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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 APRIL 23, 2018
TELECONFERENCE BEFORE HONORABLE MICHAEL A. MELLOY,
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning
at 3:00 p.m.

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1 PROCEEDINGS

2 (April 23, 2018)

3 JUDGE MELLOY: This, of course, is in the
4 matter of the State of Texas vs. the State of New
5 Mexico and the State of Colorado, Supreme Court
6 Original No. 141.

7 Let me just start with the named parties
8 including the United States. Who is on for the
9 State of Texas?

10 MR. SOMACH: Yes, Your Honor. This is
11 Stuart Somach. I'm the counsel of record for the
12 State of Texas. With me is Francis Goldsberry,
13 Robert Hoffman, Theresa Barfield and Brittany
14 Johnson. All of those folks are on the service
15 list.

16 JUDGE MELLOY: Who was the second name
17 you mentioned?

18 MR. SOMACH: Robert Hoffman.

19 JUDGE MELLOY: Okay. And Theresa
20 Barfield, Brittany Johnson. Is there anybody else
21 besides you, Mr. Somach?

22 MR. SOMACH: No. And then myself.

23 JUDGE MELLOY: And then who is on for
24 the --

25 UNIDENTIFIED SPEAKER: Goldsberry. You

1 forgot Goldsberry.

2 MR. SOMACH: No. I thought I started
3 with him.

4 JUDGE MELLOY: I missed him. Okay.

5 Then for the State of New Mexico who do we
6 have?

7 MR. RAEL: Your Honor, Ms. Marcus Rael,
8 counsel of record for the State of New Mexico.
9 With me I have Deputy Attorney General Tania
10 Maestas, I have David Roman and I have Lisa
11 Thompson and Michael Kopp.

12 JUDGE MELLOY: Okay. For the State of
13 Colorado who do we have?

14 MR. WALLACE: Yes. Good afternoon, Your
15 Honor. This is Chad Wallace for the State of
16 Colorado.

17 JUDGE MELLOY: All right. And then for
18 the United States?

19 MR. DUBOIS: Good afternoon, Your Honor.
20 This is Jim Dubois for the United States and also
21 on the phone are Steve Macfarlane, Lee Leininger,
22 Judy Coleman and I believe Shelly Randel from
23 Interior.

24 JUDGE MELLOY: Okay. And then
25 Albuquerque County Water Utility, who do we have on

1 for that entity or are you on?

2 MR. BROCKMANN: Yes, Special Master.
3 This is Jim Brockmann on behalf of the Albuquerque
4 Bernalillo Water Utility Authority, counsel of
5 record.

6 JUDGE MELLOY: And then the City of
7 El Paso?

8 MR. CAROOM: Good afternoon, Your Honor.
9 This is Doug Caroom for the City of El Paso and
10 Susan Maxwell is with me.

11 JUDGE MELLOY: Okay. Do we have the City
12 of Las Cruces?

13 MR. STEIN: Yes, Your Honor. This is Jay
14 Stein for amicus curiae City of Las Cruces, New
15 Mexico.

16 JUDGE MELLOY: And then El Paso County
17 Water Improvement District No. 1?

18 MS. O'BRIEN: Yes, Your Honor. This is
19 Maria O'Brien for El Paso County Water Improvement
20 District No. 1.

21 JUDGE MELLOY: And then what about
22 Elephant Butte Irrigation District?

23 MS. BARNCASTLE: Good afternoon, Your
24 Honor. This is Samantha Barncastle for Elephant
25 Butte Irrigation District.

1 JUDGE MELLOY: Okay. And then we have
2 Hudspeth County Water Control. Anyone on for them?

3 MR. MILLER: Yes, Your Honor. This is
4 Drew Miller, counsel of record for Hudspeth County
5 Conservation and Reclamation District No. 1.

6 JUDGE MELLOY: And then what about the
7 New Mexico Pecan Growers?

8 MS. DAVIDSON: Good afternoon, Your
9 Honor. This is Tessa Davidson for New Mexico Pecan
10 Growers.

11 JUDGE MELLOY: And how about New Mexico
12 State University?

13 MR. UTTON: Yes, Your Honor. This is
14 John Utton on behalf of New Mexico State
15 University.

16 JUDGE MELLOY: Is anyone on for the State
17 of Kansas?

18 (Silence.)

19 JUDGE MELLOY: All right. No one for
20 State of Kansas.

21 MR. SOMACH: This is Stuart Somach, Your
22 Honor. I did talk to them and I don't believe that
23 they will be on the telephone call.

24 JUDGE MELLOY: Okay. And then I should
25 just advise we do have, of course, a court reporter

1 here and I have -- two of my law clerks are sitting
2 and listening. I've also asked Michael Gans and a
3 couple of the people from his IT staff to join us.
4 Michael, are you on?

5 MR. GANS: Good afternoon, Judge Melloy.
6 Yes, I'm here with Christine Werner and John Elser
7 from our automation staff.

8 JUDGE MELLOY: Okay. All right. Is
9 there anybody I've missed who we haven't gone
10 through?

11 (Silence.)

12 JUDGE MELLOY: All right. Well, I'd like
13 to start today by just talking about some of the
14 mechanics of the case before we get to some of the
15 issues that we have to talk about. I've been
16 working with Michael Gans' office and the best way
17 to set up the service list and how to handle the
18 service and filing and so on. With the prior
19 Special Master -- of course, he handled both the
20 service, he handled the filing and he handled the
21 maintenance of the record. Of course, in this case
22 I'm going to be handling the case and Michael's
23 office will be handling keeping the record and
24 maintaining that for the Supreme Court and so on.
25 I just want to go through a couple of the mechanics

1 of how we're going to handle that and do that and
2 make a few changes from the way things have been
3 handled previously.

4 First of all -- and we'll include this in the
5 written order so you'll have this to refer to.
6 As you know, Mr. Gans has set up a place right on
7 the Eighth Circuit website. If you haven't
8 checked, you can go to the Eighth Circuit website
9 and it's on the first page that shows the docket
10 for this case. Any pleading or other matter that
11 you want to have filed in the case, as is indicated
12 in Mr. Gans' letter of April 6th, should be sent to
13 that txvnm141@ca8uscourts.gov email address. I'm
14 going to eliminate the requirement that you send a
15 courtesy copy by email to me. We have set it up
16 through Mr. Gans' office that whatever you send to
17 that email will automatically be forwarded to me.
18 We'll just have one email address for any filings
19 or pleadings and they go to that address and then
20 I'll automatically receive a copy. As I say, I'll
21 confirm this in the written order.

22 It 's my understanding that under the first
23 and second case management orders that had been
24 filed by Mr. Grimsal that you were serving four
25 copies of each document. I shouldn't say serving.

1 You were filing four hard copies of each document.
2 I don't think we need quite that many. What I'm
3 going to ask that you do is send one hard copy to
4 Mr. Gans and one hard copy to me. In the order
5 that will be coming out I will give you -- it will
6 include the mailing address for each of us on that.
7 Now, we have been told by the Supreme Court that
8 they will require a hard copy record of all the
9 proceedings and so the copy that you will be
10 sending to Mr. Gans will be the hard copy that will
11 eventually be sent to the Supreme Court at the end
12 of the case. Again, just one copy to him and one
13 copy to me, which leads me to a question I have.
14 As I understand the prior case management orders,
15 the parties have been serving hard copies on each
16 other. Am I understanding that correctly? Do you
17 want to continue to do that? Maybe I'll start
18 with --

19 MR. RAEL: This is Marcus Rael, State of
20 New Mexico. We had a meeting on April 4th in
21 Denver and I think we basically agreed -- the four
22 parties did -- named parties -- and I think we
23 basically agreed to do it by electronic service
24 from this point forward.

