

NO. 141 Original

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In The

SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF AUGUST 27, 2021, REMOTE  
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL  
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH  
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at  
11:01 a.m.

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1                   **JUDGE MELLOY:** Good morning. This is  
2 Judge Melloy. Let's get started in connection with  
3 our hearings. In the matter of State of Texas versus  
4 State of New Mexico and State of Colorado, United  
5 States Supreme Court Original No. 141. We'll start by  
6 taking the appearances. Mr. Somach, do you want to  
7 enter the appearances for the State of Texas?

8                   **MR. SOMACH:** Yes, Your Honor. This is  
9 Stuart Somach, lead counsel for the State of Texas.  
10 With me from my law office are Theresa Barfield, Sarah  
11 Klahn, Francis Goldsberry, Robert Hoffman, Rich  
12 Deitchman. From the Texas Attorney General's Office,  
13 Priscilla Hubenak, and then, also with us is Bobby  
14 Skov, the Texas Rio Grand Compact Commissioner, and  
15 Suzy Valentine, his engineer advisor.

16                  **JUDGE MELLOY:** Okay. Mr. Wechsler, you  
17 on for New Mexico?

18                  **MR. WECHSLER:** Yes, Your Honor. Good  
19 morning. Jeff Wechsler from Montgomery & Andrews for  
20 the State of New Mexico. I also have Kayla Brooks  
21 with me from my office; Cholla Khoury from the New  
22 Mexico Attorney General's Office; Zachary Ogaz, also  
23 from that office; Luis Robles and Susan Barela from  
24 Robles Rael & Anaya; Lisa Thompson and Michael Kopp  
25 from Trout Raley; John Draper and Corinne Atton from



1 Draper & Draper. We have the state engineer and  
2 Compact commissioner Mr. John D'Antonio. We have Greg  
3 Ridgley, the general counsel for the Office of State  
4 Engineer; Arianne Singer, the general counsel of the  
5 Interstate Stream Commission; and Shelly Dalrymple.

6 **JUDGE MELLOY:** And for Colorado,  
7 Mr. Wallace, are you on?

8 **MR. WALLACE:** Yes, good morning, Your  
9 Honor. This is Chad Wallace for the State of  
10 Colorado. Also from the attorney general's office are  
11 Preston Hartman, Dan Rheiner, and Scott Steinbrecher.

12 **JUDGE MELLOY:** United States,  
13 Mr. Dubois?

14 **MR. DUBOIS:** Good morning, Your Honor.  
15 James Dubois for the United States. Also on for  
16 Department of Justice are Judith Coleman, Lee  
17 Leininger, and Jennifer Najjar, and from the  
18 solicitor's office, Chris Rich and Shelly Randel.

19 **JUDGE MELLOY:** Okay. The Albuquerque  
20 Water Utility Authority?

21 **MR. BROCKMANN:** Good morning, Judge  
22 Melloy. This is Jim Brockmann for the Albuquerque  
23 Bernalillo County Water Utility Authority.

24 **JUDGE MELLOY:** Anybody else on for that  
25 -- for the Water Authority?

1                   **MR. BROCKMANN:** I believe it'll just be  
2 me this morning and this afternoon, however long it  
3 takes. Mr. Peter Auh, the general counsel, may join  
4 at some point during the day, but he did have some  
5 other commitments.

6                   **JUDGE MELLOY:** Okay. City of El Paso?

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

10                  **JUDGE MELLOY:** Okay. City of Las  
11 Cruces? Anyone on for the City of Las Cruces?  
12 Mr. Stein, are you here? Apparently not. All right.

13                  **MR. BROCKMANN:** Your Honor, this is Jim  
14 Brockmann. Mr. Stein is on the line for the City of  
15 Las Cruces, along with their utilities director,  
16 Delilah Walsh and Adrienne Widmer.

17                  **JUDGE MELLOY:** Okay. El Paso County  
18 Water Improvement District No. 1?

19                  **MS. O'BRIEN:** Yes, good morning, Your  
20 Honor. Maria O'Brien for El Paso county water  
21 improvement district No. 1. Renea Hicks is also on,  
22 Dr. Al Blair, the district engineer, and Mr. Jesus  
23 Reyes, the general manager for the district, are also  
24 on.

25                  **JUDGE MELLOY:** Okay. Elephant Butte

1     Irrigation District?

2                   **MS. BARNCASTLE:** Good morning, Your  
3 Honor. Samantha Barncastle for the Elephant Butte  
4 Irrigation District, and with me today is Dr. Phil  
5 King.

6                   **JUDGE MELLOY:** I'm sorry. Who did you  
7 say was with you?

8                   **MS. BARNCASTLE:** Dr. Phil King, our  
9 consultant.

