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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 MARCH 19, 2020  
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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## PROCEEDINGS

(March 19, 2020)

1  
2  
3 JUDGE MELLOY: Good morning. This is  
4 Judge Melloy. All right. Let's get started. This  
5 is in the matter of -- Hello? Let me just finish.  
6 This is in the matter of United States Supreme  
7 Court Original No. 141 Texas vs. New Mexico and  
8 Colorado with the United States as an Intervenor.  
9 I'm going to take a roll of who is on the call and  
10 I suspect by the time we get that completed that  
11 anybody else who may be trying to call in should  
12 hopefully be on the call. Let's just start and I'm  
13 going to do it basically in the order that's on the  
14 service list.

15 Who is on for the United States?

16 MR. DUBOIS: Your Honor, this is Jim  
17 Dubois for the United States and I believe  
18 Ms. Coleman is on and Mr. Leininger and  
19 Mr. McFarlane.

20 JUDGE MELLOY: Okay. All right. Then  
21 for the State of New Mexico who is on, please?

22 MR. RAEL: Good morning, Your Honor.  
23 This is Marcus Rael and David Roman on behalf of  
24 the State of New Mexico. With us today we have  
25 Lisa Thompson as well as Ms. Cholla Khoury,

1 Director of the Environmental Litigation Division  
2 for the Office of Attorney General.

3 MR. RIDGLEY: Here for the State of New  
4 Mexico, Greg Ridgley, general counsel for the New  
5 Mexico State Engineer.

6 MS. DALRYMPLE: Shelly Dalrymple for the  
7 New Mexico Interstate Stream Commission.

8 JUDGE MELLOY: And was it Ms. Khoury that  
9 you said that is in charge of the Environmental  
10 Division of the Attorney General's Office?

11 MR. RAEL: That's correct, Your Honor.  
12 K-H-O-U-R-Y.

13 JUDGE MELLOY: All right. Then we  
14 have -- Anybody for the State of Colorado?

15 MR. WALLACE: Yes, Your Honor. This is  
16 Chad Wallace.

17 JUDGE MELLOY: And then Texas?

18 MR. SOMACH: Yes, Your Honor. This is  
19 Stuart Somach. On the phone also is Theresa  
20 Barfield, Francis Goldsberry, Sara Klahn, Priscilla  
21 Hubenak from the Texas Attorney General's Office  
22 and Susan Valentine who is the engineer advisor to  
23 the Texas Rio Grande Commissioner.

24 JUDGE MELLOY: All right. Then let's go  
25 through the amici. Albuquerque Water District or

1 Water Utility? Mr. Brockmann, are you on?

2 MR. BROCKMANN: Yes, Your Honor. Jim  
3 Brockmann for the Albuquerque Bernalillo County  
4 Water Utility Authority.

5 JUDGE MELLOY: All right. Anybody else  
6 on for them?

7 MR. BROCKMANN: No, sir.

8 JUDGE MELLOY: City of El Paso?

9 MR. CAROOM: Yes, Your Honor. This is  
10 Doug Caroom for the City of El Paso and with me is  
11 Daniel Ortiz.

12 JUDGE MELLOY: Can you spell that last  
13 name, please.

14 MR. CAROOM: O-R-T-I-Z.

15 JUDGE MELLOY: City of Las Cruces?

16 MR. STEIN: Good morning, Your Honor.  
17 This is Jay Stein on behalf of amicus curiae City  
18 of Las Cruces, New Mexico.

19 JUDGE MELLOY: Elephant Butte Irrigation  
20 District?

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

24 JUDGE MELLOY: El Paso County Water  
25 Improvement District No. 1?

1 MS. O'BRIEN: Yes. Good morning, Your  
2 Honor. This is Maria O'Brien for El Paso County  
3 Water Improvement District No. 1 and also on the  
4 line is counsel for EP No. 1, Renee Hicks.

5 JUDGE MELLOY: Okay. Hudspeth County  
6 Conservation & Reclamation District No. 1?

7 MR. MILLER: Yes. Good morning, Your  
8 Honor. This is Drew Miller for the Hudspeth County  
9 Conservation & Reclamation District.

10 JUDGE MELLOY: Anybody on for the State  
11 of Kansas? Anybody on for the New Mexico Pecan  
12 Growers?

13 MS. DAVIDSON: Yes, Your Honor. Tessa  
14 Davidson for Pecan Growers.

15 JUDGE MELLOY: And New Mexico State  
16 University?

17 MR. UTTON: Yes. Good morning, Your  
18 Honor. This is John Utton for New Mexico State  
19 University.

20 JUDGE MELLOY: Have I missed anyone or  
21 anybody come on the call while I was doing the  
22 roll?

23 MR. DUBOIS: Your Honor, for the United  
24 States Shelly Randel from the Solicitor's Office is  
25 also on.

1                   JUDGE MELLOY: All right. Thank you,  
2 everyone. I was very concerned after a call I had  
3 yesterday with some fellow judges with  
4 significantly fewer numbers than what we had today  
5 and we were having quite of bit of trouble with the  
6 bridge and we had some difficulty getting it to  
7 work, which is the reason for any email yesterday.  
8 I'm glad we were able to get everybody on.

9                   I sent out to you, as you know, yesterday an  
10 email with some of my tentative thoughts about the  
11 emergency motion filed by the State of New Mexico,  
12 but before we go into those specific points I guess  
13 I'll let New Mexico be heard on its motion.  
14 Whoever wants to speak for the State of New Mexico,  
15 please identify yourself and you may proceed.

16                   MR. ROMAN: Thank you, Your Honor. This  
17 is David Roman on behalf of the State of New  
18 Mexico. I certainly read carefully your email and  
19 your initial inclinations and I don't want to  
20 belabor any of the points that we raised in our  
21 motion and am happy to stand for questions that you  
22 have, but -- I guess I would start off by saying  
23 that I understand your inclination that a six-month  
24 stay that we requested isn't realistic, but I would  
25 say that the identification and substitution of new



1 lead trial counsel is much more significant of an  
2 undertaking than I believe is reflected in Texas's  
3 response or the U.S.'s response and it's much more  
4 significant than simply obviously changing a name  
5 on a case caption or adding an additional attorney  
6 to an already existing team. It's much more  
7 existential than that. In order to become fully  
8 engaged in this case in the manner that would be  
9 necessary to responsibly represent the State of New  
10 Mexico, new lead counsel would need to not only  
11 review all of the pleadings that have gone forward  
12 in this case, but digest over 35 expert reports and  
13 all of the voluminous accompanied scientific data,  
14 the references disclosed by the parties, it has to  
15 become familiar with all of the discovery to date  
16 which includes over 500,000 documents -- not just  
17 pages, but documents -- in this complex case that's  
18 played out over many decades. They'll have to meet  
19 with witnesses and especially New Mexico agency  
20 personnel at the Office of the State Engineer, the  
21 Interstate Stream Commission. They'll have to work  
22 closely with existing counsel. And importantly,  
23 they will have to determine the next steps needed  
24 to effect their trial and strategy decisions and  
25 they'll have to do all that under the

