

NO. 141 Original

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In The

SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF AUGUST 24, 2022, REMOTE  
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL  
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH  
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at  
11:02 a.m.

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## P R O C E E D I N G S

**JUDGE MELLOY:** All right. This is in Original No. 141, State of Texas versus State of New Mexico and State of Colorado and the United States. Let me start by -- well, first of all, let me mention, I think we had some people who had not muted. Other than -- unless you're speaking, be sure to put your speaker on mute, if you would, please.

We'll start with the State of Texas.  
Mr. Somach?

**MR. SOMACH:** Yes, Your Honor. This is Stuart Somach for the State of Texas. With me from my office are Theresa Barfield, Sarah Klahn, Francis Goldsberry, Robert Hoffman, and from the Texas Attorney General's Office, Priscilla Hubenak, and Mr. Bobby Skov, the Rio Grande Commissioner for the State of Texas, is also on.

**JUDGE MELLOY:** Okay. And for State of New Mexico?

**MR. WECHSLER:** Good morning, Your Honor. Jeff Wechsler from Montgomery & Andrews. Also from our office, we have Shelly Dalrymple; Cholla Khoury, the chief deputy attorney general; and Zach Ogaz from the New Mexico Attorney General's Office; Marcus Rael from Robles Rael & Anaya; Lisa Thompson and Michael



1 Kopp from Trout Raley; John Draper from Draper &  
2 Draper; and we expect to have Mike Hamman, the state  
3 engineer and Rio Grande Compact Commissioner; Rolf  
4 Schmidt-Petersen, the director of the interstate  
5 stream commission; and Nat Chakeres, the general  
6 counsel for the Office of the State Engineer.

7 **JUDGE MELLOY:** For the State of  
8 Colorado? I saw Mr. Wallace on. Anyone else?

9 **MR. WALLACE:** Yes. Good morning, Your  
10 Honor. Chad Wallace for the State of Colorado. Also  
11 for the Attorney General's Office is Preston Hartman.  
12 We also have joining us today the deputy state  
13 engineer, Mike Sullivan; Colorado's engineer advisor  
14 to the Compact, Craig Cotten.

15 **JUDGE MELLOY:** And then for the United  
16 States, I saw Mr. Leininger.

17 **MR. LEININGER:** Yes, good morning, Your  
18 Honor. And joining me today from the Department of  
19 Justice is Judy Coleman and Jennifer Najjar; from the  
20 Department of Interior Solicitor's Office, Chris Rich,  
21 Shelly Randel; and from the Bureau of Reclamation,  
22 Jennifer Faler, Michelle Estrada-Lopez, and Ian  
23 Ferguson.

24 **JUDGE MELLOY:** All right. Then for the  
25 Albuquerque Bernalillo County Water Utility Authority,

1 who do we have, if anyone?

2 **MR. BROCKMANN:** Good morning, Your  
3 Honor. This is Jim Brockmann for the Albuquerque  
4 Bernalillo County Water Utility Authority.

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

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

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

9 **MR. STEIN:** Good morning, Your Honor.  
10 This is Jay Stein for the City of Las Cruces. I  
11 expect to be joined by Delila Walsh, the director of  
12 Las Cruces utilities, and Adrienne Widmer, the  
13 assistant director.

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

16 **MS. O'BRIEN:** Yes, good morning, Your  
17 Honor. Maria O'Brien for El Paso County Water  
18 Improvement District No. 1. Counsel Renea Hicks is  
19 also on, district manager, Jesus Reyes, and district  
20 engineer, Dr. Al Blair.

21 **JUDGE MELLOY:** Elephant Butte Irrigation  
22 District?

23 **MS. BARNCASTLE:** Good morning, Your  
24 Honor. Samantha Barncastle for EBID. I apologize. I  
25 don't have video today due to bandwidth issues related

1 to the weather, but with me today is my client, the  
2 manager and treasurer of the irrigation district,  
3 Dr. Patrick Sullivan, and the central advisor to the  
4 board of directors, Gary Esslinger.

5 **JUDGE MELLOY:** I might ask you,  
6 Ms. Barncastle. You mentioned weather. One of the  
7 things I'm a little curious about is I've been reading  
8 about all the monsoons in the southwest. Has all the  
9 rain materially affected the water levels in -- in the  
10 reservoirs?

11 **MS. BARNCASTLE:** No, Your Honor.  
12 Unfortunately, this rain comes in, for us, below the  
13 reservoir, and it affects farmers' fields at this  
14 point. So we have farmers' crops drowning in water  
15 that we can't evacuate. It's just a matter of timing  
16 and -- and location. But we're hoping that those  
17 rains will materialize north of the reservoir and  
18 start to help reservoir levels soon.

19 **JUDGE MELLOY:** All right. Thank you.  
20 Who do we have on for Hudspeth County  
21 Conservation and Reclamation District No. 1?

22 **MR. MILLER:** Good morning, Your Honor.  
23 This is Drew Miller on behalf of Hudspeth County  
24 Conservation and Reclamation District No. 1.

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

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

3                   **JUDGE MELLOY:** Anyone on for New Mexico  
4 State University?

5                   **MR. UTTON:** Yes, Your Honor, good  
6 morning. This is John Utton for NMSU.

7                   **JUDGE MELLOY:** Southern Rio Grande  
8 Diversified Crop Farmers Association? Anyone on?

9                   (No response.)

10                  **JUDGE MELLOY:** I assume nobody is on for  
11 State of Kansas. And I did see the special -- our  
12 mediator, Mr. Boylan is on. Did I miss anyone?

13                  **MS. DAVIDSON:** Your Honor, I believe  
14 A.J. Olsen with the diverse growers is trying to  
15 appear, but he appears to have a problem with his mic.

16                  **JUDGE MELLOY:** Okay. I'll show  
17 Mr. Olsen appearing. I would mention, I had three or  
18 four requests from various members of the news media  
19 to listen in to the status conference this morning,  
20 which I have granted, so there are some news media  
21 listening to the -- to the presentation, as well.

22                  All right. Basically we 're here this  
23 morning to get an update on where we are with the  
24 settlement drafting process and so I think I'll  
25 probably let Mr. Leininger speak first. You've sort

1 of taken the lead on this so what -- where are we,  
2 Mr. Leininger?

3 **MR. LEININGER:** Yes, Your Honor, thank  
4 you. So the parties continue to meet. We've been  
5 meeting regularly, making progress. We've had  
6 in-person meeting a couple weeks ago in Denver. That  
7 was a very helpful, productive meeting. So we've  
8 continued to make progress. There's -- there's choppy  
9 waters, though, with continuing the course here. We  
10 still expect the September 23 deadline for purposes of  
11 final draft settlement agreement, which would then be  
12 available for our respective approvers to review. We  
13 are scheduling -- and Judge Boylan, I believe, is  
14 going to be attending this, too. We are scheduling  
15 another meeting in Santa Fe next week, in-person  
16 conference, with New Mexico, United States, and New  
17 Mexico amici for purposes of addressing the other part  
18 of this case that we had discussed last status  
19 conference, which is the -- the project --  
20 interference project use within New Mexico. So we're  
21 continuing to make -- make progress, Your Honor.

22 **JUDGE MELLOY:** Well, I'll let Mr. Somach  
23 speak in a moment, but the last time we were together,  
24 if I understood what he was saying correctly, he  
25 didn't feel there was any real reason why you couldn't

1 go ahead and finalize the Texas part of the agreement.  
2 Most of your discussions, as I understand at this  
3 point, are intra New Mexico concerns. Where are you  
4 on that?

5 **MR. LEININGER:** There has been  
6 discussion about completing that draft, and also, I  
7 think you'll hear from the other parties on this,  
8 putting it in a final enough form that we can then  
9 share with amici, and so we understood that the draft  
10 was still -- and I think all the parties would agree  
11 -- still subject to amendment, still subject to  
12 editing. We were concerned that we didn't have a form  
13 of this in sufficient form for purposes of  
14 distribution. We understand that there's a need to  
15 have this distributed and get the response from amici  
16 with regard to the Texas portion of it.

17 The proposal right now, I think, is that  
18 we would -- anyone that this document is shared with  
19 needs to sign a confidentiality agreement. So one of  
20 the things we have discussed is taking the existing  
21 confidentiality agreement amongst the parties and  
22 providing basically that form for purposes of amici  
23 counsel signature, and we intend to be working on that  
24 this week, having that complete, and then I know  
25 there's a desire to get the draft decree out as soon

1 as possible so upon confidentiality signatures, and  
2 with the understanding that the distribution would be  
3 limited to amici counsel, I believe we'll be in a  
4 position to do that next week.

