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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 OCTOBER 25, 2018
TELECONFERENCE BEFORE HONORABLE MICHAEL A. MELLOY,
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning
at 2:00 p.m.

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PROCEEDINGS

(October 25, 2018)

JUDGE MELLOY: Good afternoon. This is Judge Melloy. Good afternoon, everyone. Shall we start? I don't know if we have everybody on, but I assume by the time we get done going through a roll that we'll have everybody here. Let's just start by taking a roll call of who is on the line.

Who do we have for the State of Texas?

MR. SOMACH: Yes, Your Honor. This is Stuart Somach and with me is Francis Goldsberry, Robert Hoffman, Theresa Barfield, Brittany Johnson and Sarah Klahn is on a separate line calling in.

JUDGE MELLOY: What was the name of that last person?

MR. SOMACH: Sarah Klahn, K-L-A-H-N.

JUDGE MELLOY: Okay. For New Mexico?

MR. RAEL: Good afternoon, Your Honor. This is Marcus Rael on behalf of the State of New Mexico. Also on the call with me today are Deputy Attorney General Tania Maestas, David Roman, Lisa Thompson, Michael Kopp.

JUDGE MELLOY: All right. And for the State of Colorado?

MR. WALLACE: Yes, Your Honor. Chad

1 Wallace.

2 JUDGE MELLOY: And for the United States?

3 MR. DUBOIS: Good afternoon, Your Honor.

4 This is Jim Dubois and also on the line are Judy
5 Coleman, Lee Leininger, Steve MacFarlane and Shelly
6 Randel from the Solicitor's Office.

7 JUDGE MELLOY: And who from the
8 Solicitor's Office did you say?

9 MR. DUBOIS: Shelly Randel from the
10 Solicitor's Office.

11 JUDGE MELLOY: Okay. All right. Then is
12 anyone on for the Albuquerque Bernalillo County
13 Water Utility Authority?

14 MR. BROCKMANN: Yes, Your Honor. Jim
15 Brockmann for the Albuquerque Bernalillo County
16 Water Utility Authority.

17 JUDGE MELLOY: Sorry I butchered the
18 pronunciation. How about the City of El Paso?

19 MR. CAROOM: Yes, Your Honor. Doug
20 Caroom and with me is Susan Maxwell.

21 JUDGE MELLOY: City of Las Cruces?

22 MR. STEIN: Yes, Your Honor. This is Jay
23 Stein for the City of Las Cruces.

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

1 MS. O'BRIEN: Yes, Your Honor. This is
2 Maria O'Brien on behalf of El Paso County Water
3 Improvement District No. 1.

4 JUDGE MELLOY: And Elephant Butte
5 Irrigation District?

6 MS. BARNCASTLE: Good afternoon, Your
7 Honor. This is Samantha Barncastle.

8 JUDGE MELLOY: Hudspeth County
9 Conservation and Reclamation District No. 1?

10 MR. MILLER: Yes, Your Honor. This is
11 Drew Miller on behalf of the Hudspeth District.

12 JUDGE MELLOY: What about the New Mexico
13 Pecan Growers?

14 MS. DAVIDSON: Yes, Your Honor. This is
15 Tessa Davidson on behalf of New Mexico Pecan
16 Growers.

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

19 MR. UTTON: Yes, Your Honor. Good
20 afternoon. This is John Utton for NMSU.

21 JUDGE MELLOY: What about the State of
22 Kansas? Anyone on for the State of Kansas?
23 (Silence)

24 JUDGE MELLOY: Before we turn to the more
25 substantive issues -- well, let me ask first, did I

1 miss anyone? Is there anyone else on the line?

2 (Silence)

3 JUDGE MELLOY: All right. Before we turn
4 to some of the issues on the agenda, let me ask the
5 parties, has Kansas been a participant in these
6 proceedings? I know they're -- Are they just
7 monitoring? Do you know what their anticipated
8 role is going to be? Can anybody speak to that?

9 MR. SOMACH: Yes. I can. This is Stuart
10 Somach for the State of Texas. I've had
11 conversations with the State of Kansas and I had
12 anticipated talking to them prior to status
13 conference to be able to provide you a more robust
14 answer, but they are monitoring the case. What I
15 wanted to check with them was how active they
16 wanted to be in the day-to-day litigation of the
17 case; whether they wanted to be as active as the
18 other amici. I just don't know. I do have that on
19 my list of things to follow up on. I talked to
20 them at least once. They were still trying to
21 decide exactly how much involved on a day-to-day
22 basis they wanted to be in the litigation. I will
23 follow up and be able to provide you with a better
24 answer to your question.

25 JUDGE MELLOY: Well, why don't you ask

1 them to provide that answer as well after you've
2 had a chance to visit with them. Ask that they
3 file some kind of statement as to what role they
4 anticipate playing in the litigation going forward.

5 MR. SOMACH: I will do that. That is
6 what I will do.

7 JUDGE MELLOY: All right. Thank you.
8 Now, we just received a document stipulation
9 regarding discovery scheduling protocol which I
10 have not really had a chance to read yet, but we'll
11 talk about that in a minute, I guess.

12 Let's kind of turn to the issues that I have
13 on my agenda as well as the one that the State of
14 Texas has identified as something I want to add to
15 the agenda.

16 On the interim stipulation regarding procedure
17 for use of central repository, I've gone over that
18 document and I guess I have just a couple questions
19 about it that I wanted to bring to your attention.
20 And we may not necessarily need to resolve it
21 today, but I just wanted to alert you to them.
22 This is very far down the road, but paragraph 10
23 provides that once the case is concluded the
24 Veritext Vault manager will permanently remove the
25 documents from the vault. I guess, like I said,

1 that date is a long way off probably, but one of
2 the things that immediately came to mind when I
3 read that is we look at what we're dealing with
4 here today or in this litigation, which is the 1938
5 agreement, and what does it mean, what were the
6 intentions of the parties and everything else about
7 it and I'm wondering about preservation of
8 documents in the event that any decree that may
9 ultimately be entered in this case or any
10 settlement that may be effectuated becomes the
11 matter of some dispute 30 years from now.

12 Have you thought about that at all or given
13 that any consideration as to some permanent
14 retention of documents as back-up to however this
15 case is ultimately resolved?

16 MS. BARFIELD: Good afternoon, Your
17 Honor. This is Theresa Barfield on behalf of the
18 State of Texas. Your Honor raises a good point.
19 The parties have not actually spoken about
20 potential retention of the documents. I think
21 certainly from Texas' perspective all of the
22 documents produced to the Veritext Vault are done
23 electronically and so we have permanent
24 retention -- should the parties desire to do so --
25 on-site at Somach Simmons & Dunn as opposed to

1 maintaining the monthly cost structure that
2 Veritext would provide us to do should we continue
3 to use the vault after the completion of
4 litigation. I'll let the other parties weigh in
5 obviously, but to the extent that the parties agree
6 to maintain for some standard or certain period of
7 time, we can certainly do so in-house at our law
8 firm.