10                  **JUDGE MELLOY:** Okay. All right. Thank  
11 you. Hudspeth County Conservation and Reclamation  
12 District No. 1?

13                  **MR. MILLER:** Yes, good morning, Your  
14 Honor. This is Drew Miller on behalf of the Hudspeth  
15 County District.

16                  **JUDGE MELLOY:** Okay. New Mexico pecan  
17 growers?

18                  **MS. DAVIDSON:** Good morning, Judge  
19 Melloy. Tessa Davidson on behalf of New Mexico pecan  
20 growers.

21                  **JUDGE MELLOY:** New Mexico State  
22 University?

23                  **MR. UTTON:** Good morning, Your Honor.  
24 This is John Utton on behalf of NMSU, and I believe  
25 joining me -- I can't tell if it's Scott Field with

1 the general counsel's office, or Scott Brenner, but is  
2 also on the call -- or at the meeting. Thank you.

3 **JUDGE MELLOY:** Southern Rio Grande  
4 Diversified Crop Farmers Association?

5 **MR. OLSEN:** Good morning, Your Honor.  
6 A.J. Olsen on behalf of the Southern Rio Grande  
7 Diversified Crop Farmers.

8 **JUDGE MELLOY:** I might add for the  
9 record, we did get a request from one news  
10 organization to listen in, and we granted that so  
11 there's at least one news organization on the line.  
12 Should be aware of that. Did I miss any of the  
13 appearances? Anyone who's appearing that I missed?

14 (No response.)

15 **JUDGE MELLOY:** All right. Then let me  
16 just start by saying that as I think you-all know, we  
17 had a site visit on Monday and Tuesday of this week,  
18 and I think it went very well. I thought the  
19 information and sites that we did visit were certainly  
20 very helpful for me to get some context of what we're  
21 talking about when we talk about specific ditches and  
22 canals and return flows and drains and so on so forth.  
23 So I -- I thought it was very useful, and I just want  
24 to, again, express my appreciation to all those who  
25 went to, I know, a lot of work to put the visit

1 together. As I said, I do appreciate the work that  
2 went into that.

3 This is kind of down the line a little  
4 bit in what I was going to talk about, but since we're  
5 talking about the visit. You had said you were going  
6 to bring us up to date on the status of the -- of the  
7 drone flyover, Ms. Barfield. Is there anything to  
8 report on that?

9 **MS. BARFIELD:** Yes, Your Honor.  
10 Actually, if you don't mind, I'm going to allow Ms.  
11 Klahn to get you up to date. She's been the person  
12 most involved with the drone issue.

13 **JUDGE MELLOY:** Ms. Klahn?

14 **MS. KLAHN:** Good morning, Your Honor.  
15 The drone flyover is complete down through the -- I  
16 would say the delivery system -- main delivery system  
17 of the El Paso No. 1 district, and those drone videos  
18 have been made available to the parties as part of our  
19 exhibit list, and we are in the process of flying the  
20 rest of the river down to Fort Quitman. I -- I  
21 anticipate, based on what the consultant told us, we  
22 should have those videos early next week, and we'll  
23 provide those immediately, of course, and then we'll  
24 have the whole river from -- from Elephant Butte  
25 Reservoir down to Fort Quitman.

1                   **JUDGE MELLOY:** Okay. Thank you. All  
2 right. Let's take up the motion to continue. As  
3 everyone knows, Texas has filed a motion to continue  
4 and asked for a six-month continuance. Most of the  
5 parties and amici have responded. Some supportive;  
6 some in opposition. Let me, I guess, start by asking,  
7 does anyone on the Texas side want to be heard orally  
8 on the motion to continue?

9                   **MS. HUBENAK:** Your Honor, I'd like to be  
10 heard. This is Priscilla Hubenak with the attorney  
11 General's Office in Texas.

12                   **JUDGE MELLOY:** Go ahead.

13                   **MS. HUBENAK:** Good morning, Your Honor.  
14 May it please the Court, Texas has made a compelling  
15 case for a six-month extension in this litigation that  
16 has been lasting over eight years. This situation is  
17 the very type of situation where the Court can  
18 reasonably exercise its discretion to grant a trial  
19 continuance. This case is highly complex and  
20 technical, and it's very important to three states, to  
21 many citizens of those respective states, and to the  
22 United States, and Texas hired Mr. Somach to be the  
23 lead counsel for this important water law case to the  
24 state, and we now find ourself in the situation where  
25 he may -- he is required to be absent from the

