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No. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF MAY 1, 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

(May 1, 2020)

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3 JUDGE MELLOY: This is Judge Melloy. I
4 understand from the operator that we have 34
5 participants, so I think we probably have just
6 about everyone. Let me start by asking, do we have
7 the court reporter online? Are you there?

8 COURT REPORTER: I am.

9 JUDGE MELLOY: Okay. Very good. For the
10 party's information, I wasn't sure if we needed the
11 transcript from the last hearing in late March, but
12 I did end up asking the court reporter to prepare a
13 transcript. I just received it today, so it will
14 be available to the parties if they want -- well, I
15 guess immediately.

16 Let's get started. Again, this is Judge
17 Melloy. This is in United States Supreme Court
18 Original No. 141, State of Texas vs. State of New
19 Mexico and State of Colorado, United States as
20 Intervenor. Let's start with appearances. I'll
21 start with the State of Texas.

22 Mr. Somach, are you there?

23 MR. SOMACH: Yes, Your Honor. This is
24 Stuart Somach. Also on the phone is Theresa
25 Barfield, Francis Goldsberry, Sarah Klahn, Robert

1 Hoffman and Priscilla Hubenak from the Texas
2 Attorney General's office. I think that's the
3 totality of who we have on the phone.

4 JUDGE MELLOY: And Priscilla Hubenak did
5 you say from the Attorney General's office?

6 MR. SOMACH: Yes. Priscilla Hubenak.

7 JUDGE MELLOY: Okay. Very good. All
8 right. And then for New Mexico who do we have?

9 MR. RAEL: Good morning, Your Honor.
10 This is Marcus Rael on behalf of the State of New
11 Mexico. With me today are Cholla Khoury from the
12 Office of the Attorney General, Lisa Thompson,
13 Michael Kopp, State Engineer John D'Antonio,
14 General Counsel to the State Engineer's Office Greg
15 Ridgley, General Counsel to the Interstate Stream
16 Commission Arianne Singer, Shelly Dalrymple, Rolf
17 Schmidt-Petersen.

18 Your Honor, I'd like to take a second and
19 introduce the new members of the State of New
20 Mexico's litigation team to Your Honor. They are
21 Luis Robles, Jeff Wechsler and John Draper.
22 Mr. Robles and Mr. Wechsler are going to be taking
23 over litigating this case on behalf of the State of
24 New Mexico. Mr. Draper and I are going to serve as
25 legal advisors to the State of New Mexico and the

1 Attorney General's Office. That's all for New
2 Mexico, Your Honor.

3 JUDGE MELLOY: Let me ask you, Mr. Rael,
4 have you designated any member of your team as lead
5 counsel?

6 MR. RAEL: Your Honor, Mr. Wechsler is
7 going to serve as lead counsel.

8 JUDGE MELLOY: All right. Okay. Very
9 good. Well, I want to welcome the new members.
10 Mr. Robles, Mr. Wechsler, Mr. Draper, I look
11 forward to your participation.

12 State of Colorado, who do we have?

13 MR. WALLACE: Yes, Your Honor. This is
14 Chad Wallace for the State of Colorado and also
15 with me is Preston Hartman also from the Attorney
16 General's Office.

17 JUDGE MELLOY: Okay. And then let me go
18 back just a second. Some of the names that have
19 been mentioned including Mr. Hartman and some of
20 the ones I know both for New Mexico and Texas I
21 believe are not currently on the service list.
22 If you want them to be served, you actually should
23 update the service lists.

24 MR. RAEL: Your Honor, this is Marcus
25 Rael. We sent an updated service list to Your

1 Honor yesterday.

2 JUDGE MELLOY: All right. Very good.
3 Thank you. For the United States who do we have?

4 MR. DUBOIS: Good morning, Your Honor.
5 This is James Dubois for the United States and also
6 on the line are Lee Leininger, Judith Coleman and
7 Shelly Randel from the Solicitor's Office.

8 JUDGE MELLOY: Now, did I understand,
9 Mr. Dubois, that -- did I read in something that
10 was filed that Mr. McFarlane retired?

11 MR. DUBOIS: Yes, Your Honor. He had the
12 temerity to retire.

13 JUDGE MELLOY: Well, I was surprised to
14 get that announcement and sorry that he's leaving
15 the case. I know he was one of the more active
16 participants and left you holding the bag, I guess,
17 huh? In any event --

18 MR. DUBOIS: It's all right, Your Honor.
19 I started with the bag, handed it off and have
20 taken it back now, so it's all good. Just to be --
21 Just to advise you, it's Dubois.

22 JUDGE MELLOY: Dubois. I'm sorry.

23 MR. DUBOIS: Oh, no. Don't be.

24 JUDGE MELLOY: All right. Then for
25 Albuquerque Bernalillo County Water Utility

1 Authority?

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

5 JUDGE MELLOY: City of El Paso, anyone on
6 board or on the call?

7 MS. MAXWELL: Your Honor, Susan Maxwell
8 for the City of El Paso.

9 JUDGE MELLOY: All right. City of Las
10 Cruces?

11 MR. STEIN: Good morning, Your Honor.
12 This is Jay Stein for the amicus curiae City of Las
13 Cruces, New Mexico.

14 JUDGE MELLOY: El Paso County Water
15 Improvement District 1?

16 MS. O'BRIEN: Yes. Good morning, Your
17 Honor. Maria O'Brien as counsel for El Paso County
18 Water Improvement District No. 1 and counsel for
19 the district Renea Hicks is also on the line and
20 also on the line with the district is Dr. Al Blair,
21 the district engineer.

22 JUDGE MELLOY: All right. Elephant Butte
23 Irrigation District?

24 MS. BARNCASTLE: Yes. Good morning, Your
25 Honor. This is Samantha Barncastle for the

1 Elephant Butte Irrigation District.

2 JUDGE MELLOY: Thank you. Hudspeth
3 County Conservation and Reclamation District No. 1?

4 MR. MILLER: Yes, Your Honor. This is
5 Drew Miller on behalf of the district.

6 JUDGE MELLOY: New Mexico Pecan Growers?

7 MS. DAVIDSON: Good morning, Your Honor.
8 This is Tessa Davidson on behalf of New Mexico
9 Pecan Growers.

10 JUDGE MELLOY: Is anyone on for New
11 Mexico State University?

12 MR. UTTON: Yes, Your Honor. Good
13 morning. This is John Utton on behalf of NMSU.

14 JUDGE MELLOY: State of Kansas, anybody
15 on for them?

16 (Silence.)

17 JUDGE MELLOY: All right. What I thought
18 I would do is start with I guess a few comments or
19 observations that I've developed in my mind in
20 light of what's happened over the last six weeks
21 sort of globally as well as in response to what you
22 filed in the last couple days. I do appreciate the
23 fact that you have filed those status reports and
24 outlined disagreements as well as the areas of
25 agreement.