5 **JUDGE MELLOY:** I -- I assume, however,  
6 you've been sharing the outlines and the significant  
7 points of the agreement with amici or have you not?

8 **MR. LEININGER:** We have. We're -- we're  
9 absolutely talking, you know, within -- about these  
10 concepts because we don't want any surprises here at  
11 this late stage. So I think that the -- the concept  
12 here is understood amongst all the parties and the  
13 amici. So the actual language itself, however,  
14 appearing in that -- in that draft is -- you know, we  
15 -- we expect we will have some substantive comments so  
16 it is that form document that we feel has to be in  
17 better shape before it's distributed.

18 **JUDGE MELLOY:** Do you anticipate that if  
19 you make your September 23 deadline and you have a  
20 final document ready to be submitted to the parties  
21 for approval, that you will be able to make it public  
22 at that point?

23 **MR. LEININGER:** No, Your Honor.

24 **JUDGE MELLOY:** Why not?

25 **MR. LEININGER:** Well, because it is

1 still subject to review for purposes of approval. So  
2 in our case, it has to be approved by the Solicitor  
3 General and by the Assistant Attorney General for the  
4 Environment Division. So it is -- it would be subject  
5 potentially to some changes. Again, we've been in  
6 close contact, close communication, with both  
7 branches, and we don't expect that there's going to be  
8 any rejection of this; but because it is still subject  
9 to approval, Your Honor, we don't think it should be  
10 made public.

11 **JUDGE MELLODY:** Mr. Somach, what's your  
12 view of all this?

13 **MR. SOMACH:** Well, Your Honor, as I  
14 indicated last time, you know, we had said that we  
15 were going to kind of be done with our part by August  
16 8th. At the request of the mediator, we -- because he  
17 had requested us to wait until he got back from his  
18 vacation, we did meet around August 10th, I believe,  
19 and by that time, we had fulfilled everything that we  
20 could fulfill. We had finished everything that we  
21 could finish at that point. After the discussion on  
22 the 10th, we -- at the request of -- after we had  
23 discussion among the parties, we provided a -- what we  
24 call a draft final of what we think would be the  
25 decree. We, last week, provided a copy of that to all



1 the parties. I had first met with Mr. Wechsler, and  
2 the two of us had agreed on a draft final to provide  
3 to all of the parties. We did that last week, and at  
4 this point, other than being on call, we're done.  
5 There's nothing more we can do. We -- we've exhausted  
6 what we can do. We haven't gotten any feedback yet  
7 from United States, although United States keeps  
8 saying there are holes in what we provided. There are  
9 some issues that Colorado has raised and -- and we'll  
10 be certainly willing to talk to them about them, but  
11 there's -- there's not much that Texas can do. Based  
12 upon your prior determination, we'll wait until  
13 September 23rd. We have -- we certainly hope that  
14 everybody reaches a final agreement on what I think  
15 last time were called ancillary issues to the -- to  
16 the Compact issues that are in the decree. I -- I  
17 will say this, that we think the decree -- the draft  
18 we have is sufficient -- in sufficient form to provide  
19 to amici and would have -- and have been advocating  
20 providing it to the amici. I note that this is the  
21 24th. September 23rd is now less than a month away,  
22 and waiting another week, two weeks, to provide amici  
23 with documents, I think, you know, telegraphs an  
24 impossibility of being done by -- by the 23rd.

25 But, again, we're -- we're -- we're at

1 the end of what we can do. We'll be on call, you  
2 know, to talk to -- to folks and to discuss issues,  
3 but there's not much we can do. I -- I would say that  
4 if we reach agreement, and I -- I'm a little bit  
5 concerned about the notion of a lot of changes and  
6 edits after the 23rd because that means the 23rd isn't  
7 really a date of agreement because all that does is  
8 kick the ball down the road, and if the Solicitor  
9 General's Office doesn't get back to us until  
10 December, we'll be negotiating into 2023 based on what  
11 I just heard. So that -- that does give us some  
12 trouble. We -- we would suggest, actually -- and I  
13 think you have mentioned the concurrency of approvals  
14 with an evidentiary hearing to prove up the decree.  
15 We certainly believe that that's appropriate and would  
16 advocate your setting a date in November, assuming an  
17 agreement is reached, to begin some evidentiary  
18 hearings.

19 But -- but more fundamental or as  
20 fundamental of that is if -- if this doesn't come  
21 together on the 23rd, while we're hopeful, I think  
22 we're also a little skeptical. At this point in time,  
23 we really do believe and urge you to set a trial date  
24 and -- and would -- would urge you to set a trial  
25 date. You'd indicated November was -- was too

1 aggressive, but we believe that a trial date in  
2 December that we could get two -- two weeks of trial  
3 in December and maybe then get this thing done by the  
4 end of January, but we really urge that as an  
5 important backup, that -- that everything I've heard,  
6 everything we see is this thing keeps rolling. It  
7 just keeps moving forward. If we don't have agreement  
8 by September 23rd, I will say this, you know, we're --  
9 we're hanging in there until September 23rd, but if  
10 there's no agreement by 23rd -- September 23rd, Texas  
11 is going to walk away from the negotiation table, and  
12 it's our intention to -- to trial. We need to get  
13 this resolved. It's in nobody's interest to keep this  
14 continuing indefinitely. I hate to say that, and I  
15 don't know that you can resolve this case through a  
16 settlement without the State of Texas being on board,  
17 and so, again, we urge you to schedule a trial date as  
18 early as December so that we can -- we can resolve  
19 this and move this on to the -- to the Court for final  
20 resolution.

21 **JUDGE MELLOY:** What's your view of  
22 keeping the agreement confidential after the 23rd?

23 **MR. SOMACH:** I don't see any reason to  
24 keep it confidential.

25 **JUDGE MELLOY:** Why would it need to

1 remain confidential, Mr. Leininger?

2           **MR. LEININGER:** Your Honor, beyond the  
3 fact that it is still subject to approval, and  
4 although we produced -- we, the attorneys have been  
5 working this for years, produced our recommendation,  
6 it's ultimately the SGA and the AAG's decision. So if  
7 there is anything -- again, we are in constant  
8 communication with our superiors so we don't  
9 anticipate anything, but that said, it is still a  
10 document subject to final approval so it's still a  
11 document that we think should be kept under  
12 confidentiality until there is final approval. That  
13 goes to the concept of having a prove-up hearing,  
14 also, while the -- while the approval is being sought.  
15 We -- we -- the evidentiary hearing to prove up the  
16 settlement agreement, which we understand, Your Honor,  
17 is requested, and we think is a good idea, we have a  
18 lot of technical data to present, but all this has  
19 been subject to confidentiality and it's all  
20 consistent with our settlement principles. So we  
21 don't feel that disclosure of -- of any of the  
22 information that has been exchanged under 408 in  
23 confidence prior to final approval of this document is  
24 required.

25           **JUDGE MELLOY:** All right. Well, let me

1 ask, I guess, both Mr. Somach and Mr. Leininger.

2 Mr. Somach, you indicated that as far as  
3 you're concerned, everything Texas can do, you've  
4 done, and you have an agreement that's, as I  
5 understand it, is in final form. Do you think you can  
6 carve out the dispute between Texas, New Mexico,  
7 Colorado, and United States, resolve the Original  
8 Action, while still leaving the intra-New Mexico  
9 disputes for resolution in some other form?

10 **MR. SOMACH:** Yes.

11 **JUDGE MELLODY:** What's your view of that,  
12 Mr. Leininger, and I'll give Mr. Wechsler a chance to  
13 respond?

14 **MR. LEININGER:** And, Your Honor, that --  
15 we are having these discussions almost daily now with  
16 New Mexico for that -- for that very purpose, but  
17 carving -- carving out the eventual settlement terms  
18 from a final decree is problematic. We think that  
19 this resolution of -- of Compact issues are all  
20 integrated, and they should be in an integrated final  
21 decree. So we are continuing these discussions for  
22 that purpose. We are meeting regularly with New  
23 Mexico. We'll be meeting with the New Mexico amici.  
24 We are hopeful that we will arrive at these settlement  
25 terms, which would then be incorporated into a final

1 decree.