9 JUDGE MELLOY: Well, I just think that
10 the documents that are used in the litigation --
11 and, like I say, this is a date that's a long way
12 off and we can talk about it further, although I
13 just don't want it to sort of get lost in any
14 last-minute resolution of the case -- that there be
15 some retention of the documents that are used in
16 the case so that -- like I say, it could be 30
17 years from now. Look at what this case is all
18 about. Or it could be 50 years from now. There
19 should be some retention so that we have access to
20 those documents and can refer back to them. I
21 think we do need to at least think about that
22 before the case is over. As I said, that's a long
23 way off. That's just one thing I wanted to alert
24 you to.

25 Then the other issue, which I need to talk to

1 the Supreme Court Clerk about a little bit, is my
2 access to documents. I obviously don't want a
3 passcode because I don't want to have access to
4 everything that's in the vault, but as motions are
5 filed or proceedings are brought it very well could
6 be that you will reference documents that are in
7 the vault. I don't know if we're going to have to
8 provide every one of those in hard copy to the
9 Supreme Court. What I was thinking of is maybe --
10 if this is technologically feasible -- to set up a
11 separate folder just for my access. I mean,
12 everybody could have access to it, but it would be
13 the only folder that I would have access to where
14 if you want to use a document in connection with a
15 particular matter that's brought before the Court,
16 you could then transfer those documents into that
17 folder that I would have access to. I think at
18 least on an interim basis we should try to set
19 something like that up. It may be that ultimately
20 we'll have to print them all in hard copy for the
21 Supreme Court, but at least I think on an interim
22 basis there should be something that I would have
23 access to without necessarily having you file
24 everything in hard copy. Does that make any sense?
25 Is it even technologically something that can be

1 done?

2 MS. BARFIELD: Your Honor, this is
3 Theresa Barfield again. Yes. That absolutely
4 makes sense and I'm certain that the Veritext
5 personnel have the capacity to do so and Texas is
6 happy to reach out to Veritext and get that in
7 progress and get that set up for you.

8 JUDGE MELLOY: Okay. Well, good. Like I
9 say, it may -- at the end of the day it may be --
10 the Supreme Court has told us that they want
11 everything in hard copy and I don't know if that's
12 going to mean potentially hundreds or thousands of
13 pages of exhibits. And that may be what they want,
14 but we'll reach out to them and find out exactly
15 what their requirements are going to be going
16 forward.

17 Since we're on the Veritext stipulation, I
18 think it's Texas that raised the issue of a dispute
19 concerning cost. Can you tell me where you are on
20 that issue and what the concerns are.

21 MS. BARFIELD: Yes, Your Honor. This is
22 Theresa Barfield again on behalf of the State of
23 Texas. The parties have been working under the
24 course of the last month -- along with other issues
25 that are under separate stipulations we've been

1 working on this cost allocation issue with respect
2 to the cost of maintaining the documents in the
3 Veritext Vault. This requires me to give you a few
4 numbers in terms of what is in the vault right now
5 and what the anticipated costs are and then I'll
6 let you know what the parties have discussed and
7 decided upon in terms of what we're presenting to
8 you as proposals today. We do need your
9 assistance.

10 As of yesterday, in my conversation with
11 Veritext there are 102 gigabytes that have been
12 deposited. Of those gigabytes 70 were produced by
13 the State of Texas, 22 by the United States and 10
14 by New Mexico. The Colorado documents are
15 currently in box.com pending resolution of this
16 allocation issue. They are unable to move the
17 documents until we resolve this and we get a formal
18 stipulation that divides the cost up.

19 The cost estimates for maintaining the vault,
20 there is an approximate \$2,000 per month storage
21 and contents management fee currently. We
22 anticipate given the volume of the documents there
23 and what we see coming down the road in the case
24 that this could triple. It could go higher than
25 that, but for purposes of the discussion today

1 we're going to assume a tripling of that number as
2 we progress and the monthly fee. Through the
3 discussions we've had with all of the attorneys for
4 the parties the proposed allocation of this amount
5 that has been agreed upon between Texas, New Mexico
6 and the United States is a 20 percent equal split
7 between the four parties, but also one share -- for
8 the fifth share to go to the amici collectively,
9 for the amici to decide amongst themselves an
10 appropriate method of distributing the 20 percent
11 share and for -- There are nine amici. Let's run
12 the math on that, Your Honor. Under that scenario,
13 the equal 20 percent share would be currently \$410
14 to each of the four parties and \$410 to the amici
15 to be split up as many as nine ways which would
16 approximate \$45 a month. As these numbers triple
17 we could be looking at \$1230 a month for the
18 parties and \$136 a month for the amici.

19 Now herein lies the problem. The issue has
20 been raised by the State of Colorado. At this time
21 the State of Colorado can only commit to a 5
22 percent share for reasons I will let counsel for
23 the State of Colorado explain to Your Honor. Given
24 this restriction by the State of Colorado, however,
25 the remaining parties have discussed the problem

1 and have determined that the State of Texas -- if
2 we had our preference anyway absent Your Honor's
3 order otherwise -- that Texas, New Mexico and the
4 United States would continue to maintain a 20
5 percent split per party, Colorado 5 percent and
6 then 35 percent would be shared and split between
7 the amici for their use of the vault.

8 That's essentially the dilemma that we're in
9 right now. I would defer at this time to
10 Mr. Wallace as counsel for Colorado to explain the
11 5 percent issue that the State of Colorado is
12 having because that's a significant aspect of the
13 discussion.

14 JUDGE MELLODY: Mr. Wallace?

15 MR. WALLACE: Yes, Your Honor. I thank
16 Ms. Barfield for the introduction there.
17 Colorado's position has been that we are certainly
18 willing to work with the other parties in this case
19 to use the vault for their convenience. We do
20 understand there's a large number of documents
21 involved in this case and the vault might prove an
22 easy way to manage the exchange of all these
23 documents. Given that, currently Colorado has less
24 than 2 and a half percent of the total document
25 storage space in play. We do not anticipate that

1 amount to be going up significantly as the other
2 parties engage in depositions and discovery. We
3 had agreed in a prior phase of this case to split
4 the cost for the previous Special Master. That
5 percentage to Colorado was also 5 percent. That is
6 one basis for Colorado offering up that amount. We
7 feel that given our role in the case with no claims
8 against it or brought by it that that amount is
9 imminently reasonable. Further, I am at a bind
10 given the state's statutory procurement
11 requirements committing the state at this time to
12 higher potential fees. I think there's a
13 reasonable basis that we will exceed that
14 procurement threshold level. I simply cannot agree
15 to that without going through a procurement
16 process. Those are really the main reasons we have
17 for feeling that the 5 percent cost share is more
18 than adequate and a very reasonable offer given our
19 position in this case.

20 JUDGE MELLOY: Do any of the amici want
21 to be heard on this issue?

22 MR. BROCKMANN: Yes, Your Honor. I'll go
23 first. This is Jim Brockmann for the Water
24 Authority.

25 This cost allocation proposal that Texas has

1 laid out is not one that the parties collectively
2 have brought to us or discussed with us as amici.
3 In our experience the parties are splitting the
4 cost in original actions, but the amici are not
5 involved with paying those costs. Particularly,
6 with the Veritext Vault there doesn't seem to be an
7 increased cost for the amici to have access -- it's
8 nothing more than a password -- and view that
9 material. Even if there were no amici, the cost
10 would be the same to the parties. In the original
11 actions that we've worked on we have not before had
12 an experience where amici have been asked to pay
13 for or ordered to pay for costs as part of the
14 original action. I guess from the Water
15 Authority's position unless we're a party we should
16 not have to pay for costs.