1 Let me just start on a negative note. I guess
2 I didn't fully appreciate until I saw particularly
3 Texas' filing how slow New Mexico was to get out of
4 the gate on depositions. I'm disappointed to see
5 that New Mexico didn't take a single deposition for
6 the first year of discovery. Now, one of the
7 things that I found curious about the whole
8 scenario -- and I'll let the parties respond to
9 this if they think it's appropriate -- is that in a
10 way it almost seems like the depositions are
11 backwards in the sense that it's my understanding
12 that normally you take the depositions of fact
13 witnesses first and then when you have the fact
14 witnesses depositions you then prepare and take
15 your expert or you prepare your expert reports and
16 then take your expert depositions. This just seems
17 to be the opposite. We're doing all the experts
18 first for the most part and then we're going to
19 take the fact witnesses. To me that just seems
20 like doing things backwards. I understand that
21 until the expert reports were disclosed you can't
22 take an expert deposition , but I don't know why
23 more time wasn't spent during that first year
24 nailing down things like how is the project
25 currently being operated. We're now going to be

1 getting into depositions dealing with project
2 operation and, like I say, I'm finding it a little
3 difficult to understand how an expert opines about
4 something when you haven't even taken the
5 depositions of the people who are operating the
6 project. As I said, that's an observation you can
7 respond to or not if you care to.

8 My second -- Let me just go through these and
9 I'll give everybody a chance to respond. My second
10 observation is when we were together I think it was
11 March 19th I don't think anyone anticipated that --
12 at least I didn't anticipate that things would
13 develop the way they have. I think on March 19th
14 we had less than 1,000 deaths nationwide in the
15 United States. We're now over 60,000 from the
16 COVID-19 virus. We're just starting to reopen
17 things. I think in light of what's happening and
18 the requirements on social distancing and other
19 things going forward that this is a pretty
20 aggressive schedule and I certainly hope we can
21 meet it and hold to a roughly June 1st trial date
22 of next year. I do think, though, that -- again,
23 I'll let anybody respond -- that the discovery
24 schedule is pretty aggressive in this case given
25 the fact that I've talked to some of the judges in

1 our building, I've talked to some attorney friends
2 and I have yet to hear of anybody who thinks that
3 it's realistic to have in-person depositions before
4 July and probably August or September before we can
5 actually have depositions in-person. Having said
6 that, I'm also hearing from a lot of lawyers and
7 from the magistrate and so on in our building that
8 there's a lot of discovery been going on through
9 videoconferencing whether it's Zoom or Microsoft
10 Team that is being done and it's being done
11 successfully. It's not easy the first one or two
12 you do, but after you have done one or two it
13 actually works pretty well. In fact, I've heard
14 some attorneys tell me they are preferring it.
15 I think to expect that we would start in-person
16 discovery with the requirements for social
17 distancing to put 30 lawyers into a room with a
18 deponent any time in the next 60 to 90 days I think
19 is totally unrealistic and that's not even
20 considering the problems with travel to get people
21 to the deposition. I read recently that United has
22 canceled 90 percent of their schedule for May and
23 will probably do the same thing for June. I think
24 we have to assume that for at least the next
25 probably 90 days minimum and maybe longer that

1 we're going to have to go forward with deposition
2 discovery, but it's going to have to be
3 videoconference. Anyway, a comment or observation.

4 I also realized from a personal perspective
5 that I need to be more involved in the discovery
6 and I need to be more hands-on in supervising it to
7 keep it moving, so we're going to be having much
8 more frequent conferences. In fact, I'm thinking
9 that if we're going to reopen discovery on the 15th
10 of May, which I guess is two weeks from today -- or
11 probably the 18th actually because it will probably
12 be the following Monday -- that I may have a
13 conference with counsel two weeks from today just
14 to figure out how things are going with the video
15 setup and maybe we'll even try to do that
16 conference by video and have it as a trial run for
17 how we might do video depositions. I also heard
18 from one attorney that they are using Veritext for
19 their videoconferencing service. As I recall,
20 Veritext is the service that you're using to upload
21 your documents to the cloud. I don't know if any
22 of you have talked to Veritext, but they may be
23 very helpful in setting up the discovery. I have
24 some other comments too, but let me just start with
25 those two and see if there's any reaction to -- I

1 guess, Mr. Somach, anything you want to say about
2 any of that?

3 MR. SOMACH: No. Not other than I agree
4 100 percent with what you've said. I mean, the
5 reason we've provided you the matrix of depositions
6 was that was part of my frustration on the last
7 call and I'm not going to say anything more about
8 it unless you have questions. The thing with the
9 virus, I agree 100 percent with you that unless we
10 take video depositions there's no practical
11 schedule. I would feel -- I think I said this
12 before to you, but I've got -- including myself --
13 several attorneys and witnesses that are over 70
14 years old. Airplanes, hotels, restaurants, it just
15 simply is not manageable. We have talked to
16 Veritext about depositions. We're comfortable with
17 what they provide. There's another outfit out
18 there called Planet Depo. They have really made
19 provisions right down to having private break-out
20 rooms during the depositions so that it's virtually
21 as if you're there. Obviously we've indicated this
22 in the status conference statement that we filed.
23 We think it's the only way to proceed. We did demo
24 one where we actually practiced a deposition and it
25 worked very well. My observation was the same as

1 yours; that it may take one or two to really get it
2 going. Once we get it going I think we'll be able
3 to do more depositions in a shorter period of time
4 because you eliminate all the travel and all the
5 related logistics associated with that. There's
6 nothing that you have said and -- We encourage your
7 involvement in the discovery process. Ms. Barfield
8 from my office has taken the lead in terms of all
9 the discussions with the other parties on
10 scheduling depositions. We feel like we're in a
11 pretty good position to begin right as soon as we
12 can taking these depositions. Again, other than in
13 a sense agreeing with what you said, that's all I
14 have to say.

15 JUDGE MELLODY: Let me ask you this one
16 question, Mr. Somach. I'll ask you, but I guess
17 anybody can answer it. In the depositions that
18 have been taken so far how many people aside from
19 the deponent and the deponent's attorney and court
20 reporter do you have in the room?

21 MR. SOMACH: Well, you know, one of the
22 things I looked at over the last couple of days
23 after I got New Mexico's letter was what the rules
24 will be even when we're allowed to start moving
25 around. Even in New Mexico I think the rule is

1 going to be five people. Well, if you just count
2 the one attorney for each of the parties plus a
3 court reporter, you've got yourself your five
4 people. That's without witnesses. That's without
5 any of the amicus present. How many people have
6 been in the room is varied depending upon who is
7 being deposed. Certainly on average I would say
8 you have about 10 people and sometimes you have
9 more than that. We've had to actually move rooms
10 because the rooms that Veritext had scheduled are
11 too small. We have had to get much larger rooms in
12 order to accommodate everybody that has been in the
13 room. I'm not sure I have a better count for you
14 than that. That's generally what I believe would
15 occur.