1           circumstances -- the very difficult and novel  
2           circumstances that we're facing right now. Of  
3           course, the State is currently working diligently  
4           to identify new lead counsel, but even that process  
5           has been greatly hampered by the current  
6           restrictions. In-person meetings can't happen.  
7           Even normal operations in talking with who these  
8           people might be are compromised. Even once  
9           identified they would be for the time being greatly  
10          handicapped in terms of being able to get up to  
11          speed simply because they can't have the -- not  
12          only can't have the procedures that would normally  
13          happen in this case, but even reviewing certain  
14          documents would be impossible at this point because  
15          of restrictions on accessing documents from people  
16          who are working at home and don't have access to  
17          servers and billions that are currently on  
18          lock-downs. At this point asking for a six-month  
19          stay is not something that we're doing lightly, but  
20          it's something that's believed to be the minimum  
21          amount of time it would be necessary to bring in  
22          and have someone able to engage in a manner that  
23          would allow the State to be represented in such a  
24          way that this case could be fully developed and  
25          tried in a manner that is befitting of an original

1 action. I definitely --

2 JUDGE MELLOY: Well --

3 MR. ROMAN: Go ahead, Your Honor. I  
4 don't want to cut you off.

5 JUDGE MELLOY: No. Go ahead. Finish  
6 your thought.

7 MR. ROMAN: The last thing I would say,  
8 Your Honor, is I hope you understand that I  
9 understand the difficulty that this is placing the  
10 State in. It's not something that I take lightly.  
11 It's been the most difficult decision certainly  
12 professionally that I've ever had to make and I  
13 don't want to be putting the State in a difficult  
14 position, but giving new lead counsel the  
15 opportunity to even begin to digest this complex  
16 case basically let alone from the nuances is  
17 something that I think that amount of a stay would  
18 necessitate.

19 JUDGE MELLOY: Well, let me ask you two  
20 things before we go on. First of all, I think it  
21 was Texas that responded that Mr. Rael has been  
22 designated as lead counsel all along.

23 What is your response to that?

24 MR. ROMAN: Your Honor, that is true that  
25 he has been designated on the captions as lead

1           counsel. I have been the one who has had the bulk  
2           of all of the day-to-day operations of the case  
3           whether it be issuing and responding to discovery,  
4           taking and preparing for a number of depositions,  
5           coordinating all of the case coordination with  
6           state agencies, even working on the day-to-day  
7           strategy, meeting with the other parties and that's  
8           been the role that new lead counsel would have to  
9           step in and fill. Because of competing cases of  
10          large stature Mr. Rael has not been involved to the  
11          extent that may have been thought otherwise.  
12          That's what I would respond to that question.

13                    JUDGE MELLOY: Well, the other question I  
14          have is that even if you were allowed some  
15          additional time to get a new attorney and get up to  
16          speed, why does it have to be a 100 percent stay?  
17          Why can't we continue to do document discovery --  
18          As I understand it, you have a large team and  
19          different people are doing different things. I  
20          think asking for a total cessation of all  
21          proceedings for six months was not realistic.

22                    MR. ROMAN: Your Honor, I understand that  
23          is your inclination on that. I want to be clear  
24          that when we asked for the stay that it was with  
25          the understanding that there would be continued

1 supplemental disclosures as required by the federal  
2 rules and by the case management plan with respect  
3 to ongoing electronic discovery -- ESI discovery --  
4 as well as supplemental disclosures based on  
5 requests for additional information that arose out  
6 of depositions that have been taken and other  
7 supplemental discovery disclosures as required to  
8 supplement what ongoing discovery is. You know,  
9 this is still an evolving case. The U.S. recently  
10 produced about 80,000 pages of additional documents  
11 and has now indicated that they have about 30,000  
12 additional documents that it anticipates producing  
13 soon and an additional group of an unknown number  
14 of documents for which it doesn't even have a  
15 target date at this point. Similarly, I know  
16 Colorado has indicated they have some additional  
17 documents of an unsure time frame as well that they  
18 will be disclosing, so this isn't a static  
19 situation. Even if we were to have a stay on  
20 ongoing litigation, there would be some additional  
21 documents. We can certainly continue with that,  
22 but my concern in having other aspects of the case  
23 move forward is that in bringing in new lead  
24 counsel there are strategic decisions that they  
25 would have to be making in conjunction with the

1 current team and the course of litigation and  
2 responses that as the ground is shifting beneath  
3 them and it's an evolving situation it becomes all  
4 the more difficult to be in a position to not only  
5 get up to speed, but to adequately represent the  
6 State as conditions continue to change.

7 The other thing I would say on that, Your  
8 Honor, is that in your email yesterday you  
9 indicated that it was your intent to have a ruling  
10 on all of the pending motions before you in the  
11 next couple weeks. Obviously that's going to  
12 greatly change the complexion of the case one way  
13 or the other. However it is that Your Honor ends  
14 up ruling, we may be looking at a significantly  
15 different case in a few weeks than we are currently  
16 and a stay of the proceedings in order to  
17 re-evaluate what is currently assumed about the  
18 status of the case is another reason to have new  
19 counsel then come in based on the changed  
20 complexion of the case.

21 JUDGE MELLODY: Where is the State in  
22 terms of hiring a new counsel?

23 MR. ROMAN: I'm going to defer to Mr.  
24 Rael on this , Your Honor. I don't want this to be  
25 a tag-team between the two of us, but he's in a

1 much better position than I am to be able to  
2 address that right now.

3 MR. RAEL: This is Marcus Rael, Your  
4 Honor. We're in the process of trying to identify  
5 whether somebody from my firm or bringing in  
6 somebody else to work with us to try to bring it up  
7 to speed. Your Honor, I have been listed as lead  
8 counsel in the case, but, as Mr. Roman stated, I  
9 took a step back due to other litigation that I had  
10 and whether it's myself, somebody else from my firm  
11 or a combination of the two, it's going to take  
12 time for that person to come up to speed and be  
13 able to make sure that we properly represent the  
14 State. I think any prejudice that Texas or anyone  
15 else is facing, Your Honor, pales in comparison to  
16 having a full record in this matter and making sure  
17 that the State is properly able to put its case  
18 forward so that we don't end up with a Florida v.  
19 Georgia situation where the Court is sending it  
20 back to you and asking you to make sure that we get  
21 a full record going. The fact of the matter is if  
22 a state has something to say, I think the Court has  
23 been clear that they want to hear it. Any  
24 prejudice that Texas or any party would face is  
25 minimal in comparison to making sure that the State

1 of New Mexico is able to get all of their evidence  
2 before you and is able to do a good job in doing  
3 so.

4 JUDGE MELLOY: Anything else you want to  
5 say about these matters before I give the other  
6 parties a chance to respond?