2 **JUDGE MELLOY:** But what I understand you  
3 not to say, though, Mr. Leininger, is you don't a  
4 hundred percent disagree with Mr. Somach? If you  
5 can't get these resolved, I don't hear you saying that  
6 it's impossible to have a carve out?

7 **MR. LEININGER:** No. We -- and let me be  
8 clear, Your Honor. We -- for purposes of settling  
9 this case -- settling our claims with regard to the  
10 Compact and Compact issues intrastate, which we  
11 believe is all subject to the Compact, they cannot be  
12 carved out. There are issues which we are talking  
13 about which really go more to implementation that we  
14 think perhaps would be more appropriate in a reform in  
15 one of the other federal cases. For example, there  
16 are pending lawsuits against the operating agreement.  
17 There is the pending lawsuit for the title -- title  
18 action that we brought. So there are elements of this  
19 that may be more appropriate for those cases, but as  
20 far as the Compact issues themselves, no, it should be  
21 integrated complete decree.

22 **JUDGE MELLOY:** Well, I -- I hear what  
23 Mr. Somach is saying is that if the amici don't get  
24 this for at least another week, now we're down to  
25 about three weeks before your drop-dead date. You

1 have issues to resolve. I mean, you really need to  
2 kind of pretty much have these issues resolved within  
3 the next, say, ten days, to give you enough time to  
4 reduce them to writing. Do you think -- I mean, do  
5 you think realistically you'll know after next week?

6 **MR. LEININGER:** Yes.

7 **JUDGE MELLODY:** Mr. Wechsler, what's your  
8 -- what's your view of all this?

9 **MR. WECHSLER:** Yeah, Your Honor, I'll  
10 comment on the issues that you've been asking the  
11 parties about or fill in some of the gaps. I'll start  
12 with that carve-out issue. New Mexico is positive  
13 about the whole settlement as -- as a holistic part,  
14 but the calculus changes if we're talking about only  
15 parts of the settlement, as we would in any overall  
16 agreement. So I'm not sure that New Mexico would  
17 agree the Compact provisions without the agreement on  
18 the other provisions. That -- that's something that  
19 we would have to think about. So to your question to  
20 Mr. Leininger, I'm not saying it's impossible. I'm  
21 not saying it's impossible because New Mexico hasn't  
22 evaluated that because that's not the way we've been  
23 looking at the settlement.

24 On the -- the negotiations, I agree with  
25 Mr. Leininger. I mean, we're in contact with one or

1 more of the parties every day. You asked about the  
2 amici. We have tried very hard to keep the amici  
3 informed throughout this entire process. In the last  
4 month, that included two full-day, in-person meetings  
5 with our amici, and we're trying to give them as much  
6 information as we can within the bounds of what we've  
7 been allowed thus far to disclose, but we are a very  
8 strong proponent. We have been for the last several  
9 months for sharing the settlement documents with the  
10 amici so that they can have a meaningful opportunity  
11 to comment on that. You asked Mr. Leininger do we  
12 think it's realistic to get these documents done, say,  
13 in the next ten days. I think the answer to that  
14 question is yes. It's not that we're starting from  
15 scratch. We have very strong drafts of settlement  
16 documents, including a decree for all of the  
17 provisions that we're talking about. Now, there's  
18 still a few outstanding issues that we're working on,  
19 but we have meetings set up to resolve those -- or to  
20 attempt to resolve those, and we see a path forward.  
21 We're confident that we will be able to reach a  
22 settlement by September 23rd.

23 I want to fill in the gap on one other  
24 thing that is still going on, on the -- what I'll call  
25 the Compact portion, and that is there's still some



1 technical meetings and technical issues that are  
2 outstanding. It's contemplated there will be a number  
3 of appendices that include a number of technical  
4 descriptions and the nature of those are still being  
5 worked out. I think we have agreement on the  
6 concepts, but there's still significant work going on  
7 there. And we -- as Mr. Leininger indicated, we --  
8 we're -- we're heavy into bilateral discussions,  
9 including this full in-person meeting next week with  
10 Judge Boylan that our -- our hope there is to be  
11 resolving some of the other outstanding issues that we  
12 think that this provides an opportunity to do.

13           You know, I've heard some of the  
14 discussion about the -- the timing. I mean, what we  
15 would support is a procedure in which you set a  
16 deadline or series of deadlines, one deadline for the  
17 parties to obtain the necessary signatures, another  
18 deadline to submit a motion related to the settlement  
19 documents, and -- and perhaps at the same deadline or  
20 -- or slightly later of -- of proposed procedure to  
21 you for the hearing on the settlement and then the  
22 hearing date. We -- we take Mr. Leininger's point  
23 about until these settlement documents are actually  
24 signed, they remain confidential settlement  
25 discussions and negotiations and -- and, therefore,

1 it's hard for us to see how they could be made public;  
2 but that being said, we're also mindful of Texas'  
3 concerns expressed by Mr. Somach that they're anxious  
4 to get this done as quickly as possible, as are we,  
5 and we certainly could obtain those signatures and --  
6 and proceed with that process relatively quickly.

7 I believe that's all of the questions  
8 that you asked, but I'm happy to stand for other  
9 questions or -- or answer any issues you have.

10 **JUDGE MELLODY:** Well, I guess I'll ask  
11 you and Mr. Wallace the same question. You said you  
12 could get a signature fairly quickly. I mean, what's  
13 -- what -- assuming there's a final agreement on  
14 September 23, what are the steps that have to be gone  
15 through within the State of New Mexico to sign off on  
16 an agreement?

17 **MR. WECHSLER:** Within the State of New  
18 Mexico, ultimately the settlement will be signed by  
19 the New Mexico attorney general, and the New Mexico  
20 attorney general has full authority to enter into that  
21 settlement. Prior to that happening, I anticipate  
22 that the attorney general will be consulting with some  
23 of the other state leaders, the governor, the  
24 governor's -- you know, the state engineer, and -- and  
25 ultimately, likely others that will need to be

1 consulted, but only the attorney general will need to  
2 sign off. We have started that process many weeks ago  
3 and so our anticipation is that would take a matter of  
4 weeks, not months, for New Mexico to get  
5 authorization.

6 **JUDGE MELLOY:** And I assume that you  
7 have been -- well, you have two assistant attorney  
8 generals on the phone here today and have been  
9 participating all along, but so -- I assume the  
10 attorney general's office has been very intimately  
11 involved in the negotiations and knows what's going  
12 on?

13 **MR. WECHSLER:** Yes, Your Honor. Ms.  
14 Khoury is the chief deputy attorney general, and she  
15 has led our negotiating teams throughout this process.

16 **JUDGE MELLOY:** Let me ask this: At this  
17 point, are you aware of any amici or other interested  
18 party that would object to what you're proposing to do  
19 here in this settlement?

20 **MR. WECHSLER:** I'm not aware of any that  
21 would object. I think there are some who are anxious  
22 to see the specific provisions of the settlement  
23 documents, which we, as I said, are anxious to share  
24 with them; but as I said, we have tried to share  
25 without the specific written documents all of the

1     operative provisions of the settlement with them on a  
2     number of occasions, and -- and I'm not aware of any  
3     that I -- that are opposing those.

4                 **JUDGE MELLOY:** Well, I don't want to  
5     speak for Ms. Barncastle or any of the other parties,  
6     but I assume, I mean, the -- I guess if I were in  
7     their position, I would want to know bottom line,  
8     what's it going to do to my district, and I assume  
9     you've been telling them that all along, this is  
10    what's going to happen going forward if we approve  
11    this; is that correct?

12                **MR. WECHSLER:** That's correct, Your  
13    Honor. We've been talking with each of the amici  
14    about specifically how it would impact them. We've  
15    also been trying to present a -- a picture of what we  
16    think water use and water regulation would look like  
17    below the reservoir following a settlement in the --  
18    in the many years following that so that would include  
19    potential regulations, changes, and all of those  
20    important details.

21                **JUDGE MELLOY:** How about above the  
22    reservoir? Have there been any concerns raised? I  
23    know, you know, Albuquerque is a party to the -- not a  
24    party, but an amici of this case. Have there been any  
25    concerns raised about how this would affect water use

1 above the reservoir?