16 JUDGE MELLODY: Well, and I also -- Just
17 to follow up on the one point that Mr. Somach made,
18 I think we may find that at the end of the day that
19 by doing the bulk of the depositions by video that
20 it can be a more efficient process. The first
21 couple may be more difficult, but I think when you
22 eliminate all the travel time getting to the
23 depositions and then -- This is just a supposition
24 or speculation, but I have a feeling that at the
25 end of the day the video will be a little more

1 efficient. I may be wrong, but certainly you save
2 a lot of time on travel if nothing else and that's
3 time that could be spent deposing a witness as
4 opposed to time spent on an airplane and it
5 certainly will be a lot cheaper in terms of travel
6 time, travel expenses. There may be some
7 additional expense with the video portion of it,
8 but I'm sure that's more than offset by the savings
9 with travel expense.

10 What is New Mexico's feeling about this? I
11 know this isn't consistent with what you were
12 suggesting, but what's your response?

13 MR. WECHSLER: Yes, Your Honor. This is
14 Jeff Wechsler and it's a pleasure to be before you.
15 I'll respond first to your first observation. We
16 recognize and understand your frustration. The
17 point is received. We can't change the past, but
18 we can fix it going forward. New Mexico has been
19 working diligently. We've devoted significant
20 resources to the case. We understand the
21 importance of it. We're prepared to take this case
22 to trial in June of 2021.

23 Moving to your second observation, we agree
24 it's an aggressive schedule that will require
25 cooperation and working amongst the parties, but

1 we're committed to do what's necessary again to get
2 the trial on the schedule that you have asked us to
3 get there.

4 As to remote depositions, you're right. It is
5 our position that we prefer in-person depositions.
6 I'm sure that's the feeling of other counsel as
7 well. There are a lot of challenges and obstacles
8 to doing remote depositions. I have done them
9 myself. They are difficult in terms of
10 communication with the witness both if you're
11 defending the deposition and also if you're taking
12 it and I could go through a litany of challenges
13 that it presents. That being said, we are
14 realistic. We all know the circumstances in which
15 we're living. While it is our preference to do
16 in-person depositions, I'm happy to talk about some
17 of the precautions that we think are possible to
18 make those possible. If it is your direction that
19 we should be taking remote depositions, then we
20 will make that work.

21 As to your final observation that you're
22 intending to get more involved in discovery, we
23 also would welcome your participation.

24 JUDGE MELLOY: Well, in terms of the most
25 immediate depositions that would hopefully be

1 scheduled before the end of May, I note that --
2 I'll turn to Ms. Barncastle. I recall from your
3 discussions at the last hearing that you are going
4 to be going out on pregnancy or maternity leave
5 either the 1st of June or shortly after the 1st of
6 June and that any witnesses that you're
7 representing you would like to have deposed before
8 your maternity leave obviously or after you come
9 back. I would think that maybe they should go to
10 the head of the line because of your personal
11 situation. I don't know if you have any response
12 to that, but --

13 MS. BARNCASTLE: Actually, Your Honor,
14 yes. This is Samantha Barncastle for the Elephant
15 Butte Irrigation District. I have to say I'm a
16 little business dismayed at New Mexico's letter
17 from a couple of days ago indicating that they all
18 of a sudden need two of my witnesses before they
19 can disclose their surrebuttal reports. I went
20 through with you last time the fact that I had
21 talked to New Mexico numerous times about getting
22 to at least Dr. King. There was never even a
23 mention of Dr. Falk. Going all the way back to
24 August of 2018 when the Rule 26 disclosures were
25 provided, these witnesses were known to have

1 information. They were disclosed -- at least
2 Dr. King was disclosed very early on in May of 2019
3 as an expert. It should not have been a surprise
4 to New Mexico. Yet, they did nothing to try to
5 schedule these and knowing all the way as far back
6 as December that I was pregnant and would be going
7 out and knowing that personally I am having issues
8 with this pregnancy and could potentially be taken
9 out earlier than expected they still did nothing,
10 so I'm quite upset at the situation, Your Honor,
11 and at this point I'm in a tough situation because
12 I am anticipating a C-section in early June. I may
13 not make it to that point. I am being told that --
14 I've already been put on bedrest as of today. I
15 was told a few days ago that it would be May 15th
16 and now it's been moved up two weeks. My doctors
17 are doing everything they can to keep this baby
18 inside of me for the longest period possible for
19 the safety of the baby, but I also am unable to
20 travel due to the Coronavirus issue. My husband
21 and I if we have a chance of seeing our child born
22 together have to make sure that neither one of us
23 gets infected. Obviously the hospital has to let
24 me in, but they don't have to let him in.
25 In-person depositions are not really a possibility.

1 Just because the state is going to reopen certain
2 things doesn't mean that even in July it will be
3 safe for my newborn for me to be attending
4 in-person depositions. I would suggest to Your
5 Honor that we have two potential options. One is
6 to hope that I hang in there through the end of May
7 and get these scheduled immediately if New Mexico
8 does need them for their surrebuttal reports.
9 While that presents its own set of issues -- for
10 example, Dr. King will be in the middle of starting
11 to run water because they open on May 18th pursuant
12 to board direction provided March 5th -- not to
13 mention the fact that I may have to cancel, the
14 only other option I can see, Your Honor, is a
15 limited extension on surrebuttal reports for New
16 Mexico to sometime after my maternity leave to give
17 them an opportunity to take these depositions once
18 I return and still provide rebuttal reports once I
19 return, but, Your Honor, I would prefer to push on
20 this. I would prefer to push forward and hope that
21 everything works out and hope that I can attend
22 these depositions from bed and adequately defend
23 them and New Mexico should not get some sort of a
24 windfall unfairly long prejudicial extension just
25 because I happened to be pregnant and they did

1 nothing about it. I apologize for my somewhat
2 emotional comments, but this is quite frustrating
3 for me at this point.

4 JUDGE MELLOY: All right. Thank you.
5 Anything from the United States?

6 MR. DUBOIS: Your Honor, I don't disagree
7 with your assessment of things. Along with
8 Mr. Somach I think you have hit some of the nails
9 straight on the head.

10 As far as Dr. King, I would say that you're
11 also correct that that pretty much has to be pushed
12 to the front of the line if New Mexico thinks that
13 they really need that deposition before filing
14 their surrebuttal reports. Remember, these are
15 surrebuttal reports. That is something that should
16 not be pushing back the date for their disclosure
17 of those reports so then we can get on with the
18 rest of the depositions. We actually right now are
19 having sort of -- One of our discovery experts
20 within our division is in about 2 minutes having a
21 seminar on video depositions. This is a very
22 timely topic and we are prepared to go forward with
23 video depositions as I said in my report. At the
24 minimum you have to do that this month and I
25 suspect you're correct that it's more like 60 or 90

1 days, but we can't put this case on hold waiting
2 for in-person depositions. I think that the
3 schedule we've proposed is makable, particularly if
4 we do the video depositions.

