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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 DECEMBER 14, 2018  
TELECONFERENCE BEFORE HONORABLE MICHAEL A. MELLOY,  
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111  
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning  
at 11:00 a.m.

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## 1 PROCEEDINGS

2 (December 14, 2018)

3 JUDGE MELLOY: This is Judge Melloy.  
4 We're here this morning on a status conference.  
5 Let's maybe just start and I'll run through the  
6 list of parties. If you could tell me who is on  
7 the line for each of you, I'd appreciate it.

8 For the State of Texas?

9 MR. SOMACH: Yes, Your Honor. This is  
10 Stuart Somach and with me is Francis Goldsberry,  
11 Theresa Barfield, Robert Hoffman and I believe also  
12 on the telephone is Priscilla Hubenak from the  
13 Texas Attorney General's Office.

14 MS. HUBENAK: That's correct, Stuart.  
15 I'm on the line.

16 JUDGE MELLOY: Thank you. For New  
17 Mexico?

18 MR. RAEL: Good morning, Your Honor.  
19 This is Marcus Rael on behalf of the State of New  
20 Mexico. With me I have Deputy Attorney General  
21 Tonia Maestas as well as David Roman, Lisa Thompson  
22 and Michael Kopp.

23 JUDGE MELLOY: And for the State of  
24 Colorado?

25 MR. WALLACE: Good morning, Your Honor.

1 This is Chad Wallace for Colorado.

2 JUDGE MELLOY: For the United States?

3 MR. DUBOIS: Good morning, Your Honor.

4 This is Jim Dubois and also on the phone are  
5 Stephen MacFarlane from the Department of Justice,  
6 Judy Coleman from the Department of Justice and  
7 Shelly Randel from the Solicitor's Office.

8 JUDGE MELLOY: Okay. Albuquerque Water  
9 Utility Authority? Anyone on for them?

10 MR. STEIN: Mr. Brockmann will not be  
11 joining today, Your Honor.

12 JUDGE MELLOY: Okay. What about the City  
13 of El Paso?

14 MR. CAROOM: Good morning, Your Honor.  
15 Doug Caroom and Susan Maxwell for the City of  
16 El Paso.

17 JUDGE MELLOY: City of Las Cruces?

18 MR. STEIN: This is Jay Stein for the  
19 City of Las Cruces, Your Honor.

20 JUDGE MELLOY: Okay. El Paso Water  
21 Improvement District No. 1?

22 MS. O'BRIEN: Good morning, Your Honor.  
23 Maria O'Brien on the telephone for El Paso County  
24 Water Improvement District No. 1.

25 JUDGE MELLOY: And Elephant Butte

1 Irrigation District?

2 MS. BARNCASTLE: Good morning, Your  
3 Honor. This is Samantha Barncastle for Elephant  
4 Butte Irrigation District.

5 JUDGE MELLOY: Hudspeth County  
6 Conservation District?

7 MS. TREJO: This is Deborah Trejo  
8 stepping in for Drew Miller for the Hudspeth County  
9 Conservation and Reclamation District No. 1.

10 JUDGE MELLOY: I'm sorry. What was your  
11 last name?

12 MS. TREJO: Trejo, T-R-E-J-O.

13 JUDGE MELLOY: All right. Thank you.  
14 New Mexico Pecan Growers?

15 MS. DAVIDSON: Good morning, Your Honor.  
16 This is Tessa Davidson for New Mexico Pecan  
17 Growers.

18 JUDGE MELLOY: Anyone on for New Mexico  
19 State University?

20 MR. UTTON: Yes, Your Honor. Good  
21 morning. This is John Utton.

22 JUDGE MELLOY: Okay. And then State of  
23 Kansas?

24 MR. CLARK: Yes. Good morning, Your  
25 Honor. This is Bryan Clark in the Kansas Attorney

1 General's office for the State of Kansas.

2 JUDGE MELLOY: All right. And is there  
3 anyone else on that I have missed?

4 (No response.)

5 JUDGE MELLOY: All right. Thank you. I  
6 don't think we have a lot to talk about this  
7 morning, but if the parties have something they  
8 want to bring up, certainly we can discuss it.

