently have is at
18 the end of the day that we'll reach that settlement.
19 I don't dispute the fact that if we reach settlement,
20 it'll be a quicker road to a decree in the Supreme
21 Court than if we try this case. I have -- I have -- I
22 mean, that -- that should go without question. The
23 issue here from our perspective is what happens if you
24 don't reach settlement because, you know, if in April
25 or May, notwithstanding everybody's good intentions,

1 the legislature doesn't do what the -- the -- the
2 negotiators wanted to do, that time frame that they're
3 talking about that I don't dispute is -- is displaced
4 by a whole year. So we've added a year to the
5 timeline that they're talking about in terms of final
6 resolution to the Court, and that's our concern.
7 Obviously if we reach agreement, that'd be great. We
8 think it's worth the effort. We'll continue to work
9 with any party that will sit down and continue to talk
10 to us, but we don't think it's mutually exclusive of
11 maintaining the trial date at October 3rd.

12 **JUDGE MELLOY:** The -- it sounds like
13 it's a little bit of a two-step process, though. If
14 -- if the trial were continued, it could be continued
15 to some time February/March of 2023, with the
16 understanding that if the settlement agreement is not
17 finalized by September, then you go ahead with that
18 trial date; if the settlement is finalized, then we
19 probably continue it again. But we wouldn't have to
20 necessarily continue it for a whole year at the
21 outset, would we?

22 **MR. SOMACH:** Certainly not. I mean, you
23 could -- in a sense, you could -- you could continue
24 it month to month, you know, if that were something
25 that -- that you would entertain, but I -- I'm -- you

1 know, there's practical ramifications of doing that.
2 We just -- we just feel that we've been at this for a
3 very long time. This is -- as you recall, Judge
4 Boylan is the second mediator we had, then we've had
5 half of the trial, then we've been at this since
6 December, and -- and, now, what's being proposed is
7 something that goes into the next year. The New
8 Mexico attorney general changes at the end of the
9 year, and we have no idea -- talk about uncertainty --
10 what that means in terms of conditional settlement.
11 And so with all of that in front of us, that's why we
12 urge, you know, continuing with the trial date of
13 October 3rd. And, again, I just want to be clear,
14 that does not mean we're unwilling or won't sit down
15 and put whatever resources are necessary toward it and
16 also looking to see if we can get a resolution, and
17 notwithstanding Mr. Wallace's statement about ambition
18 and whether September 23rd is ambitious, we're willing
19 to come up with a status conference in as early as the
20 middle of August to come back and have a conversation
21 about where we are and whether we should go to trial
22 on October 3rd or whether or not it should be
23 continued at that point in time. We just don't feel
24 we have the level of comfort or certainty today to be
25 willing to give up a trial date that we have -- we

1 have worked very hard to -- to get in the first place.

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

3 Do any of the amici want to be heard?

4 Ms. Barncastle?

5 **MS. BARNCASTLE:** Yes, Your Honor, and I
6 think there are others so I'll just defer for a few
7 minutes.

8 **JUDGE MELLOY:** Okay. All right. Go
9 ahead. Mr. Stein?

10 **MR. STEIN:** Yes. Thank you, Your Honor.
11 This is Jay Stein, counsel for the amicus city of Las
12 Cruces. I do have a comment on the debate that's been
13 going forward. The City of Las Cruces participates in
14 this process in two respects. We are fully engaged in
15 the settlement process and work with our state, the
16 state of New Mexico in that, and, also, we participate
17 in the trial process, and the City had a witness in
18 the first trial stage, you may remember, Dr. Jorge
19 Garcia, and we will also have a witness in the second
20 trial phase, should that occur, presented by state
21 attorneys. We do not believe that the settlement
22 process can occur simultaneously with the trial
23 preparation process. We are certainly willing to
24 continue with the negotiation process. I want to
25 elaborate that a bit. But we do not believe the