5 JUDGE MELLOY: Anybody else want to be
6 heard on this issue?

7 MR. WALLACE: Yes, Your Honor. This is
8 Chad Wallace for the State of Colorado. I just
9 want to make a few points and let you know that I
10 appreciate the position that everybody else is in
11 and I'm not sure that there are any good answers to
12 present. In that line, the Colorado Attorney
13 General is looking at rules and methods at least
14 within the state for conducting remote depositions.
15 It's not a unique circumstance to this case alone.
16 I wanted to make three points of observation that
17 might help the rest of the parties in putting
18 together remote depositions. First, making sure
19 that we have adequate video presentation. I've
20 attended some of the depositions in this case
21 remotely and in some instances the video quality
22 was distinctly lacking. I think we can take care
23 of that if we just keep our eye on it. The second
24 point is to make sure that we have -- all parties
25 have access to remote real-time transcript

1 abilities. Not all the reporters have that
2 capability, but I think it's essential for
3 everyone. The third point is to make sure that we
4 have the ability to have real-time exhibit-sharing
5 among all the participating parties. That way
6 everyone can see what's being talked about. To
7 date that has been an issue. I'm sure we can
8 overcome that challenge, but I just wanted to bring
9 those three points to everyone's attention.

10 JUDGE MELLOY: Well, I'm sure there will
11 be mechanical issues that have to be addressed, but
12 from what I've been told it works pretty well and
13 in some cases the integration of the exhibits into
14 the deposition is actually smoother on a video than
15 it is sometimes in-person. It's going to require
16 some technical skill and it's also going to require
17 that everybody has sufficient bandwidth so that the
18 video quality is adequate. I know that that's been
19 a challenge in a few cases, but I think people are
20 recognizing that and that they are upgrading their
21 systems. There are going to be challenges, but I
22 don't think there's any other alternative at this
23 point short of just stopping everything and putting
24 the case on hold for 60 days or three months or
25 whatever period of time we're talking about.

1 Unless there's anything else, I want to just
2 talk about a couple other tentative issues. New
3 Mexico suggested that all the parties exchange
4 their witness lists by July 15th. I think that
5 that is somewhat unrealistic for two reasons. One
6 is that I seriously doubt that anybody will be able
7 to accurately determine who their witnesses are
8 going to be that early in the proceedings. The
9 other problem I think that's going to result if I
10 went ahead with that is that the inclination will
11 be to list everybody you can think of who you might
12 call so that you wouldn't be caught with someone
13 arguing later on that you didn't include that name
14 on the list on July 15th and now you can't call
15 them as a witness. I'm afraid the list would be
16 wildly overinclusive which would defeat the whole
17 purpose of I think what New Mexico is getting at.
18 Having said that, however, that's not to say we
19 can't start talking about witnesses fairly early
20 on. As people identify witnesses that they know
21 are going to be called, there's no reason why they
22 can't be identified and that this can be somewhat
23 of an evolving process that will result in the
24 commission of a final witness list as we get closer
25 to the actual trial date. I don't think it's a

1 situation -- and I want to say this with a lot of
2 these issues -- where July 15th is a deadline or
3 September 1st is a deadline and then nothing
4 changes before or after those dates. I think we
5 can start to talk about witnesses June 1st for that
6 matter, but with the understanding that it's an
7 evolutionary process as people start to look at
8 what the issues are, decide the issues, decide who
9 is going to testify about each issue. I'm not
10 going to order witness disclosure on July 15th, but
11 I do want to start talking about witness lists
12 early on so that we can be ready to go to trial
13 when we do have a trial date.

14 Anybody want to respond to that or anything to
15 add to that?

16 MR. WECHSLER: Your Honor, this is Jeff
17 Wechsler for New Mexico. The purpose of that
18 provision was simply to be prepared for trial so
19 that we understood the witnesses from each of the
20 parties, so the other parties knew our witnesses
21 that we had deposed and properly prepared so that
22 we could put on the best possible presentation for
23 you at trial. The process that you're describing,
24 an evolving process, would accomplish exactly that
25 purpose and we would welcome that.

1 JUDGE MELLOY: Okay. All right. A
2 couple other comments. New Mexico has suggested a
3 site visit. I just want to think about that some
4 more. I had thought about that myself before New
5 Mexico had even suggested it. There may be a value
6 to it. Whether it should be on the ground or a
7 flyover and the timing are all things I want to
8 think about. My current inclination is not to do
9 it this August if for no other reason than, as I
10 previously indicated and I think the parties agree,
11 this is a pretty aggressive discovery schedule and
12 I don't want to take out time that might be devoted
13 to depositions to do a site visit. I think that's
14 something that we can do at a later date if it's
15 something that I ultimately decide would be useful.
16 I may even take up Texas' suggestion even to wait
17 until after the trial starts or at least until the
18 issues are more narrowed. I'm deferring on that I
19 guess is what I'd say.

20 A couple other comments. The issue of
21 bifurcation, I'll let people talk about that if
22 they would like. I would say that in looking
23 through the orders that we issued within the past
24 several weeks as well as just sort of my general
25 feelings about the case that the further I get into

1 it the more I'm inclined to think that we should
2 bifurcate the liability and damages from remedy. I
3 don't want to throw this back at you, Mr. Somach,
4 but actually there was something that you said at
5 the hearing a year or so ago that really resonated
6 with me on that issue and that is -- and I'm
7 paraphrasing -- you had said Texas didn't sue the
8 Lower Rio Grande Valley, but they sued the State of
9 New Mexico and that one of the remedies may involve
10 at least in part the people who are above the
11 Elephant Butte Dam or the river above the dam.
12 There's just so many permutations to a remedy in
13 this case that I would think at the end of the day
14 what's going to happen is if it's determined that
15 Texas can prove its case and New Mexico has some
16 liability that the remedy will be so dependent upon
17 what that liability is, small or large. It's going
18 to depend upon -- and then I think it will be up to
19 New Mexico to at least initially come forward with
20 a solution. It may be that the solution won't be
21 satisfactory and I'll have to recommend something
22 to the Supreme Court, but I just think that at this
23 point there are so many permutations to a remedy
24 when we don't even know what we have to remediate
25 that that really needs to be a second phase trial.

1 You know, I'm not making any decisions or casting
2 stones at this point, but that's sort of my strong
3 inclination going forward.