9 I would as a preliminary matter ask one  
10 question. I'm trying to think -- I think it was  
11 your office, Mr. Somach, sent an email a few days  
12 ago to a very lengthy list indicating that some  
13 people may not have received notice of the date,  
14 time and call-in number for this hearing. Do you  
15 know anything about that or why? Are there people  
16 who aren't on the service list? Do you know  
17 anything about that?

18 MR. SOMACH: Yes. We had a meeting and I  
19 believe -- and Mr. Dubois can correct me, but we  
20 had understood that -- some people had inquired of  
21 us as to whether or not we had received notice  
22 of -- It wasn't notice of the meeting. I think  
23 everybody knew that there was going to be a status  
24 conference. The question became whether or not  
25 everybody had gotten the call-in information. We



1 provided the call-in information and at the same  
2 time I believe my paralegal here sent out a note to  
3 the full list just to make sure that everybody had  
4 the call-in information. I believe that's what  
5 that was about, just making sure everybody had the  
6 call-in number information.

7 JUDGE MELLOY: Okay. Well, the call-in  
8 information remains the same from hearing to  
9 hearing, but we can send a notice out in the future  
10 to make sure that everybody knows what that  
11 telephone number is.

12 Then I guess let me just talk about dates for  
13 a minute. When I put out the amended scheduling  
14 order a few weeks ago, I sort of just adopted what  
15 you had suggested and I didn't realize you had  
16 put -- I guess I realized it, but it just didn't  
17 register about the December 24th date. Are you  
18 okay with that date or do you want some adjustment?  
19 I guess that mainly affects you, Mr. Somach.

20 MR. SOMACH: And the United States. We  
21 did put that date out. We were aware of the fact  
22 that the 24th was Christmas Eve. I think we'd like  
23 to stick with that date. I mean, that's what we're  
24 working on. We're certainly going to get, quite  
25 frankly, work done before the 24th. That was the

1 reason, in fact, that we did inquire of your  
2 chambers as to what you wanted to do or what was  
3 the appropriate way to handle in terms of the  
4 format of the briefing because it would have  
5 created a problem if we had to move through a  
6 printer to put it in Supreme Court form, in that  
7 booklet form. That's how that came up. That would  
8 have created a problem, but because the response  
9 was we could put that in the normal and ordinary  
10 format that we could do here ourselves, then that  
11 resolved that problem and so at least the State of  
12 Texas is comfortable with that date. We did talk  
13 to the United States earlier this week and that was  
14 one of the issues we talked about because we were  
15 aware of your inquiry on that. Again, the United  
16 States can speak for itself on that.

17 JUDGE MELLODY: Does the United States  
18 feel any differently?

19 (No response.)

20 JUDGE MELLODY: Okay. Hearing nothing,  
21 then, we'll just stay with that date.

22 MR. DUBOIS: I'm sorry, Your Honor. I  
23 was on mute to make sure that I didn't say  
24 anything. We're fine with that date. The  
25 alternative, Your Honor, unfortunately, means that

1           either way you're sort of sandwiching around the  
2           Christmas holiday and we in picking that date  
3           determined that it was probably more sensible to  
4           get it done before rather than straddle it.

5                       MR. RAEL: Your Honor, this is Marcus  
6           Rael on behalf of the State of New Mexico. We're  
7           also fine with keeping the Christmas Eve date.  
8           However, we think it makes sense and we would  
9           appreciate -- because we're basically going to be  
10          losing a week around the Christmas and New Years  
11          holiday, we would appreciate moving the January  
12          23rd date back 10 days and then maybe moving the  
13          February 7th date back 10 days if Your Honor would  
14          be willing to do so.