25 JUDGE MELLOY: So electronic service

1 only?

2 MR. RAEL: Unless somebody remembers
3 differently than I do, Your Honor.

4 MR. SOMACH: Your Honor, this is Stuart
5 Somach for Texas. I actually paused because I
6 couldn't remember if we were serving hard copies or
7 not. We're certainly fine with just electronic
8 service and I think Mr. Rael is correct that we did
9 agree -- particularly as we move into discovery --
10 that service can all be done electronically.

11 JUDGE MELLOY: Okay. And then have you
12 been serving the amici everything that is filed
13 or -- I guess, what has been the practice and what
14 do you understand the -- what do you believe will
15 be the practice going forward in that regard?

16 MR. SOMACH: Your Honor, this, again, is
17 Stuart Somach for Texas. We have been serving
18 everybody that's been on the service list and I
19 think our intention was to continue to do that with
20 whatever it is that we are filing.

21 JUDGE MELLOY: Okay. Fine. I want to
22 talk a little bit more further as we get into the
23 call about the status of the amici, but at least as
24 of right now they will be served with everything
25 that anyone else gets served with.

1 What about things that aren't filed such as
2 discovery? Is it your present intention to serve
3 all the amici with all discovery?

4 MR. SOMACH: I think that that was our
5 intention. Anybody can disagree, but we were going
6 to serve whomever was on the service list, which
7 included all of the amici. One of the things we
8 didn't do is separate out I think -- as I read one
9 of the letters, they were talking about stakeholder
10 amici. We were just talking about serving anybody
11 that was amici that was on the list equally and
12 that we would serve them with whatever got served
13 among the parties. Again, someone could correct me
14 on that.

15 MR. DUBOIS: This is Jim Dubois for the
16 United States. I'm not sure that we agreed that we
17 were going to send all of the discovery responses
18 and documents to everyone.

19 JUDGE MELLODY: This is Judge Melloy.
20 I noticed in one of the letters -- or maybe more
21 than one -- that there was some reference to maybe
22 doing some type of discovery depository for the
23 amici as opposed to serving the discovery responses
24 on each of them, but -- well, let's kind of table
25 that for a moment and we'll talk about that in a

1 minute when we talk about the amici.

2 Going back to a couple of the mechanical
3 issues with Michael Gans' office. I know there is
4 reference to sealed documents and privileged
5 documents in the proposed scheduling order.
6 First of all, do you think there are going to be a
7 lot of those types of documents? Given the fact
8 we're dealing with mainly public entities here, I
9 would imagine most of what we're talking about is
10 probably going to be public already, isn't it, or
11 do you think we'll have a lot of that type of
12 material or has anybody thought about that?

13 MR. SOMACH: This is Stuart Somach again
14 and I would concur with you. I'm not aware at this
15 point in time what would be confidential other than
16 there had been some early exchanges of material
17 under a confidentiality agreement and I believe
18 that the intention is to maintain that
19 confidentiality. Beyond that, I'm not certain
20 certainly from Texas' perspective that this is a
21 giant issue, but, then again, I'll allow other
22 parties to speak from their perspective.

23 MR. WALLACE: Your Honor, this is Chad
24 Wallace. I think one of the potential items that
25 may come up for filing under seal might have to

1 deal with infrastructure and security issues.
2 For example, dam schematics. The parties may work
3 together if anything like that needs to be filed.

4 JUDGE MELLOY: I'll have Mr. Gans weigh
5 in here if I'm misstating anything, but as I
6 understand it from our perspective when you do want
7 to file something, of course, the proposed order
8 includes a requirement that there be a motion and
9 then once it's filed under seal we will ask that
10 you not electronically transmit it because -- well,
11 I don't know. Michael, should they electronically
12 transmit it or not? At the end of the day we'll
13 keep a physical copy separate from the rest of the
14 file. Is that how we're going to do it? We did
15 talk about this last week a little bit. I'm not
16 sure how we exactly resolved the sealed documents.

17 MR. GANS: Well, Judge, I think there's a
18 couple questions. First of all, a motion to seal
19 could be filed electronically or it could be filed
20 just in paper format. It depends on whether or not
21 the motion contains anything that the partes would
22 believe should be confidential as well as the
23 related documents. We would accept it in either
24 format. Any materials you propose to file to seal
25 should be sent to me in paper for me to hold. I

1 guess the question is whether we also want to set
2 up some sort of offline way for parties to submit
3 that to me so that you might have electronic
4 versions of that and that depends on whether or not
5 some of these documents even exist in an electronic
6 version. I think the best way to handle that is
7 when someone gets ready to submit something under
8 seal, probably call me and talk to me about it in
9 advance.

10 JUDGE MELLOY: All right. Well, that may
11 be a bridge we'll have to cross when we get to it
12 as to the mechanics of exactly how to get those
13 documents to both Mr. Gans and myself. I don't
14 necessarily need an electronic version. Probably
15 the easiest will be to have them sent in hard copy
16 both to Mr. Gans to keep offline in a separate file
17 and a hard copy to me. When we get to that point,
18 we can talk about that a little further.

19 A couple more just sort of mechanical issues.
20 I think one of the reasons the Supreme Court has
21 asked that I take over this case -- and it's
22 certainly no reflection on Mr. Grimsal as he did a
23 wonderful job -- but it's pretty obvious that as
24 this case goes forward it's going to get pretty
25 expensive in terms of attorney fees for a private

1 special master and I guess for want of a better
2 term I'm free help. I don't think there will be
3 any expenses for the parties. I haven't gotten a
4 completely definitive answer from the Supreme Court
5 as to whether at the end of the case they will
6 charge back out-of-pocket expenses. I think that's
7 still somewhat up in the air, but certainly they
8 will be very minimal relative to what would have
9 been spent in terms of private attorney fees.
10 As I mentioned earlier, we do have a court reporter
11 present. She will make a transcript of the
12 hearing. The reporting fee will be paid by the
13 Supreme Court as I understand it, but if you want a
14 copy of this hearing transcript, you'll have to
15 order that from her directly and each party will be
16 responsible for paying for their own copy. Other
17 than that, I don't see any expenses immediately
18 that the parties would be responsible for. Like I
19 say, at the end of the case if we have a long trial
20 and they want to charge back the court reporting
21 fee or any other -- or my travel expenses or
22 whatever else might be involved, that is something
23 the Supreme Court will have to decide down the
24 road. Any questions about that?
25 (No questions.)

1 JUDGE MELLOY: Then one other thing I did
2 want to talk about. I feel like today I'm probably
3 going to have a lot more questions for you than
4 answers and a lot of the questions you may not be
5 prepared to really answer or discuss today.
6 I'm strongly inclined at this point to schedule an
7 in-person conference where we can maybe hash out
8 these issues in a little more detail at some point
9 in the next 60 to 90 days. I'm sure one of the
10 questions on the top of your mind is where we'd
11 have such a conference. My current inclination is
12 at least for something like that that I would
13 probably come to a location that would hopefully be
14 convenient to you. As a circuit judge it would
15 probably be easier for me to impose upon my fellow
16 circuit judges for a courtroom and I'm sort of
17 leaning probably towards Denver as a place that
18 might be convenient. I'll let you know hopefully
19 in the not too distant future as to when and where
20 we might have such a conference. I do think
21 there's a lot of things to be discussed here that
22 I'm not sure is very convenient to do by telephone
23 and, quite frankly, I feel like I've only --
24 although I've spent a lot of time on this case
25 already, I'm only scratching the surface of what I

1 need to know about what's ahead of us. That's sort
2 of my current thinking.