2 **MR. WECHSLER:** Well, certainly that's an  
3 issue that I understand the ABCWUA has expressed.  
4 We've had discussions with them to try and allay any  
5 concerns. There have been some discussions within the  
6 context of the mediation about that issue, but we're  
7 confident that -- that ultimately the settlement is  
8 not going to concern our amici -- current amici or any  
9 of our water users above the reservoir.

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

11 Mr. Wallace, Mr. Somach indicated you've  
12 raised a couple issues. Anything that you think is a  
13 deal breaker or where do you feel we're at on this  
14 whole process?

15 **MR. WALLACE:** Your Honor, Colorado's  
16 position is that we have no concern with the current  
17 proposal for water distribution between the two  
18 states, New Mexico and Texas, so -- so that physical  
19 aspect is not something that's standing in the way.  
20 Colorado does have some continued concerns with the  
21 language in a proposed draft decree regarding the  
22 parameters of the Compact and how we describe the  
23 legal obligations in the settlement. So that's --  
24 that's not so much a physical structural issue but is  
25 a -- a legal description issue that we continue to

1 work through. Hopefully we -- we can continue to --  
2 to work with that and get that done by the end of  
3 September. Along with Texas, we -- we agree with them  
4 that carving out the issues of distribution between  
5 those two states, Texas and New Mexico, from internal  
6 New Mexico state issues is -- is acceptable and might  
7 make this go forward more quickly. It also might  
8 resolve some of the legal obligation descriptions that  
9 Colorado has a concern with in -- in the totality of  
10 those settlement documents.

11 To address some of your other questions,  
12 if -- if and when we reach a settlement, Colorado will  
13 have its attorney general sign that, likely in  
14 consultation with the state's governor and state  
15 engineer. The AG has been informed of progress and  
16 knows where we are in settlement at this point. If  
17 we, in fact, do reach a settlement by September 23rd,  
18 we think that we can get a hearing done on that this  
19 year, if, in fact, it is finalized. We do have some  
20 concerns, however, with what the U.S. has expressed in  
21 that, if we reach a final settlement, the U.S. is  
22 reserving, it seems, the right to change the language  
23 of that settlement. Now, we don't know what that  
24 might be, but that does raise some concerns on our  
25 end, if it's final, how much of it is being changed.

1                   **JUDGE MELLOY:** And how long -- are we  
2 talking a matter of weeks to get your attorney general  
3 to sign off?

4                   **MR. WALLACE:** Yes, we are.

5                   **JUDGE MELLOY:** Okay. And I know early  
6 on, Mr. Wallace, you had expressed a concern that one  
7 of your major interests in this litigation is that we  
8 not set precedents, so to speak, in connection with  
9 this Compact that might spill over to other Compacts.  
10 I think probably maybe fair to say Colorado may be  
11 party to more Compacts than any other state in the  
12 union. But I assume those concerns have been allayed?

13                   **MR. WALLACE:** That's what we're  
14 currently working on. When I said we're trying to  
15 address the parameters of the Compact obligations in  
16 the settlement, it -- it's that sort of putting the  
17 side walls on that so that we're confident how we're  
18 describing this Compact settlement as being consistent  
19 with the 1938 Compact and keeping it penned into that  
20 so it's not novel and we're not creating something new  
21 and everyone is comfortable with our -- our  
22 interpretation of the '38 Compact in that it is  
23 limited, in fact, to the resolution of this dispute  
24 and will carry over into our other Compacts.

25                   **JUDGE MELLOY:** Judge Boylan, do you have

1 anything you want to add to this discussion or any  
2 comments?

3                   **JUDGE BOYLAN:** Thank you, Judge. Well,  
4 first of all, I do believe these issues that  
5 Mr. Wallace and Mr. Somach have raised are important  
6 ones, but I do think that they are resolvable and  
7 resolvable between now and September 23rd. I have  
8 every confidence that that will, in fact, be true. In  
9 reference to the intrastate New Mexico disputes, I  
10 have been pursuing my duties as mediator pursuant to  
11 your order consistent with the view that it is  
12 important that those matters be addressed and be part  
13 of the overall settlement, and on occasion, that's led  
14 me to meet directly with New Mexico and amici.  
15 Sometimes amici, sometimes the U.S., New Mexico, and  
16 amici, and I believe that while it does make it more  
17 complex, I view that as being important issues that  
18 overall must be resolved if we're going to reach a  
19 settlement.

20                   In reference to the sharing of the  
21 settlement documents with amici, we had a telephone  
22 conversation with the parties yesterday. I informed  
23 them that it was my intention to at least alert you  
24 that it was my view that my role as a mediator would  
25 include an ability to direct the parties to share the



1 documents with amici since they have been part and  
2 parcel of the settlement discussions, albeit with the  
3 understanding that the people that would see the  
4 documents would have to send a confidentiality  
5 agreement in provisions that Mr. Leininger mentioned.  
6 And so I would either hope that you would order it or  
7 if you don't wish to get that deep into the settlement  
8 discussions itself, at least if I hear no objections  
9 from the Court, it would -- my intention is to direct  
10 the parties to indeed proceed in that fashion and do  
11 so immediately because I do believe that time is of  
12 the essence and that they're deserving of seeing those  
13 documents.

14 **JUDGE MELLOY:** Do you have a form of  
15 disclosure agreement that you could send out on fairly  
16 short notice or any of the parties --

17 **JUDGE BOYLAN:** I do believe that  
18 Mr. Leininger has the confidentiality provisions that  
19 were signed by each of the parties and it just needs  
20 to be amended in some respects so that amici would be  
21 identified and I could ask him to talk about that, but  
22 it's my understanding that's ready to go almost  
23 immediately.

24 **JUDGE MELLOY:** Anything else? Looks  
25 like you're sitting in our same courthouse.

1                   **JUDGE BOYLAN:** I'm sitting in one of the  
2 law offices in downtown Minneapolis, but I like the  
3 background better.

4                   The other thing I think I would like to  
5 comment on is whether or not the Court can convene a  
6 hearing on the -- on the settlement document prior to  
7 the completion of a review by the federal authorities  
8 identified by Mr. Leininger. I think that there is a  
9 way of doing that, and perhaps that's by directing the  
10 parties to file the papers under -- under seal and to  
11 at least schedule an in-camera review of those pending  
12 the approval of -- the final approval, but I think  
13 that there's a way of shortening the time frame for  
14 the finality rather than waiting until 2023 to do  
15 that. I -- I liked your comments last time we met,  
16 Judge, that perhaps there are ways of shortening that  
17 up as opposed to continuing the -- the process kicking  
18 the can down the road by some months.

19                  **JUDGE MELLOY:** I think the problem with  
20 an in-camera review would be, I guess, twofold. One  
21 is my -- my vision of a hearing would be that there  
22 would be fairly wide dissemination notice, probably  
23 the -- I'm just thinking out loud here. We'd probably  
24 have some published notice. We'd probably direct each  
25 of the water districts to maybe notify every one of

1 their -- their members, and -- I don't know. But I  
2 would anticipate it'd be fairly widespread so that  
3 anybody who had a problem, even if they weren't a  
4 named party or an amici, who wanted to be heard or at  
5 least be given a notice of a hearing. And then the  
6 other thing is I don't know that I would understand  
7 what the agreement means in camera without -- without  
8 a hearing where people could explain it. Now -- and I  
9 -- and I'm just thinking out loud about the hearing.  
10 You know, I don't know how technical the hearing has  
11 to be, and in part, it may depend on whether there's  
12 objections. If everybody is happy with it, it's not  
13 likely I'm going to say, well, you know, Texas, New  
14 Mexico, water users, Colorado, United States, you're  
15 all on board, and I'm going to throw a monkey wrench  
16 in the works. I would think that would be highly  
17 unlikely. I think a lot of -- you know, I think some  
18 evidence is probably going to be required, but I don't  
19 know how technical it has to be unless there are  
20 specific objections that have to be addressed. But  
21 anyway, I'm just thinking out loud about that at this  
22 point.

23 **JUDGE BOYLAN:** I do think that the  
24 parties are envisioning that some technical testimony  
25 will be important to assist the court in understanding

1 the proposed agreement that they're asking you to  
2 consider for approval.

3 **JUDGE MELLOY:** Let me circle back to  
4 you, Mr. Leininger. How quickly do you think you can  
5 get that confidentiality agreement in form that you  
6 can get it out to the amici?

7 **MR. LEININGER:** That's on the top of my  
8 list. We're actually meeting with New Mexico this  
9 afternoon for continuing settlement negotiations.  
10 That's on the top of my list so, Your Honor, over the  
11 next couple of days.