15                      JUDGE MELLOY: Well, let's hold that  
16          thought for a moment. What I want to talk about is  
17          a date for the hearing and then we'll move back  
18          from there as to what's a realistic time frame.  
19          Let me just look here for a moment. I need some  
20          time to read the motions, get ready. When we were  
21          talking about the reply briefs due on February 7th,  
22          I was looking either at the week of February 19th  
23          for a hearing. This would be an in-person hearing  
24          and I would anticipate we'd do it in Denver again  
25          unless there's any objection to that. I'm pretty

1 committed the next two weeks after that, the week  
2 of February 26th and the first week of March, the  
3 week of March 4th. I could do it the week of March  
4 12th or -- well, actually, I could do it in any  
5 time in March after that. How do those dates look?  
6 Do people have their schedules available? How do  
7 those dates look to you? Let me just say this too.  
8 If we adopt Mr. Rael's suggestion, we're almost  
9 certainly then into those March dates.

10 MR. SOMACH: This is Stuart Somach, Your  
11 Honor. You know, you can expect, I guess, from me  
12 that I prefer the dates not moving at all. Like  
13 I've said every conference we've had, this constant  
14 delay creates all kinds of problems particularly  
15 with respect to the question of what issues have  
16 been decided or not and so that what we've -- the  
17 reason we filed the early motions or the reason why  
18 we recommend moving in this direction was to get  
19 this issue resolved as early as possible in  
20 discovery. From the State of Texas' prospective  
21 we'd like to keep the schedule as it is. After  
22 all, all the parties had agreed to that schedule  
23 initially when it was proposed to you. We're fine  
24 with the February 19th date because presumably  
25 after you've read the briefs and heard the oral

1 arguments and had the additional time you'll want  
2 to take, getting a determination from you one way  
3 or another as early as possible is helpful.  
4 Anything else just drags these critical issues on  
5 and further complicates discovery. Our preference  
6 here is to go with February 19th and keep the  
7 existing schedule.

8 JUDGE MELLOY: How does that week --  
9 either the 19th or some other date during that  
10 week -- I'm pretty open that week. How does that  
11 work for everybody else?

12 MR. DUBOIS: This is Jim Dubois for the  
13 United States. The week of the 19th or the week of  
14 the 11th both work for the United States.

15 MR. WALLACE: Your Honor, this is Chad  
16 Wallace for Colorado. Either of those weeks will  
17 work as long as the hearing is in Denver. I would  
18 not be able to travel the week of the 19th.

19 JUDGE MELLOY: Well, is anybody proposing  
20 it be anywhere else? We could certainly have it  
21 here in Iowa, but I presume it's much more  
22 convenient for everybody if we do it in Denver. As  
23 I've indicated in the past and as I've talked with  
24 the clerk of the Supreme Court, there's no -- I'm  
25 willing to go to Denver for these hearings. The

1 trial will almost certainly be here, however. For  
2 these hearings we're going to have a couple or  
3 three times a year and I don't mind going to Denver  
4 and that's fine with the Supreme Court as well.  
5 Does anybody have a problem with the week of  
6 February 19th?

7 MS. BARNCASTLE: This is Samantha  
8 Barncastle. I don't know who I cut off. I  
9 recognize that I'm amici and I may be towing the  
10 line a bit, but I may have some issues that I'm  
11 asking the court to consider at this next hearing  
12 and I'm still determining whether or not that will  
13 be necessary, but I will be unavailable completely  
14 on February 21st and 22nd. Otherwise, I'm  
15 completely free the two weeks that are on the  
16 table.

17 MS. O'BRIEN: Special Master, this is  
18 Maria O'Brien for EP No. 1. I have some similar  
19 constraints and just wanted to clarify. People are  
20 articulating the week of February 19th?

21 JUDGE MELLODY: It should be the 18th  
22 actually.

23 MS. O'BRIEN: Okay. Thank you. I just  
24 wanted to be clear that we weren't skipping the  
25 Monday. That week we'll have similar constraints

1 to Ms. Barncastle. EP No. 1 does plan on  
2 participating relatively actively in this briefing.  
3 Anything we would want to address with the Court I  
4 would be available the 18th and the 19th of that  
5 week.

6 JUDGE MELLOY: But not the 20th?

7 MS. O'BRIEN: The 20th is possible, but  
8 difficult and definitely not -- the 20th, 21st and  
9 22nd are relatively difficult. I have some pending  
10 out-of-state travel that is scheduled around many  
11 other counsel's schedules as well.