7 MR. ROMAN: Your Honor, this is David  
8 Roman. I had two other issues to discuss. One  
9 related to rebuttal expert reports and one related  
10 to your proposed hearing at the end of April. I  
11 can discuss those right now with Your Honor's  
12 indulgence or if you would prefer to address the  
13 issues --

14 JUDGE MELLOY: Go ahead. I want to hear  
15 it.

16 MR. ROMAN: Okay. Thank you. Regarding  
17 the rebuttal expert reports, obviously we're  
18 requesting a full stay and that would include those  
19 reports. Currently Mexico has depositions of  
20 additional Texas and U.S. experts that would need  
21 to be completed prior to completion of those  
22 rebuttal reports and certain depositions that have  
23 been scheduled that can't go forward now for  
24 obvious reasons.

25 JUDGE MELLOY: When were they scheduled



1 for?

2 MR. ROMAN: One was scheduled for the  
3 previous week, I believe, last week. Yes. I  
4 believe it was the previous week. It had to be  
5 canceled. Others we were planning to schedule.  
6 Two important ones -- I would say very, very  
7 important ones -- are of non-retained United States  
8 expert witnesses that are very key players in this  
9 case. We were waiting on documents from the United  
10 States related to their non-retained expert  
11 opinions and did not feel that we could go forward  
12 with those depositions in the absence of having  
13 received the documents that those experts were  
14 relying on for their opinions. The United States  
15 disclosed last night the documents related to the  
16 expert opinion of one of those experts and we don't  
17 have the documents yet for the other non-retained  
18 expert. I want to be clear. We requested those  
19 documents shortly after the disclosure of the  
20 non-retained experts and I don't want there to be  
21 any thought that I'm saying there's any bad faith  
22 whatsoever on the part of the United States. I  
23 know that they have been working diligently to get  
24 these documents and that's simply the way it is as  
25 far as when they have been able to disclose them,

1 but we were not in a position to go forward with  
2 these important depositions -- I felt -- in the  
3 absence of those documents on which the experts  
4 relied. Because they were non-retained experts  
5 rather than your typical retained experts, there's  
6 not the same type of immediate disclosure  
7 requirement as there would be for retained experts  
8 and I think that's part of what accounted for the  
9 delay, but, again, we haven't been able to take  
10 some of those required depositions. Even if the  
11 problem of not having these needed depositions  
12 could be resolved by being able to file  
13 supplemental rebuttal reports following those  
14 depositions and also in response to expected  
15 supplemental expert opinions by Texas -- I should  
16 step back and say that at least one of Texas's  
17 modeling rebuttal experts has indicated that he's  
18 working on additional opinions to be disclosed at a  
19 later unknown date. Even if we were able to file  
20 supplemental reports based on those later  
21 depositions and based on the later supplemental  
22 opinions, we're still in a very difficult position  
23 with regard to filing those expert reports simply  
24 because of the current circumstances. Our experts  
25 are facing some very significant logistical

1 problems right now. Pretty much all of them are  
2 quarantined at home. They are not able to work  
3 under their normal conditions including having  
4 support staff. Many of them are taking care of  
5 kids at home. Most significantly when it comes to  
6 modeling rebuttal reports, they are not able to run  
7 these very complex models in an efficient manner on  
8 home computers. One of them -- I know several of  
9 them actually have had issues with not only very  
10 slow, slow processing, but also frequent crashes  
11 resulting in having to restart model runs. All of  
12 the normal meetings and back and forth and  
13 finishing up that goes into a lot of these very  
14 complex reports is just being significantly  
15 disrupted so that even if we were in a position of  
16 being able to respond in supplemental reports to  
17 late arriving information at a later date, we would  
18 still request at least a brief extension of two  
19 weeks on the expert reports and rebuttal reports  
20 simply due to the inability of all of those experts  
21 to work in the manner in which they normally do and  
22 the logistical problems associated with that.

23 The final point I would make, Your Honor, is  
24 clearly it makes sense to have a hearing at the end  
25 of April to evaluate where we are in terms of this

1 ever-evolving changing-daily virus situation and to  
2 discuss when depositions and other aspects of the  
3 normal course of litigation can resume, but I would  
4 respectfully urge you to wait -- regardless of the  
5 status of whether we have a stay or not, I would  
6 urge you to wait until June to have a hearing on  
7 the substantive trial and case-related issues you  
8 raised in your email. As we discussed before,  
9 whatever ruling you'd make in the next few weeks is  
10 going to significantly alter the case and new lead  
11 counsel is not only going to have to learn all the  
12 factual, technical and legal landscape of this  
13 really complex case in a very short amount of time,  
14 but is going to have to do so in the new context of  
15 whatever this case becomes. I'd say that holding a  
16 hearing at which the major strategic decisions are  
17 going to affect the case and the course of the  
18 trial prior to the time that lead trial counsel  
19 will have had an opportunity to become even  
20 basically familiar with the issues let alone  
21 familiar with its nuances would not only work great  
22 prejudice to the State of New Mexico, but I think  
23 would undermine the finality of what's decided at  
24 this hearing as far as how trial would proceed.  
25 I'd hate to be in a situation where decisions made

1 at that point would have to be revisited based on  
2 changed circumstances. To enable new lead trial  
3 counsel to be able to be in a position to argue and  
4 work with the Court and the parties on a strategic  
5 way forward about trial, about bifurcation, about  
6 mediation, all these very important decisions, I  
7 would respectfully urge that they at least have  
8 until June to be in a position to address those  
9 issues with the Court. And with that, I will ask  
10 if you have any questions for me or I would turn it  
11 over to hear from the other parties.

12 JUDGE MELLODY: No. I don't have any  
13 further questions. Let me just make this comment.  
14 I may have overstated a little bit in the email.  
15 My main goal was to come up with a trial date so  
16 that we can block time out on the calendar so we  
17 know when the trial is going to start. I  
18 anticipate that the mechanics of the trial as to  
19 how we're going to sequence witnesses -- Whether we  
20 do it as everybody put on their evidence with their  
21 historical experts in one chunk and then in a  
22 second phase everybody put on their hydrological  
23 expert testimony, I don't know. I'm just  
24 speculating at this point. I think that's going to  
25 be an evolving discussion over the next year as we

1 get closer to the trial, but I want to at some  
2 point fairly soon have a date so that we know what  
3 it is, people can put it in their calendar and we  
4 don't get to a position where six months from now  
5 we try to put a trial date and somebody says, "I've  
6 already made plans to do this", somebody else has  
7 plans to do something else. I want to get  
8 something on the calendar fairly soon that we can  
9 block out. Whether we do it at the end of April,  
10 I'm not 100 percent certain, but I would certainly  
11 like to be thinking about it at that point.

12 Having said that, maybe I'll let the United  
13 States respond first. I hear Mr. Roman say you owe  
14 them a lot of documents and they can't get the  
15 rebuttal expert reports completed until you get  
16 them those documents so they can take some  
17 depositions. What is your response to all that?