12 **JUDGE MELLOY:** So when you say the  
13 existing confidentiality agreement, are you talking  
14 about one that was prepared specifically for  
15 settlement purposes?

16 **MR. LEININGER:** Yes.

17 **JUDGE MELLOY:** Okay. So that's not --  
18 that's not one that I was party to?

19 **MR. LEININGER:** I believe --

20 **JUDGE MELLOY:** It's not in the decree or  
21 anything -- or not the decree, but not in the  
22 scheduling order, right?

23 **MR. LEININGER:** I believe when we  
24 continued negotiations approximately a year ago, one  
25 of your orders did actually order the confidentiality

1 agreement be imposed upon the parties so, yes, it is  
2 subject, I think, I believe, to your -- to your court  
3 order, and we would take that document, for purposes  
4 of disclosure, to the amici counsel. And -- and, Your  
5 Honor, again, our concern is that these documents are  
6 not public documents. These are settlement documents,  
7 and they have to be subject to strict confidentiality.  
8 They should be limited in their disclosure so that is  
9 why we would also ask that -- that the -- the drafts  
10 be limited to disbursal among the amici counsel that  
11 have signed off on the confidentiality.

12 **JUDGE MELLODY:** Well, I -- I understood  
13 that the technical advisors have been intimately  
14 involved in the negotiations. Would they be included  
15 within that circle of people who could look at the  
16 documents or at least have them discussed? There may  
17 be a difference between discussing them and looking at  
18 them, but, you know, as a practical matter, I'm not  
19 sure it makes a lot of difference.

20 **MR. LEININGER:** Right. As a practical  
21 matter, I would agree with Your Honor, but, you know,  
22 with regard to what has been written, the language,  
23 and as Mr. Wallace said, there's some question as to  
24 how certain of these -- of these settlement concepts  
25 are phrased, no. This is a matter for counsel to

1 resolve so, no, it should not be expanded beyond  
2 distribution of the draft amongst counsel under  
3 confidentiality.

4 **JUDGE MELLOY:** But they could discuss it  
5 with their technical folks and their water managers  
6 or, you know, City of El Paso can talk to the director  
7 of the water distribution system -- I can't remember  
8 the technical name in El Paso, but -- but in any  
9 event, you can -- you can talk to the relevant people  
10 about what this is going to impose upon them and what  
11 they're going to get out of them, can't they?

12 **MR. LEININGER:** Sure. Yes, Your Honor.  
13 It's the document, the draft document, that we were  
14 discussing for purposes of distribution.

15 **JUDGE MELLOY:** Do you feel you need any  
16 order from me at this point to effectuate this?

17 **MR. LEININGER:** I would have to go back  
18 and review your previous order. What I understand is  
19 you did order confidentiality in these settlement  
20 negotiations so whether that has to be expanded, a  
21 potential of that order, and it was -- it was short  
22 order, so whether that has to be expanded or not, I  
23 would have to go back and look at the language and  
24 perhaps consult with the other counsel here as to  
25 what's necessary.

1                   **JUDGE MELLOY:** I'll take a look at that,  
2 as well.

3                   All right. Anything further from the --  
4 any of the parties? In a minute, I'll give the amici  
5 a chance to weigh in if they have anything they want  
6 to say, but anything else from any of the parties?

7                   **MR. SOMACH:** Your Honor, this is Stuart  
8 Somach again. I just want to briefly say, and I -- I  
9 don't want to be the -- the -- the only -- I hate  
10 being the one that -- that rains on the parade so to  
11 speak, but I do urge you to consider scheduling a  
12 trial date if by September 23rd, this -- this is not  
13 completed. There's -- I'm -- you know, I'm hopeful  
14 but very skeptical at this point in time. I certainly  
15 hope I'm wrong, but if I am wrong, then we really do  
16 need that trial date and I -- I think it needs to be  
17 scheduled as a hard date as early as possible. And --  
18 and I know I've said this before, but -- but I think  
19 it's important for me to at least, on the record, say  
20 it again.

21                   **JUDGE MELLOY:** Well, let me think about  
22 that, Mr. Somach. If I did schedule two weeks in  
23 December -- and I will say this mainly for the benefit  
24 of New Mexico, I guess -- I would not expect anybody,  
25 other than Texas, to present evidence. That still

1 means they'd have to cross-examine, but we would use  
2 that strictly for Texas' case, but let me think about  
3 that a little bit.

4 **JUDGE BOYLAN:** Can I suggest that while  
5 you're speaking of scheduling, that it may make a lot  
6 of sense to schedule an in-person status conference  
7 with you for September 23rd or perhaps the day prior  
8 to the September 23rd deadline. I think sometimes the  
9 in-person deadlines have a great deal of leverage with  
10 helping people get things moving, at least have that  
11 to consider that at least.

12 **JUDGE MELLOY:** When you say "in-person,"  
13 as opposed to Zoom?

14 **JUDGE BOYLAN:** Correct.

15 **JUDGE MELLOY:** How do the other people  
16 feel about that?

17 **MR. SOMACH:** Certainly it's fine with  
18 Texas, Your Honor.

19 **JUDGE MELLOY:** Well, it so happens, I  
20 was actually thinking we'd probably do one the week  
21 after the 23rd, but I'd already kind of -- what -- and  
22 the -- and why do you think we should do it the day  
23 before, Judge, or the day of?

24 **JUDGE BOYLAN:** The week after sounds  
25 even like a better idea to me, Judge. I just think



1 that it's important that since September 23rd has been  
2 identified by the -- by the U.S. and New Mexico and  
3 others as a deadline that they believe is appropriate  
4 for a presentation of completed deal, that we see  
5 where exactly we are as that date arrives.

6 **JUDGE MELLOY:** All right. I was  
7 thinking we'd probably do it by Zoom, but, you know,  
8 the -- I think your suggestion of in person might not  
9 be a bad one. Let me think about that, and if I do,  
10 I'll check with the Supreme Court. I assume they  
11 won't have any objection to this, but maybe I'll  
12 schedule it for Denver. That seems to be a pretty  
13 convenient location for everybody. But let me think  
14 about that.

15 **MR. WECHSLER:** Your Honor, we're -- we  
16 support an in-person meeting status conference that  
17 week after. I do have a commitment that simply can't  
18 be moved on that Thursday so apologize for the  
19 inconvenience.

20 **JUDGE MELLOY:** Well, I was thinking  
21 earlier in the week in any event so that's not a  
22 problem. I was thinking the 27th or 28th or could  
23 even do it on Monday, the 26th. Let's just say the  
24 27th. We'll plan on that and it'll probably be in  
25 person and it'll probably be in Denver. Any objection

1 to that from anyone?

2 **MR. SOMACH:** No, Your Honor, except I  
3 just want to reiterate the fact that we're looking at  
4 September 23rd as -- I just -- I just don't want -- I  
5 don't want Texas to be misleading anybody. If -- if  
6 the purpose of the 27th is to say we need more time,  
7 we're -- we're not going to agree to that, and so I  
8 just -- I just want to make certain that that's clear.  
9 We -- we understood that you disagreed with us about  
10 the timing on this and so we're -- we're hanging in  
11 there until the 23rd because there's -- there's no  
12 option to do anything else but hang in there until the  
13 23rd, but -- but we will not agree to continue  
14 negotiations beyond the 23rd. I -- I don't want to be  
15 misunderstood about that. So the 27th is fine. We'll  
16 -- I'll be there.

17 **JUDGE MELLOY:** Well, I -- I would  
18 anticipate, Mr. Somach, that on the 27th, we'll do one  
19 of two things, we'll either talk about how we're going  
20 to get the settlement approved and to the Supreme  
21 Court or we're going to talk about trial mechanics.

22 **MR. SOMACH:** Just to finish the thought  
23 you started, we're more than happy to start presenting  
24 testimony in those two weeks in December. We're up  
25 first anyway, and we're ready to go.

1           **JUDGE MELLOY:** All right. Anything else  
2 from the parties or -- or Judge Boylan before I let  
3 amici have anything to say if they want to weigh in?

4           (No response.)

5           **JUDGE MELLOY:** All right. If not, do  
6 any of the amici want to be heard?