3 All right. Unless there's anything else
4 anybody wants to say about the mechanics --
5 Michael, if you want to stay on, that's fine. If
6 you want to drop off, I think -- Is there anything
7 else you can think of that we should be talking
8 about?

9 MR. GANS: No. Just if anyone had any
10 questions for me and I also want to encourage
11 anyone to feel free to call me. I can give you my
12 direct line so that you can call me if you have a
13 question or concern. Again, that's Michael Gans,
14 G-A-N-S, (314) 244-2424.

15 JUDGE MELLOY: Don't hesitate to call
16 him. He doesn't take a lot of time off. He's
17 usually there and he's always willing to answer
18 questions.

19 MR. GANS: Thank you, Judge.

20 JUDGE MELLOY: Okay. If you want to drop
21 off, Michael, feel free to do so. Otherwise, I'm
22 going to go on and start talking about the case
23 management plan a little bit.

24 MR. GANS: All right. I'm going to hang
25 up. Thanks, Judge.

1 JUDGE MELLOY: Thank you.

2 Let me start by a couple sort of preliminary
3 observations that may or may not be accurate based
4 upon what I've read about this case so far. The
5 case is a little unusual in the sense that while
6 there's a lot of data out there and there's a lot
7 of information, you have also been at it for four
8 years and there's been quite a bit of litigation in
9 other forms that have already I'm sure fleshed out
10 some of these issues. You've had the litigation in
11 New Mexico State Court, you've had the litigation
12 in the United States District Court over the
13 2006 -- Is it 2006 or 2008 agreement? I've seen
14 both dates.

15 UNIDENTIFIED SPEAKER: 2008.

16 JUDGE MELLOY: Yeah. Someplace I saw
17 2006. I thought that was a typo. The 2008
18 agreement. It isn't like we're starting at ground
19 zero here, but because there's been so much
20 litigation that also means there's an awful lot of
21 material out there as well. It's certainly a
22 two-way sword. One of the things I think the
23 Supreme Court would like is for me to be somewhat
24 of a hands-on case manager in this case and to try
25 to keep the case moving to the extent we can. I

1 understand it's very complicated. There's going to
2 be a lot of material. Sort of as an initial
3 observation, one of the things that you have
4 indicated in your case management order is the --
5 what's the term -- your initial start date for all
6 proceedings. I wonder why we can't start that
7 earlier. Once New Mexico files its response, which
8 I believe is due May 22nd, and files its
9 counterclaims, I think we'll know at that point
10 pretty much what the issues are. I don't think we
11 need to wait until Texas and the United States file
12 answers to those counterclaims. I think at that
13 point we're going to know what the issues are.
14 I would propose that we start the clock running, so
15 to speak, on June 1 as opposed to waiting until
16 after Texas and the United States file their
17 response. I have to say that from that point
18 forward I'm not prepared today to make a lot of
19 definitive decisions about dates. I think the
20 proposal that you both have set forth, I think one
21 version has -- I guess both versions you are in
22 agreement that initial disclosures be 90 days from
23 the at issue date which, as I said, I would like to
24 set at June 1, and so certainly we'll keep that
25 date in place, but I'm going to reserve ruling on

1 some of these other dates -- particularly the
2 sequencing of experts -- until I've had a chance to
3 study this a little bit more and we can have, as I
4 say, an in-person conference and maybe discuss
5 these issues in a little more detail.

6 Any questions or problems with that?

7 MR. SOMACH: This is Stuart Somach from
8 the State of Texas. Texas has no problem with
9 that. I think you're correct. We'll know on
10 June 1 what the issues are. My assumption, then,
11 is that we should at least think about the
12 discovery commencing 90 days after that.

13 JUDGE MELLOY: Well, the plan that you
14 submitted has -- that's the date for the initial
15 disclosures. That's your Rule 26 disclosure date.

16 MR. SOMACH: Rule 26. Not the expert.

17 JUDGE MELLOY: Right. And then the
18 discovery starts at that point.

19 MR. SOMACH: Yes. That's correct.

20 JUDGE MELLOY: There is one other issue
21 about discovery. I should have actually mentioned
22 this before Michael got off the line.

23 One of the -- well, let me just go -- I'm kind
24 of jumping around here.

25 Let me go through the proposed case management

1 plan, which I appreciate how thorough it is and I
2 think it covers most of the issues and I don't have
3 a lot of problems with it, but let me just take the
4 draft case management plan. If you have it in
5 front of you, starting with 2.2 I'm eliminating the
6 requirement that you send a copy of documents to
7 me. If you send them to that TX email address,
8 that will get to me. As I said, we'll have one
9 hard copy sent to the clerk and one hard copy sent
10 to me. We'll give you the addresses when we send
11 you the written order.

12 I think the question I had about 2.3 I think
13 has been answered. At the current time the plan is
14 to only email documents, responses to
15 Interrogatories and so on to each other. You're
16 not going to send hard copies. On point 3 -- at
17 least as of the current time -- the amicus curiae
18 are going to receive copies of everything.

19 One of the issues I want to get into in more
20 detail when we do have an in-person conference is
21 the role of the amici. In the draft plan it's a
22 pretty limited role. I have now received the
23 letters from the various parties of Elephant Butte,
24 El Paso Water Improvement District, Hudspeth and
25 others who want a more expanded role. I don't want

1 to delve into this too deeply today, but let me
2 just ask this first question about that. Do you
3 feel that -- and maybe I should be asking the amici
4 this -- that all of you are -- for want of a better
5 term -- created equal in all of this? It seems to
6 me that El Paso Water Improvement District and
7 Elephant Butte Irrigation District have a somewhat
8 different and maybe -- I don't know if I want to
9 use the word enhanced, but you're in a little
10 different position than some of the other amici.
11 Is there any thought that some should be treated
12 differently than others?

13 MS. O'BRIEN: Your Honor, I was unclear
14 whether you're seeking input from amici or from the
15 parties?

16 JUDGE MELLODY: Either one.

17 MS. O'BRIEN: This is Maria O'Brien on
18 behalf of El Paso County Water Improvement District
19 No. 1.

20 Your Honor, without belaboring I think we did
21 set out in the joint letter we sent with our sister
22 irrigation district, EBID, Elephant Butte
23 Irrigation District, that we do feel that the two
24 Rio Grande Project districts do have a different --
25 are situated differently than the other amici in

1 the context of this case and we believe that there
2 absolutely needs to be a role for these two
3 entities in the case. That said, we are not
4 arguing for exclusion of other amici, but we think
5 it's essential -- it's a role of amici -- if
6 traditional amici were to be limited, that perhaps
7 some of those restrictions are not properly applied
8 to Elephant Butte Irrigation District and what we
9 call EP No. 1.