18 MR. DUBOIS: Well, Your Honor, with  
19 respect to --

20 JUDGE MELLODY: Excuse me one second. I'd  
21 ask the parties to move their phone if they are not  
22 speaking. Go ahead.

23 MR. DUBOIS: Jim Dubois with the United  
24 States. We had scheduled Dr. Blair and we tried to  
25 reschedule because we weren't able to get the

1 documents at first and we'd offered some other  
2 dates. When those weren't accepted for this month,  
3 the ability to put the fear of God in the  
4 unretained experts to get me documents sort of was  
5 harder to sustain. Now the dates that have been --  
6 that were previously selected for Dr. Blair would  
7 have been at the end of April and so the production  
8 of the documents this week didn't seem particularly  
9 problematic. We're still gathering Dr. King's  
10 documents. To be honest, Your Honor, as far as --  
11 you know, I understand that the depositions are  
12 needed for the rebuttal reports. They will have  
13 all the documents for both of these experts. The  
14 Blair documents are uploaded and the King documents  
15 should be uploaded before the end of this month, so  
16 they are going to have that assuming that we have a  
17 stay on depositions for the 60 to 90 days that you  
18 indicated. They are going to have more than  
19 adequate time to look at all the documents before  
20 any depositions. That said, obviously there were a  
21 lot of depositions that were scheduled for April.  
22 Not merely these two non-retained experts, but a  
23 lot of other experts as well. We've never been  
24 asked for -- frankly, we haven't even been talked  
25 to about noticing our experts for which reports

1           were submitted. It's a bit disingenuous -- I'm  
2           just saying it's a bit disingenuous to say this is  
3           all because the United States didn't get them the  
4           documents they need in time.

5                         JUDGE MELLOY: Let me clarify what you're  
6           saying. Are you saying that you were asked to make  
7           your non-retained experts available for  
8           depositions, but you've never been asked to make  
9           your retained experts available?

10                        MR. DUBOIS: Yes and no, Your Honor. We  
11           were asked for dates for one of the two  
12           non-retained experts. We have never been asked for  
13           a date for the originally disclosed retained expert  
14           for which an expert witness report was submitted.  
15           Some of our experts have been deposed. The Bureau  
16           folks, the Bureau of Reclamation folks who were  
17           disclosed as employee experts, if you will, those  
18           have been deposed, but our retained expert modeling  
19           hydrology type person has never even been  
20           requested. I'm merely saying that a lot of stuff  
21           was going to be going on in April. I understand  
22           that that set of depositions presents -- or that  
23           the vacating of all of those depositions is going  
24           to present a problem for rebuttal reports to some  
25           degree. I think the United States is not



1 particularly concerned if there's at least some  
2 extension on the rebuttals, particularly since  
3 we're going to stay depositions for -- I think what  
4 I had proposed is 60 days. Yes, we're still  
5 getting the documents for one of the non-retained  
6 experts and doing that disclosure, but they have  
7 got Dr. Blair's documents now and given the fact  
8 that pretty much all depositions are going to be  
9 stayed for some period of time, that one is a  
10 non-issue frankly. I think all parties are still  
11 disclosing ESI as they are finding it. Saying that  
12 this is all because the United States hasn't  
13 disclosed a few documents and that that's what's  
14 driving this I think is somewhat disingenuous.

15 JUDGE MELLODY: Do you have anything else  
16 you want to say about the rest of New Mexico's  
17 motion?

18 MR. DUBOIS: Yeah, Your Honor. I think  
19 that -- I understand Mr. Roman's issue and I  
20 sympathize with it. I think he's in a tough  
21 position, but I will point out that Mr. Roman is  
22 not the only counsel engaged with this. Trout  
23 Raley has been intimately involved and has been  
24 doing the depositions of a lot of the technical  
25 folks, that they do have other counsel involved, so

1           it's not like it's -- Although Mr. Roman has been  
2           doing sort of Herculean effort sort of as a one-man  
3           show in Mexico, it's not like he's doing this thing  
4           alone and so it's not really a matter of bringing  
5           up one single attorney to take on all of this.  
6           There is a team of attorneys working on this. I do  
7           think that a six-month stay that seems to have  
8           ongoing obligations for everyone but New Mexico is  
9           not something that I think is an acceptable process  
10          for the United States and I think what we have  
11          suggested, which was essentially a two-month stay  
12          on depositions which effectively would be a stay on  
13          the depositions, but the written discovery  
14          essentially would be continuing -- and as I read  
15          your email, the written discovery process would  
16          just continue and essentially be extended to the  
17          end of depositions, whenever that is. The written  
18          discovery would proceed as normal going forward to  
19          whatever our ended up cut-off date is for  
20          depositions. That makes some sense to just  
21          continue the written discovery process and that  
22          includes ESI and everything else. A two-month stay  
23          when we can't really finish things because we can't  
24          get at the discovery of the experts should allow  
25          time for completion of the ESI, getting all of the

1 documents if there's outstanding requests for  
2 documents pending. I don't anticipate that that's  
3 a problem. Then we'd have -- under our proposal  
4 we'd have time to finish the depositions and we  
5 should be able to coordinate those while the  
6 deposition stuff is being stayed. I think that a  
7 six-month extension and pushing a trial into  
8 essentially late 2021 is not consistent with sort  
9 of getting this thing done. New Mexico does have  
10 other counsel engaged in this case, very competent  
11 counsel. I think that what we have proposed is not  
12 as draconian as either what's been proposed by New  
13 Mexico nor as tight as proposed by Texas. I think  
14 that it is a middle ground that should be workable.  
15 It gives time to get out new counsel, bring them up  
16 to speed and then proceed to finishing the  
17 depositions that remain to be taken, both the ones  
18 that were scheduled for this month and any  
19 additional ones. I think New Mexico in its motion  
20 also eluded to other depositions that it hadn't yet  
21 noticed. I assume that will include the United  
22 States' retained expert from Stetson Engineers. We  
23 should be able to schedule all that within the kind  
24 of time frame that I laid out.

25 JUDGE MELLOY: All right. Texas, I'll

1 let you speak. Mr. Somach, what is your thought?

2 MR. SOMACH: Yes, Your Honor. First of  
3 all, I'd like to say that we are comfortable with  
4 what you had laid out in your tentative email and  
5 that we'd make ourselves available any day during  
6 the week of April 27th for a conference.