7           **MS. O'BRIEN:** Your Honor, Maria O'Brien  
8 on behalf of El Paso County Water Improvement District  
9 No. 1. If I may just make a few comments. First, I  
10 just want to be clear that EP1 supports fully a  
11 legally and technically sound settlement agreement and  
12 certainly sooner rather than later. We do not believe  
13 that, as we understand the settlement is being  
14 structured by the parties, that we can arrive at a  
15 legally and technically sound settlement agreement  
16 without the assent of EP1. We emphasize, I think,  
17 some of what's been articulated by at least some of  
18 the parties and Judge Boylan that immediate inclusion,  
19 certainly at least the district amici, and full --  
20 full integration of the districts into settlement  
21 discussions and review of current drafts regardless of  
22 the state of those drafts.

23           I want to be clear, based on some of  
24 your comments, Your Honor, as well as comments from  
25 others, while EP1 is aware of the general concepts in

1 the settlement, our technical advisor has -- has not  
2 been intimately involved in those discussions, some  
3 but not all, and I will -- I will say that, you know,  
4 words matter. We have not seen an outline. We have  
5 not seen a draft. We do not know how the different  
6 pieces, even all of which we do not know what all  
7 those pieces are, fit together. So we, again, implore  
8 you to allow immediate inclusion of EP1 in -- in these  
9 discussions that are significant import, you know, to  
10 the parties, and certainly to the districts. And this  
11 is because the Special Master is fully aware of the  
12 relationship of the project and the Compact and that  
13 the water supply at issue in this case is dedicated to  
14 the project, the districts are the beneficiaries of  
15 the project and that water supply and have contractual  
16 rights and obligations with regard to that water  
17 supply. For this reason, we also do not agree that  
18 the so-called Texas portion and the U.S., which is  
19 sometimes also referred to as the intrastate portion,  
20 can be separated for purposes of settlement. Again,  
21 as we understand it from the bit that we do know, the  
22 settlement will address some significant and important  
23 project operations issues that are related to  
24 settlement of the so-called Texas portion, and we  
25 don't see how that portion can be finalized and/or

1 separated out from the issues that relate to the  
2 project overall, which the U.S. continues to work on.  
3 But regardless, we understand that there are  
4 significant pieces of the so-called Texas portion that  
5 impact, address, even modify project operations, and,  
6 again, while we've been included in some aspects over  
7 those discussions, we have not been included in all.  
8 We do not know how all the pieces fit together, and we  
9 are very anxious, again, to be fully integrated, so,  
10 again, that we can support a technically and legally  
11 sound settlement.

12 With that, Your Honor, I'll take any  
13 questions but felt it necessary to articulate where we  
14 believe things stand.

15 **JUDGE MELLOY:** I assume you have no  
16 objection to signing some type of confidentiality  
17 agreement?

18 **MS. O'BRIEN:** Absolutely not, Your  
19 Honor. We've made that clear to the mediator and the  
20 other parties, and we've -- from the beginning, we've  
21 stood ready to sign whatever is necessary with regard  
22 to confidentiality.

23 **JUDGE MELLOY:** Subject to seeing the  
24 language, and like you say, words matter, from what  
25 you know about the broader concepts, are there any

1 deal breakers that you think at this point?

2 **MS. O'BRIEN:** Your Honor, I don't want  
3 to equivocate, other than, you know, how the pieces  
4 fit together. Again, the pieces that we are aware of  
5 is very important because there's -- there's an  
6 interface between some of the project operation  
7 changes and have under and overdeliveries will be  
8 addressed, and until we understand how those issues  
9 all work together, I don't believe I can, you know,  
10 unequivocally say that there's a deal breaker.

11 To the extent we understand where things  
12 stand to date, I don't believe we believe there is a  
13 deal breaker, although I believe there was some  
14 articulation by a few of the parties' counsel that  
15 there are some technical issues regarding  
16 implementation that are still at play, and we are --  
17 those pieces are very important to us. So we have  
18 seen no deal breaker to date, but there still appear  
19 to be some moving parts that are of critical  
20 importance, and, you know, we hope to be proactive and  
21 a positive participant in bringing those things to  
22 closure in a way that we can fully support the  
23 settlement.

24 **JUDGE MELLOY:** Let me ask Mr. Wechsler  
25 something. If a settlement is reached and approved,

1 will this -- will that result in dismissal of all the  
2 other pending litigation?

3           **MR. WECHSLER:** If we were able to have a  
4 full resolution of all of the issues, it would  
5 resolve, I think, the outstanding issues in the lower  
6 Rio Grande. You asked earlier, are there some issues.  
7 I know you were talking specifically about all of the  
8 New Mexico intrastate issues, could those be carved  
9 out from the Compact issues, and my answer was we  
10 don't think so. I do, however, think there are a  
11 number of issues within the intrastate issues that  
12 could be carved out. So our hope is to resolve as  
13 many of those as possible. There's -- we observe a  
14 spirit of -- maybe cooperation is too strong a word,  
15 but there's a real sense that -- of opportunity right  
16 now to resolve a lot of issues that have been  
17 separating a number of parties for decades, and we're  
18 hopeful that we can resolve as many of those as  
19 possible, but I don't think that all of those would  
20 need to be resolved in order to resolve the so-called  
21 New Mexico intrastate portion of the settlement. So  
22 we're -- we're taking our best shot at resolving all  
23 of those. I'm very confident that we can resolve  
24 some, and I'm very confident that we can resolve the  
25 intrastate issues that separate the State of New

1 Mexico and the United States in such a way that would  
2 result in a settlement by September 23rd.

3 **JUDGE MELLOY:** And you feel that  
4 September 23rd is still realistic under a month now?

5 **MR. WECHSLER:** I do.

6 **JUDGE MELLOY:** With this, specifically  
7 would the litigation filed by New Mexico challenging  
8 the operating agreement be dismissed?

9 **MR. WECHSLER:** Yes.

10 **JUDGE MELLOY:** Okay. All right.  
11 Anybody else want to be heard, either parties or amici  
12 at this point?

13 **MR. STEIN:** Your Honor, this is Jay  
14 Stein. I do want to make one brief comment.

15 **JUDGE MELLOY:** Go ahead.

16 **MR. STEIN:** The City is equally  
17 interested in having the settlement documents provided  
18 as soon as possible. Of course we will sign any  
19 confidentiality agreement in that respect, but going  
20 forward, the implementation of this agreement with  
21 respect to the City's ability to provide municipal  
22 water supply in the future through the implementation  
23 of this arrangement is key and therefore we need to  
24 see those documents as soon as possible and to have  
25 our water managers weigh in on them. Thank you, Your



1 Honor.

2 **JUDGE MELLOY:** Was that Ms. Barncastle  
3 wanting to be heard? I think I heard her say  
4 something.

5 **MS. BARNCASTLE:** Yes, it was, Your  
6 Honor. Thank you. So three very quick points.  
7 First, thank you to Ms. O'Brien for aptly stating  
8 again what I stated last time. EBID stands by EP No.  
9 1's comments there. These issues just can't simply be  
10 split up. They are too interwoven. The second issue  
11 is really the most important by far and that is the  
12 United States' requests for confidentiality being  
13 extended only to counsel is incredibly important.  
14 Drafts of documents like this can be inflammatory if  
15 they reach the streets of the lower Rio Grande. For  
16 example, I have been the subject personally of  
17 multiple physical threats of violence, one of which  
18 occurred during trial in this case in which you were  
19 aware of. So if we see drafts leaking out, I worry  
20 that certain people might take certain actions related  
21 to those drafts because drafts simply can't be  
22 understood by the general public while the lawyers are  
23 doing lawyer machinations, and so we need the ability  
24 to work unconstrained and not have drafts leaking out  
25 well before they are actually final. And I have a lot

1 of respect for the United States colleagues. I know  
2 they've been subject to some of these attacks, as  
3 well. Same as New Mexico. And so it's not just a  
4 matter of worrying about somebody hanging their hat on  
5 particular language. It's a matter of presenting this  
6 appropriately to the public at the right time, and we  
7 just simply can't afford a misstep in that arena.

8 And then third, I would like to  
9 encourage you to just stay mediation and settlement  
10 focused and avoid setting trial at this point,  
11 especially for this year. If trial needs to be set,  
12 the parties -- it's not just as simple as saying the  
13 State of Texas will present evidence. The United  
14 States has obligations that are interwoven with the  
15 Texas case, which means the districts do, too. New  
16 Mexico simply having to cross-examine some of the most  
17 important witnesses in this case is not actually  
18 simple. So I would encourage you to just stay  
19 mediation focused and settlement focused for the time  
20 being.