1 October 3rd trial date can reasonably be retained.

2 As Your Honor knows, this case is
3 extremely complicated. It has numerous issues
4 involving hydrology and administration, how the water
5 right -- water rights are actually distributed and
6 enjoyed and used by the various parties in the state,
7 including the city of Las Cruces, and from our
8 perspective, the negotiations are beginning to move
9 into a new tier of issues. Previously they have
10 focused on the question of agricultural rights,
11 agricultural use and irrigation. Now, they are
12 beginning to address the sleeping giant, and that is
13 the municipal uses. I'm referring to the state's
14 second largest city, the city of Las Cruces, which is
15 in the center of this. Those issues are now beginning
16 to appear. The process that we use and that we employ
17 to assist the -- the state is when proposals are made,
18 we get them to our -- our hydrologist, and proposals
19 are made constantly. New proposals are constantly
20 coming out. We have to get them to our hydrologist.
21 He has to have analyzed them. They then come back to
22 us, which we provide to our state. Our state then
23 makes them part of the negotiation process with the
24 United States and the State of Texas. All of this
25 takes a long time, and those are just the proposals,

1 the specific narrow proposals. We don't have a term
2 sheet. There were efforts to create one, but all of
3 that collapsed. There is no term sheet. Instead,
4 there are principles, and those principles change, and
5 sometimes we can't even be told what the principles
6 are. Those are -- are confidential among the
7 negotiating parties alone. This makes it a difficult
8 and complicated process for the water users that are
9 actually in the trenches, and I'm referring
10 specifically to Las Cruces, which has a very daunting
11 burden and the burden of -- of providing municipal
12 supply on a daily basis to 125,000 customers.

13 The proposal that I see on the table, a
14 tentative settlement by September 23rd, I think, is
15 highly challenging. We're willing to commit to that
16 and to do what we can to work with New Mexico on that
17 in this new area of -- of municipal supply. I do not
18 believe that it is feasible at all to have a dual
19 track where we engage in that process together with
20 some trial preparation for an October 3rd trial date.

21 **JUDGE MELLOY:** You say you're in a new
22 phase. Does that mean there's a whole set of issues
23 you feel that still need to be resolved?

24 **MR. STEIN:** There are issues that have
25 emanated from the agricultural discussions and the

1 allocation of agricultural rights that are now
2 beginning to impact the city and creating specific
3 issues for us, yes.

4 **JUDGE MELLOY:** As a New Mexico citizen
5 and representing a New Mexico entity, are you as
6 confident as Mr. Wechsler that if -- if you need a
7 legislative solution, that the New Mexico legislature
8 will approve it?

9 **MR. STEIN:** I believe so. I believe
10 that a -- a legislative solution that is supported
11 both by the cities of Las Cruces and Albuquerque would
12 pass the legislature.

13 **JUDGE MELLOY:** But if either city were
14 to oppose it then --

15 **MR. STEIN:** That would make it a more
16 difficult process, and I couldn't -- I couldn't answer
17 to the result.

18 **JUDGE MELLOY:** So basically, it's --
19 it's not an absolute necessity but highly desirable to
20 have Albuquerque and Las Cruces on board?

21 **MR. STEIN:** Without question, Your
22 Honor.

23 **JUDGE MELLOY:** Okay. Thank you,
24 Mr. Stein.