1 in-person trial that is set. First, I want to just go  
2 through the points of our motion, and then I want to  
3 respond to three issues that have arisen in the  
4 responses. His absence from the courtroom is  
5 unexpected and totally unplanned. His unavailability  
6 has really arisen at the 11th hour on the eve of  
7 trial. The six-month extension that we're asking is  
8 minimal compared to the length of time that this case  
9 has been in litigation. Even considering that the  
10 Supreme Court decision in 2018 that allowed the  
11 parties to actually begin the actual litigation part  
12 of the trial, that's three-and-a-half years ago, so  
13 another six months is minimal compared to that. It is  
14 not simple or easy to substitute another attorney in  
15 as lead counsel. There are -- Mr. Somach has lawyers  
16 in his firm that are very competent and knowledgeable  
17 about this case, but, you know, up until a little more  
18 than three weeks ago, no one of them envisioned that  
19 they would be the lead counsel in the courtroom, and  
20 they -- whichever person is going to do that task  
21 needs additional time to work with Mr. Somach to  
22 prepare for that role. Mr. Somach is not only  
23 unavailable to be present in the courtroom, he, for  
24 much of the time, will be unavailable to be involved  
25 in the case at all, so participation even from a

1 distance will be limited for him. It's not just a  
2 matter of him being absent from the courtroom. He's  
3 also going to be forced to be absent from the trial  
4 completely, and with all the preparation and filings  
5 that have gone on in the past few months and the past  
6 immediate weeks, there has not been adequate time for  
7 the Texas team to adjust to this change in  
8 circumstances surrounding this upcoming trial.

9 In sum, Texas will be prejudiced if it  
10 is required to go to trial without its lead counsel.  
11 The responses raised three issues that I want to  
12 address. The first is, much is written in the  
13 responses about the volume of water that New Mexico  
14 may be harmed by this delay, as they refer to it.  
15 What volumes of water Texas or New Mexico will be  
16 harmed is the very disputed facts that are going to be  
17 heard in the trial. Texas filed this lawsuit to  
18 achieve relief for water that it believes it is not  
19 getting. That amount, like the amount stated in the  
20 responses, will be decided by Your Honor, and the  
21 prejudice that Texas is asserting today is not the  
22 lack of water, but the lack of its lead counsel in the  
23 trial.

24 Second, one amici response accuses Texas  
25 of not being serious about reaching a negotiated



1 resolution. We completely disagree with this  
2 statement. It is not appropriate for me to discuss  
3 with the court settlement discussions, but I'm just  
4 going to re-urge that that statement is inaccurate.

5 Building -- third, building upon the  
6 topic of settlement, additional time could be put to  
7 good use. Practically, if the six-month continuance  
8 would be granted, Texas and New Mexico would continue  
9 settlement discussions, and in that vein, if the  
10 continuance is granted, Texas will actually propose a  
11 new mediator who could help facilitate more meaningful  
12 settlement discussions that have occurred in the past.  
13 And, frankly, Your Honor, I'm reminded of your  
14 recommendation of a mediator who was able to settle  
15 the NFL lawsuit. If someone that strong can do that,  
16 we need someone who will bring the parties to the  
17 table.

18 Mr. Somach is the key legal strategist  
19 for the Texas team. The amici El Paso County Water  
20 Improvement District No. 1, the City of El Paso and  
21 its utilities board, and the Hudspeth County  
22 Reclamation District have all relied on Texas to  
23 present its best case to protect their interests and  
24 so on behalf of their interests and the interest of  
25 Texas itself, we respectfully request that the Court

1 exercise its discretion to grant the six-month  
2 continuance for trial. No party wanted to go to trial  
3 faster than Texas wanted to go, but we find ourselves  
4 in a situation where we need additional time for the  
5 trial team.

6 Thank you, Your Honor.

7 **JUDGE MELLODY:** Well, let me ask you  
8 this, Ms. Hubenak. On the settlement issue, and I  
9 don't want to obviously get into the particulars of  
10 settlement discussions, but who are the lead players,  
11 so to speak, on the two sides for purposes of -- of  
12 discussion of -- are you taking the lead on that issue  
13 or how --

14 **MS. HUBENAK:** Your Honor, in the past, I  
15 have not taken the lead on that issue. It's been  
16 really led by Mr. Somach, although I've been -- I've  
17 participated in settlement discussions. I have had  
18 discussions with the New Mexico Attorney General's  
19 Office going forward on settlement discussions. It  
20 would be led by my office, and I anticipate it would  
21 be led by the New Mexico Attorney General's Office, as  
22 well.

23 **JUDGE MELLODY:** What 's your response to  
24 the argument that one of the parties or amici raised  
25 that this is sort of your -- your coming to the table

1 pretty late, that an offer was -- a detailed proposal  
2 was submitted back, I think in June, and it took three  
3 months or two months, whatever, for Texas to even give  
4 a response.