4 MR. SOMACH: Let me just comment on that.
5 The opposition to bifurcation really focused more
6 on what you have indicated would be a first part,
7 which would be liability and damages. What I was
8 concerned about when we put that together was that
9 there would be some bifurcation internal to that or
10 some phase. What I looked at were the witnesses
11 that would be involved and a recognition that you
12 didn't gain very much by doing that in the context
13 of, for example, liability and damages. After all,
14 we only have one damage expert and it flows right
15 from the case in chief. Remedies are different.
16 The other question that this raises is you
17 indicated a desire not necessarily to sit and have
18 a trial for eight to ten weeks all at one time and
19 that you wanted to take breaks and so I thought
20 also as a natural matter there would be some -- for
21 example, as we suggested, you would try a case for
22 a couple of weeks -- I'm just using that. Whether
23 or not that's the right time frame or not, I don't
24 know -- and then take a break so that we already
25 would have some gaps or some natural breaks in the

1 trial process anyway. That perhaps is -- In terms
2 of separating a remedy from damage and liability,
3 that seems an appropriate way to proceed if that's
4 what you decide to do.

5 JUDGE MELLODY: And let me say about the
6 trial -- again, we'll be discussing this a lot more
7 in the next year, but my current inclination is to
8 probably do it two weeks on, two weeks off. When I
9 talked about phasing -- and I'm not sure if this
10 will even work or if it's the way to do it -- but I
11 kind of look at it as that there are certain issues
12 that are somewhat discrete and which we may want to
13 try separately or in different segments. In other
14 words, one of the issues that I understand that's
15 going to have to be resolved is what apportionment,
16 if any, does New Mexico even have? United States
17 and Texas, someone indicated that that's an
18 unsettled question. Is that a discrete issue where
19 Texas would put on its evidence and Mexico put on
20 its evidence and the United States and the amici
21 and then we try that for two weeks? How the
22 project is being currently operated, which to some
23 extent implicates the operating agreement, but not
24 the validity of the operating agreement, would we
25 talk about that for a couple weeks? I don't know.

1 Or perhaps does Texas put on its whole case from
2 liability to damages in one continuous stream like
3 you would do if you're in front of a jury? Those
4 are all issues I don't know that we have to decide
5 today, but those are ones that are on the table at
6 least for discussion as we go forward.

7 MR. SOMACH: Actually, that's helpful to
8 hear that because I think it is something that's
9 certainly internal to Texas we should think about
10 and talk about to be able to respond intelligently.
11 My assumption had been that we would put on our
12 case first, but that doesn't mean that we should
13 not think about it since we are going to have
14 two-week blocks or whatever you decide. I have a
15 question about that. In terms of our being able to
16 think through and being able to help you in terms
17 of -- When you try are you trying cases five days a
18 week? Do you have a dark day? So that we can plan
19 timing how do you -- It's not too early to at least
20 think about these things. I don't know what your
21 preference is in terms of -- Do you start at 9:00
22 and go to 5:00? Go to 3:00? Those would be
23 helpful at some point in time knowing so that we
24 can help you in terms of what our views on trial
25 scheduling is.

1 JUDGE MELLOY: Well, it's going to depend
2 to some extent upon -- If I do it the way I'm
3 currently thinking about which is maybe two weeks
4 on and two weeks off or a week off so we have some
5 break and also time for the parties to prep the
6 witnesses, I would probably do it for five days.
7 If we were to do it in more of a fashion where we
8 just keep going week after week, then I might just
9 cut it back to four days. My current inclination
10 is to try to get 10 days in. I just think once
11 everybody is there let's get as much in as we can.
12 We'd probably do it two weeks on, two weeks off and
13 five days a week. The other thing I will be
14 discussing with counsel as we go forward -- and
15 again, not making a final decision today -- is that
16 in reading and in looking at how these cases have
17 been tried in the past -- and I have tried cases
18 like this -- I may be directing that a fair amount
19 of the direct evidence come in through the reports
20 and much, if not all, of the direct testimony will
21 be written and that the live testimony will be
22 pretty much limited to the cross-examination. I'm
23 pretty sure that's the way they did it in Georgia
24 vs. Florida and I know there have been other cases
25 like that. Again, it may not be every witness we

1 do it that way. Maybe some. I think that's
2 certainly one way to make the trial run more
3 efficiently is if the direct evidence comes in
4 through the expert reports. I'm just throwing that
5 out.

6 Anything from New Mexico about all of this?
7 I've kind of rambled on for a while here.

8 MR. WECHSLER: Yes, Your Honor. New
9 Mexico, as we indicated in our letter to you,
10 supports bifurcation. I think that would apply to
11 either state. We'll point out that we are quite
12 confident in our technical case and so if New
13 Mexico is successful, that would also apply to
14 remedies that Texas would have. I'll point out
15 that bifurcation has been done as you have
16 indicated in other cases, other cases that I've
17 been involved in and Mr. Draper has been involved
18 in including Kansas vs. Colorado, Montana vs.
19 Wyoming and very much agree that it is an effective
20 way to separate out those issues. And as an
21 example, when you look at the expert testimony
22 that's put on, there's been assumption from the
23 damages experts as to the modeling and what the
24 correct modeling is. But if you are dealing with
25 liability in the first instance, you know at the

1 end of that how much water each state was entitled
2 to. Now the damages experts no longer have to rely
3 on assumptions. As you point out, even more near
4 and dear I think to this case is how that remedy
5 would be made up and there are a number of
6 different ways which takes complex analysis and
7 evaluation taking into consideration the various
8 regulatory schemes within those states. Again, we
9 support that.

10 With respect to phasing, we also support
11 phasing. We think it's a good idea for the parties
12 with your direction to be working out discrete
13 issues. For example, the historians. Each state
14 has a competing historian and we think there would
15 be a great benefit to hearing the testimony
16 together so that you can compare and contrast the
17 testimony, understand what separates them and
18 what's different. Same thing is true for the other
19 technical areas like the modeling. As for pretrial
20 testimony, again, I can offer examples in two
21 recent cases in which I was involved in. In the
22 Montana vs. Wyoming case there was no pretrial
23 testimony. It was live. In the Kansas vs.
24 Nebraska case it was pre-filed at the direction of
25 the judge. The other two most recent cases, as you

1 pointed out, the Florida vs. Georgia case did
2 pre-file testimony. The Mississippi vs. Tennessee
3 case, which is ongoing, did not do pre-filed
4 testimony. I think there's benefits to both. New
5 Mexico has a slight preference for doing live
6 testimony, but if you prefer to have pre-filed
7 testimony because you think it would be helpful to
8 be able to review, think about, evaluate the
9 testimony ahead of time so that you're prepared for
10 the questioning, we're happy to proceed in that
11 manner and we can work out and discuss some of the
12 details later on. For example, in the past when we
13 have done that, the witnesses have been allowed to
14 put on at least a summary within an allotted amount
15 of time of what their testimony is which gives you
16 the benefit of being able to be introduced to that
17 expert, what their expertise is and then get a
18 general summary. Those are my thoughts on those
19 topics.