10 MR. STEIN: Your Honor, this is Jay Stein
11 representing the City of Las Cruces, New Mexico.
12 We would take the view that all amici are created
13 equal and I would do so on the basis of the Supreme
14 Court jurisprudence. The case that we're dealing
15 with is to construe an equitable apportionment,
16 which is an equitable division of water amongst
17 states. That is based upon water use and water
18 claims of the equities which are the water users
19 within the states for the directly affected parties
20 and, therefore, I would argue that all have an
21 equal interest in and an equal participation.

22 MR. DUBOIS: Your Honor, this is Jim
23 Dubois for the United States. I disagree with
24 Mr. Stein in the sense that this is not an
25 equitable apportionment. This is interpretation

1 and application of a Compact with the states
2 operating as transpatriate. I think that the
3 traditional role of the amici is appropriate and I
4 will agree with Mr. Stein that it does seem that
5 there's no sort of legal distinction among amici
6 and so they may end up being treated equally, but
7 this is not an equitable case. This is a case
8 about the Compact.

9 MR. STEIN: But it is a construction of
10 the equitable apportionment that was created by the
11 Rio Grande Compact and in that sense it is a
12 construction and an evaluation of the equities upon
13 which the Compact was based on.

14 MS. BARNCASTLE: Your Honor, this is
15 Samantha Barncastle for Elephant Butte Irrigation
16 District.

17 First of all, I agree with the comments made
18 by Ms. O'Brien, counsel for our sister district,
19 but, as an example, one way that the two districts
20 will be different than the rest of the amici are
21 through the discovery procedures. We will be the
22 ones responding to discovery about how the Rio
23 Grande Project works in conjunction with the United
24 States. No other party will play that role in this
25 process. That's just one example of how we will be

1 different.

2 MS. O'BRIEN: Maria O'Brien for El Paso
3 County Water Improvement District 1. I would
4 respectfully disagree with Mr. Dubois with regard
5 to his comments as well as on Mr. Stein in terms of
6 all amici being equal. I think Your Honor
7 recognized at the beginning of the call that this
8 is a complex and unique case. We have some
9 guidance from the Supreme Court with regard to the
10 case and that is that we have a unique situation
11 where a reclamation project that we have our own
12 project is, as the Court stated, inextricably
13 intertwined with the Compact. The interest in the
14 project and interest in the Compact are difficult,
15 if not impossible, to sever or to separate and that
16 was in large part the basis for granting a full
17 intervention of the United States. At this point
18 it appears that there will be numerous contracts
19 which the districts that are a party -- the
20 districts being EBID and EP No. 1 -- will be put at
21 issue and that is not the case with the other
22 amici. Again, I think that there is already a
23 record which demonstrates unique status of these
24 two current amici that should be taken into
25 consideration as Your Honor fashions the

1 appropriate role for amici going forward.
2 To be clear, we're not arguing for preclusion of
3 other amici participating. We think it
4 important -- and again, the record already reflects
5 that these two amici, the two districts of the Rio
6 Grande Project, have a very unique interest as
7 stated.

8 MR. BROCKMANN: Your Honor, this is Jim
9 Brockmann for the Albuquerque Bernalillo County
10 Water Utility Authority. A couple observations.
11 Obviously we signed the letter supporting equal
12 participation by all amici and believe that's
13 appropriate. I guess an observation is that if you
14 do intend to take this matter up in more detail at
15 an in-person status conference, perhaps it will
16 become more apparent when we talk about each of the
17 specific issues about where amici participation is
18 limited or more broadly construed; whether we're
19 talking about discovery depositions or attendance
20 at hearings and status conferences. I might note
21 that as set forth in our letter, our firm was
22 counsel of record for Nebraska in the
23 Nebraska/Wyoming case and in that instance Special
24 Master Owen Olpin definitely treated all of the
25 amici equally there. They were allowed to brief

1 issues including reply briefs, which I don't know
2 that any of the parties have proposed here or any
3 of the amici have proposed here, and they attended
4 hearings and made arguments where the Special
5 Master there thought it was useful. With more
6 limited time, but they also received copies of
7 discovery and so forth. I think it worked out well
8 there because it kept the stakeholders very
9 well-informed and sort of on the same page with the
10 States. I think that's an example to me going
11 forward of how the amici can be treated equally.
12 In that case the interests were quite different
13 from downstream environmental interest to
14 irrigation districts and public power irrigation
15 districts that were involved.

16 JUDGE MELLODY: This is Judge Melloy.
17 I think one of the issues about the amici is their
18 role in discovery. If they are going to have an
19 active role, I'm just concerned that just, for
20 instance, scheduling a deposition will become a
21 nightmare if you have to work with 20 different
22 people's schedules. I'm less concerned about
23 serving discovery responses, particularly since
24 it's going to be done electronically, but I want to
25 think a lot more and I'll be asking for more input

1 on what, if any, role they should have in the
2 discovery process in particular. Like I said, I'm
3 not quite as concerned about even briefing, but if
4 we get to -- if and when we ever get to a trial in
5 this case, I would be loath to have 20 parties
6 examining witnesses. And I should say -- maybe I
7 should have said this at the outset -- whatever we
8 decide today or whatever we decide six weeks or two
9 months, three months from now isn't set in stone.
10 As this case goes along I'm sure the discovery
11 schedule will to some extent evolve, the
12 participation of amici and other issues will
13 hopefully be narrowed. They may expand, but I hope
14 they are narrowed. Whatever we decide today on
15 something like discovery or amici doesn't mean
16 that's going to be the way it's going to be for the
17 next two or three years.

18 MR. SOMACH: Your Honor, this is Stuart
19 Somach. I want to throw out a practical concern
20 about depositions. The proposal that I saw a lot
21 of folks doting would be that a lawyer and an
22 expert would be at each one of the depositions or
23 could be. Just the math with respect to the
24 current people would mean you'd have 16 expert
25 people, plus -- I'll just throw this figure out.

1 When just the parties met to talk about the case
2 management plan, we had about 13 people there and
3 no experts. I'm thinking all of a sudden you're
4 looking at having to accommodate -- not just
5 schedule. The schedule I think is an issue, but I
6 think more importantly is I'm not sure -- I mean,
7 when you get numbers in the 30's attending
8 depositions, just finding a place to accommodate
9 that becomes quite a practical problem and so I
10 just want to throw that in as you're considering
11 these issues.

12 JUDGE MELLOY: All right. Well, like I
13 said, we can talk about that a little bit more.
14 Going back to the scheduling order itself, I'd like
15 to turn to paragraph 4 for a minute. I don't see a
16 need to have Certificates of Service for all
17 discovery materials filed. I don't need to know
18 every time you schedule a deposition. I don't
19 think it needs to be in the record as to New Mexico
20 sent a set of Interrogatories to Texas. I don't
21 know that we need to know that necessarily. I
22 think obviously if there's disputes, there's
23 provisions for how to handle those disputes and
24 file those materials. I'm going to eliminate that
25 requirement. I would say also that another reason

1 I don't think it's necessary is that in the next
2 section, Section 5, you have a requirement which I
3 think is very useful, that the parties file a
4 progress report once a month. Certainly in that
5 progress report on discovery you can set out that
6 Texas sent Interrogatories or requests for
7 production of documents were served on non-party X.
8 That information will be, I presume, in that
9 monthly status report anyway. I don't think it's
10 necessary to -- I don't want to use the word
11 clutter up, but to have the docket reflect all the
12 Certificates of Service, so I'm going to eliminate
13 that unless somebody thinks there's a compelling
14 reason to keep it in.