12 JUDGE MELLOY: And let me say I would  
13 anticipate that when we do get together in Denver  
14 that the hearing would not necessarily be limited  
15 to the motions. That would certainly be the lion's  
16 share of the time I expect we will spend. If there  
17 are other matters -- scheduling or whatever they  
18 might be -- certainly that would be a time we could  
19 take those up as well.

20 MS. TREJO: Your Honor, this is Deborah  
21 Trejo. I just wanted to point out that it's  
22 President's Day February 18th. I think that's a  
23 federal holiday. I just wanted to point that out  
24 to the extent that that might impact anything .

25 JUDGE MELLOY: Right. Let's do this.

1 I'm going to schedule it for the 19th and I'm going  
2 to leave the dates as they are. Probably the only  
3 people who really are affected by the federal  
4 holiday are federal employees and I certainly don't  
5 mind traveling on the 18th and getting out there  
6 the evening before and hopefully the United States  
7 parties won't either. Let's just plan on the 19th.  
8 All right? That's February 19th. Any questions  
9 about that?

10 (No response.)

11 JUDGE MELLOY: We'll plan to start at  
12 9:00. I do need to -- the only caveat is I do need  
13 to make sure that's not the 10th Circuit's court  
14 week and that they'd be using all their courtrooms  
15 or that we can find another courtroom, but subject  
16 to courthouse availability we'll do it on the 19th  
17 of February.

18 All right. Let's talk for a minute about  
19 Kansas' participation. I received the pleadings or  
20 the notice or whatever we want to call it from the  
21 State of Kansas. I guess I'm having a little  
22 trouble understanding exactly where -- It's  
23 Mr. Clark, isn't it, that's on the phone?

24 MR. CLARK: Yes, Your Honor.

25 JUDGE MELLOY: Tell me where you're



1 coming from in terms of your participation in this  
2 case.

3 MR. CLARK: Sure. Our interest in the  
4 case is pretty limited to legal issues dealing with  
5 interstate compact, interpretation of them and  
6 basically the legal issues that we briefed as an  
7 amicus to the U.S. Supreme Court when the case was  
8 there on exceptions. I don't want to necessarily  
9 limit us to a particular issue or particular set of  
10 issues, but just sort of generally speaking that's  
11 our interest in the case. That's sort of where we  
12 are coming from. We don't have an interest like  
13 maybe some of the other amici do in participating  
14 in discovery or sitting in on depositions or having  
15 access to the Veritext Vault, but we do still have  
16 an interest in the legal issues that we'd like to  
17 monitor and review the motions, for example, when  
18 they are filed on December 24th and decide whether  
19 those sets of legal issues that are raised are  
20 something that we want to weigh in on or we have an  
21 interest in. I do suspect that those motions that  
22 are filed on the 24th will touch on the issues that  
23 we are interested in because it deals with some of  
24 the issues that we briefed to the U.S. Supreme  
25 Court when the case was there on exception s. We'd

1           like to reserve the right or the ability to file  
2           briefs on those issues that are of interest to us,  
3           but don't foresee getting involved in any deeper or  
4           more involved way like, for example, what the case  
5           management plan envisions for amici generally.

6                         JUDGE MELLOY: Well, I guess I'm having a  
7           little trouble understanding how you can  
8           meaningfully brief a case if you don't have access  
9           to the documents that may form the basis for the  
10          briefing.

11                        MR. CLARK: I think that the issues that  
12          we are interested in will mostly deal with  
13          interpretation of the compact. It may deal with  
14          some historical facts that were fleshed out in the  
15          Special Master's first report. In terms of getting  
16          into the details of what will be fleshed out in  
17          discovery, I don't anticipate that we would be  
18          getting involved in that. Obviously as the briefs  
19          are filed if that changes, then we would have to  
20          decide whether we wanted to become more involved at  
21          that point and then cross that bridge when we come  
22          to it or just hold our -- keep our powder dry for a  
23          later time. At this point -- for example, when we  
24          filed the brief with the U.S. Supreme Court, we  
25          didn't have access to discovery or anything like

1           that.  What we briefed pretty much was just sort of  
2           general well-accepted facts of hydrology basically  
3           and then interstate compact law and didn't get into  
4           the weeds of what -- and I don't anticipate that  
5           being the case even now that discovery is underway.  
6           Again, maybe that will change depending on what's  
7           filed, but that's just sort of our sense of it as  
8           we sit here right now.