20 JUDGE MELLODY: And I agree on what you
21 said about the pre-filed. If I go that route,
22 certainly the proponent would be allowed some time
23 to introduce the witness and give some summary.
24 Hopefully not a lengthy one, but you wouldn't have
25 to just say "call witness X" and then tender for

1 cross-examination. There would be some opportunity
2 to introduce the witness and get a little bit of
3 summary. Anything from Colorado about this?

4 MR. WALLACE: Yes, Your Honor. Colorado
5 has in the past and continues to support
6 bifurcation. We think it will lead to judicial
7 efficiency. Phasing of witnesses also makes sense.
8 Whatever Your Honor's pleasure is on conducting the
9 trial that way.

10 JUDGE MELLOY: United States?

11 MR. DUBOIS: Your Honor, I think that
12 your suggestions on particularly carving the remedy
13 into a separate phase, I think that's consistent
14 with what we suggested in our status report, so we
15 have no objection to that. As far as written
16 versus direct testimony or live testimony, we can
17 work that either way, so it's at the Court's
18 pleasure.

19 JUDGE MELLOY: Okay. Do any of the amici
20 want to be heard on this?

21 MS. O'BRIEN: Yes. Maria O'Brien for EP
22 No. 1. We had sent a letter to you I think
23 yesterday outlining a couple items, much of which
24 we've discussed today, but one of them being a
25 bifurcation issue which I think that we presented a

1 bit of a slightly different view perhaps, a little
2 bit more nuance than has been played out here, but
3 I would summarize it just as this. I believe our
4 view is as much legal as it is factual in terms of
5 trying to get our arms around the legal principles
6 controlling in this case as well as the underlying
7 facts that will move us through trial. We believe
8 what we've outlined in our letter, which is
9 coupling as a Phase I in a potentially bifurcated
10 case the measure of any apportionment and
11 associated delivery obligations under the Compact
12 or the correlative respective allocations from the
13 Rio Grande Project that that should be coupled with
14 a prospective remedy and that is based I think on
15 our view which I think has been brought out so far
16 in the case and would continue to be that really
17 the limited extent of any entitlement to water
18 below Elephant Butte -- whether you're calling it
19 an apportionment or an allocation from the
20 project -- is from and through the project and
21 therefore the controlling principles that we'll
22 need to be looking to are reclamation law, project
23 operations as Your Honor has pointed out in recent
24 orders and just now will be critical to determining
25 and providing the parameters for the entitlement

1 and so we don't think that should be de-linked from
2 a prospective remedy. We think how the project is
3 operated and thereby the allocations and
4 entitlements from the project and under the Compact
5 are linked together as a legal and a factual matter
6 for purposes of determining what the states and the
7 district are entitled to. We do think that
8 retrospective damages should be a separate phase of
9 a bifurcated case, but we think that it is very
10 important to look at how we're defining remedy and
11 that, again, given the legal and factual issues
12 that are central in this case that we don't think
13 it would be appropriate to de-link in a bifurcated
14 case the apportionment and allocation of the
15 project from a prospective remedy.

16 MR. DUBOIS: This is Jim Dubois for the
17 United States. I might also note that with regard
18 to the whole notion of trying to figure out what
19 the discrete segments would be that that may be
20 influenced also by dispositive motions which may
21 limit some of those issues, so I'm not sure whether
22 we're going to really be able to zero in on some of
23 that stuff until after dispositive motions are
24 resolved.

25 JUDGE MELLOY: Well, and that kind of

1 leads into the comment I was about to make, which
2 is that there's been comments made both by the
3 first Special Master and by the parties from time
4 to time that the Compact is unambiguous, that all
5 we need to do is look at the Compact and we can
6 figure all this out, but at the same time nobody
7 can agree on the most elementary question that any
8 Compact is supposed to address which is which is
9 each state's apportionment, if any? We can't even
10 agree if New Mexico has an apportionment. Now, if
11 the Compact is as unambiguous as people say it is,
12 we should be able to resolve that by summary
13 judgment. Maybe we won't, but I find that to be a
14 very curious aspect in this case. The Compact was
15 supposedly unambiguous, but nobody can even decide
16 if New Mexico's got an apportionment and what that
17 apportionment is. I just throw that out as an
18 observation that maybe we can resolve these issues
19 by summary judgment or -- and this will lead to
20 another point I make in a second -- but by
21 settlement. Before I get to that, anybody else
22 from the amici or the parties want to be heard on
23 these issues?

24 MR. UTTON: Your Honor, this is John
25 Utton representing New Mexico State University. I

1 just wanted to briefly touch on the bifurcation
2 issue. I think in addition to the efficiency that
3 it would promote, I think another benefit to that
4 is it would provide an opportunity for settlement
5 if it were broken into two stages like that with
6 some intervening time where some of the more
7 difficult issues perhaps have been decided that
8 would guide the parties in trying to find a remedy
9 ourselves. I think that might be in looking at
10 what issues are in the first -- if bifurcated -- in
11 the first proceeding or part of it, that should be
12 a consideration. What are the difficult issues
13 that at this point have prevented settlement, which
14 has really ground to a halt, that if the Court
15 ruled on those would help the parties tackle some
16 of these very difficult issues on their own. I
17 think the Court was correct in identifying that
18 implementing whatever ruling the Court makes
19 because of all the water usage up and down the
20 system including in Texas is going to be a
21 challenge and probably cannot be done simply by a
22 Court Order and would require the party involvement
23 to come up with a management approach to do that
24 and I think that would lend itself well to
25 settlement if there was that intervening time to

1 try to do that. Just I think from the amici
2 perspective that would be an important step. Thank
3 you, Your Honor.

4 MR. SOMACH: Your Honor, this is Stuart
5 Somach. I just wanted to make two quick points
6 about what's been said. Number one, we do think
7 summary judgment motions when we get to dispositive
8 motions are important and we are considering some
9 of those that would incorporate some of what you
10 articulated. That's one of the reasons why in the
11 schedule we're concerned that it not be so
12 compressed at the end so that you don't have a
13 chance to rule on those things with the opportunity
14 to limit the issues that are actually going to
15 trial. On the written direct testimony I want to
16 convey a concern that we have. While some
17 testimony is more amenable to that approach, the
18 modeling and other testimony will need, I believe,
19 beyond just an expert report which sometimes are
20 very difficult to understand in terms of right down
21 to equations and similar technical issues or expert
22 issues that are embedded in there, that there will
23 be perhaps a little bit more needed in terms of
24 direct testimony to explain those expert views than
25 just a quick summary. My concern and my experience

1 is if the first time you really dig into those
2 issues is on cross-examination, you get a different
3 view than if those particular witnesses are allowed
4 to at least explain what they did, why they did it
5 and why their conclusions are where they are.
6 Certainly if we have pre-filed reports, that
7 streamlines that, but I just want to just simply
8 express a view that I don't think you can with
9 respect to some of those issues eliminate that.