17 JUDGE MELLOY: Anybody else want to be
18 heard?

19 MR. STEIN: Your Honor, this is Jay Stein
20 for the City of Las Cruces. We concur with
21 Albuquerque's position that Mr. Brockmann has
22 expressed.

23 MR. MILLER: Your Honor, this is Drew
24 Miller for the Hudspeth District and I also would
25 concur with the positions that have just been

1 expressed by the other amici.

2 MS. O'BRIEN: Your Honor, this is Maria
3 O'Brien for El Paso County Water Improvement
4 District No. 1. I will not -- I'm not taking a
5 position today with regard to this given that
6 exactly what the cost allocation would look like
7 does not appear to have been settled amongst the
8 parties in terms of it's proposed to be allocated
9 to amici collectively and I -- I just wanted to
10 articulate that. As to the initial matter, I don't
11 wholly concur with what else has been expressed in
12 terms of perhaps a nominal charge in terms of
13 access and participation in having that access. I
14 take no position today, but I wanted to make clear
15 that by my silence I am not concurring with what
16 the other amici have said.

17 JUDGE MELLOY: Let me ask this. As far
18 as El Paso Water Improvement District and Elephant
19 Butte are concerned, is this sort of the flip side
20 of having an enhanced role? You also have enhanced
21 responsibility?

22 MS. O'BRIEN: I would agree with that,
23 Your Honor, and that's why I felt it necessary to
24 articulate that I'm not agreeing that we should
25 bear no cost for the access we are being provided.

1 At this point it's difficult to articulate not
2 knowing literally where the chips are going to fall
3 in terms of what that cost would be. I would agree
4 with what you just stated in terms of the enhanced
5 role that we do have that we certainly would be
6 amenable to evaluating the cost with regard to
7 access to the documents.

8 JUDGE MELLOY: Okay. Well, let me give
9 this some thought. Anybody else want to be heard?
10 I'm not going to make a decision this minute.
11 I want to think about it a little bit. Does
12 anybody else want to be heard before I turn to a
13 different topic?

14 MS. BARNCASTLE: Yes, Your Honor. This
15 is Samantha Barncastle for the Elephant Butte
16 Irrigation District. I would echo the comments
17 submitted. The Elephant Butte Irrigation District
18 is not necessarily opposed to sharing in some of
19 the costs, but we do need more time to evaluate
20 what exactly that would mean. I might just point
21 out for the Court that Colorado's position has been
22 that at this time they do not intend to
23 participate, but that may change and so we may want
24 to include some contingency for the future. If
25 Colorado does become an active participant, they

1 will need to bear more of the burden of the cost.
2 With those thoughts, Your Honor, EBID is not
3 necessarily opposed to sharing some of the cost of
4 accessing any of the documents or being able to
5 participate in sharing documents with the Veritext
6 Vault, so EBID will reserve any further comment and
7 stand with EP No. 1 on this issue.

8 JUDGE MELLOY: All right. Let me say
9 this. I'll give you let's say 10 days to think it
10 over and if you have a position, I'd like to see it
11 filed by no later than a week from this coming
12 Monday. I think that's November 5th. Whatever a
13 week from Monday is. It's the day before the
14 election. I think it's the 5th. If you or any of
15 the other parties want to file anything in
16 connection with this issue, file it by the close of
17 business on November 5th and then I'll make a
18 decision as to the allocation. All right?

19 MR. DUBOIS: Your Honor, this is Jim
20 Dubois for the United States. I would just add one
21 thing in response to Mr. Brockmann's comments that
22 as an amici he has not had to bear costs. I've
23 been in several of these cases and I've never also
24 seen one where the amici had access to all the
25 documents being produced. The parties did not have

1 to bear the cost of producing and storing documents
2 to be made available to the amici. They are
3 essentially getting a benefit without a cost and I
4 think that's the concern.

5 JUDGE MELLODY: Okay. Well, all right.
6 As I said, if anybody wants to be heard further
7 through any written submission, file it by the
8 close of business a week from Monday on the 5th.

9 I do want to follow up on one thing that
10 Ms. Barncastle mentioned, though, that has been
11 troubling me or at least something that I've
12 thought quite a bit about. That's Colorado's
13 position in this litigation.

14 I know that you have a non-participation
15 agreement, but, Mr. Wallace, what do you envision
16 your role in this case going forward?

17 MR. WALLACE: I suppose at this point in
18 time, Your Honor, our role as far as discovery is
19 going to be monitoring discovery, taking a rather
20 inactive part. I do anticipate we would attend
21 depositions. If there are questions relevant to
22 Colorado's interests, I think we would ask them.
23 If there are legal issues that are raised that
24 would affect Colorado's interest, we would brief
25 them. At this time we do not anticipate raising

1 any claims or, conversely, the need to raise any
2 defenses. I have struggled with this, Your Honor,
3 as well. We're named as a party nominally as a
4 Defendant with a controversy that appears to be
5 geographically located outside the state, so those
6 aspects of the controversy likely don't impact us.
7 However, larger interpretations about how the
8 Compact is to be operated and the obligations of
9 the states as a whole or as they might impact
10 Colorado do affect us and that's what we're going
11 to be watching out for.

12 JUDGE MELLODY: Well, I guess that was my
13 concern is that -- we're going to in a minute or
14 two talk about trying to adjudicate some legal
15 issues and there may be issues that don't directly
16 affect Colorado, but as a party you may be subject
17 to issue preclusion and it may even affect a
18 different Compact or maybe something that has
19 implications even beyond this litigation because I
20 know Colorado is party to a number of water rights
21 agreements. I just -- I don't know. I'm just --
22 I've struggled with the concept of sort of being
23 in, but being out at the same time. I guess it's
24 your concern about the legal implications in terms
25 of issue preclusion on various issues that may

1 ultimately be determined affect you and this
2 litigation with this Compact or some other Compact
3 or some other litigation as well, but I'm just --
4 I'm trying to get my mind around how exactly
5 Colorado is going to be in, but also be out.

6 MR. WALLACE: Yeah. I certainly
7 sympathize with that conundrum. I find myself
8 asking the very same questions. I agree that there
9 could be impacts to this Compact as well as general
10 Compact interpretation, which we take very much an
11 interest in. I struggle to give you a short and
12 plain answer about enumerating what exactly we're
13 going to be doing here.

14 JUDGE MELLOY: Okay. Well, let me ask
15 just generally, has any discovery actually started
16 yet beyond the depositing documents?