15 MR. DUBOIS: Your Honor, this is Jim
16 Dubois for the United States. The status reports
17 are every other month as we've got it structured.
18 Were you wanting to --

19 JUDGE MELLODY: Oh. Every other month.
20 That's fine. I misread that. I'm sorry.

21 All right. Then going on I think -- on
22 6.2.1.1, as I said, we'll change the at issue date
23 to June 1, 2018.

24 Jumping forward a couple pages, 6.2.7, what's
25 the thought of eliminating that section or should

1 we just change it to except as maybe ordered by the
2 Court? I can certainly see in a case with this
3 complexity and that's going to go on as long as
4 it's going to take that there may be a desire to
5 perpetuate testimony.

6 UNIDENTIFIED SPEAKER: We may need
7 something to perpetuate lawyers.

8 JUDGE MELLOY: How about if I just change
9 that to except as maybe ordered by the Court. So
10 Rule 27 will not apply, except, maybe as ordered by
11 the Court because I do think that there may be that
12 necessity at some point.

13 In Section 7 I think it's New Mexico indicated
14 in their letter that in the Georgia vs. Florida
15 litigation that there were over 2 million documents
16 by each side. Hopefully we will be significantly
17 less than that. I still anticipate it will be
18 voluminous. Have you given any thought to an index
19 of documents? Serving 100,000 documents on
20 somebody without an index is going to be difficult
21 to deal with. I will be the first to confess I'm
22 not an expert on e-discovery. Will documents be
23 searchable? Will there be an index? Have you
24 thought about that at all?

25 A. Your Honor, this is Marcus Rael on behalf of the

1 City of New Mexico. I think the State of New
2 Mexico supports that. We think it would be a
3 really good idea to have documents indexed and, if
4 possible, to make them searchable. I think it will
5 make the case go much smoother than otherwise.

6 MR. SOMACH: Your Honor, this is Stuart
7 Somach. I think this is part of what the parties
8 were going to sit down and talk a little bit about
9 in terms of -- I mean, I think we all recognize the
10 amount of documents that will be involved and it
11 doesn't do anybody any good to exchange them in any
12 way that just creates more problems, so I do think
13 we intended to sit down and have a conversation how
14 best to do this so that what we provide is useful
15 and that everybody can either search them or
16 similarly make them available.

17 I wanted to add, interestingly enough, that in
18 the Florida/Georgia example that you used from
19 beginning to end was 18 months to trial with all of
20 those documents. I'm not sure that's something
21 anybody here wants to replicate. In addition to
22 the number of documents, they were doing that in a
23 very compressed period of time.

24 JUDGE MELLOY: Well, I do think that 18
25 months may be a little aggressive, but certainly I

1 think one of the goals is to try to get this case
2 to trial as quickly as possible. I know that in
3 New Mexico's letter you talked about sequencing and
4 referred to a couple of other examples where that
5 was used, but I also noticed in looking at those
6 orders we were talking about that they used 30 and
7 60 days to respond to have expert designations.
8 300 days may be a little aggressive in terms of the
9 amount of time that I'm going to allow even
10 assuming I do agree with your argument about a
11 sequencing of experts. As I say, I'll certainly be
12 happy to hear further argument about that when we
13 get together in-person.

14 As far as I'm concerned, I don't have any
15 problems with the section on privilege. As a
16 matter of fact, I think the rest of it -- I think
17 the rest of it I don't have a problem with. As I
18 mentioned when Mr. Gans was still on the phone,
19 we'll have to work out a procedure under 11.2 of
20 filing confidential documents, but I think --
21 again, don't hesitate to call him and he'll
22 certainly confer with me about any issues having to
23 do with getting confidential documents filed.

24 Under 12.1.2.1 I want to think about that
25 procedure a little bit more as to exactly how we're

1 going to handle discovery disputes. Is it your
2 thought under that section that we would try to do
3 an informal resolution without ever actually filing
4 anything? Is that the reason for the direct email?
5 I don't know if you have given a lot of thought to
6 that particular section.

7 MR. RAEL: Your Honor, this is Marcus
8 Rael for the State of New Mexico. I think that is
9 the thought, that we would try to resolve it
10 informally and we would try to do that with a
11 telephone call with you, if necessary. And then if
12 that doesn't work, then we can try and do a formal
13 filing with Your Honor.

14 JUDGE MELLODY: Okay. All right. Well, I
15 don't have a problem with that and I think it
16 probably hopefully will be more efficient and I
17 certainly don't have a problem with calling. If
18 I'm available, I'll be more than happy to try to
19 rule on any disputes in depositions as you've
20 provided for in 12.2. I may tweak that provision
21 under 12.1.2.1, but as a general proposition I
22 don't have any problem with it.

23 At the current time the thought is we would
24 leave both 14 and 15 blank. Is that what you're --
25 Is that your thinking?

1 MR. RAEL: Yes, Your Honor. This is
2 Marcus Rael on behalf of New Mexico again. I think
3 until we get further down the road and Your Honor
4 makes a decision, I think we'd leave them blank.

5 JUDGE MELLODY: Yeah. Well, let me just
6 tell you this. This may be unrealistic, but I
7 certainly would like to see us try to shoot for
8 having this case at issue and ready for trial in
9 two years. I'd like to be trying this in spring of
10 2020, which sort of sounds like a long way away.
11 It is, but I would certainly be hoping that we
12 could maybe -- I may be unrealistic with that goal,
13 but that's sort of my hope if we can get this case
14 at issue and tried --

15 MR. SOMACH: Your Honor, this is Stuart
16 Somach for Texas. I think that's consistent with
17 what we would like to see happen certainly. I
18 actually have a -- I just want to make sure. I
19 didn't want to do this out of sequence. I wasn't
20 sure the right place to insert this, so if you want
21 to talk about this later or not at all, just let me
22 know.

23 You indicated that you wanted to have a
24 face-to-face conference and I think that is a very
25 good idea. I have a significant surgery scheduled

1 and I wanted to make sure -- and I need to be at
2 the conference you want to have and so I wanted to
3 provide you with those dates, if those could be
4 accommodated. I didn't know if this was a good
5 place to insert that, but I just wanted to indicate
6 that.

7 JUDGE MELLOY: Okay. Well, why don't
8 I -- Let me see. When are you not available?

9 MR. SOMACH: I go in for surgery on my
10 back. The surgery is scheduled for June 8th.
11 They tell me that it will be six weeks before I can
12 travel.

13 JUDGE MELLOY: Okay. So that takes you
14 to about the middle of July.

15 MR. SOMACH: Yes. I apologize. I had
16 actually scheduled that when -- we're going to be
17 at issue a little sooner than I had been thinking
18 and, of course, I didn't know if you were going to
19 have a conference. I do apologize, but
20 unfortunately it took me forever to schedule those
21 dates and unfortunately I need the surgery, so --

22 JUDGE MELLOY: Okay. Well, let me look
23 at my schedule and I'll send out a couple dates and
24 see what works for everybody and hopefully try to
25 get something scheduled and work around your

1 schedule if we can.

2 All right. Going back to the scheduling
3 order, your Appendix C I think is certainly
4 commendable and hopefully we can work with that.

5 Let me turn now if I can -- Are there any
6 questions or comments about the scheduling order at
7 this point?

8 (Silence.)