9                         JUDGE MELLOY:  Well, I think the issue  
10           becomes either you're in or you're out.  If you're  
11           in, then you get served with all the pleadings and  
12           the other parties have that obligation to keep you  
13           advised, you're given notice of everything that  
14           happens.  I don't know.  I'm having a little  
15           trouble with the idea that you're sort of in, but  
16           sort of out.

17                        MR. CLARK:  Sure.  I definitely  
18           understand that.  Maybe a better way of framing  
19           what our interest is or how we envision being a  
20           participant is sort of how amici participate, for  
21           example, at the federal circuit level, at the U.S.  
22           Supreme Court level.  Typically -- at least in my  
23           experience in filing amicus briefs in those  
24           courts -- the briefs are limited to legal issues  
25           that don't require what's made available in

1           discovery and the factual development in the  
2           record. That's sort of how we envision it. I  
3           mean, I guess if you're -- we're trying to find a  
4           way of how exactly Kansas fits into the mix since  
5           we don't envision being as involved as some of the  
6           other amici are. If Your Honor would be open to  
7           allowing Kansas to file an amicus brief without  
8           being formally labeled an amici as defined in the  
9           case management plan, I think maybe we would be  
10          open to that. For example, I guess maybe what I'm  
11          thinking is, you know, we have been an amicus in  
12          support of Texas. When the briefs come in on the  
13          24th, Texas can send us the brief and we can decide  
14          whether we are interested in those issues and  
15          whether we want to file a brief and then we can  
16          decide to weigh in at that point. That would be  
17          sort of a less formal role. We'd have to figure  
18          out exactly how that would work. That's sort of  
19          what we're envisioning.

20                    JUDGE MELLODY: Well, here's what I was  
21                    envisioning. Either Kansas is in for all purposes  
22                    as an amicus or you're out. If you're out, then  
23                    you would not be served or there would be no  
24                    obligation to serve you as an amici. That wouldn't  
25                    preclude you from monitoring the case, consulting

1 with Texas or any of the other parties with whom  
2 you may be aligned. I mean, you can monitor the  
3 case just like anybody else can by just looking at  
4 the docket. If at some point you feel like you  
5 want to be heard on an issue, just file a motion at  
6 that time and ask to be allowed to submit a brief.  
7 I guess I don't think it's fair to the other  
8 parties to be -- to have the same rights, but  
9 without any of the obligations. I'm not inclined  
10 to allow you to continue as an amicus with all the  
11 rights that everybody else has if you're not  
12 willing to take on the responsibilities and burdens  
13 that they have as well.

14 MR. CLARK: Sure. That makes perfect  
15 sense to me and we're not interested in having --  
16 to be honest with you -- all the rights and  
17 opportunities to participate that the other amici  
18 do want. That does make sense to me. What you've  
19 proposed sounds like it would take care of our  
20 interests and still allow us to be involved if we  
21 wanted to in terms of requesting permission to file  
22 a brief with the issues that arise or are of  
23 interest to us. One question I have just as I  
24 think about how this would play out is if we are  
25 out and we see the briefs come in on December 24th,

1           then what would the deadline be for an amicus brief  
2           that we might file if we're out and when would you  
3           want to receive -- what would be the timing of a  
4           motion and then the filing of the brief?

5                         JUDGE MELLOY: Well, I think the brief  
6           would have to be filed by the deadline set in the  
7           briefing schedule, which is January 23rd, and what  
8           I would want would be if you want to file something  
9           to get it on file with -- I'd like the motion and  
10          brief to be filed together and then we'd allow  
11          whether or not it's going to be docketed.