17 MS. BARFIELD: Your Honor, this is
18 Theresa Barfield. Yes, it has started in terms of
19 a robust meet and confer effort over the course of
20 the last month on how depositions are going to be
21 started, continuing issues relative to the deposit
22 of documents into the vault including the sharing
23 of load files and search for ESI data so that we
24 can proceed with the depositions. We do have
25 agreed-upon dates by all counsel to start the

1 depositions of EP1 and EBID of their board members.
2 There's one caveat. We're working on specific
3 dates with respect to EBID, but are looking at a
4 week in mid-December. The notices for EP1,
5 however, are going out this week given the fact
6 that all counsel has now agreed to start day one of
7 these depositions in November. The State of Texas
8 also served Special Interrogatories on the State of
9 New Mexico and Request for Production of Documents
10 in addition to the documents that have been
11 uploaded to the Veritext Vault are in progress and
12 anticipated to be served today or tomorrow at the
13 latest.

14 JUDGE MELLODY: All right. Let me ask the
15 parties and the amici, have you had any problems so
16 far with the case management order? I know it's
17 pretty early in the process. Any obvious problems
18 arisen yet or is it workable so far?

19 MR. SOMACH: This is Stuart Somach for
20 Texas. I think there have been some issues -- and
21 perhaps the United States can address it -- with
22 respect to the initial document production. In the
23 context of that discussion I want to talk a little
24 bit about some timing issues associated with our
25 obligations and let me just shorthand that by

1 saying we have got to produce our expert reports in
2 February. There's been some delay in uploading
3 some of the United States' initial documents, which
4 is understandable, but they'll have to explain to
5 you. Plus, the case management plan provides when
6 we make a document request that the parties have 90
7 days to respond. What we're finding is because we
8 don't know what the initial document production was
9 in its entirety and won't know, even if we were to
10 put out our document requests today the production
11 wouldn't be for 90 days, which presses us in terms
12 of being able to allow our experts to take a look
13 at those documents and incorporate them or
14 contemplate them in their reports. There's kind of
15 a dislocation of timing. When the case management
16 plan had a -- certainly I'm not complaining about
17 the timeline for the total case, but some of the
18 internal dates are expanded over what is in the
19 Rules of Civil Procedure which bumps very close or
20 right on top of our requirements in terms of expert
21 report disclosures. I think it is a problem. I
22 would hate to do expert reports and then have to
23 supplement them because that will mean an extra
24 round of depositions on the supplemental issues.
25 Perhaps we can talk a little bit about that

1 dislocation in the context -- among other things --
2 of the United States' document production.

3 JUDGE MELLOY: Are you basically
4 suggesting that we shorten that to something like
5 60 days? I believe that's paragraph 7.3.

6 MR. SOMACH: Yeah. It would be a
7 shortening up and it would be commensurate with the
8 dates we have to produce our expert report. I
9 don't know if 60 days -- What's in the rule? I
10 can't recall.

11 UNIDENTIFIED SPEAKER: Normally it's a
12 30-day.

13 MR. SOMACH: Yeah. Somewhere -- you
14 know, even suggesting perhaps 60 days is long, but
15 somewhere between the 30 in the rule and maybe 45
16 days would then get us what we need so that we can
17 incorporate those -- our experts could incorporate
18 that information within the expert reports.

19 JUDGE MELLOY: Okay.

20 MR. DUBOIS: Your Honor, this is Jim
21 Dubois for the United States. That is a proposal
22 that is going to be fairly impossible for the
23 United States to meet as far as pushing -- for
24 instance, just on ESI information, we are trying to
25 come to an agreement on terms for ESI searches.

1 JUDGE MELLOY: ESI is what?

2 MR. DUBOIS: Electronically stored
3 information. Obviously we have a lot of computers
4 to search, a lot of places to search. There is
5 essentially -- having talked to our tech people,
6 shortening the request for production to 30 or 60
7 days is simply going to require us to be filing
8 extensions or protective orders or something.
9 That's not going to be possible.

10 As far as getting our documents out, we have
11 currently loaded about -- through the end of
12 October it will be about 26,000, 27,000 documents,
13 137,000 pages. We have more that we are in the
14 process of processing, scanning, reviewing, Bates
15 numbering and uploading and we expect that to
16 hopefully be finished by the end of November, but
17 giving us a date that's impossible is not the best
18 solution here. I think that between the ESI and
19 the other document issues raised by Mr. Somach the
20 real issue here is the expert date. I mean, if we
21 gave them another 150,000 pages of documents and
22 multiple gigabytes of ESI two weeks before the
23 expert witness reports are due, you can't actually
24 convince me that they have the ability to process
25 and use that for purposes of their expert reports

1 in two weeks. I would be surprised if they could
2 do it in six. I think that while it's nice to talk
3 in theory about we'll just shorten this thing down
4 to 40 or 60 days for producing all this
5 information, there is a lot of information and I
6 think probably the more realistic approach is in
7 conjunction with the legal issues that we haven't
8 gotten to yet. It may implicate moving the expert
9 witness -- the February 1 expert witness date and
10 possibly the rest of the dates as a consequence of
11 that. You can try and teach the horse to talk, but
12 it's not likely to actually work. You can't expect
13 the impossible from the federal production.

14 JUDGE MELLOY: The argument that you just
15 made, Mr. Dubois, pretty much makes the argument
16 that Mr. Roman made at the hearing in Denver; that
17 Texas -- and to the extent I at least in part
18 adopted their recommendation -- as being too
19 aggressive in how quickly this case can get ready
20 for trial.

21 MR. DUBOIS: I concede, Your Honor, that
22 it has taken perhaps longer than initially
23 anticipated to get some of these preliminary
24 matters in place. I mean, we've had a number of
25 meetings regarding the ESI stipulation and trying

1 to get that in process. The depositions -- I mean,
2 we've -- it's not for lack of diligence in trying
3 to make this get moving. It's just that it has
4 been somewhat more difficult than perhaps was
5 anticipated by some parties. As you know, I wasn't
6 at the August hearing. I apologize for that.
7 At the end of the day I think to some degree at
8 least the -- whether the overall spacing of the
9 dates changes much is a different question than
10 whether or not the initial dates get pushed, the
11 disclosure of the expert witnesses and I think
12 probably all the commensurate dates after that get
13 pushed 90 days.

14 MR. RAEL: Your Honor, this is Marcus
15 Rael on behalf of the State of New Mexico. This is
16 why we made the point that we made in Denver when I
17 brought this up. This case is not like other
18 complex litigation cases. It's just too
19 data-driven and there's too much information and
20 that's all we were arguing and now I'm glad that
21 the United States is considering that maybe we were
22 correct that the dates that Texas proposed were
23 just too close together. We strongly support the
24 United States in this and, that is, that the expert
25 witness dates need to get moved back and then all

1 the commensurate dates, as Mr. Dubois just said,
2 need to get pushed back as well. There's just too
3 much information to process that quickly.

4 MR. DUBOIS: Your Honor, this is Jim
5 Dubois. As you noted, this case ends up -- because
6 of the nature of the issues -- with a lot of older
7 documents, stuff that is not necessarily just in
8 the computer systems already. There's a lot of
9 gathering the physical documents and then needing
10 to convert all of those paper documents to
11 electronic format that can be loaded into the
12 Veritext Vault. That is part of the delay in
13 gathering -- or the time consumption in gathering
14 and processing all those documents and then
15 reviewing them.