10 JUDGE MELLODY: I understand and I think
11 that's an issue that we'll have to, again, develop
12 as we go along and I understand that lawyers and
13 judges are probably better at reading historian
14 reports than they are hydrology reports. It may
15 depend upon the nature of the witness as to how
16 much direct testimony and explanation is required,
17 but I think we'll have to develop that as we go
18 forward.

19 I think that covers most of the issues I
20 wanted to talk about except for I guess the one
21 issue that Ms. O'Brien brought up in her letter and
22 was eluded to by New Mexico just a minute ago.

23 Is there a thought that at some point in these
24 proceedings the parties want to enter into some
25 type of formal mediation with or without the

1 benefit of a mediator? What are your thoughts
2 about that? Mr. Somach?

3 MR. SOMACH: There have been over a
4 period of years here discussions. The Texas view
5 is that we are always willing to sit down and try
6 to resolve the case. Our experience, however, is
7 that just having the parties meet is not a fruitful
8 exercise. We've done that. It hasn't resulted in
9 a satisfactory experience and in some respects it's
10 created some counter-productive problems I think.
11 If we were to move forward, I think we would like
12 to have a mediator. We think that that would be
13 essential to any kind of potential success in those
14 types of discussions. Certainly the Texas Rio
15 Grande Commissioner has told me in direct response
16 to that question that, of course, Texas would
17 participate in any of those discussions, but,
18 again, subject to we do believe that it's going to
19 require a third-party to be involved if we're not
20 going to have a counter-productive experience.

21 JUDGE MELLODY: New Mexico have any
22 thoughts about that? Mr. Wechsler?

23 MR. WECHSLER: We do, Your Honor.
24 As Mr. Somach indicated, there have been
25 discussions. My understanding is that there was

1 some progress made on those. As Mr. Somach
2 indicates, obviously we haven't settled. We're
3 happy to continue those. We're open to settlement
4 discussions. These are complicated cases with
5 complicated issues affecting a great number of
6 people. If there's a possible resolution between
7 the states, that's probably the best outcome. In
8 fact, the Court has on multiple occasions
9 encouraged the states to settle these interstate
10 disputes. The possibility of a mediator New Mexico
11 is open to. That has been successful in some other
12 interstate water disputes. If that's Texas'
13 preference we're happy to participate in that and
14 in the meantime we'll be preparing for trial in
15 June of next year.

16 JUDGE MELLOY: Okay. Well, I think --
17 Before I let the other parties speak, I think at
18 this point if there's any reasonable likelihood of
19 success that it would probably be a good idea to
20 have a mediator and I'd like the parties to be
21 thinking as well as I will be about who that person
22 might be. I have a couple thoughts, but I want to
23 give it some more consideration. I don't know if
24 we need somebody who is really good at mediation or
25 somebody who is really good who knows a lot about

1 water law. We can talk about that a little bit
2 more. There's a former magistrate judge up in
3 Minnesota who has done a wonderful job over the
4 years and he was able to settle the NFL case. I
5 figure if you can bring the NFL players and
6 management together and settle that that you can
7 settle just about anything, but he wouldn't know
8 anything about water law. Let's give that some
9 thought and we'll talk about it some more, but I'm
10 strongly inclined to think that a mediator would be
11 useful in this case. Mr. Dubois, do you have
12 anything you want to say about that?

13 MR. DUBOIS: I think, Your Honor, if
14 there are going to be productive discussions at
15 this point, I agree with Texas that a mediator
16 would be essential. While there was some progress
17 in settlement discussions, my impression is that a
18 skilled mediator is required at this point. The
19 mediators that they had in Kansas vs. Nebraska had
20 worked with the Sri Lankan government and the Tamil
21 Tigers and between the Arabs and the Palestinians
22 and so they were able to manage the two states, but
23 it was a close go, so it's going to have to be
24 somebody with a pretty high degree of mediation
25 skill I think.

1 JUDGE MELLOY: Well, and I know in
2 Georgia v. Florida -- maybe Florida v. Georgia -- I
3 can't remember which -- that they actually took a
4 time out and spent several months with a mediator
5 and maybe even on more than one occasion and were
6 not successful. It's not easy, but -- Anyway,
7 Colorado, do you have any thoughts on this?

8 MR. WALLACE: Yes, Your Honor. Colorado
9 would support mediation and the use of a mediator.
10 We think that would be helpful. Like with many
11 other compact cases, maybe an opportunity to get a
12 better and longer-lasting remedy may lie through
13 settlement talks than through litigation.

14 JUDGE MELLOY: Any of the amici want to
15 be heard on this issue?

16 MS. O'BRIEN: Your Honor, I appreciate
17 your taking up this issue. As you noted, we raised
18 it in our letter. We certainly support efforts at
19 mediation. We think a mediator may prove very
20 useful. The issues are sufficiently complex and
21 certainly what's at stake for EP No. 1 is so vital
22 that we do believe that working towards a
23 settlement as opposed to a litigated resolution is
24 the way to go. As we said many times, we believed
25 we had solved this in the context of the 2008

1 operating agreement and remain convinced that that
2 is an appropriate remedy here. That said, one
3 procedural note, while we are to remain at this
4 point an amicus in the case as opposed to a party
5 given that we are the recipients of Texas' Compact
6 water under the Rio Grande Compact, we need to be
7 involved directly and fully in any efforts at
8 settlement. While we obviously fully recognize
9 that it is beneficial and often necessary to have
10 different groups of parties or amici meeting in
11 groups to move specific issues forward, we believe
12 we are an integral part in any resolution of the
13 case and so I would be remiss if I didn't
14 explicitly say that. Hopefully that's obvious as
15 we move forward or if we move forward with
16 settlement discussions. Thank you.

17 JUDGE MELLOY: Well, I think that
18 probably can go without saying because I'm assuming
19 any resolution through mediation or settlement is
20 going to implicate the operating agreement. As you
21 say, that was your attempt at settling the dispute
22 and so if it's something that is a different
23 resolution, it will obviously require the parties
24 to the operating agreement I assume to agree to
25 amend or abdicate it or do something to it if there

1 is a settlement. Anybody else have anything they
2 want to say about that?