7 With respect to the substance of what's been  
8 discussed, from the very beginning from our very  
9 first telephone conferencing and onward the State  
10 of Texas has been concerned about moving this case  
11 forward in a diligent fashion. I know that I have  
12 made that statement more than once to you both on  
13 the phone and in various times we've met in-person.  
14 We believe -- I believe that much of New Mexico's  
15 current problem -- aside from the virus issue which  
16 I'll address in a minute -- has been a result of  
17 their own decisions. They are the ones that  
18 decided who and how many people to put on the  
19 litigation of this very important case and they are  
20 the ones who decided not to take depositions early  
21 in the case, not to zealously and vigorously take  
22 depositions after the initial reports were issued  
23 and then after the plaintiff's rebuttal reports  
24 were issued. Those were decisions that we found  
25 curious, but they were decisions that they were

1 free to make. Prior to this latest round of  
2 requests for delay we were aware of the fact  
3 that -- because they asked whether or not we would  
4 agree to a three-month extension of discovery. We  
5 have prepared from the very beginning to litigate  
6 this case vigorously. We have taken depositions.  
7 Most of the depositions scheduled for April were  
8 depositions that we had scheduled. Only one  
9 deposition that New Mexico requested, which was of  
10 Mr. Hornburger or Dr. Hornburger, was canceled  
11 because of the virus. That was the only deposition  
12 that they had on schedule during the month of  
13 March. The rest of the depositions were scheduled  
14 for April, which was after the date that their  
15 expert reports were due. We were fully expecting  
16 that report to be -- those reports to be issued  
17 next week so that we could work on them. We  
18 were -- until the virus hit -- fully expecting  
19 discovery to be over in May. We do not believe and  
20 we are prepared regardless of how the Special  
21 Master rules on the motions to proceed. All of  
22 Texas's ESI is completed and has been completed  
23 since January. What we hear from New Mexico -- and  
24 there are really many things and it's not just that  
25 Mr. Roman is leaving. It's that they are not ready

1 in any event even if Mr. Roman is staying. We see  
2 no cause for delay in terms of their reports which  
3 are due next week. We do certainly -- I mean, for  
4 God's sake, I'm over 70 and I don't want to be  
5 traveling around taking depositions. We certainly  
6 understand that the depositions that were scheduled  
7 for April, which were scheduled for a time after  
8 these reports would be done, ought to be continued  
9 until it is safe for folks to travel. I have no  
10 objection. I'm not getting on a plane. That's for  
11 certain. That's quite a different issue than what  
12 you're hearing here. They asked for a nine-month  
13 extension; a six-month stay, a three-month  
14 extension of time after that of discovery. Quite  
15 frankly, I think what we've proposed is the right  
16 way to proceed, which is very close to certainly  
17 what you have suggested in your tentative issue.  
18 This notion that this is all because Mr. Roman is  
19 leaving is just not accurate. They have done very  
20 little in terms of keeping on schedule. They are  
21 under the gun and in addition to the problems that  
22 Mr. Roman's leaving provides they had their own  
23 problems before that because they simply hadn't  
24 moved forward as diligently as you would have  
25 expected. All of that was due to choices they made

1 from how many people they had litigating on New  
2 Mexico's behalf -- They seemed to have a lot of  
3 people at depositions. Apparently not all of them  
4 were working on the case. You're hearing the  
5 frustration in my voice because this is just  
6 exactly what we've experienced since way back when  
7 Mr. Rael said they weren't ready, that the schedule  
8 had to accommodate them, that they needed six more  
9 months than Texas did before they could issue their  
10 expert reports. This is a refrain we've heard from  
11 day one of this litigation and it continues and it  
12 continues today. At some point someone has to say,  
13 "Look, we've got to get done. We've got to set a  
14 trial date. We need to move forward." Again, you  
15 can hear the frustration in my voice and I'm not  
16 sure there's much more I could add. We would  
17 certainly adhere to what you tentatively suggested  
18 yesterday and if you have any questions of me, I'd  
19 be more than happy to answer them.

20 JUDGE MELLODY: I just have a question for  
21 Mr. Roman. I'm hearing from both the United States  
22 and Texas that you haven't really done much by way  
23 of depositions up to this point and that this is  
24 somewhat of a self-inflicted problem. What's your  
25 response to that?

1 MR. ROMAN: Your Honor, my response is  
2 that I don't believe that that's accurate. We have  
3 done a number of depositions, especially with  
4 respect to experts and technical experts. We were  
5 in the process of trying to schedule additional  
6 depositions of experts for these expert reports.  
7 I would point out that while Mr. Somach said it was  
8 a curious choice that we didn't take depositions of  
9 their experts immediately after they were  
10 disclosed, I would point out that when we disclosed  
11 our expert reports at the end of October that there  
12 were very few expert depositions that Texas took  
13 prior to the time their rebuttal reports were due  
14 and many of the depositions that they have  
15 scheduled or attempted to schedule throughout the  
16 month of April were of experts that had been  
17 disclosed back in October either that had been  
18 deposed one time and then held open to be deposed  
19 again or they are fact experts who had been deposed  
20 before and then were being deposed again, other  
21 experts who hadn't been deposed in the first place.  
22 There was a significant period of time between  
23 disclosures and when those depositions were set.  
24 The fact of the matter is we have attempted to be  
25 as diligent as possible in scheduling these



1           depositions. As far as not taking certain fact  
2           depositions early on, as Your Honor is well aware  
3           there have been so many documents disclosed and the  
4           time that it's taken to go through all of those  
5           documents to be able to know what's out there,  
6           where we are, what questions to ask has -- was very  
7           significant and certainly did eat into time that  
8           other depositions could have been taken. We didn't  
9           have nine people on our team that were able to go  
10          through documents and set up the depositions. We  
11          weren't coordinating with -- I believe Texas and  
12          the U.S. are able to coordinate pretty closely on a  
13          number of these issues. We didn't have that. It's  
14          not a matter of not being diligent and not working  
15          on things. It's a matter of what the facts have  
16          led us to.

17                 I would also make one other point. When  
18                 talking about the team here and the size of things,  
19                 Trout Raley in Colorado was brought up and  
20                 certainly has played a very significant role  
21                 especially with respect to the technical aspect of  
22                 the case, but it would be I think incorrect to  
23                 suggest that they would be in a role to step up  
24                 what is -- the coordination that has to happen  
25                 within the State of New Mexico. Not only are they

1 fully extended already on the technical aspect of  
2 things, but so much of this case has to do with  
3 state entities and all the coordination that has to  
4 go on there I believe has to be done locally and  
5 that's why the -- My understanding is that the  
6 Attorney General is doing everything possible to  
7 have local lead trial counsel to be able to effect  
8 that in a way that would not be possible for  
9 someone out-of-state, especially that's already  
10 overburdened.