12                        MR. CLARK: Okay. So this is just a for  
13          example. I don't know that Kansas would get  
14          involved at this point, but just since we have  
15          these hard dates in front of us, the January 23rd  
16          response deadline, if we were to decide we didn't  
17          want to file a brief, we could file the motion  
18          requesting permission to file it, attach the brief  
19          and file both of those on January 23rd?

20                        JUDGE MELLOY: Yes.

21                        MR. CLARK: Okay.

22                        JUDGE MELLOY: At least that's my thought  
23          on it. Let me ask if any of the other parties have  
24          any problems with that or if they have any other  
25          thoughts?

1 MR. SOMACH: This is Stuart Somach for  
2 the State of Texas. We have no problem with that.

3 UNIDENTIFIED SPEAKER: We have no problem  
4 with that, Your Honor.

5 JUDGE MELLOY: So unless anybody wants to  
6 be heard, we'll go ahead on that basis.

7 Let me circle back to one issue I wanted to  
8 mention. Mr. Somach's office had sent that request  
9 about clarification concerning filing with the  
10 Supreme Court. Does anybody have any question  
11 about that? We might as well make sure we're all  
12 on the same page. I did check with the clerk just  
13 to confirm my understanding. Until a report is  
14 filed or somebody wants the Supreme Court to do  
15 something -- which I'm not exactly sure at this  
16 point what that would be before a report is  
17 filed -- but to the extent you did, the Supreme  
18 Court does not want any of those filings that are  
19 made in this case. So until we ask the Supreme  
20 Court to do something or a report is filed, we  
21 don't file anything with the Supreme Court. Is  
22 there any question about that?

23 MR. DUBOIS: Your Honor, this is Jim  
24 Dubois. I think part of Mr. Somach's question was  
25 just the format issue and I was going to -- for

1           what it's worth -- observe that in the other cases  
2           that I've been in that until there is something  
3           being filed with the Supreme Court that the  
4           standard federal court format for papers has been  
5           used before the Special Master on other cases, so  
6           what you've suggested at this point is consistent  
7           with at least what the United States has seen in  
8           these kinds of cases.

9                         JUDGE MELLOY:  Yes.  I hope I was clear  
10           in the email that it will be filed in the standard  
11           8 1/2 x 11, these motions and anything else, until  
12           they actually get to the Supreme Court.  They were  
13           clear that if for some reason a filing in the  
14           Supreme Court needs to be referred back to  
15           something that's been filed with me that they will  
16           have that available.  They will have it available  
17           in a couple ways.  Obviously they can look at the  
18           docket just like everybody else can and see what's  
19           been filed.  Plus, I don't know if you're aware of  
20           this or not, but the Supreme Court has directed  
21           that we keep a paper copy of everything.  At some  
22           appropriate time -- maybe at the end of the case,  
23           maybe earlier -- we'll be sending bankers boxes  
24           full of documents, I'm sure, to the Supreme Court.  
25           We have to keep a paper record of everything that's



1 filed. They will have access to everything.

2 Any questions about that?

3 (No response.)

4 JUDGE MELLOY: I had a question about an  
5 email I received a couple days ago with a Veritext  
6 invitation to register for Veritext. I'm not  
7 planning to do that at this time. If at some point  
8 we set up a separate file or folder as we've talked  
9 about previously for documents that I may need  
10 access to, I presume I can get access at that time.  
11 Given the Supreme Court's requirement that they  
12 want to see just about everything in paper form,  
13 I'm assuming that unless it's extremely voluminous  
14 that most everything is going to have to be filed  
15 with paper copies attached.

16 I think that pretty well covers the things I  
17 wanted to talk about. Any issues with discovery or  
18 anything that the parties need to bring up at this  
19 point?

20 (No response.)

21 JUDGE MELLOY: Hearing none, we'll  
22 adjourn, then, and I'll see everybody in Denver on  
23 February 19th. If something else comes up in the  
24 meantime, be sure to let me know and we can set up  
25 a phone conference if we have to. All right?

1 Thank you, everyone. Have a good holiday.

2 (The conference concluded at 11:42 a.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 14th day of December, 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 9th day of January, 2019.

/s/ Shannon Benter-Moine  
\_\_\_\_\_  
Certified Shorthand Reporter  
and Notary Public

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