5 **MS. HUBENAK:** Your Honor, I think Ms.  
6 Barncastle and her response on behalf of Elephant  
7 Butte Irrigation District answered that very well.  
8 She pointed out that that was the first substantive  
9 response that we had ever received from New Mexico and  
10 it came at a time when everyone was preparing for  
11 trial and it was a very substantive response, but  
12 there was not sufficient time to respond to that.  
13 Texas has since responded to New Mexico to that offer.

14 **JUDGE MELLODY:** All right. Thank you.  
15 Let me -- let me handle it this way. Is there anyone  
16 who wishes to speak in support of the motion to  
17 continue before I ask if anyone wants to speak in  
18 opposition? Anyone want to be heard in support?

19 **MS. O'BRIEN:** Your Honor, Maria O'Brien  
20 on behalf of El Paso County Water Improvement District  
21 No. 1. I believe you have received our response in  
22 support of Texas' motion for continuance, and I won't  
23 repeat what we said there, but would support  
24 everything that Ms. Hubenak articulated regarding the  
25 compelling reasons to grant a continuance. Ms.

1 Hubenak focused on the ability to use that time for  
2 settlement purposes, which we concur would be a very  
3 valuable use of time. Now, I -- I would note, and I  
4 think probably most, if not all, the lawyers, perhaps  
5 Your Honor, could concur in this, that I have never  
6 been involved in a complex case, certainly a complex  
7 water case, where there was successful settlement  
8 while litigation was simultaneously ongoing. It  
9 simply is not really reasonable or feasible that the  
10 parties would be able to make sufficient progress when  
11 they're grappling with both litigating the complex  
12 issues as well as trying to settle them. So I think  
13 this presents a real opportunity here, as Ms. Hubenak  
14 described.

15 I would note, we also did, in our  
16 response, include a proposal/suggestion of another way  
17 to make use of the need of continuance by Texas, which  
18 is to obtain perhaps some greater clarity on the  
19 parameters that Your Honor has set for the case to  
20 date by providing an opportunity to present those  
21 legal issues to the Court and for the parties to weigh  
22 in on exceptions. So that -- that is also something  
23 that could be done as settlement negotiations  
24 proceeded. As Texas has indicated and is committed to  
25 and, you know, New Mexico can speak for -- for itself

1 on that matter. So, again, we would just strongly  
2 concur on the request by Texas and believe that given  
3 the import of -- of this case, it's -- it's necessary  
4 and that there are opportunities here to make very  
5 good use, valuable use, of the time that Texas has  
6 requested. Thank you.

7 **JUDGE MELLODY:** Let me ask you this,  
8 Ms. O'Brien. What -- what are the issues that you  
9 think the Supreme Court should address right now?

10 **MS. O'BRIEN:** We believe that your --  
11 your two orders, the -- the March, 2020, order  
12 dismissing the counterclaims, as well as the May,  
13 2021, issues addressing what issues relate to  
14 liability under -- under the Compact, we believe those  
15 orders, taken together, define legal issues in the  
16 case and to be tried, and the -- we believe the  
17 counterclaims as against the United States were  
18 dismissed, and we believe that Counterclaim 4 as  
19 against Texas was modified and narrowed with regard to  
20 Your Honor's determinations with regard to summary  
21 judgment. We believe that providing an opportunity to  
22 package those rulings up for the Supreme Court will  
23 enable the Court to weigh in on the issues of the  
24 counterclaims, the scope of those counterclaims,  
25 propriety of those counterclaims, and address Your

1 Honor's determinations on summary judgment regarding  
2 what are the Compact's -- Compact rights and  
3 obligations and how those interface or do not  
4 interface with the counterclaims New Mexico seeks to  
5 bring in this case. I think as you've seen that there  
6 is -- there is a disagreement certainly amongst the  
7 parties and amici about the -- the import of your --  
8 of your rulings and what should or could be set for  
9 trial at this point. I -- I would point to the  
10 responses of New Mexico -- both New Mexico and some of  
11 the New Mexico amici to the Texas motion to continue  
12 where they say that the prejudice -- they would be  
13 prejudiced by granting a continuance because the  
14 operating agreement, the 2000 operating agreement to  
15 which Texas is not a party, would continue to -- would  
16 harm them in the interim. We believe the prejudice  
17 they claim of is actually not a remedy that's  
18 available to them in that case, and that is for Your  
19 Honor to determine that the operating agreement is not  
20 valid and, in fact, that they believe, we think, based  
21 on what they have said, that Your Honor could, in  
22 fact, enjoin the operating agreement and provide water  
23 to them that they think they are entitled to. So we  
24 believe that having an opportunity for the Supreme  
25 Court and then the parties to address the issues that

1 you have determined and, again, how the counterclaim  
2 issues interface with Compact rights and obligations,  
3 that we think is the more narrow issue before Your  
4 Honor here. We do not think that reclamation law  
5 issues or the validity of the operating agreement is  
6 at issue, and that continues to be attempted to be put  
7 at play by New Mexico, and I think that's evident from  
8 the motions in limine, evidence -- evident by the  
9 responses to the -- responses to Texas' motion to  
10 continue. So I think it would provide clarity to the  
11 parties and to Your Honor in terms of what should be  
12 tried, and we believe it would thereby result in  
13 greater efficiency in the long run.