25 Mr. Brockmann?

1 **MR. BROCKMANN:** Good morning, Your
2 Honor, and thank you for the opportunity, again, for
3 the amici to make a few brief remarks. I do want to
4 say that -- that New Mexico does keep, I believe, the
5 New Mexico amici fairly well briefed, but just as a
6 matter of process, when they meet with the other
7 parties and then we get briefed on -- on certain
8 matters, as Mr. Stein indicated, it takes us time to
9 evaluate those on behalf of our clients and come back
10 so I -- I do think this case is, in addition to the
11 complexity of the case, being an Original Action
12 affecting a lot of water users, there is an additional
13 level of complexity because the -- the state
14 representatives, I think it's essential for them to
15 continue to keep us involved and informed so that we
16 do support an ultimate settlement, and things have
17 continued to move and evolve. It's hard for -- for me
18 to say with certainty whether or not there's actually
19 principles of agreement or not because we're not in
20 the room for some of those discussions, but it does
21 seem to continue to evolve, I guess, from our
22 perspective. Albuquerque, the Water Authority,
23 continues to support the settlement process. I -- I
24 -- from my perspective, I don't see a settlement yet,
25 but I think the parties are working on general

1 principles, and I think they're better to give their
2 opinions on where it's at and whether or not there are
3 differences between the parties. But I do agree that
4 -- that mid September is extremely ambitious to get
5 this written down. As you've indicated, the parties
6 worked on a term sheet for a while, and -- and we
7 don't have one, and there's a different set of
8 principles they're working on, and we haven't seen
9 that. That said, we've been informed generally of the
10 discussions. We know generally what the issues are.
11 But to -- to reduce that to writing and -- and
12 actually have the parties agree with that and there is
13 a process within New Mexico where I know the state
14 engineer, the ISC, the attorney general's office are
15 sitting down to work with us on various issues that
16 involve intrastate administration, but that takes
17 time. And from my perspective, the 23rd of September
18 is very ambitious, and it would be difficult for the
19 parties to do both trial and settlement negotiations
20 at the same time, trial preparation.

21 **JUDGE MELLOY:** Well, let me ask you
22 this: Is there anything about the principles that
23 have been agreed upon that you're aware of that would
24 cause your client, basically the City of Albuquerque,
25 to -- to object?

1 **MR. BROCKMANN:** I have to see the
2 principles in writing to answer that. So there have
3 been discussions about issues that do affect the Water
4 Authority, and -- and I understand sometimes there's a
5 proposal and there's pushback, no, we can't do that,
6 but I haven't seen a document really that I can sit
7 down and talk to our client about and say is there an
8 effect or not. If I was giving you a tentative answer
9 today, I would say I think -- I think they're pretty
10 comfortable with where we're at, but I can't say that
11 with certainty.

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

13 **MR. BROCKMANN:** Thank you.

14 **JUDGE MELLOY:** Anyone else? Did you
15 want to speak, Ms. Barncastle?

16 **MS. BARNCASTLE:** Yes, Your Honor. If
17 anybody should be upset about requesting an extension
18 on the trial deadline, it's EBID. We are getting EP
19 No. 1 their water. We have been doing it for years.
20 EBID, without proper groundwater administration, is
21 going to continue to be harmed while that is the case.
22 So if anybody is concerned here about pushing the
23 trial date, it shouldn't be Texas. It should be me.
24 But I'm here to support pushing off that trial date
25 because we need a holistic response and a proper

1 solution to all of these issues that are older than
2 me. Multiple of the cases that are impacted, the
3 issues that are impacted began long ago. Mr. Somach
4 told you himself, early 2000s was when Texas started
5 thinking about this. Is it realistic to think that we
6 could settle a case like this in seven months? I
7 don't think so. There's no possible way. You look at
8 the talent in this room. You look at the work that
9 has been put in. Not a single lawyer in this room
10 will tell you with a straight face that they haven't
11 worked through every single weekend, say, for a couple
12 of minor examples, since we started this mediation
13 process. There is absolutely no reason we should not
14 push trial right now, give ourselves an opportunity
15 that we all deserve, to finish this the right way.

16 **JUDGE MELLOY:** Let me -- let me ask you
17 this: Are there other lawsuits that would be effected
18 by this settlement? I should ask maybe some of the
19 other parties, but I know you're very involved with
20 the case.

21 **MS. BARNCASTLE:** I can think of three
22 issues in the adjudication directly implicated,
23 multiple federal district court cases in -- and
24 directly related cases, and I have approximately 15
25 pending water rights protests that would all be

1 effected.