3 MS. BARNCASTLE: Your, Honor --

4 MS. DAVIDSON: Yes --

5 JUDGE MELLOY: Sorry. Ms. Barncastle,
6 you go first.

7 MS. BARNCASTLE: Thank you, Your Honor.
8 This is Samantha Barncastle for EBID and I bet that
9 what I'm going to say is exactly what Ms. Davidson
10 has in mind, but anything related to settlement is
11 extremely important to the farmers in the Elephant
12 Butte Irrigation District and Lower Rio Grande area
13 because they are the ones that have the direct
14 target on their backs. They use both service water
15 and groundwater and they need both resources to
16 stay alive. Anything that we discuss through
17 settlement or through litigation in terms of a
18 remedy is necessarily a target on their back and
19 it's incredibly important that we get it right
20 going forward and, as Colorado stated, that we find
21 a better, longer-lasting remedy than is possible
22 through litigation.

23 JUDGE MELLOY: Anyone else want to be
24 heard?

25 MR. STEIN: Your Honor, this is Jay

1 Stein, counsel to the City of Las Cruces. Your
2 Honor, there are municipal interests that are
3 involved in this as well. The City of Las Cruces
4 is New Mexico's second largest city and it will be
5 directly impacted by the outcome of this litigation
6 and of course has to be present in any settlement
7 negotiations that will directly affect its ability
8 to make municipal water supply to its customers.
9 Thank you.

10 MS. DAVIDSON: This is Tessa Davidson
11 with New Mexico Pecan Growers. If I could build on
12 Ms. Barncastle's comments. I do agree with her
13 comments. I actually wanted to chime in because
14 there has been some reference to past settlement
15 discussions. If you recall in our amicus brief in
16 support of New Mexico's motions, we were -- and I
17 think informed you that there are some ongoing
18 efforts within New Mexico to resolve some of our
19 internal issues. We were actually involved in some
20 of the discussions that were going on. We felt
21 that there was some progress, but I do think that
22 from our perspective progress was very difficult
23 because of the aggressive trial schedule. From our
24 perspective we felt certain parties didn't feel
25 they could litigate and talk at the same time. I'm

1 only raising this issue because if it is your
2 thought of getting a mediator involved, I would
3 just caution given the aggressive schedule that
4 it's difficult for the parties to meet those
5 aggressive deadlines and also make progress with
6 settlement discussions. Thank you.

7 JUDGE MELLOY: I appreciate that. Thank
8 you.

9 MR. BROCKMANN: Your Honor, this is Jim
10 Brockmann. Similar to the other New Mexico amici,
11 I guess given your recognition earlier that
12 remedies potentially could involve the entire state
13 of New Mexico, which obviously implicates the
14 middle Rio Grande, any settlement discussions needs
15 to also involve the amici Water Authority. We are
16 extremely concerned about how the Compact is going
17 to be administered in the future. We know how it's
18 been done in the past, but given the views of the
19 case that Texas and the United States have put
20 forth it causes real concerns for the Water
21 Authority about potential remedies or their views
22 of how the Compact should be administered going
23 forward. It's absolutely critical that we also
24 would be involved with those talks. I also want to
25 echo what Ms. Davidson just said. One of your

1 opening comments was that it was an extremely
2 aggressive schedule and I think if you do have
3 involvement on a twice monthly basis it will allow
4 the parties to determine whether or not the
5 schedule is too aggressive to get all of the work
6 done and I think you'll also likely get a better
7 feel for the amount of work that's being put in.
8 If there is going to be settlement discussions,
9 just our observation is one reason that it hasn't
10 been successful in the past is that the experts
11 that are needed and the attorney time is too
12 divided between trying to litigate the case and
13 meet deadlines and to have serious settlement
14 discussions and look for compromises and remedies.
15 If that's something that's going to be given a real
16 100 percent effort, it might require a pause in the
17 schedule to see if the parties can concentrate
18 their efforts on that and make it successful.
19 Thank you.

20 JUDGE MELLOY: Well, let me just make
21 this comment about what you just said. I think
22 that is also one of the benefits of a mediator in
23 the sense that I don't want to be directly involved
24 in the settlement discussions and I don't want to
25 be involved in parties' differing views as to the

1 likelihood of success in mediation and the progress
2 that is or is not being made towards a settlement.
3 If there is to be a pause, it will probably be
4 because there is a mediator who comes to the Court
5 and says, "I think a 60 day timeout where we do
6 nothing but talk about settlement might produce a
7 result", or diversely comes and says, "We're just
8 not getting anywhere. You might as well go ahead
9 and try the case." Having sort of a neutral person
10 who can make those kind of comments and assessments
11 I think would be very beneficial to myself as well
12 as hopefully to the parties. I think we've kind of
13 exhausted that topic. Is there anything else
14 anybody wants to talk about before we sort of talk
15 about what we're going to do over the next couple
16 weeks?

17 MS. O'BRIEN: If I may just move back
18 very briefly to the bifurcation issue. As that
19 discussion concluded it currently is clear that
20 there is different views of what bifurcation may or
21 should look like. I'm just wondering if it would
22 not be helpful to consider some early briefing on
23 that issue given that depending on the view that
24 prevails it may or may not shape discovery somewhat
25 as well as make trial motion briefing a bit more

1 efficient. I just raise that as something to
2 consider, Your Honor.

3 JUDGE MELLOY: All right. Well, let's
4 plan to talk about that a little bit more at the
5 next hearing. What I would like to do is I'm going
6 to sort of put the onus on Mr. Somach's firm to
7 come up with a methodology to do video depositions
8 and report back to me as to what you think is a
9 workable way to do it and then schedule a hearing
10 for two weeks from today. We'll use the same time,
11 but we'll actually try out the video and hopefully
12 do it by video teleconference, see how it works and
13 we can at least see each other. In the meantime, I
14 would suggest to New Mexico that you start talking
15 to Ms. Barncastle very promptly about getting her
16 people scheduled. If you can't get her depositions
17 before she has to go out for maternity leave, it's
18 highly unlikely I'm going to let you hold off on
19 your surrebuttal report until after she gets back
20 and you can take them in August or September. You
21 better get those scheduled and get those at the top
22 of the list.

23 MR. WECHSLER: I understand, Your Honor.

24 JUDGE MELLOY: Okay. Anything else we
25 want to talk about today?

1 MR. SOMACH: We've done a lot of work on
2 this. We will contact the other parties and then
3 we'll report back, see if we can get agreement. If
4 not, we'll articulate where the differences are and
5 we'll also be in a position to be able to use some
6 methodology like this for the next hearing so that
7 you can see how it works.

8 JUDGE MELLOY: Okay. Great. Let's plan
9 on two weeks from today at 11:00. All right?

10 MR. WALLACE: Your Honor, this is Chad
11 Wallace. Will you still be holding the regularly
12 scheduled status reports even today?

13 JUDGE MELLOY: No. That's not necessary.
14 Anything else? All right. Then I'll see everybody
15 in two weeks hopefully. Thank you, everyone.

16 (The conference concluded at 12:20 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 1st day of May, 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 15th day of June, 2020.

/s/ Shannon Benter-Moine

Certified Shorthand Reporter

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