14 **JUDGE MELLODY:** All right.

15 **MR. DUBOIS:** Your Honor, Jim Dubois for  
16 the United States. I'd like to just make one  
17 observation. As you know from our pleadings, we are  
18 not taking a position on the six-month stay, but the  
19 question you raised earlier about the -- the New  
20 Mexico proposal in late June. I would just observe  
21 that -- I would agree that the problem there largely  
22 was timing, and the -- the proposal from New Mexico  
23 was, in fact, substantive, but only a starting point  
24 for very lengthy discussions that would have had to  
25 follow, and with the preparations necessary to get

1 ready for September trial, that was simply not  
2 possible; however, those preparations basically are  
3 done, which changes the dynamics, you know, if for --  
4 for -- if you choose to give the states room to try  
5 and enter into substantive settlement negotiations,  
6 that dynamic has completely changed because trial  
7 preparation should be essentially done. So I just  
8 observe that there is a very different situation from  
9 the timing of the New Mexico proposal to forward from  
10 here.

11 **JUDGE MELLOY:** Thank you. All right.

12 **MR. MILLER:** This is Drew Miller on  
13 behalf of the Hudspeth District. May I have just a  
14 few words?

15 **JUDGE MELLOY:** Yes.

16 **MR. MILLER:** Thank you. Your Honor, we  
17 -- I filed a letter on behalf of the Hudspeth District  
18 in support of Texas' motion.

19 **JUDGE MELLOY:** I've seen it. Yes.

20 **MR. MILLER:** We agree with the points  
21 raised in its motion by Ms. Hubenak today, points made  
22 by the Texas amici, counsel for EPCWID, Ms.  
23 Barncastle. I just want to underscore one thing I  
24 made mention of in my letter very briefly, but I'd  
25 like to underscore it. The Hudspeth District is of



1 very limited financial means. They've had to be very  
2 selective in terms of the extent of my and my law  
3 firm's participation in this matter so -- so the  
4 Hudspeth District and its constituents, you know, we  
5 rely on the State of Texas, counsel for the State of  
6 Texas, and in particular, we've relied on Mr. Somach  
7 to protect our interest. We don't really fend for  
8 ourselves in this case. We rely on -- on counsel for  
9 the State of Texas and Mr. Somach. So I just wanted  
10 to -- to underscore that point in support of the  
11 State's motion.

12 **JUDGE MELLODY:** All right. Thank you.  
13 Who would like to speak, if anyone, in opposition to  
14 the motion?

15 **MR. WECHSLER:** Your Honor, this is Jeff  
16 Wechsler. I won't review the things we've put in our  
17 response. I'm sure you've read it. We're ready to go  
18 to trial. We think that trial should commence  
19 September 13th as scheduled. As we've pointed out,  
20 Texas has quite able counsel. While we're not  
21 unsympathetic to the plight of Mr. Somach's family,  
22 they do have seven other attorneys representing 200  
23 years of experience. They're aligned with the United  
24 States. Their interests will be well protected. If  
25 necessary, Mr. Somach can certainly participate

1 virtually. If -- if experience has taught us  
2 anything, it's that that's possible now.

3 As we indicated in our motion, we're  
4 quite concerned about the delay because the expert  
5 analysis that's been done over the course of the last  
6 couple years shows that New Mexico is being deprived  
7 of at least 94,000 acre-feet per year under the  
8 current status quo. We filed -- we originally filed  
9 in Federal District Court to vindicate those rights.  
10 It's been over ten years, and -- and it's time. It's  
11 time for us to have that done so that the farmers  
12 don't have to go another growing season without that  
13 water so that the municipalities in New Mexico don't  
14 have to continue having this cloud over their title,  
15 and it -- the last reason we pointed out is it's --  
16 it's difficult to reserve three months for trial. It  
17 would be disruptive and costly to try and reschedule  
18 this some time down the line six months from now. A  
19 couple of responses to the things that were raised by  
20 Texas. I don't disagree with Ms. Hubenak that the --  
21 it ultimately is for this Court to determine exactly  
22 how much water New Mexico is being deprived, but our  
23 point is, it's not fair for New Mexico to bear that  
24 burden of this delay, which is what we think would be  
25 happening.