21 With that, Your Honor, I have no further  
22 comments left.

23 **JUDGE MELLOY:** All right. I want to ask  
24 Ms. Barncastle one thing. To what extent do you need  
25 to discuss the settlement documents with your

1 technical advisors, chairmen of your board,  
2 presidents, what -- you know, the people who are the  
3 decision makers and the people who are advising you?

4 **MS. BARNCASTLE:** At this point, Your  
5 Honor, even without documents, I am in daily  
6 conversations with all of those people, my client, my  
7 board of directors, our technical advisors, as well as  
8 the State of New Mexico, New Mexico amici, and the  
9 United States. So I do need free ability to discuss  
10 these issues. It's certainly going to be nice to be  
11 able to share documents at certain points in time, but  
12 one of EBID's regular practices is actually not to  
13 disseminate documents for the client to take home with  
14 them. So for the reasons I exactly expressed to you  
15 just before. So showing them a document versus  
16 handing it to them to walk out the door is something  
17 entirely different for EBID because of our history  
18 with some of these violent threats. You know, water  
19 wars is a term that was coined because people used to  
20 kill each other, and these threats actually are still  
21 live and well so we -- we have implemented certain  
22 safeguards within the EBID process. Being able to  
23 discuss is incredibly important. Being able to hand a  
24 copy to somebody, not so much from my perspective.

25 **JUDGE MELLOY:** Well, let me ask this:

1 Does anyone object, among the amici, to what I  
2 understand to be Mr. Leininger's proposal is that you  
3 sign a confidentiality agreement that the document  
4 itself not be disseminated beyond the attorneys who  
5 are parties to the confidentiality agreement but that  
6 you would be able to discuss the contents of the  
7 settlement agreement with technical advisors and  
8 decision makers? If I'm summarizing you correctly,  
9 Mr. Leininger -- correct me if I'm wrong, but does  
10 anybody object to any -- to those restrictions?

11 **MR. BROCKMANN:** Your Honor, this is Jim  
12 Brockmann to the Water Authority. I think part of the  
13 answer and what I wanted to indicate earlier, part of  
14 that depends on the timing of it. If we're looking at  
15 some additional drafts and we're trying to understand  
16 a settlement and can ask questions where we'll work  
17 back and forth with New Mexico to understand it, I  
18 think counsel's participation at that point is  
19 probably adequate, but, for example, with the Water  
20 Authority, they have a general counsel. They have an  
21 executive director. They have a chief planning  
22 officer, and my anticipation is that they will, at  
23 some point, request copies of the draft to -- to read  
24 through themselves, and if we've got a -- a 30- or a  
25 50- or a 75- or 100-page draft, they will want to sit

1 in their office and look at it and have conversations  
2 about it. So at some point, and it might be before  
3 it's final, to have my best communication with the  
4 client, but they will have to read the document and be  
5 able to ask questions. It's hard for me to -- to try  
6 to summarize it to them in an hour or a day-long  
7 conversation. So it might depend on the timing, but I  
8 believe we can work with the State of New Mexico and  
9 the parties to find that appropriate time.

10 **JUDGE MELLOY:** But for the -- for the  
11 immediate future, though, the documents would not be  
12 disseminated beyond the attorneys who signed the  
13 confidentiality agreement? Is that the understanding?

14 **MR. BROCKMANN:** Yes. And the Water  
15 Authority --

16 **JUDGE MELLOY:** That may change at some  
17 point, but at least as of right now, that's what's on  
18 the table?

19 **MR. BROCKMANN:** We can work with those  
20 parameters initially, but, again, eventually, we might  
21 press the parties to be able to disseminate those to a  
22 few limited number of decision makers as part of our  
23 client groups.

24 **MR. STEIN:** Your Honor, this is Jay  
25 Stein. That arrangement will be a hardship for Las

1 Cruces. We are going to need to show these documents  
2 to our expert, our hydrologist Lee Wilson, as well as  
3 our water managers in Las Cruces Utilities,  
4 principally Delila Walsh and Adrienne Widmer.

5 **MS. O'BRIEN:** Your Honor, I -- our  
6 understanding -- and I thought this is what  
7 Mr. Leininger responded earlier when you pressed him  
8 on this issue, was that, you know, normally  
9 confidentiality agreements are structured so that  
10 counsel signs, you know, on behalf of, you know,  
11 themselves, obviously, and the client that they  
12 represent, but that the -- and the -- anyone within  
13 the client that it's disseminated to is bound by that  
14 confidentiality and -- and counsel is responsible for  
15 ensuring that, and that's how we've proceeded, well,  
16 in a variety of cases and other kinds of  
17 confidentiality agreements, and in this particular  
18 case. EP1 does have a need to share and work with  
19 district engineer and general manager regarding  
20 drafts. There's -- as parties have referenced to do,  
21 there are appendices that support, clarify, implement  
22 provisions of the draft that are technical in nature  
23 and so there's this, you know, again, an interplay.  
24 What I would suggest is that each amici party that  
25 signs the confidentiality agreement lists the universe

1 of people that would be entitled to and be shared the  
2 document, and I think that, again, that appears from  
3 what people are saying to date is going to be an  
4 individual entity, individual counsel determination,  
5 and I think that should address what -- some of the  
6 concerns that are expressed, but I think individual  
7 entities are perhaps in different places. You know,  
8 if EBID has certain parameters of how they want to  
9 share, that's fine, but I -- I do think that each  
10 entity needs to be able to share the document with  
11 relevant people within that entity, and I -- if we  
12 list those and limit it, I think that should address  
13 the concerns of broader dissemination.

14 **MR. BROCKMANN:** This is Jim Brockmann.  
15 I would support that kind of an approach because I  
16 think that will define the folks, our specific client  
17 representatives, that would get the document and --  
18 and we would know specifically who it would be without  
19 dissemination beyond probably just a -- a small  
20 handful of people within each organization.

21 **MR. LEININGER:** Your Honor, it 's  
22 Mr. Leininger. May I respond?

23 **JUDGE MELLOY:** You may. Well, I have a  
24 comment, but go ahead.

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

1 So these are nonparties, and it's highly unusual to  
2 disseminate these draft settlement documents amongst  
3 nonparties, and this is the exception to remain the  
4 exception. I think initially, we are seeking that  
5 counsel be the signatories to the confidentiality  
6 agreement, that the dissemination be limited to them,  
7 and if they were to come back to us, the parties, for  
8 purposes of broader dissemination, that would be the  
9 appropriate time to perhaps expand this disclosure.

10 **JUDGE MELLODY:** Well, you pretty much  
11 articulated what I was going to say, Mr. Leininger.  
12 At this point, with less than a month to get this  
13 done, I don't think we want to spend two weeks  
14 negotiating the confidentiality agreement and  
15 negotiating who is going to get to see it and who  
16 isn't. There may come a point when it gets closer to  
17 September 23rd, and it's 98 percent final that -- that  
18 we expand the universe, but at this point, I think the  
19 -- the request that it be limited only to counsel is  
20 not an unreasonable one. I understand Mr. Brockmann's  
21 original suggestion to be that there may come a point  
22 where they may request expansion, and that's fine, but  
23 I don't want to spend the next week and a half doing  
24 nothing but negotiating the confidentiality agreement  
25 with the amici. I think that time is better spent



1 dealing with the substance of the -- of the -- of the  
2 negotiations and the -- and the -- and the disputes.  
3 So let's limit it to counsel, but we'll -- we can come  
4 back and revisit that issue if necessary in a couple  
5 weeks, but I think at this point, we'll limit it to  
6 counsel. They can certainly discuss it with their  
7 respective clients and, you know, I think -- I think  
8 they can be pretty thorough with their clients without  
9 necessarily going over it line by line. So can you  
10 get that out by tomorrow, Mr. Leininger?

11 **MR. LEININGER:** Yes, Your Honor.

12 **JUDGE MELLOY:** And as soon as -- so as  
13 soon as the counsel sign it, what are they going to  
14 get at that point? Are they going to get the  
15 agreement that Texas has sent to you?