16 JUDGE MELLOY: All right. Mr. Somach,
17 what is your response to all this?

18 MR. SOMACH: Well, you know, I hear what
19 the United States is saying and what New Mexico is
20 saying and I think my response is the same as my
21 response in Denver. I don't know what -- You know,
22 we've been at this for a long time. We uploaded a
23 great -- a lot of data because that's the nature of
24 this case. What our problem is now, of course, is
25 that if they don't produce, it puts us under a bind

1 because we need their production in order to do our
2 work. We've done what we can do on our own and we
3 anticipated being able to take depositions and get
4 this document production done in a timely manner.
5 Our original proposal was a little bit longer than
6 what the case management plan has and our internal
7 dates were much shorter, so there is a compression
8 that the case management plan creates that
9 exacerbates, I think, what New Mexico and the
10 United States are saying, but -- I mean, I have to
11 take them at their word. If they need more time, I
12 don't know what to do because we're dependent upon
13 their production in order for us to do what needs
14 to be done. I'd like to keep any delay or any
15 change at a minimum. I think it's a combination
16 perhaps of, as they suggest, moving dates, but also
17 shortening production periods and that the two of
18 those things together perhaps could keep us closer
19 to a trial date like the one that's in the case
20 management plan. We are somewhat dependent. We
21 also -- I'll just throw this out again, although I
22 know that you've rejected it once. We did propose
23 also simultaneous expert reports which would have
24 the effect of accommodating a longer period of time
25 at the front end here before expert reports needed

1 to be filed. If that assisted -- well, maybe it's
2 a combination of all of those things; moving some
3 dates, compressing production dates and something
4 like simultaneous expert reports. All of those
5 things together could keep us at the end of the day
6 at a date closer to what you had ordered in terms
7 of the case management plan for a trial date, but
8 that's -- that's my reaction to what I heard.

9 JUDGE MELLOY: Let me go back to
10 Mr. Dubois for a minute. You had said that 60 days
11 on production is just impossible. Could you expand
12 on that? I understand why the initial production
13 is going to be difficult given the volume of
14 documents, but assuming -- and maybe I shouldn't
15 assume this -- but assuming Texas or New Mexico
16 give you fairly targeted requests for production --
17 because if you're going to produce hundreds of
18 thousands of pages already --I'm hoping it isn't
19 another 150,000 pages on top of that -- but
20 assuming it's fairly targeted production, why
21 should it take more than 60 days to respond to such
22 a production?

23 MR. DUBOIS: Your Honor, I'm sorry. I
24 probably wasn't clear. What I was referring to as
25 far as impossibility would be a 60-day production

1 on all the ESI. That is a laborious process for us
2 to go through all of the hardware that has to be
3 tracked down and scrubbed for electronically stored
4 information. That is actually what I was referring
5 to as far as we can't do that. I mean, we won't
6 physically be able to do that. Once we have our
7 initial production done, then, yeah, I don't think
8 that the 60 days is a problem. Hopefully we'll
9 have that done by the end of November. Obviously
10 there are things that I can't control, but that is
11 certainly the goal. After that I would think that
12 if document production was targeted -- and there's
13 a large if there -- but if it was targeted, then 60
14 days on that would not be a problem because it
15 would be presumably a small amount beyond the
16 pretty large network of documents that we're
17 gathering and producing.

18 With respect to the expert witnesses, what we
19 actually anticipate, Your Honor, or what we had
20 anticipated was that our -- some of our technical
21 experts would be opining to the extent that we
22 use the -- Let me back up a second. Part of our
23 production is a USGS hydrologic model of the basin
24 below Elephant Butte Dam and we've produced close
25 to 100 gigabytes of data and report files. At this

1 point that is the only model which has been
2 disclosed or has any production on. We have
3 anticipated at some point having Texas' model,
4 which has not yet been produced, as part of what we
5 would be having expert witness testimony on.
6 Texas still has some supplementation to do as well.
7 Pushing the February 1st date disadvantages a
8 number of people, including us. But as far as once
9 we --

10 JUDGE MELLOY: Did you say --

11 MR. DUBOIS: Once we've gone through the
12 documents of hundreds of thousands of pages, I
13 would think that we can make 60-day productions.

14 JUDGE MELLOY: Did you say moving the
15 February 1 date would disadvantage or advantage
16 you?

17 MR. DUBOIS: Excuse me. I meant keeping
18 to the February 1st date would disadvantage us.

19 JUDGE MELLOY: Oh. Okay. Are you
20 anticipating using in-house experts? Will the
21 folks from the Geological Survey Division also
22 opine on the model?

23 MR. DUBOIS: We haven't determined that
24 yet. If we use the USGS model, it is possible that
25 the GS folks would testify simply as to the

1 structure of the model. They would not be doing
2 significant runs to say, "If you make these
3 assumptions versus these assumptions, it produces
4 this kind of result." To the extent that we are
5 using in-house experts, it might go to some other
6 issues depending on what survives the motions for
7 judgment on the pleadings and things like that.
8 We do have consulting experts that would be opining
9 on whatever hydrologic model is available and the
10 predicted impacts of pumping on the project water
11 supply in the Rio Grande.

12 JUDGE MELLODY: I mean, is that going to
13 be the main issue in the models, do you think, is
14 what affect does groundwater pumping have on the
15 water in the river?

16 MR. DUBOIS: It is going to be an issue,
17 Your Honor. Until we have all the models, until we
18 know ultimately what New Mexico's case is and
19 whether they are going to allege or have their own
20 model to allege that, no, pumping really isn't
21 sucking water out of the river, that is difficult
22 to fully assess. The hydrology and the impacts of
23 groundwater pumping on the water supply of the Rio
24 Grande Project will be an issue and will be the
25 subject of modeling.

1 JUDGE MELLOY: And does either Texas or
2 New Mexico know at this point whether your models
3 are going to be substantially different from the
4 USGS models?

5 MR. SOMACH: This is Texas and the answer
6 to that question is it is -- the answer is yes.

7 MR. RAEL: This is Marcus Rael
8 representing New Mexico and the answer is, yes,
9 ours will be substantially different.

10 JUDGE MELLOY: So there's no reasonable
11 likelihood that you could agree upon a model and
12 then fight over the imports. It's going to be both
13 fighting over imports and fighting over the model
14 itself. Is that a fair assessment?

15 MR. RAEL: Yes, Your Honor.

16 MR. DUBOIS: This is Jim Dubois. I'm not
17 sure. It's possible that the models in all of the
18 various structures may have similar answers that
19 are more dependent on input assumptions than on
20 model structure, but until we've got everything we
21 really won't know.

22 JUDGE MELLOY: So how soon will Texas
23 know what its model looks like? I mean, you had
24 pretty much represented when we were in Denver,
25 Mr. Somach, that you were ready to go on that issue

1 or at least that was my understanding.

2 MR. SOMACH: Yes. I know what our model
3 looks like and we are looking -- from a model in
4 and of itself we're ready to go. I didn't
5 understand exactly Mr. Dubois' statement about
6 producing a model or supplementing production. It
7 will be part of our expert report assuming we do
8 February or if it's delayed, whenever we delay it.
9 That model will be laid out there in an expert
10 report.