11 MR. RAEL: This is Marcus Rael. Can I  
12 say a couple of things as well?

13 JUDGE MELLODY: Go ahead.

14 MR. RAEL: Your Honor, I take exception  
15 to how Mr. Somach portrayed my testimony at the  
16 hearing before Your Honor when we were trying to  
17 set the schedule. I never said New Mexico wasn't  
18 ready. What I said was that the compressed  
19 schedule that Texas was proposing and ultimately  
20 even the schedule that Your Honor finally put into  
21 place was too quick and that New Mexico -- that I  
22 didn't think any of the parties were going to be  
23 able to get it done in that compressed time frame.  
24 That's turned out to be relatively true. A lot of  
25 that can be blamed on the COVID-19, but the fact of

1 the matter is I never said New Mexico wasn't ready.  
2 I talked about the compressed schedule. New Mexico  
3 isn't trying to move the trial date to the end of  
4 2021. We're perfectly fine with your proposed  
5 trial date of May to June of 2021, Your Honor.  
6 What we're concerned about is making sure that  
7 we're able to put the proper record before Your  
8 Honor. I think Mr. Roman's point in response to  
9 Mr. Somach's accusations that New Mexico has been  
10 dilatory are correct, Your Honor. The fact of the  
11 matter is Texas took up almost every date in April  
12 for depositions. They're doing that for a reason.  
13 The fact of the matter is they haven't taken their  
14 depositions either and it's really difficult for us  
15 to be able to take the depositions when all of the  
16 dates in April are taken. They took up all the way  
17 to the last day of discovery, Your Honor. It's  
18 just the reality of the situation we're all facing.  
19 This is not on New Mexico not representing their  
20 position correctly.

21 JUDGE MELLODY: Mr. Wallace, do you have  
22 anything you want to say for Colorado?

23 MR. WALLACE: I'll be very brief, Your  
24 Honor. First off, I am available for the  
25 conference at the end of April as you indicated you

1           wanted to have. Postponing depositions certainly  
2           makes sense in the light of circumstances.  
3           Colorado has no objection whatsoever to postponing  
4           those for an appropriate length of time. Colorado  
5           takes no position on the other forms of stay.  
6           We're simply not involved enough to form an opinion  
7           on those.

8                         JUDGE MELLOY: Any of the amici want to  
9           be heard?

10                        MS. BARNCASTLE: Your Honor, this is  
11           Samantha Barncastle for the Elephant Butte  
12           Irrigation District. I have a complicating factor  
13           I'd like to add to the situation if you'd allow me.

14                        JUDGE MELLOY: Go ahead.

15                        MS. BARNCASTLE: Your Honor, a couple  
16           months ago I began reaching out to counsel for New  
17           Mexico because some of the depositions that were  
18           referenced that haven't been taken -- particularly  
19           of the United States' non-retained experts -- are  
20           actually EBID's consultant. One of them is EBID's  
21           consultant and two of the other witnesses that  
22           haven't yet been deposed are listed as Texas'  
23           experts. Those are EBID employees. They are all  
24           potentially going to need to be deposed related to  
25           New Mexico's counterclaims. If those counterclaims

1 do end up going away, this may be a non-issue.  
2 The reason I reached out to New Mexico was because  
3 as counsel in this case are aware I am pregnant at  
4 this point in time and I'm going to be leaving on  
5 maternity leave sometime around the 1st to the  
6 middle of June and I informed New Mexico of this  
7 situation because we were running out of time to  
8 take depositions and I had not yet been contacted  
9 about dates for my particular client or consultant.  
10 As the United States indicated, only one of their  
11 non-retained experts had been deposed and that was  
12 the one that the United States had worked with New  
13 Mexico to get dates for those depositions. In  
14 terms of the other two non-retained experts, those  
15 have not yet been deposed. I have not to date  
16 received any requests for dates for any of my  
17 consulting witness or clients and so I have no idea  
18 if New Mexico intends to take those depositions and  
19 if they do the problem will be that if we have a  
20 stay and we put off depositions, New Mexico is  
21 effectively out of time when it comes to my  
22 maternity leave and I'll be leaving probably around  
23 the 1st of June, so based on the schedule as I  
24 understand it in your email New Mexico will need to  
25 be ready to come back and take those depositions in

1 the last week or two of May to have those done  
2 before I'm out for a possible eight-week maternity  
3 leave due to the fact that I'm going to be  
4 requiring a planned C-section as a result of health  
5 concerns that I am currently dealing with. I take  
6 no real position, but I just wanted to let the  
7 Court know that that is going to be a potentially  
8 limiting factor.

9 JUDGE MELLOY: So the depositions of your  
10 employees who have been designated as experts would  
11 not be -- could not be occurred basically during  
12 June or July is what you're saying?

13 MS. BARNCASTLE: I don't know exactly  
14 when my doctors will schedule the planned  
15 C-section; the reason being that it depends on the  
16 health of my baby and I and that is currently a  
17 situation that's very much up in the air. We're  
18 hoping for around June 15th, that I can make it to  
19 there, but I've been told to plan for as early as  
20 being out on June 1st and so it would be six to  
21 eight weeks depending upon how well I recover from  
22 the point in time that I go out of work. June and  
23 July possibly into the early weeks of August, but  
24 I'm hoping that that's not the case.

25 JUDGE MELLOY: All right. Any of the

1 other amici want to be heard?

2 MS. O'BRIEN: Yes. Your Honor, this is  
3 Maria O'Brien for EP No. 1. I just wanted to say  
4 as an initial matter we believe Your Honor has and  
5 we greatly appreciate the guidance addressed in  
6 your email sent yesterday the issue that EP No. 1  
7 raised in our request for the now canceled March  
8 31st hearing as well as in our response to New  
9 Mexico's emergency motion and that is with regards  
10 to the stated and the need for a ruling on the  
11 pending motions to dismiss. We appreciate Your  
12 Honor's guidance on that issue in terms of the  
13 timing of when we might receive additional guidance  
14 regarding that. Again, we appreciate that.

15 Generally in terms of extensions, stays or  
16 delay we certainly defer to the Special Master in  
17 terms of synthesizing and evaluating the input from  
18 the various parties and amici as to what is the  
19 best path forward given the circumstances. We do  
20 believe that the United States in their response  
21 letter to New Mexico's emergency motion has made a  
22 good proposal with regard to potential reasonable  
23 approaches for those necessary extensions and  
24 delays with one clarification we believe. I think  
25 Mr. Dubois touched on this, but just to be clear,

1 not only do we believe that written discovery in  
2 terms of responses should continue, but that  
3 additional discovery responses could be propounded  
4 understanding there might be need for extensions to  
5 those in terms of trying to keep things moving  
6 where that makes sense under the circumstances.

7 The final thing I would just like to note,  
8 something that EP No. 1 is intimately familiar with  
9 is the issue of the non-retained experts that has  
10 received some discussion at this point. Mr. Dubois  
11 mentioned Dr. Blair who is the district engineer  
12 for EP No. 1 and I just wanted to be clear that  
13 Dr. Blair's deposition was actually scheduled,  
14 noticed for March 2nd and 3rd in Austin and we were  
15 working diligently with the United States and  
16 Mexico to provide documents in advance of that  
17 deposition as has been the case with all other  
18 supplemental disclosures with regard to all  
19 experts. Those are produced sometimes in advance  
20 and sometimes on the day of deposition and that  
21 was, in fact, going to be the case and Mexico  
22 determined that it wanted to cancel that deposition  
23 for what I understood to be scheduling reasons and  
24 we subsequently offered additional dates for next  
25 week in advance of New Mexico's due date for their



1           rebuttal expert reports and those dates were  
2           declined. I just wanted to be clear that there  
3           were definitive dates set for those depositions and  
4           everybody was working in terms of United States and  
5           EP No. 1 to move that forward. Thank you, Your  
6           Honor. That's all I have at this point.