1           On the issue of settlement, surprised to  
2     learn of the extreme interest now in settlement talks  
3     because, as you know, this process went on for quite  
4     some time without that kind of interest, from our  
5     perspective. While I don't want to -- I can't get  
6     into the details, I will disagree strongly with Ms.  
7     Hubenak's characterization that this was the first  
8     substantive offer that New Mexico had made. Perhaps  
9     she's not aware of it, but, in fact, New Mexico had  
10    made a number of substantive offers over the course of  
11    several years. From our perspective, ultimately, New  
12    Mexico's interests really weren't being listened to,  
13    and that was one of the reasons that settlement was  
14    unsuccessful. But I just don't want you to be  
15    thinking that that -- the first substantive offer from  
16    New Mexico was in June. That's not correct.

17           **JUDGE MELLOY:** Well, this is the first  
18    time I've heard that there was some discussion about  
19    changing mediators. Have you -- are you aware of that  
20    request, Mr. Wechsler, and what's your -- do you have  
21    a view on it?

22           **MR. WECHSLER:** I'm not aware of the  
23    specific request. I am familiar with the suggestion  
24    from Texas and the reasons for it. I think New Mexico  
25    shares the -- the belief that if you were to deny this

1 motion and we were to engage again in what we would  
2 hope be more productive settlement discussions, that a  
3 change in approach, a change of the mediator would be  
4 helpful.

5 **JUDGE MELLOY:** Okay. All right. Thank  
6 you.

7 **MR. DUBOIS:** For what it's worth, Your  
8 Honor, on that last point, I think the United States  
9 also agrees that a change in mediation strategy might  
10 be more productive if -- if we're going to go down  
11 that path.

12 **JUDGE MELLOY:** Okay. All right. Anyone  
13 else wish to be heard in opposition to the motion to  
14 continue?

15 **MR. STEIN:** Your Honor, this is Jay  
16 Stein.

17 **JUDGE MELLOY:** Go ahead.

18 **MR. STEIN:** Representing the City of Las  
19 Cruces. The City of Las Cruces strongly supports the  
20 positions that were enunciated by Mr. Wechsler  
21 recently, and the City of Las Cruces also opposes any  
22 request for a continuance for reasons of its own, and  
23 that is because the City of Las Cruces is a municipal  
24 water supplier with numerous obligations to supply a  
25 community with the water supply and to treat

1 wastewater. The City's water rights have been under a  
2 cloud since the initiation of this case in 2013, and  
3 that inhibits and obstructs our ability to plan for  
4 the future. Accordingly, we strongly oppose the  
5 continuation request from Texas because of the cloud  
6 that it presents to the City's water rights and the  
7 obstruction to our ability to plan for future water  
8 supply. Thank you, Your Honor.

9 **JUDGE MELLOY:** All right. Thank you.  
10 Anyone else want to be heard?

11 (No response.)

12 **JUDGE MELLOY:** Well, I've given this a  
13 lot of thought, and one of my concerns is one of the  
14 last points that Mr. Wechsler raised, which is that  
15 it's hard, both professionally and personally, for  
16 people to set aside three months of time -- block of  
17 time for a trial, and -- and I can't speak for the  
18 attorneys, I can only speak for myself, but I've sort  
19 of structured my whole year around this trial, so to  
20 move the whole trial to the spring will be difficult.  
21 Having said that, however, one of the things that has  
22 not been discussed this morning, although it was  
23 certainly talked about in the written responses, is --  
24 is this whole issue of the Delta variant and the COVID  
25 problem. If I understand Ms. Barncastle's letter, she

1 is, in essence, asking that the three or four EBID  
2 witnesses all be allowed to testify remotely. My  
3 sense is that other parties are about ready to ask for  
4 the same thing, and I know Mr. Wallace asked if they  
5 could -- if the attorneys could appear remotely. I --  
6 I'm having great concerns that we will start this  
7 trial, and one or -- or two things will happen, or  
8 maybe both. One is that it'll be one day live, one  
9 day remote, we're going to be flipping back and forth,  
10 which will be very inefficient. And the other  
11 possibility is the one that's been alluded to by  
12 several people, what are we going to do if one of the  
13 attorneys or myself test positive, which would  
14 probably bring the -- the trial to a screeching halt  
15 for some period of time. What I am going to rule is  
16 that I'm going to grant the motion, but I'm going to  
17 -- I want to talk a little bit about what kind of a  
18 continuance it's going to be. Since there's a very  
19 real possibility, and Mr. Dubois was kind of reading  
20 my mind on this in his -- in his filing, that much of  
21 the trial, if we started it in -- in two or three  
22 weeks, would be -- would have to be remote. I would  
23 like to suggest that we go ahead with at least part of  
24 the trial this fall, but do it remotely. It seems to  
25 me that going over the witness list that we could take