11 The USGS model is quite a different animal in
12 many respects from the models that I think we'll
13 produce and New Mexico will produce. It was
14 produced for a wholly different purpose by the USGS
15 and may or may not lend itself to the litigation.
16 We've certainly reviewed it. We have our views of
17 that model as I know New Mexico does. I do think
18 it's a bit of a different animal than the ones that
19 either New Mexico and the United States will
20 utilize and produce as part of this case. We've
21 got a model. We're moving towards finalization of
22 that model right now and, as importantly, the
23 expert report that will emanate from the model once
24 done. The answer is yes. Some of the inputs to
25 the model as we run different scenarios are part

1 and parcel of work being done by other experts and
2 some of that work is a bit dependent upon what we
3 discover through the written production and the
4 depositions that we'll take of witnesses between
5 now and the time that our expert reports are done.
6 The fundamental modeling has been done. The model
7 has been created and it's a matter of now doing
8 what needs to be done in order to come up with an
9 expert report associated with the model.

10 JUDGE MELLOY: Have the parties disclosed
11 the names of their experts? Does everybody know
12 who everybody else's experts are?

13 MR. SOMACH: No. That hasn't been done.
14 I think under the case management plan I understood
15 it to be done at the time -- the disclosure of
16 expert and expert reports for the United States and
17 Texas would be the February date and then July for
18 New Mexico.

19 JUDGE MELLOY: How many experts has Texas
20 retained?

21 MR. SOMACH: More than we're going to
22 disclose, but I'm thinking -- I've done this count
23 before. We will probably have about 10-plus
24 perhaps, but 10 is a good round number of experts
25 that we will disclose and reports that we will

1 provide.

2 JUDGE MELLODY: And the experts -- I think
3 we talked about this in Denver -- you'll have
4 probably one on history; is that right?

5 MR. SOMACH: Well, history we may or may
6 not and that report will depend a little bit on
7 what you decide with respect to these legal issues
8 because to the extent history at least relates to
9 what the Compact means, if the Compact is not
10 ambiguous that report looks quite different than if
11 you determine that there is ambiguity and that
12 decision has not been made already by the first
13 Special Master and the Court. Let's say history of
14 some type. We have the modeling expert, the model
15 itself, plus we have all the various inputs which
16 include agronomy which includes consumptive use,
17 there's urban consumptive use issues that have
18 experts associated with it, there are water quality
19 issues both in terms of the water, soil, trees
20 experts. I'm trying to think of what else. Those
21 are the major areas that we'll be looking at.
22 There are some operational issues about how the
23 reservoir -- how the system operates that -- and
24 some of that is historic, some of that is ongoing.
25 Then, of course, we have economic and damage

1 experts to testify. I think when you add that up,
2 you get around 10, more or less, reports as part of
3 our presentation. I assume that's the same with
4 the other parties too.

5 JUDGE MELLOY: I assume New Mexico,
6 Mr. Rael, would have about the same?

7 MR. RAEL: Yes, Your Honor. A similar
8 amount for sure.

9 JUDGE MELLOY: Are you going to have an
10 expert -- I know one of the issues you've raised is
11 the maintenance of the reservoir -- I guess that
12 would be a way of putting it -- that water is being
13 consumed by the allowance of vegetation growth and
14 that -- basically just that the reservoir is not
15 being maintained properly. Are you going to have
16 an expert on that too?

17 MR. RAEL: Are you talking to New Mexico,
18 Your Honor?

19 JUDGE MELLOY: Yes. I mean, that's the
20 issue you've raised, isn't it?

21 MR. RAEL: Yes. We anticipate doing
22 that. That's one of the issues we've raised, as
23 you said.

24 MR. DUBOIS: Your Honor, this is Jim
25 Dubois. I think that Mr. Rael is misspeaking. It

1 is not about maintenance of the reservoir. It is a
2 claim that the United States -- I believe the claim
3 is that the United States has not met its alleged
4 responsibility in maintaining the river down below
5 the reservoirs.

6 JUDGE MELLOY: Well, I thought it was the
7 reservoir itself, but I may be wrong. Maybe it's
8 both.

9 MR. RAEL: Your Honor, Mr. Dubois is
10 correct. We're talking about the growth that was
11 allowed to propagate the output, the flow of the
12 river.

13 JUDGE MELLOY: Okay. All right. Well,
14 let me say this. We've talked about this for quite
15 a bit. Let me take a look at the schedule again,
16 but I will -- at a minimum I'm going to shorten up
17 the response time on production of documents for
18 all parties and amici to 60 days. That affects at
19 least paragraphs 7.2 and 7.3 of the case management
20 plan. It may affect other paragraphs. I'll have
21 to go through it and make sure that hopefully we
22 don't create an inconsistency. I know at least
23 those two paragraphs will be impacted by that
24 change. We'll take a look at that and try to
25 figure out what to do with the schedule and get out

1 a revised case management plan accordingly. All
2 right. Then I guess --

3 MR. DUBOIS: Your Honor, this is Jim
4 Dubois. That may actually segue to your number 4.

5 JUDGE MELLOY: That's just where I was
6 going. Go ahead.

7 MR. DUBOIS: I'm sorry, Your Honor.

8 JUDGE MELLOY: No. Go ahead.

9 MR. DUBOIS: I was just going to suggest
10 that this was probably a good place to talk about
11 those issues and setting up a schedule and how that
12 schedule maybe reflects on the initial disclosure
13 for experts as well.

14 JUDGE MELLOY: Let me just say, one of
15 the reasons I put that into the -- or on the agenda
16 for today is as I got -- after getting back from
17 Colorado and thinking about this issue further, two
18 problems came up in my mind with my trying to frame
19 the issues that I wanted you to brief. The first
20 and maybe most obvious is that I've only been in
21 this case a few months and you've been in it for
22 four years and you've done all the briefing of the
23 Supreme Court and you know all the issues I think
24 or should maybe as well as I do. Secondly, and
25 maybe most importantly, I was concerned that if I

1 said I thought an issue needed to be briefed that
2 one side or the other may take that as an
3 indication that I've already indicated that there's
4 some -- that I've made up my mind on it or that
5 just the fact that I've identified an issue that
6 the Supreme Court may or may not have decided was
7 something that I've already decided they did decide
8 or didn't decide, however you want to put it. I
9 think the better approach in my mind is -- what
10 would be the normal adversarial way of doing
11 something is the party that feels -- if it be New
12 Mexico's counterclaims or adjudication of law
13 points, motions for partial summary judgment, file
14 a motion to that effect, brief it and then let the
15 other side respond. I guess I would be more
16 comfortable with going about it that way. Having
17 said that --

18 MR. SOMACH: Can I --

19 JUDGE MELLOY: Go ahead.

20 MR. SOMACH: I'm sorry, Your Honor. I
21 didn't mean to -- I had a question. You know, the
22 first thing is I re-read the transcript and I think
23 that what you're suggesting now, upon reflection I
24 may have suggested to you to do it the other way
25 and I apologize for that. I think the way you're