9 JUDGE MELLODY: Let me just kind of throw
10 out some issues or concerns I have based on my
11 preliminary review. As I say, I feel like I've
12 only scratched the surface so far. One of the
13 issues, of course, that we talked about already is
14 the role of amici. I think we have at least -- at
15 least it's clear until we can actually have a
16 conference meeting and maybe refine this a little
17 further that at a minimum they will be receiving
18 notices of all pleadings that are filed up to this
19 point.

20 One of the questions I had in just going
21 through the letters and so on is can you tell me
22 the status of the 2008 operating agreement? Is the
23 United States and the two irrigation districts
24 working under that agreement? Is it suspended? Is
25 it gone? What is the status of that agreement at

1 this point?

2 MR. DUBOIS: Your Honor, this is Jim
3 Dubois for the United States. The 2000 operating
4 agreement is what the United States and the
5 districts are currently operating under, so it is
6 in place and it is in operation.

7 MS. O'BRIEN: Okay. Your Honor, this is
8 Maria O'Brien for EP No. 1. Either I misheard or
9 Mr. Dubois misspoke. It's the 2008 operating
10 agreement. Yes, it's fully in place, enforceable
11 and functioning quite well.

12 Q. Okay. And as I understand it, that agreement was
13 only between the two irrigation districts and the
14 United States. New Mexico is not a party and
15 objects to it. Texas is not a party and I'm not
16 sure where they exactly come down on it, if they
17 are -- What is Texas' position about that operating
18 agreement? Were you willing to live with it? Is
19 that sort of your position?

20 MR. SOMACH: We were willing to live with
21 it, but more needed to occur besides just the
22 operating agreement and so -- the operating
23 agreement only covers a small universe of the
24 issues that we've raised within the litigation.
25 We think that it is a good tool to address some of

1 the problems, but it doesn't address the whole of
2 the problem that we've raised in our complaint.

3 MR. WALLACE: Your Honor, if I can --
4 This is Chad Wallace for the State of Colorado.
5 Just to make it clear for the record, Colorado,
6 likewise, is not a party to the agreement and is
7 also, likewise, not privy to a lot of the decisions
8 made in day-to-day operations, so we cannot form an
9 opinion on the operating agreement at this time.

10 MR. STEIN: Your Honor, this is Jay Stein
11 representing the City of Las Cruces. The City of
12 Las Cruces intervened in the lawsuit that was
13 brought by the State of New Mexico to set aside the
14 operating agreement. The City intervened on one
15 count only and that was to ascertain the effect of
16 the operating agreement on groundwater and storage.

17 JUDGE MELLODY: Okay. It's my
18 understanding that New Mexico objects to the
19 operating agreement. Is that still your position?

20 MR. RAEL: Yes, Your Honor. The State of
21 New Mexico objects to the operating agreement and
22 does not think that it's functioning well or we
23 wouldn't be here right now.

24 JUDGE MELLODY: Okay. As I understand it,
25 that operating agreement did nothing to resolve any

1 of Texas' issues -- or New Mexico's for that
2 matter -- about entitlement to back water or
3 damages; correct?

4 MR. SOMACH: This is Stuart Somach again,
5 Your Honor. That's correct from Texas'
6 perspective.

7 JUDGE MELLOY: And I assume the same
8 would be true for New Mexico to the extent they
9 feel they have any claims?

10 MR. RAEL: That's correct, Your Honor.
11 I think it's also important to note that that suit
12 was stayed by Federal Judge Browning in order to
13 allow this litigation to go forward.

14 JUDGE MELLOY: Okay. All right. One of
15 the things I had a question about in going through
16 this is the status of the State of Colorado.
17 Mr. Wallace, you have already sort of indicated
18 that you're involved, but somewhat of a bystander.
19 I don't know if that's the best way to put it.

20 As I look at this, Colorado would not be
21 impacted by this litigation unless somehow the
22 other -- the Compact itself would be changed to
23 require Colorado to deliver more water. Am I
24 missing something or is that your position
25 basically?

1 MR. WALLACE: No, Your Honor. I believe
2 there might be more to it than that.
3 Unfortunately, we're not in a position to evaluate
4 it. The simple way to look at it is it's not a
5 Colorado state line delivery at issue under Article
6 3 of the Compact. What we're looking at is the way
7 that Elephant Butte Reservoir comes out being
8 managed potentially differently as a result of this
9 litigation and the amount of water in Elephant
10 Butte Reservoir in turn does impact Colorado in
11 regards to its credit water or forgiveness of debts
12 under the Compact. Colorado could, in fact, face
13 obligations different as it faces today as a result
14 of this litigation. However, we're not really in a
15 good position to evaluate whether that's true or
16 not. That's one reason why in our letter we
17 mentioned the non-waiver agreement. It's our
18 intent to try and not expand this litigation if at
19 all possible, but we don't want to waive any of our
20 rights essentially by not bringing any and every
21 conceivable counterclaim at this time.

22 JUDGE MELLOY: Well, I understand that
23 and I guess the one thing that I would hope we can
24 avoid is that we get a year and a half into this
25 case and then all of a sudden Colorado realizes it

1 does have an interest that -- as I say, I'd like to
2 avoid any delay to the extent we can do so. I
3 would hope that Colorado would monitor it closely.
4 Do you plan to be an active participant?

5 MR. WALLACE: We are a party unless, of
6 course, Your Honor, everyone else would agree to
7 let us all go. Beyond that, I think a lot of our
8 answers might be found in groundwater computer
9 modeling or groundwater and surface water computer
10 modeling. It's really a numbers issue. What
11 happens to the amount of water in the Rio Grande
12 Project? We do plan on examining the available
13 data very closely and certainly don't plan on
14 delaying once we find anything out that might, in
15 fact, impact us. At this point we simply don't
16 have the information to know.

17 JUDGE MELLODY: I might mention I noticed
18 in your letter that you had suggested that it would
19 be very efficient if there was some type of a
20 single computer model. Obviously it's way to early
21 to even ask the parties to even comment on that I
22 think, but certainly it would be something that I
23 would hope the parties would at least take a look
24 at as to whether or not that's a suggestion that
25 might be worthwhile and useful. As I say, I'm sure

1 at this early stage it's way too early to even
2 seriously discuss something like that.

3 This may be a very elementary question, but
4 one of the things I'm having a little trouble
5 understanding is the Supreme Court in Justice
6 Gorsuch's opinion talks about the Compact basically
7 incorporating the project and the downstream
8 contracts. Where do I go to see the downstream
9 contracts? I looked at the Special Master's
10 report. Again, I may be missing something there,
11 but I found Exhibit 12, which is a contract between
12 Elephant Butte and El Paso Irrigation District
13 No. 1, which is just a two-party contract, and that
14 talks about the 57 percent/43 percent split.
15 It references contracts between the United States
16 and the irrigation districts, but I'm not sure
17 where those contracts are located. Then I got the
18 letter today from -- let me see here -- from the
19 Hudspeth County Conservation and they reference a
20 contract they have for water rights.

21 I guess what I'm asking is, is there a
22 depository? Is there someplace one can go and look
23 at all these contracts that Justice Gorsuch
24 referred to? Where are they, I guess?

25 MR. SOMACH: This is Stuart Somach, Your

1 Honor. We certainly could provide you -- pull
2 those out. They are included in the universe of
3 materials that were part of the first Special
4 Master's report.

5 JUDGE MELLOY: Well, if you can just tell
6 me where they are in the appendix or in that disk
7 or where they are, I'd -- I mean, just direct me to
8 them.