7                     JUDGE MELLOY: Any of the other amici  
8           want to be heard?

9                     MR. BROCKMANN: Your Honor, this is Jim  
10          Brockmann. I will also try to be brief.

11                    In general, we support New Mexico's position.  
12          I believe it's absolutely critical in a case of  
13          this magnitude and importance that New Mexico be  
14          able to have trial counsel that it is comfortable  
15          with to replace Mr. Roman and sort of the critical  
16          role played. Although other attorneys are part of  
17          the team, there's a big difference between people  
18          that have worked on the case in capacity that might  
19          help with document production and written discovery  
20          versus having a trial counsel that is used to  
21          trying cases of this magnitude or are experienced  
22          in that way. The argument that simply other  
23          attorneys that have worked on the case are able to  
24          step up and step in I think sort of overstates that  
25          possibility. It's important that New Mexico be

1           able to select and get up to speed a trial counsel  
2           that can coordinate with other aspects. I think  
3           Mr. Roman did a good job of describing the  
4           complexity of that task. Our firm has worked on  
5           past original actions and this matter is moving  
6           forward since you have been involved at a light  
7           speed compared to some of the cases that we worked  
8           on starting in the '80s and '90s and I'm sure the  
9           Court likes to see these things moved along. I  
10          would caution against pushing it too fast so that  
11          we do not get in the situation that they had in  
12          Florida vs. Georgia. Cases we've had have had  
13          individual witnesses go on for three weeks at a  
14          time, experts. It is an absolutely Herculean task  
15          for somebody who is not familiar with this case to  
16          understand it. Likewise, I think there's a  
17          difficulty in asking people that aren't litigation  
18          counsel or that have experience in that role to try  
19          to step in and do a trial that can last for weeks  
20          and in this case it would be months. I wanted just  
21          to sort of emphasize those points. Other than  
22          that, we fully support New Mexico's position and  
23          don't think that it is at all unreasonable and that  
24          New Mexico should be able to adequately decide who  
25          the best substitute is for Mr. Roman and that's

1 something that they are working diligently on.

2 Thank you, Your Honor.

3 JUDGE MELLOY: Well, let me just say  
4 this. I was encouraged by the comment from  
5 Mr. Rael that he felt a May/June time frame for the  
6 start of the trial is still realistic, which, of  
7 course, is a delay from what was in the last  
8 scheduling order. I would also like to make the  
9 comment that when we did the last scheduling order,  
10 which was done in light of the government shutdown  
11 of early 2019 or late 2018, there actually was some  
12 slippage built into the schedule. I was quite  
13 frankly concerned that there would be another  
14 shutdown at the start of the new fiscal year or  
15 something else had come up. I had not in my  
16 wildest imagination thought of a Coronavirus, but  
17 that's neither here nor there. I do think there is  
18 some time in the schedule between the time of  
19 pretrial and actually from the time of filing the  
20 motions to the trial date, which is about six  
21 months later than the original trial schedule. So  
22 if we add a couple months to that, now we're  
23 talking about eight months. I think we could  
24 probably redo the schedule in such a way to make a  
25 May/June trial date. And also just to follow up on

1 the comments Mr. Brockmann just made, I suspect  
2 that this trial is probably going to stretch out  
3 over several months unfortunately. I hope we can  
4 conclude this more quickly than that, but I'm  
5 assuming that even if the trial goes along that  
6 there will be developments that will require some  
7 supplemental discovery or -- The start of the trial  
8 may not be the end of it. My goal would be at this  
9 point to try to come up with a trial management  
10 schedule at the end of April that would accommodate  
11 a start of trial in May/June and then work back  
12 from there. Hopefully that will give New Mexico  
13 time to get somebody on board and get them up to  
14 speed and from my understanding from Mr. Rael he  
15 thinks that's realistic. That will be my goal. In  
16 the meantime I would say that, as indicated  
17 previously, the deposition discovery will be stayed  
18 pending a hearing. At this time I would anticipate  
19 that it would be a telephonic hearing at the end of  
20 April. If there's any way that it could be  
21 in-person, I would prefer to do that. We have a  
22 lot of issues to discuss and it's difficult to do  
23 it in a conference phone format with this many  
24 parties, but I don't think that's probably going to  
25 be realistic. If for some reason it would look

1           like putting it back a week to the first week of  
2           May or something like that and we could do it  
3           in-person, I would consider doing that, but right  
4           now let's assume it will be telephonic and during  
5           the week of April 27 and we'll get a notice out on  
6           that. In the meantime I'm going to direct that the  
7           parties need not file their status report on March  
8           31st. I may ask for some type of updated status  
9           report before the hearing at the end of April, but  
10          at the current time you do not need to file your  
11          status report. As far as New Mexico's rebuttal  
12          expert is concerned, I will delay the deadline on  
13          submission of that report until we can discuss it  
14          further at the end of April.

15                 Let me ask the parties something I meant to  
16                 ask about the rebuttal experts. Are they the same  
17                 experts who did the initial reports or are we  
18                 talking about different experts?

19                         MR. ROMAN: Your Honor, are you asking  
20                         for New Mexico specifically?

21                                 JUDGE MELLOY: Yeah. I'll ask you. Then  
22                                 let me ask the other parties generally.

23                                         MR. ROMAN: For our rebuttal reports,  
24                                         Your Honor, they are the same experts as were  
25                                         disclosed at the end of October. We do not have

1 new experts who will be issuing rebuttal reports.

2 JUDGE MELLOY: I mean, these shouldn't be  
3 super long. You already have the initial report  
4 from the plaintiff's experts and then your expert  
5 had to prepare a report that, in essence, rebutted  
6 that initial report. Then we have the plaintiff's  
7 rebuttal report --

8 MR. ROMAN: What makes it different, Your  
9 Honor, is that in addition to rebuttals by Texas'  
10 experts who were disclosed initially, Texas put  
11 forward a number of new experts as well for their  
12 rebuttal reports so that our rebuttal reports that  
13 are due are not only responding to the reports as  
14 initially filed by Texas, but also responding to a  
15 number of new experts that were disclosed by Texas  
16 in their December 30th disclosures as well as the  
17 four non-retained expert reports that were  
18 disclosed by the United States on December 30th  
19 and so it's not a situation where it's static by  
20 any means where you have your typical report,  
21 response and rebuttal. There's a significant  
22 amount of new information that also has to be  
23 responded to both from existing experts, but from a  
24 number of new experts as well, so it's not nearly  
25 as discrete of a situation as it might otherwise

1 appear.