1 proposing now is the right way to go about it. I
2 had really kind of thought there were two -- I
3 would have bifurcated this a little bit. I thought
4 that the first step would be to letter brief the
5 question of what the parties think has been decided
6 versus what has not been decided. I'll explain why
7 I think that that would be an appropriate way to
8 proceed. My thought there was something like
9 simultaneous letter briefs, the parties' view of
10 what had been decided and what had not been decided
11 in the context of the motions to dismiss with a
12 fairly short turnaround, something like 30 to 45
13 days, of simultaneous briefing with a maybe 15 to
14 30-day reply. The reason I suggest that is a
15 little different than the substantive briefing that
16 would go into a motion for summary judgment or
17 partial motion for summary judgment. All of the
18 issues -- for example, the Texas (inaudible)
19 resolved by the Court have been fully briefed and I
20 would just hate to repeat all of that briefing all
21 over again because -- The issue is a little
22 different. It's what has and what hasn't been
23 decided by the Court. We'd have you then take a
24 look at that and make a decision on those briefs.
25 Then to the extent that you determine that issues

1 have not been decided, then the parties can decide
2 if they want to file a Rule 56 Motion or some other
3 motion to address the substance of issues that you
4 determine have not been decided. I look at the
5 first issue as more of a procedural issue with some
6 procedural substance to it, but more a procedural
7 question of what has and hasn't been decided. And
8 then, of course, with what has not been decided it
9 would be more of a traditional substantive briefing
10 under the Rules of Civil Procedure, Rule 56, or
11 whatever appropriate other motion would be needed.
12 Anyway, I'll stop there. That would be -- what I
13 would propose doing is separating the two out
14 starting with a question of what has and hasn't
15 been decided, which is more of a procedural
16 question, what is the law of the case, what is not.
17 And then once you make a determination on that,
18 anything residual would be up to the parties to
19 decide whether they want to brief it now or not.

20 JUDGE MELLODY: Well, the question I have
21 about that is I would be potentially deciding what
22 had been decided in somewhat of a vacuum. I mean,
23 I'm trying to think of an issue that maybe -- Let's
24 just take this as an example. I know one of the
25 disputes -- I think -- is the statement in the

1 Supreme Court opinion about who controls the water
2 after it leaves the Elephant Butte Reservoir.
3 New Mexico, I believe, takes the position they do.
4 There's at least language in the opinion upon which
5 one could argue that maybe the United States does.
6 Assuming that issue was decided one way or the
7 other that either the Supreme Court did or did not
8 decide that issue, then I have to -- then don't we
9 have to do round two as well? So what? How does
10 that affect the lawsuit? Maybe I'm not
11 articulating it very well, but -- I'm not sure -- I
12 mean, at the end of the day don't we have to tie a
13 resolution of an issue by the Supreme Court to a
14 specific defense or claim that's made by Texas or a
15 defense or counterclaim made by New Mexico?

16 MR. SOMACH: Yes. I do think so, but I
17 think that it follows -- I think that it follows
18 from the determination of what has been decided and
19 what hasn't been decided. Let me give you the
20 example. The example is if, as New Mexico
21 argued -- I don't want to get into the substance of
22 argument, but if delivery means delivery into the
23 reservoir and that New Mexico cannot take that
24 water back once it's released from the reservoir,
25 then the litigable issue is are they doing that or

1 are they not doing that? If they are doing it, is
2 it causing harm or is it not causing harm? The
3 threshold question, which, of course, we believe
4 has been decided, is is it our obligation under the
5 Compact to deliver and refrain from the pleading
6 post-1938, the (inaudible) for the reservoir? It
7 means a lot. We've got to know the answer to that
8 question. We have to know the answer to the
9 question, that is, has that been decided or not
10 decided, right down to whether or not -- what do
11 the expert reports look like and what do they
12 analyze? Those are all threshold questions that at
13 least Texas had assumed had been resolved by the
14 first Special Master and the Court. If they
15 haven't, it will change the complexion greatly of
16 what the factual component of the case is. If the
17 Compact is ambiguous -- and we believe the Court
18 has determined it is not ambiguous -- then there's
19 a whole universe of factual information that has
20 got to be produced and dealt with in this
21 litigation that we have not contemplated having to
22 produce or to deal with because of our view of what
23 had been already decided in the case. I'm not sure
24 that I'm being any clearer, but that's -- the
25 fundamental problem is that at some point we've got

1 to decide what has been decided and what is no
2 longer open for dispute and what is still open for
3 dispute or we're kind of adrift in terms of what
4 we've got to produce through trial.

5 MR. RAEL: Your Honor, this is Marcus
6 Rael on behalf of the State of New Mexico. We have
7 90 years of history here. This is a very complex
8 case. Mr. Somach is correct. I mean, I don't
9 agree with him. I'm not agreeing with him, but
10 he's correct in saying that we are a little adrift
11 and we don't know what we're going to produce, but
12 that's the whole point of discovery. I've come to
13 the opinion that resolution of these issues is best
14 addressed in the standard process and schedule for
15 dispositive motions. As I argued in Denver, there
16 has to be full factual development in this case of
17 the record and that that's necessary and the Court
18 has been clear that it favors full development of
19 cases as well. And also, Your Honor, you made it
20 clear in Denver that you don't want to litigate
21 this case on a piecemeal basis. I think that this
22 may be best addressed by allowing the case to
23 proceed in its natural course and Mr. Somach isn't
24 adrift in the sense that he won't know what to
25 produce because he'll be getting our discovery

1 request and at that time he'll know what to produce
2 and vice versa and at that time when we feel like
3 something needs to be addressed by the Court, we
4 can file the dispositive motions just through the
5 natural standard process.

6 JUDGE MELLOY: Well, I guess that goes
7 back to why I put this item on the agenda. My
8 feeling is that I don't want to preclude either
9 party from asserting its position. If Texas feels
10 that an issue has been resolved and they don't need
11 discovery on it and it's the law of the case, I
12 think they have every right to file a motion to
13 that effect and you can resist it, Mr. Rael, and
14 you can make the argument that you just made, that
15 it needs further factual development. I guess I
16 don't want to be telling people what they can and
17 cannot file and necessarily when they should and
18 should not file it. What I would rather do is just
19 let Texas file a motion and if it believes that an
20 issue has been resolved by the Supreme Court or
21 it -- you know, it could have been resolved some
22 other way because -- you're more familiar with the
23 briefing than I am, but I have read the briefs
24 and -- you've been doing this for four years, so
25 you know better than I do exactly each party's

1 position. I think, if I understand correctly,
2 Mr. Rael, that New Mexico has changed their
3 position a little bit on whether or not it has an
4 absolute right to do whatever it wants with the
5 water once it leaves the reservoir. Am I correct
6 in that?

7 MR. RAEL: Well --

8 JUDGE MELLOY: In your briefing to the
9 Supreme Court I think you have shifted positions a
10 little bit. Am I wrong?

11 MR. RAEL: Your Honor, you're correct in
12 the sense that we have shifted positions a little
13 bit, but it was never really -- that was never
14 really exactly what we were saying in the brief,
15 but, yes, Your Honor.