9 MR. SOMACH: We can pull that out for
10 you. You shouldn't have to search all of those
11 materials. What I think Justice Gorsuch was
12 talking about was the 1938 contract involving the
13 two district. When they talk about downstream
14 projects, I think what they were talking about was
15 Elephant Butte and Caballo Reservoirs because there
16 really is nothing further below that. We can
17 certainly pull those contracts out. I believe
18 that's what he was talking about. It was actually
19 a fairly limited universe of the huge assemblage of
20 documents.

21 JUDGE MELLOY: Well, I have the 1938
22 contract in front of me between Elephant Butte and
23 El Paso Improvement District No. 1, but it's just a
24 two-party contract and it doesn't involve any of
25 the other parties to the litigation and that's

1 where I was wondering where the other contracts
2 were. If you could direct me to that, I'd
3 appreciate it.

4 MR. SOMACH: We will do that. I'll
5 consult with the other parties and then we'll
6 provide you with some materials.

7 MR. WALLACE: Your Honor, this is Chad
8 Wallace. Were you interested in the entire series
9 of contracts up to the signing of the Compact or
10 any particular date range?

11 JUDGE MELLOY: Well, I'm mainly
12 interested in the ones that you think Justice
13 Gorsuch was referring to when he said that they
14 are, in essence, incorporated into the Compact.

15 MR. WALLACE: Yeah. Those were the 38
16 contracts that were signed by each irrigation
17 district in the United States.

18 JUDGE MELLOY: Yeah. I'd like to see
19 those. Those are the ones I would request.

20 What about new contracts? How do they fit in
21 this whole analysis or is that one of the things we
22 have to figure out? Like, for instance, the letter
23 from Hudspeth County Conservation and Reclamation
24 District refers to a contract they have with the
25 United States for water supply.

1 MR. DUBOIS: Your Honor, this is Jim
2 Dubois. I think that that's a very different kind
3 of contract and I think that you're probably
4 getting well ahead of where we are and you're going
5 to end up getting into a whole new set of factual
6 legal issues.

7 JUDGE MELLOY: But is it part of this
8 lawsuit? I guess that's what I'm asking. If it's
9 not part of the lawsuit -- I figure we have enough
10 on our plate without worrying about that, but if
11 it's going to be part of -- I mean, that's, I
12 guess, one of the things I'm curious about. What
13 about all the new uses of water, communities that
14 have grown up over the years and are taking water
15 out of the river? Are we going to be getting in
16 all that? Is that part of the analysis or is that
17 something that's irrelevant to this dispute?

18 MR. DUBOIS: Your Honor, we will be
19 getting into the impact of that development on the
20 river and on the project, but they are not part of
21 the project contracts. I think you're kind of
22 getting into a little more substance than you're
23 needing to at this point. The Hudspeth County
24 Contract was not part of the contracts that were in
25 place in 1938 and 1939 when the Compact was agreed

1 to and ratified by Congress.

2 MS. O'BRIEN: Your Honor, this is Maria
3 O'Brien for El Paso County Water Improvement
4 District No. 1.

5 Mr. Somach indicated the parties would work
6 together. I would request that amici be included
7 in that discussion at least with regard to what was
8 referenced as the downstream contract and Justice
9 Gorsuch's opinion refers specifically to the
10 contract that EBID and EPCWID have for their
11 product supply, which was anticipated by this
12 congressional authorization for the project. I do
13 agree with what he said in terms of that being a
14 limited universe, but it is a complex interplay of
15 congressional authorizations and contracts and I
16 think that the parties can work together to provide
17 Your Honor with your request.

18 JUDGE MELLODY: Okay. A couple issues
19 that I've flagged, which we may not resolve today,
20 but I sort of want to get your preliminary read on
21 is New Mexico in its letter takes the position that
22 the United States -- New Mexico can correct me if
23 I'm wrong about their position -- but that the
24 United States is bound by the rulings of the New
25 Mexico State Court concerning rights to mainly

1 groundwater I think below the reservoir and that
2 seems inconsistent to some extent with the position
3 that the United States is taking in its letter.
4 First of all, have I correctly articulated New
5 Mexico's position on that?

6 MR. RAEL: Your Honor, this is Marcus
7 Rael on behalf of New Mexico. We're stating that
8 the United States is bound to the source of the
9 project water which is going into the project.

10 JUDGE MELLOY: Can you explain that? I'm
11 sorry. I'm not sure I followed you.

12 MR. RAEL: So, Your Honor, the source of
13 the project water going into the project is not the
14 groundwater down below Elephant Butte Reservoir.
15 The source is the surface water only. We're saying
16 the United States is bound by the state court
17 litigation which -- and by this litigation -- which
18 found that -- I guess the state court litigation
19 which found that surface water -- I mean that
20 groundwater is not a part of the project.

21 JUDGE MELLOY: That's my understanding.
22 As I understand it, the New Mexico State Court
23 found that the surface water is part of the project
24 and subject to jurisdiction of the United States,
25 but that the groundwater was not and that you're

1 taking the position that the United States is bound
2 by that determination. Am I saying that correctly?

3 MR. RAEL: Yes, Your Honor. The United
4 States is bound by that determination and that the
5 water rights have been -- the surface water rights
6 have been fully adjudicated.

7 JUDGE MELLOY: What's the United States'
8 position on that or do you have a position?

9 MR. DUBOIS: Your Honor, we're getting
10 into -- pardon the pun -- but deep water. The
11 project water rights are surface water rights, but
12 the water that's running in the surface and runs in
13 the drains and actually come back to the river has
14 been impacted by a pumping development. The water
15 is a continuous system. If you suck water out of
16 the ground hard enough, it will impact the river
17 and the amount of water available to the surface
18 water users and to Texas, so you're really trying
19 to -- if you want to look at it in the context of
20 other Compact cases, this is not unlike Nebraska
21 saying the Republican River Compact only apportions
22 and allocates the surface water of the Republican
23 River, the virgin water supply of the Republican
24 River, and therefore pay no attention to the
25 million acres irrigated by groundwater despite the

1 fact that that groundwater development impacts the
2 flows of the Republican River. The Court rejected
3 that and basically determined that the pumping of
4 groundwater that affects that apportioned source
5 is, in fact, impacted by and Government-regulated
6 by to some degree the Compact itself. It's a
7 similar situation here.

8 MR. SOMACH: Your Honor, this is Stuart
9 Somach. I want to make sure that you understand
10 that Texas was not a party to that adjudication and
11 that adjudication dealt with something other than
12 the allegation of Compact rights and that, of
13 course, is different than what we're doing here,
14 which is looking at the Compact rights of Texas
15 versus New Mexico. In our complaint and in the
16 issues paper that we provided to you we did note
17 that one of the significant legal and technical
18 issues would be the nature and extent of
19 interconnected groundwater with the surface water,
20 the impacts of that interconnected groundwater.
21 That is, the pumping of that interconnected
22 groundwater and use of that water in New Mexico on
23 Texas' Compact apportionment. It is -- it really
24 is a complicated issue, but certainly knowable.
25 That's part of the evidence that we will put on

1 that as our case in chief will go into that issue
2 in some detail. I will add parenthetically just to
3 underscore what Mr. Dubois said that there is
4 Supreme Court precedence on interconnected
5 groundwater. That is one of the issues that the
6 State of Kansas was interested in and will, I'm
7 sure, also want to participate in as we move
8 forward with the actual substantive litigation of
9 those issues.