1 a lot of the percipient witnesses, the witnesses who  
2 were going to testify about project management,  
3 project operations remotely, and I have a feeling that  
4 a lot of those witnesses would want to testify  
5 remotely in any event. We could take the farmers  
6 remotely and leave for the live testimony in March the  
7 -- the key expert witnesses that Mr. Somach's  
8 participation would be particularly important on and  
9 who, I think, may provide -- or may be better to have  
10 those people live. And I don't -- I just don't see  
11 why we couldn't get maybe several weeks of testimony  
12 out of the way with -- with a number of the witnesses  
13 that have been identified. I don't know if -- if we  
14 didn't do that with people were reluctant to travel,  
15 particularly in the Delta variant gets worse, are we  
16 going to compel them to come to Cedar Rapids? I think  
17 we just run into a host of issues together with that.  
18 So what I'm going to suggest is that the parties get  
19 together and look at their witness lists, and we'll  
20 reconvene in a week on this issue or probably next  
21 Thursday, because I -- I know the Friday is the start  
22 of a long weekend, and talk about which witnesses we  
23 could take remotely, and as I say, maybe get to a  
24 point where we don't have to block out three months in  
25 the spring and get the trial down to five or six weeks

1 in the spring. We may even be able to take the  
2 historians remotely. I don't know that their  
3 testimony is in the same level of technicality and  
4 scientific difficulty that hydrologists and other  
5 experts might -- might testify. But this would  
6 require -- and I know New Mexico would not be happy  
7 with this, but this is going to require New Mexico  
8 also to put part of their case on before Texas  
9 completes its case because I can't very well expect  
10 Texas and the United States to put on a big chunk of  
11 their case remotely and then allow New Mexico to not  
12 put on any case. But I do think we could separate out  
13 the issues in a way that we could, over the next two  
14 to three months, get a number of weeks of testimony  
15 concluded this fall and leave for the spring the more  
16 complex testimony.

17 As far as Texas' motion and Mr. Somach's  
18 unavailability, I'm assuming that the type of  
19 testimony we're talking about here is the type of  
20 thing that with a little preparation that the other  
21 people in Mr. Somach's office could get up to speed on  
22 and that probably a number of the depositions were  
23 already taken by a number of people in Mr. Somach's  
24 office. So it may be splitting the baby a little bit,  
25 but that's sort of where I'm -- I'm coming from.



1                   Mr. Somach, did you want to say  
2 something?

3                   **MR. SOMACH:** Yes. I -- I just wanted to  
4 indicate that I will have some ability to -- I mean,  
5 in reality, this has been very difficult on both the  
6 professional and personal level. That should, I hope,  
7 go without -- without saying. But if we proceed as  
8 you have just outlined, I can participate with the  
9 understanding that there may be days where I just  
10 simply won't be available even remotely. But working  
11 with the other folks that have been working on the  
12 case, I think we can move forward and come up with a  
13 strategy to put on the witnesses that you suggested.  
14 In fact, we've been thinking about all of these things  
15 as -- as ways of managing what needs to be managed.  
16 So I think we will be able to do that, and hopefully  
17 if we resume in March where my participation is, in  
18 fact, intended to be greater -- I have my fingers  
19 crossed, and hopefully things will be such that --  
20 that that won't create a problem in terms of -- and  
21 hopefully the COVID thing will be behind us a bit,  
22 that I'll be able to travel to Cedar Rapids, and we  
23 can -- we can proceed that way. But I -- I think the  
24 accommodation that you suggested is one that we  
25 certainly can manage around and will manage around.

1                   **MR. WECHSLER:** May I ask a question,  
2 Your Honor?

3                   **JUDGE MELLOY:** You may. Certainly.

4                   **MR. WECHSLER:** Actually, I have three  
5 questions. The first is I just want to confirm that  
6 we can stand down on preparation then for September  
7 13th because those are ongoing and somewhat furious  
8 right now. So that's not going to happen if I  
9 understand your order; is that correct?

10                  **JUDGE MELLOY:** Yes. Subject to we need  
11 to discuss when we will start the remote testimony,  
12 but I could -- certainly if we're going to do that, we  
13 could -- I could give all the parties an extra week or  
14 two and push it back to closer to October 1st just so  
15 -- because I know this is going to cause both some  
16 technical changes, as well as changes in strategy and  
17 logistics and so we have some issues to work through  
18 on how we're going to do this, but yes.

19                  **MR. WECHSLER:** Understood. So you  
20 answered my second question about when, and I  
21 understand that we'll talk about it next week as you  
22 contemplate, and hopefully by then, the parties will  
23 have had time to discuss.