16 JUDGE MELLOY: I thought that the whole
17 genesis of the motion to dismiss was that once the
18 water left the reservoir that you had basically
19 unfettered control over it and, therefore, the case
20 should be dismissed. That's what I'm saying. It
21 may be that the briefing that was made to the
22 Supreme Court may also result in a decision that
23 certain issues are no longer ripe issues. I don't
24 know if I'm --

25 MR. RAEL: Your Honor, what our brief was

1 addressing was Texas' misinterpretation of what
2 New Mexico was required to do and also whether or
3 not the Compact should apply and nothing else. I
4 just wanted to clarify that. What we were
5 addressing was what we felt to be a
6 misinterpretation by Texas.

7 MR. SOMACH: Your Honor, this is Stuart
8 Somach for Texas. I'm comfortable with proceeding
9 as you have suggested. We will file a motion.
10 My assumption is that the normal motion practice
11 applies so that we'll use the Rules of Civil
12 Procedure time periods. We're more than
13 comfortable in terms of filing a motion on these
14 issues.

15 MR. RAEL: Your Honor, this is Marcus
16 Rael. I would just add that because we're going to
17 be dealing with discovery and these motions --
18 whether we're filing them or Texas may be filing
19 them, whoever may be filing them -- all at the same
20 time and we have limited resources, I would ask
21 that we be allowed a little longer than the normal
22 motion practice time because this case and the
23 motions and all the documents and data are so
24 complex. I think we're going to need a little bit
25 longer than the normal -- than the Federal Rules of

1 Civil Procedure allow.

2 MR. SOMACH: Your Honor, these are just
3 legal issues. We'll be at this well beyond my
4 lifetime. If at a certain point in time -- The
5 Rules of Civil Procedure have a motion period in
6 them. We're dealing with legal issues. Moreover,
7 we're dealing with issues that have been briefed
8 and rebriefed, argued and decided by the Court.
9 Why we need more and more time I simply don't
10 understand. We would propose using the normal
11 motion time periods.

12 JUDGE MELLODY: Just hold on a second.
13 I'm looking at the Rules of Civil Procedure and I'm
14 trying to see if there is a time frame in the
15 rules. Rule 56 doesn't set a time for response.

16 MR. SOMACH: They're local rules usually.
17 I'm referring to our local rules here.

18 JUDGE MELLODY: Yeah. Usually it's done
19 by local rule or by Court Order. Let me say this.
20 I don't want to cut you off, Mr. Rael. Did you
21 want to say something else?

22 MR. RAEL: No, Your Honor, other than
23 that the practice in this case thus far has been --
24 because of the complexity -- has been that we have
25 a little longer than the normal Rules of Civil

1 Procedure allow.

2 JUDGE MELLOY: Okay. Well, I'm going to
3 wait until the motions are filed and then I'm going
4 to set a briefing schedule and I'll take a look at
5 how complex the motions are and how many issues
6 there are and then I'll set a briefing schedule and
7 probably a date for oral argument if they look to
8 be the type that would require oral argument. All
9 right?

10 MR. RAEL: That's fair, Your Honor.

11 JUDGE MELLOY: Anything else?

12 MR. DUBOIS: Your Honor, are you going to
13 set a time for the filing of motions?

14 JUDGE MELLOY: No. Again, I think I'm
15 going to let the normal litigation process work.
16 I think that's up to Mr. Somach. If he wants to
17 file it in 30 days, file it in 30 days. The Rules
18 of Civil Procedure only require that you file it no
19 later than 30 days before the close of discovery,
20 which is --

21 MR. DUBOIS: More than 30 days. Well
22 more than 30 days at this point, Your Honor.

23 JUDGE MELLOY: So whenever -- I think
24 it's up to them as far as when they get it on file.

25 MR. DUBOIS: The reason I ask, Your

1 Honor, is because -- we may or may not be able to
2 join in their motion, but we also have -- I think
3 it came up at the August conference that the United
4 States feels that there's some issues regarding the
5 pleadings that we can probably deal with by a
6 motion as well, although we have a little longer
7 internal consultation process.

8 JUDGE MELLOY: All right. Well, again,
9 try to get them -- why don't you try to coordinate
10 with Mr. Somach to maybe try to get them both on
11 file relatively close to each other so we can set
12 up a more or less common briefing schedule and a
13 common date for oral argument.

14 MR. DUBOIS: Which is sort of why I was
15 trying to see if there was a timeline. We will
16 work with Mr. Somach and see if we can get them
17 pretty proximate.

18 JUDGE MELLOY: All right. Very good. I
19 think that pretty well covers the items I had on my
20 agenda. Anything else the parties need to discuss
21 at this point?

22 MR. SOMACH: You had put down future
23 telephone and in-person conferences.

24 JUDGE MELLOY: Yeah. I was just thinking
25 of that. I just grabbed my calendar here. I'm

1 going to schedule the next telephonic conference
2 for about five or six weeks and hopefully we'll
3 have a pretty good idea then about the motions and
4 maybe then the in-person one would be both
5 scheduling and a motions hearing. Let's see.
6 (Perusing Calendar.) We're at the end of October
7 right now or close to the end of October. How does
8 the end of the week of December 10th look? I'm
9 sitting up in St. Paul the first three days of that
10 week, but I'm open pretty much all day Thursday and
11 Friday, the 13th and 14th. Anybody object to doing
12 it on Friday, the 14th, and we do it -- maybe since
13 it's a Friday I'll do it in the morning about 10:00
14 our time, 9:00 your time? I guess if you're in
15 San Francisco, it would be 8:00. I'll make it
16 11:00 our time. Does that work for everybody?

17 MR. SOMACH: That works for Texas, Your
18 Honor.

19 JUDGE MELLOY: Hearing no objections I'll
20 set it for December 14th at 11:00 a.m. Central
21 time. At that point I'll then probably schedule
22 the next one for in-person. Anything further at
23 this point? Oh. And let me just say this. Unless
24 something really major comes up in the next week, I
25 think we can skip filing the November 1 status

1 report. I think we probably have talked about
2 everything that you would have put in that report
3 in any event, haven't we? Unless some real serious
4 issue comes up, I'll ask that the next status
5 report be filed around December 1st so that we
6 have -- in anticipation of the December 14th
7 hearing. All right? Any questions?

8 MR. BROCKMANN: Special Master, this is
9 Jim Brockmann. Just one question or clarification.
10 That is whether we had a court reporter today or a
11 transcript is available or will be?

12 JUDGE MELLOY: Yes and yes to both.

13 MR. BROCKMANN: Thank you.

14 JUDGE MELLOY: I'm planning to have a
15 court reporter for every one of these hearings. If
16 for some reason I don't, which I would not
17 anticipate happening, I'll let you know. All
18 right? Then if there's nothing else, thank you
19 everyone. Talk to you later.

20 (The conference concluded at 3:26 p.m.)

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CERTIFICATE

I, Shannon N. Benter-Moine, Certified Shorthand Reporter and Notary Public of the State of Iowa, do hereby certify that, on the 25th day of October, 2018, at Cedar Rapids, Iowa, that I reported in shorthand the above teleconference, reduced the same to printing under my direction and supervision, and that the foregoing transcript is a true record of all proceedings.

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

IN WITNESS WHEREOF, I have set my hand and seal this 20th day of November, 2018.

/s/ Shannon Benter-Moine

Certified Shorthand Reporter
and Notary Public

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