10 JUDGE MELLOY: Well, I understand the
11 argument about the interconnectedness of the
12 groundwater and the surface water. At least I
13 understand that argument is out there and I
14 generally understand what the concern is. The
15 point I was getting at -- and this is I'm sure
16 probably something we'll just have to resolve as we
17 go down the road -- is that if I understand the
18 position of New Mexico correctly, there are certain
19 arguments that the United States may make or may
20 want to make that they feel are precluded by the
21 adjudication in the New Mexico State Court. At
22 this point we probably can't do anything more than
23 to flag that that's an issue that will have to be
24 resolved. I also understand that Texas was not a
25 party to those proceedings and that even if the

1 United States is bound, Texas may not be. As I
2 understand it, that's at least a position of New
3 Mexico. Whether it's ultimately proven to be
4 correct is something we'll have to work out.
5 Another issue I noticed in the letters -- and I'm
6 not sure what New Mexico's position on this is, but
7 as I understand it Texas takes the position that
8 the Supreme Court adjudicated three or four very
9 key findings in this case and I would identify
10 those as the ones that start at page 195 of the
11 Special Master's Report. First, that New Mexico
12 has relinquished control of the project water once
13 it's delivered to the Elephant Butte Reservoir.
14 Secondly, that the Rio Grande Project is holding
15 completely integrated into the Compact and protects
16 deliveries and releases from the reservoir. The
17 third one was New Mexico is prohibited from
18 capturing waters delivered to the project. And
19 then finally, that the Doctrine of Equitable
20 Apportionment prohibits New Mexico from recapturing
21 project water after it's released from the Elephant
22 Butte Reservoir.

23 Have I correctly set out Texas' position, that
24 you feel that those findings have been adopted by
25 the Supreme Court?

1 MR. SOMACH: Yes, Your Honor. Those are
2 the basic fundamental Compact interpretations that
3 the Special Master and the Court utilized and I do
4 believe that those have been determined by the
5 Court.

6 JUDGE MELLOY: What is New Mexico's
7 position about that or do you have one at this
8 point?

9 MR. RAEL: This is Marcus Rael on behalf
10 of New Mexico. I think it's important for the
11 Court to know that the Supreme Court didn't adopt
12 the Special Master's Report, so I would say that
13 none of that has been decided by the Supreme Court.
14 They never especially adopted the Special Master's
15 Report. There was numerous objections filed by not
16 only the parties, but also almost all of the amici
17 in this case, one side or the other. It's
18 important to note that although that might be
19 Texas' position, the Supreme Court never adopted
20 that Special Master's Report, so I don't think any
21 of those findings have been made.

22 MR. SOMACH: Let me just respond quickly
23 by -- Go ahead. I'm sorry, Your Honor.

24 JUDGE MELLOY: I was just going to say
25 the issue I think you're going to deal with,

1 though, Mr. Rael, is that you did file exceptions
2 and the Supreme Court did say all the exceptions
3 are overruled. So do we look at your exceptions
4 and then say which ones did you make and which ones
5 are overruled? I'm not saying I'm there yet, but
6 that is what concerns me about the Supreme Court
7 opinion and where we are uncertain of these issues.

8 MR. RAEL: Your Honor, I think you're
9 correct. The exceptions were limited that each
10 party filed, but I think it is preliminary like
11 you're saying, Your Honor. I'm not sure we're
12 there yet, but it's our position that the Special
13 Master's Report was never adopted and so I don't
14 know where to go from there.

15 JUDGE MELLOY: Okay. Mr. Somach, did you
16 have something you wanted to add to that?

17 MR. SOMACH: I was actually just going to
18 say what you said. New Mexico did not take
19 exception to the recommendation that their Motion
20 To Dismiss the Texas Complaint be denied. They did
21 take exception -- and that's what all the briefing
22 was about -- the conclusions that the Special
23 Master reached that we're talking about now, the
24 ones you identified. If that's not what their
25 exceptions were, I have no idea what all that

1 writing was about and I am referring to the very
2 specific denial of all the exceptions or overruling
3 of all the exceptions that were in -- the Supreme
4 Court overruled every exception except the United
5 States. I don't know what could be clearer, but
6 that is our view.

7 JUDGE MELLOY: Well, does New Mexico
8 dispute at this point that the project agreements,
9 contracts are basically part of the Compact?

10 MR. RAEL: We don't dispute that, Your
11 Honor.

12 JUDGE MELLOY: I mean, that seems to be a
13 pretty specific holding of the Supreme Court.

14 MR. RAEL: Yes. We agree with that, Your
15 Honor.

16 JUDGE MELLOY: Okay. But your position
17 is that you still have control of the water after
18 it leaves the reservoir; is that right?

19 MR. RAEL: Not complete control, Your
20 Honor, but I think the case law is pretty
21 well-established that we don't relinquish our
22 sovereignty over water that remains within our
23 border. It's also pretty well-established that the
24 United States is subject to our sovereignty within
25 our borders. We don't relinquish control

1 completely, Your Honor, no, and I think that's
2 pretty well-established by the case law with this.

3 MR. DUBOIS: Your Honor, this is Jim
4 Dubois. It seems to me we're sort of re-litigating
5 some of the issues and we're trying to go quite far
6 afield and either we're going to get in making a
7 lot of arguments now or probably it might be better
8 to let the issues be shaped over the course of
9 discovery and briefing because I think that we're
10 probably going to go through a lot of this in
11 sufficient detail with the ability to more
12 adequately respond without feeling kind of
13 constrained by the fact that this is an initial
14 status conference. I'm concerned that we're
15 leading ourselves to the point where we're going to
16 have -- that I'm going to have to be making
17 arguments about what Mr. Rael is asserting and I
18 don't know that I'm comfortable trying to do that
19 off-the-cuff.

20 JUDGE MELLODY: That's fine. I'm more of
21 just telling you some of the concerns that I have
22 in going through this. Like I say, this is still
23 very preliminary for me. I think those are
24 basically the ones I've flagged so far and I'm sure
25 I'll come up with a lot more as we proceed on.

1 I don't know that there's a lot more we can do
2 today. Is there anything else that the parties
3 want to discuss today that we haven't talked about?
4 I will get out to you some proposed dates for an
5 in-person conference. My current thinking is
6 Denver would probably be a convenient location for
7 everybody and I have to also check and make sure I
8 can get a courtroom in Denver if we go there.
9 Is there anything else we need to talk about today
10 or that the parties want to talk about or have any
11 questions about?

12 UNIDENTIFIED SPEAKER: No, Your Honor.

13 MR. SOMACH: No more questions.

14 JUDGE MELLOY: All right. Well, then
15 I'll sign off and I'll get that information out
16 about some dates fairly quickly and we'll see if we
17 can't get something scheduled. Good talking to
18 everybody. I'm going to sign off now.

19 (The conference concluded at 4:26 p.m.)
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CERTIFICATE

I, Shannon N. Benter-Moine, Certified Shorthand Reporter and Notary Public of the State of Iowa, do hereby certify that, on the 23rd day of April, 2018, at Cedar Rapids, Iowa, that I reported in shorthand the above teleconference, reduced the same to printing under my direction and supervision, and that the foregoing transcript is a true record of all proceedings.

I further certify that I am not related to or employed by any of the parties to this deposition, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have set my hand and seal this 30th day of July, 2018.

/s/ Shannon Benter-Moine

Certified Shorthand Reporter
and Notary Public

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