2 **JUDGE MELLOY:** Does this -- would this
3 resolve the dispute over the United States' date of
4 priority date?

5 **MS. BARNCASTLE:** I believe so.

6 **JUDGE MELLOY:** Okay. All right. Any of
7 the other amici want to be heard?

8 **MS. O'BRIEN:** Yes, Your Honor, just
9 briefly.

10 **JUDGE MELLOY:** Ms. O'Brien.

11 **MS. O'BRIEN:** Maria O'Brien on behalf of
12 El Paso County Water Improvement District No. 1. I'll
13 be brief, Your Honor. I just wanted to state for the
14 record that EP1 wholeheartedly supports the diligent
15 and concentrated efforts of the parties to settle and
16 resolve this litigation and is committed to
17 participation to assist in effectuating a settlement.
18 I think as Your Honor has noted in the course of this
19 litigation, a settlement can achieve resolution of
20 broader issues, and as parties have noted here today,
21 hopefully in more expeditious fashion than litigation
22 could. On the issue of deadlines and timing and
23 mutually dedicating the parties' efforts to trial and
24 settlement, we defer to the parties' assessments of
25 their individual capacities and what that presents to

1 them in terms of practicality.

2 **JUDGE MELLOY:** Is -- and I -- and I
3 guess I could let Mr. Caroom speak to this, but are
4 you and the City of El Paso on the same page? Are you
5 more as -- as has been sort of the situation about
6 this case, you're more on New Mexico's side of it than
7 -- than Texas' side?

8 **MS. O'BRIEN:** Well, I won't say we're
9 more on New Mexico's side. We're on the side of the
10 project, the Rio Grande project, and I believe that
11 both the efforts of Texas and the United States is to
12 protect the project supply, the water apportioned
13 under the Compact, is dedicated to the Rio Grande
14 project, to the two districts, Elephant Butte
15 Irrigation District and downstream El Paso County
16 Water Improvement District No. 1. And with regard to
17 your question regarding the City of El Paso, yes,
18 Mr. Caroom can speak for the City, but if EP1 gets its
19 water, then the City of El Paso gets its water. We do
20 not get our water if the City of El Paso does not.
21 It's a derivative right from the district's rights
22 under the Rio Grande project.

23 **JUDGE MELLOY:** All right. Thank you.
24 Anyone else wish to speak? Ms.
25 Davidson.

1 **MS. DAVIDSON:** Thank you, Your Honor,
2 and I appreciate the opportunity to speak today. I
3 won't take long, but I did --

4 **JUDGE MELLOY:** Why don't you enter your
5 appearance just for the people listening in for the
6 record.

7 **MS. DAVIDSON:** Yes. Tessa Davidson on
8 behalf of New Mexico pecan growers. I've also been
9 asked to speak on behalf of New Mexico State
10 University and the Southern Rio Grande Diversified
11 Crop Farmers all the amici in the case. We do support
12 New Mexico in their comments and really the general
13 comments of other amici supporting New Mexico. And I
14 just want to circle back on a couple of issues that I
15 heard you -- and questions that I heard you ask
16 regarding specific terms and amounts. You're exactly
17 right. Those are terms, amounts, time periods with
18 regard to water and water use, and it affects water
19 and water use in New Mexico. And although we are not
20 the parties, we are not vested with the legal
21 authority to sign off on behalf of our states, the
22 practical effect of all of this is if you don't have
23 by the amici, it's going to be very hard to implement
24 a lot of the very, very detailed aspects of what's
25 being discussed right now. With regard to continuing

1 litigation in New Mexico, it is going to require New
2 Mexico amici participation to resolve those issues in
3 the litigation. So there's a lot of downhill
4 consequences to what's occurring uphill, and it's --
5 it's my belief that we do need additional time. If
6 this is going to work, amici need to be fully apprised
7 and understanding of what's going on. We need to be
8 able to go back to our clients and sort out issues
9 that affect them. These issues of terms, amounts do
10 directly affect them. So I just wanted to give you
11 that perspective. I'd like to see settlement succeed.
12 I'd like to see all of us not fight about these issues
13 anymore, but it's going to require some also practical
14 on-the-ground support by New Mexicans.