2 MR. SOMACH: Your Honor, if I could, this  
3 is Stuart Somach from the State of Texas. I want  
4 to make sure that I'm on the record objecting to  
5 the extra time you're giving New Mexico for these  
6 surrebuttal reports. We have diligently provided  
7 our reports in a timely manner. We have done so in  
8 an appropriate manner. That is, we didn't go  
9 outside and create brand new issues. The  
10 additional reports, which we did in a timely  
11 fashion as appropriate, were done based upon issues  
12 that were raised by New Mexico many of which had  
13 nothing to do with Texas' case in chief at all, but  
14 had to do with the issues that they were raising in  
15 the context of their counterclaims. There's  
16 nothing inappropriate about anything that we filed.  
17 In every round that we have had we have been under  
18 the gun in terms of limited time to pull reports  
19 together. If you go back and take a look at the  
20 schedule, the schedule provides us with little time  
21 and provides New Mexico with a great deal more time  
22 to do this right down to our rebuttal reports which  
23 were done very quickly after the New Mexico reports  
24 were done. We didn't take a lot of depositions  
25 after their initial reports and the reason for that

1 was there wasn't a whole lot in there that  
2 concerned us and we thought we might as well wait,  
3 let's see what they put together with respect to  
4 their surrebuttal reports and if necessary we'll  
5 take depositions at that point in time. Right now  
6 they have been given more time for all their  
7 reports by months and months than Texas was  
8 provided and now rather than having to issue their  
9 reports next week, which we have been expecting,  
10 they have at least another month in order to pull  
11 those reports together. I just want to make sure  
12 that I'm on the record for the State of Texas  
13 objecting to that extra time. I do believe that  
14 all of these delays prejudice Texas adversely and  
15 prejudices New Mexico lightly. There's  
16 consequences to these delays. Each one of them  
17 enhances New Mexico's ability to litigate the case  
18 and hampers Texas' ability to prepare and to  
19 prosecute its case. Again, you're hearing my  
20 frustration, but I just want to make sure the  
21 record is clear of what Texas' position is.

22 JUDGE MELLODY: Well, I guess my response,  
23 Mr. Somach, would be a couple things. You know,  
24 nobody anticipated COVID-19 and I am not  
25 unsympathetic to the argument that Mr. Roman has



1           made that in addition to the problem with  
2           scheduling depositions in advance of the rebuttal  
3           reports, just the mechanics of people working from  
4           home and to try to get support staff to do what  
5           they need to do to run the models, I think that's  
6           not an unrealistic concern and I believe they  
7           should have some additional time.

8           Now, in response to your argument that I cut  
9           Texas short and gave New Mexico extra time, it's my  
10          recollection that you told me at the very outset  
11          you didn't need the time, that you were ready to go  
12          and that you didn't ask for any more time and that  
13          you didn't need it.

14          MR. SOMACH: And we're still ready to go.

15          JUDGE MELLOY: But you were just  
16          complaining that you were cut short and my  
17          recollection is you said you didn't need the time  
18          and you were ready to go and that's why you got  
19          what you got.

20          MR. SOMACH: Yes, and it's not that we  
21          were cut short. I want to make sure that -- You'll  
22          never hear that from us at the end of the day, that  
23          we were cut short, but we had to work aggressively  
24          in order to meet those time frames whereas there  
25          appears to be none of that coming from New Mexico.

1           If you want to say because of the virus -- if you  
2           want to say, "okay, those expert reports are due on  
3           the 27th of April", I'll accept that, but that's  
4           not what you ruled. What you said was that you  
5           would look at them at that point in time which  
6           automatically means they are going to get more time  
7           after that. If it's April 27th that those reports  
8           are due, so be it. I will live with that. Texas  
9           will live with that. We'll live with, quite  
10          frankly, whatever you rule. That's quite different  
11          than, "We'll take a look at it on April 27th."  
12          That's automatically going to give them another  
13          month or two because at that point in time I fully  
14          expect New Mexico to explain why they couldn't  
15          possibly be ready in another week or so to file  
16          those reports, but --

17                   JUDGE MELLOY: I understand there is a  
18                   problem with some depositions and the depositions  
19                   aren't going to re-start before May 1st. I mean,  
20                   that's just the unfortunate reality and hopefully  
21                   we can get them going then, but we could be talking  
22                   about a much longer shutdown. I'm hoping it isn't  
23                   that way. Nobody knows. Things change from day to  
24                   day. I just think it's out of our hands at this  
25                   point as to when we can start deposition discovery

1           again. I certainly hope it's after the 1st of May,  
2           but -- I mean, quite frankly, I won't be shocked if  
3           it's the 1st of June or 1st of July.

4                   MR. SOMACH: They had one deposition  
5           scheduled -- one deposition scheduled before all of  
6           this occurred before the deadline for when they  
7           were to file the report, so the fact that they  
8           somehow now need months of depositions before they  
9           can file their report is not even at best -- it's  
10          just disingenuous.

11                   JUDGE MELLOY: Okay. Well, you have made  
12          your position known. We're going to have a hearing  
13          at the end of April and we'll go from there. Let  
14          me see if there's anything else I need to talk  
15          about here. I think that pretty well covers it.

16                   MR. DUBOIS: Your Honor, this is Jim  
17          Dubois. The written discovery clarification that I  
18          talked about and Ms. O'Brien talked about --

19                   JUDGE MELLOY: I was just going to  
20          mention that. Just to be clear, the stay only  
21          applies to depositions. It does not apply to  
22          written discovery. I'm only extending the deadline  
23          for New Mexico's rebuttal report and we're staying  
24          depositions. All written discovery is to continue.  
25          All supplemental disclosures, all document

1 production is to continue as normal.

2 MR. DUBOIS: Okay. Thank you.

3 JUDGE MELLOY: Let me see if there's  
4 anything else. As far as the request for a  
5 six-month stay, that's denied at this time and I  
6 don't think there's any realistic chance I'm going  
7 to give a full six-month stay of all proceedings in  
8 this case. We'll talk about what additional time,  
9 if any, New Mexico may get at the April 27th  
10 hearing, but at this point that request is denied.  
11 Any other questions or anything I missed?

12 MR. DUBOIS: Your Honor, this is Jim  
13 Dubois. I did not note that the United States is  
14 also available any time the week of the 27th. I  
15 just wanted to be clear on that. Thank you, Your  
16 Honor.

17 JUDGE MELLOY: The way I put it in the  
18 memo is that you need only advise if you're not  
19 available. If anybody is not available, let me  
20 know. Other than that, I'll assume availability.  
21 All right? If nothing else, we're adjourned.  
22 Thank you, everyone.

23 (The conference concluded at 12:21 p.m.)  
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CERTIFICATE

I, Shannon N. Benter-Moine, Certified Shorthand Reporter of the State of Iowa, do hereby certify that, on the 19th day of March, 2020, 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 teleconference, 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 1st day of May, 2020.

/s/ Shannon Benter-Moine  
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Certified Shorthand Reporter

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