16 **MR. LEININGER:** Yes. I believe that we  
17 have a draft, which had been disseminated fairly  
18 recently. So I -- I hesitate to say they will get  
19 that because there are a few provisions in there that  
20 the parties have been discussing and perhaps we have  
21 to reach a resolution on those before it's more widely  
22 disseminated, but I can certainly anticipate that  
23 we're going to have confidentiality agreement out  
24 tomorrow, by close of business tomorrow, and then  
25 we'll be able to address some of these more critical

1 remaining issues in that draft, I think, before -- and  
2 I think this would be supported by all counsel, before  
3 it has been -- it is distributed to the amici counsel.

4 **JUDGE MELLOY:** And when would that be?  
5 I mean, when -- when can Ms. O'Brien or Mr. Brockmann  
6 or any -- Mr. Stein, any of them expect to actually  
7 see something?

8 **MR. LEININGER:** Right. I had suggested  
9 next week, Your Honor. So early next week.

10 **JUDGE MELLOY:** Okay. And they would get  
11 the Texas proposed agreement and what you have -- and  
12 what you have negotiated to date with -- with the --  
13 keep referring to them as the intra-New Mexico issues?

14 **MR. LEININGER:** Not yet, on that latter,  
15 I think. Again, we're meeting with the amici on  
16 Tuesday, and I think that is going to be critical for  
17 some of these drafting purposes on that portion of the  
18 more broader resolution of these Compact issues. So  
19 there -- there is the draft that, as Mr. Somach said,  
20 has been distributed with regard to all the -- the  
21 Texas portion of this decree. That should be ready  
22 early next week.

23 **JUDGE MELLOY:** All right.

24 **MS. O'BRIEN:** Your Honor, if I may, I am  
25 frankly concerned by Mr. Leininger's comments. It

1 seems that the United States is putting itself in a  
2 position, perhaps with other parties, of, you know,  
3 what the amici get to see and when. You know, we've  
4 been hearing for weeks, if not months, that, you know,  
5 a draft could not be shared primarily because there  
6 are issues to be resolved, and that's continuing to be  
7 what we hear just now. So we're -- I think we're  
8 sophisticated enough, have a sufficient critical  
9 interest in this matter, that we should see the draft  
10 in its current form. The parties can, you know,  
11 caveat it as to what issues are not fully resolved.  
12 We understand the -- none of the issues are fully  
13 resolved, but, I mean, part of my imploring you today  
14 that we see a draft immediately is because we don't  
15 believe all the issues can be resolved without the,  
16 you know, ultimate assent of EP1. We want, again, to  
17 be a proactive and positive supporter of settlement.  
18 So I'm very concerned that, you know, we're going --  
19 we hear what Mr. Leininger is saying, that there's --  
20 we won't see it because issues are to be resolved,  
21 what will we hear next week? I think we need to -- to  
22 move beyond this and get released what the current  
23 draft is with the appropriate caveats, understanding,  
24 you know, again, it's -- it's a confidential document.  
25 We understand -- and/or documents. We understand it's

1 a work in progress. We believe we need to be involved  
2 in that work in progress.

3 **JUDGE MELLOY:** Well, I understand  
4 Mr. Leininger to say -- and let me -- let me circle  
5 back to him. So on Tuesday, you would disclose and  
6 make available to the amici the agreement that  
7 Mr. Somach has sent to you, even if there are some  
8 unresolved issues; is that right?

9 **MR. LEININGER:** That's correct. I  
10 believe counsel interpret -- Ms. O'Brien may have  
11 misunderstood.

12 **JUDGE MELLOY:** And by -- after -- after  
13 you meet with the amici on Tuesday, how soon would you  
14 make the other agreement, the intra-New Mexico  
15 agreement, available?

16 **MR. LEININGER:** That's difficult to say  
17 pending resolution of some of these very important  
18 intra -- intrastate issues.

19 **JUDGE MELLOY:** Why can't you do what  
20 Ms. O'Brien has said, here's the agreement on what we  
21 have resolved? We all know that these are the --  
22 they're going to know, I assume, after Tuesday what  
23 the outstanding issues are.

24 **MR. LEININGER:** Sure. Sure. And I --  
25 you know, it will be in a form that may be appropriate

1 for dissemination at that point, Your Honor. I -- I  
2 hesitate to say yes because New Mexico and certainly  
3 the other parties will have some opinion as to  
4 dissemination of that document, too. I mean, we will  
5 -- as we are working on this, we have resolved general  
6 principles. It's sort of filling in the underlying  
7 values, if you would, that, you know, may take some  
8 negotiation beyond Tuesday. So I hesitate to say  
9 exactly when that would be. I -- but I certainly  
10 understand how we are under a crunch right now and we  
11 need to get this done and we do need to get the drafts  
12 out and reviewed.

13 **MR. WECHSLER:** Your Honor, if I may --

14 **JUDGE MELLODY:** I was just going to ask.

15 **MR. WECHSLER:** Yeah. Your Honor, I  
16 mean, we are -- we want to be a good negotiating  
17 partner with the U.S., and I understand they have some  
18 legitimate concerns. That being said, we support  
19 broad dissemination of -- of the documents. I think  
20 an approach along the lines of what Ms. O'Brien is  
21 suggesting is something that would -- that could work,  
22 and I would also -- I want to be explicit that we  
23 would also like to share with the -- with the amici  
24 the technical documents that have been worked on that  
25 are contemplated to be appendices to the -- the decree

1 or settlement documents because we think those are  
2 also very important for the amici to understand.

3 **JUDGE MELLOY:** Well, let me ask you  
4 this, Mr. Wechsler, and anybody else can chime in if  
5 they want. Do you think it's unrealistic to say  
6 Tuesday they disclose -- by no later than Tuesday when  
7 they meet with the amici, disclose the draft agreement  
8 Texas has prepared, and by no later than the end of  
9 next week, all the other documents be shared?

10 **MR. WECHSLER:** Yes. I think that that's  
11 realistic. I think that's a good balance.

12 **JUDGE MELLOY:** All right. Well -- all  
13 right. That'll be the -- that'll be the order then.  
14 And if for some reason you feel, Mr. Leininger, that  
15 as you go through the week next week that that's not  
16 going to work or you have some serious problems with  
17 it, you need to file something, and we'll take it up  
18 then.

19 **MR. LEININGER:** Yes, Your Honor.

20 **JUDGE MELLOY:** Anybody else have  
21 anything they want to say or anything else we need to  
22 take up today?

23 **JUDGE BOYLAN:** Judge, do I understand  
24 your order to be on or before so that the parties can  
25 release those prior to the end of next week if --

1                   **JUDGE MELLOY:** Oh, correct, definitely.  
2                   On or before, yeah.

3                   **JUDGE BOYLAN:** Thank you.

4                   **JUDGE MELLOY:** And it doesn't have to be  
5                   all on one document. If you have some technical  
6                   documents ready to go now, you can do it as soon as  
7                   they sign the confidentiality agreement, but yeah.  
8                   But, of course, it's also subject to signing the  
9                   confidentiality agreement. So any attorney who for  
10                  some reason doesn't want to sign it or hasn't signed  
11                  it, they won't get it, but it's subject to signing the  
12                  agreement.

13                  All right. Well, let me just say this:  
14                  I'm generally available any time over the next several  
15                  weeks. If we have something come up, we can set a  
16                  hearing on short notice; otherwise, we'll plan to get  
17                  together on the 27th of -- of September. I -- I do  
18                  want to say, I just -- I may have one problem with  
19                  that date, but I'll double-check that, but I don't  
20                  think so. But let's plan on the 27th of September,  
21                  and that'll be in person and -- to either discuss  
22                  getting a settlement notice approved and finalized or  
23                  talk about what we're going to do at trial.

24                  Anything else from anybody want to be  
25                  heard?

1 (No response.)

2 **JUDGE MELLOY:** All right. Thank you,  
3 everybody. I appreciate your participation. Don't  
4 hesitate -- if issues come up, don't hesitate to let  
5 me know because, as I say, we can -- we can schedule  
6 something on short notice if we need to.

7 All right. Thank you, everyone.

8 (The proceedings adjourned at 12:24 p.m.)

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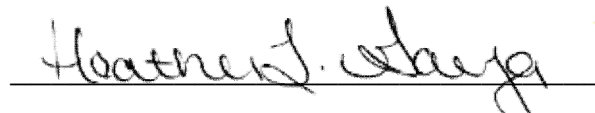


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I further certify that I am not, in any capacity, a regular employee of any of the parties in whose behalf this status hearing is taken, nor in the regular employ of any of the attorneys; and I certify that I am not interested in the cause, nor of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

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