15 **JUDGE MELLOY:** Is, from what you
16 understand of the principles that have been agreed
17 upon, and you may not know all of them, but is there
18 anything at this point that your clients would have
19 objection to?

20 **MS. DAVIDSON:** Not at this point, Your
21 Honor, as far as I understand. There are some items
22 that have yet to be fully flushed and discussed that
23 are very important to my clients. Thank you.

24 **JUDGE MELLOY:** Thank you. Anyone else?

25 (No response.)

1 **JUDGE MELLOY:** Anything further from any
2 of the parties? Let me ask you this, Mr. Leininger.
3 You said that -- when you were up here that you could
4 start drafting Monday. Who's going to do the
5 drafting? I mean, what -- has there -- are you to the
6 point where you've started to divvy up responsibility
7 of who's going to do what and when they're going to do
8 it and how soon they're going to do it and so on and
9 so forth?

10 **MR. LEININGER:** So we're -- we started
11 preliminary discussions amongst all the parties as to
12 dividing up into drafting committees. So there are
13 blocks of this that we think would be most efficiently
14 addressed with taking -- taking the subject matter and
15 reducing the agreements, principles to date, to -- to
16 writing based upon that. So we -- we -- at least I
17 envision, and we haven't actually come to -- to
18 resolution on how we're going to do this, but we
19 envision rather than spending time flying around the
20 country and -- and visiting sites, we would be doing
21 this via Zoom. We would have small select committees
22 for purposes of writing. We would have screen share
23 capabilities. We'd be devoting hours, days, weeks to
24 that effort.

25 **JUDGE MELLOY:** I've heard several of the

1 amici in particular indicate that they thought
2 September 23rd may be overly ambitious. What do you
3 think? What's your response to that?

4 **MR. LEININGER:** Well, I would agree with
5 Ms. Davidson that we have this -- we have this ability
6 to reach agreement. There are -- there are terms,
7 there are values, there are amounts, as she mentioned,
8 which I understand will still be negotiated.
9 Primarily, at least from our view, a lot of that
10 negotiation will be going on between New Mexico and
11 its amici.

12 **JUDGE MELLOY:** New Mexico and who?

13 **MR. LEININGER:** And its amici.

14 **JUDGE MELLOY:** Oh, okay.

15 **MR. LEININGER:** So we'll -- we'll
16 certainly be involved in that process. I think that
17 will be going on simultaneously with the drafting of
18 the document, but we did talk about immediately
19 beginning this process of putting this agreement to
20 paper.

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

22 So, Mr. Wechsler, do I understand that
23 essentially you still need to, in essence, come to
24 some agreement as to how the water is going to be
25 divided between the agricultural interests and Las

1 Cruces and Albuquerque and other interested parties in
2 New Mexico?

3 **MR. WECHSLER:** I think there's some of
4 that, Your Honor. I think that there are some --
5 these are some of the details that the parties need to
6 work through. You know, I -- I appreciate some of our
7 amici's concerns about not having seen all of the
8 settlement terms. Of course, that's the nature of
9 settlement discussions. There's only so much that
10 we're able to share. We've done as much as we can so
11 we've had at least weekly calls with our amici. We
12 have sought their input on the things that we think
13 would impact them. We're relatively confident that on
14 most of those issues, the things that have been
15 discussed within the settlement rooms are within the
16 contours of what we have talked about with our amici,
17 so we're confident we could reach all of the necessary
18 agreements. Certainly it's true there are -- there's
19 only so much water that New Mexico is entitled to, and
20 when you have zero sum gain, it's about administering
21 and moving that water around. Some of the
22 decades-long disputes that we've been talking about
23 are precisely that, figuring out the relative water
24 uses within the states. It's our view that we're
25 close to a resolution that we'll be able to put to bed

1 hopefully with a lasting piece, a number of those
2 issues, but there's more to do in those regards.

3 **JUDGE MELLOY:** Do you anticipate Judge
4 Boylan continuing to participate in this process doing
5 the drafting or do you think he's essentially done
6 with his role? I mean, maybe I should ask Judge
7 Boylan, but what is your view of Judge Boylan's role
8 in this?

9 **MR. WECHSLER:** From our perspective,
10 Judge Boylan has been incredibly helpful, and we do
11 view him having a role going forward. I agree with
12 Mr. Leininger about the nature of the drafting
13 process. I think through -- through most of those
14 sessions and Zoom, Judge Boylan's presence wouldn't be
15 required. In fact, the parties have shown over the
16 last couple weeks that we have had the ability, as
17 we've gone through specific terms in the last couple
18 weeks, I think that we've made very significant
19 progress simply on our own. But I do think that
20 there's likely to be some issues that will really
21 benefit from Judge Boylan's process if he's willing to
22 continue -- or participation, I should say, if he's
23 willing to continue to work with us, and it may be
24 that there is a session on the horizon that involves
25 New Mexico water users, including the United States,

1 EBID, and the New Mexico amici, to help sort through
2 some of the intrastate issues. There has been
3 significant discussion about that amongst the parties.
4 It's just that with the -- the priority of issues, we
5 haven't been able to have that session yet.

6 **JUDGE MELLOY:** Okay. All right. Thank
7 you.

8 Anybody else wish to be heard?

9 (No response.)

10 **JUDGE MELLOY:** Well, let me say this:
11 I'm not prepared to make a final decision today. I
12 want to talk -- quite frankly, I'm going to visit with
13 the clerk of the Supreme Court, Scott Harris, and I
14 want to kind of see if there's -- how they feel about
15 how this -- about going forward on this. I will say
16 this: I think very early on, I believe I said when we
17 first appointed Judge Granger as the mediator that if
18 it came to a point where there was some discussion
19 about whether the case should be stayed for some
20 period of time, that I would be guided to a large
21 extent by the mediator's view of -- of how we should
22 proceed, and I understand what Judge Boylan is saying
23 here so that'll be certainly a very significant factor
24 in my decision, but I'll let you know next week. But
25 regardless I would like to have a status conference

1 sooner rather than later, probably towards the end of
2 July. We don't have to do that one in person, but I
3 just -- I want to make sure that we're keeping things
4 moving forward with whether -- and if we -- and if I
5 don't continue the trial, we'll need to set some
6 deadlines for exchanging witness exhibits, exhibit
7 lists, witness lists, and so on so forth. So either
8 way, I want to get back together by videoconference
9 some time in, say, three or four weeks. But I'll let
10 you know what I decide next week, and we'll set a date
11 for further status conference at that point.

12 Anything else?

13 **JUDGE BOYLAN:** Judge, I'm not sure
14 whether or not that status conference is dependent
15 upon my availability, but I thought I would at least
16 alert the Court that on the Friday -- last Friday of
17 July, I will be out of the country.

18 **JUDGE MELLOY:** Okay.

19 **JUDGE BOYLAN:** But apart from that, I
20 will be except for July 29th.

21 **JUDGE MELLOY:** Thank you. I appreciate
22 that. Thank you, Judge, for all your work in this
23 case. Appreciate it.

24 All right. We're adjourned. Thank you,
25 everyone.

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(The proceedings adjourned at 10:18 a.m.)

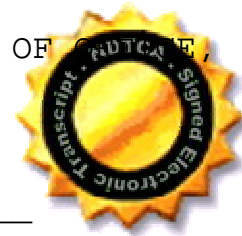
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