24                         So my third issue was I would ask that  
25 if in the order in which you're granting in part

1 Texas' motion, I would ask that you specify that no  
2 party can use this time to be modifying or  
3 supplementing their expert disclosures. This has been  
4 an ongoing concern of New Mexico's, and it seems  
5 unfair to use this to be changing the parties' cases.  
6 So thank you for that consideration.

7 **JUDGE MELLODY:** Well, I guess I'll let --  
8 maybe I should let Texas respond, but my -- my initial  
9 reaction to what you suggested, Mr. Wechsler, is I  
10 generally agree, although I think it's in a nature of  
11 expert testimony that depending on how Texas' experts  
12 testify, your experts may want to modify their  
13 opinions a little bit or -- or address issues that  
14 they didn't anticipate being raised or raised in the  
15 way they were raised so that's sort of inherent, I  
16 think, in any expert testimony, but I think as a  
17 general proposition, I don't have any problem with  
18 what you're suggesting.

19 What do you -- Mr. Somach, do you have  
20 any response?

21 **MR. SOMACH:** Yes. We -- we have no  
22 inherent problem with that. I mean, we -- we  
23 certainly -- I can assure you that that was not in our  
24 -- our mind. I will suggest this, though, and this  
25 ironically is for the benefit of New Mexico. You

1 know, a couple of their motions refer to the fact that  
2 somehow they didn't have the opportunity to depose  
3 some of our experts. I think they refer to  
4 Dr. Kimmelshue and -- and maybe Dr. Brandes. One of  
5 the things we were going to say in response to that  
6 motion in limine is the -- we don't -- we dispute that  
7 they didn't have that opportunity, but notwithstanding  
8 that, we were going to suggest if they wanted to --  
9 the proper course of doing that was not to exclude  
10 testimony, but rather to give them an opportunity to  
11 take a supplemental deposition on the issues that they  
12 claim they didn't have an opportunity to take a  
13 deposition for. This would provide that opportunity,  
14 and it would resolve those issues in the way those  
15 issues are normally resolved in any normal trial. I  
16 mean, I've been involved with trials where we got  
17 done, we went and took that deposition until 8:00,  
18 9:00, 10:00 at night, and if it had to go on a couple  
19 of nights, we -- we did that. So this gives that  
20 opportunity. So it would take some of those issues  
21 just off the table so there could be no argument that  
22 weren't given an opportunity to get the information  
23 they say they weren't able to get.

24 JUDGE MELLOY: All right. Well, I'll  
25 let the two of you talk about that, and we can visit

1 about that a little bit more next week.

2 A couple -- since I -- I've entered this  
3 ruling, I think that obviates some of the issues,  
4 particular COVID-related issues that were raised in --  
5 in the request for agenda items. I think it also  
6 probably means we need to refocus on some of the  
7 logistical issues. One of the issues that was raised,  
8 though, was what are we going to do about -- do I want  
9 paper copies of all the exhibits, and it's my  
10 understanding of what we talked about previously, and  
11 I -- and I may -- my understanding may be incorrect is  
12 that I would not request or require paper copies of  
13 all the exhibits. They could be submitted  
14 electronically. However, at some point prior to  
15 testimony, this kind of ties into Ms. Barfield's  
16 e-mail a couple weeks ago that I forgot to address at  
17 the last status conference, that at some point prior  
18 to each witness testifying, the proponent of a witness  
19 will identify which exhibits are going to be used for  
20 that witness, and that those -- those exhibits will be  
21 made available in hard copy. Is that -- am I  
22 misunderstanding what I thought we had agreed upon or  
23 is -- did anybody understand it differently?

24 **MR. SOMACH:** That is what Texas  
25 understood the situation, Your Honor.

1                   **MR. DUBOIS:** United States, as well.

2                   **JUDGE MELLOY:** Okay.

3                   **MR. WECHSLER:** Yeah. We understood  
4 that, as well, Your Honor, although we were intending  
5 to provide an entire copy for your convenience. With  
6 the hybrid version of the trial, however, we'll likely  
7 rethink that approach.

8                   **JUDGE MELLOY:** All right. Thank you.  
9 And do we want to take up the motions in limine today  
10 since we're here or -- and -- so let's -- let's go  
11 ahead on that.

12                   As you-all know, and as -- as the -- as  
13 the opponent to each motion in limine likes to point  
14 out, they're -- they're highly discouraged in Original  
15 Supreme Court actions where we want to make a complete  
16 and thorough record so, but I will let -- I guess  
17 Texas goes first in this. Do you want to be heard on  
18 any of your motions?

19                   **MR. SOMACH:** Let me -- let me indicate  
20 that from a fundamental perspective, we -- we think  
21 what we wrote was -- was sufficient. I wanted to make  
22 a couple of points, however, that on -- on three of  
23 the -- of the motions in particular. The first was  
24 with respect to the issues associated with the fourth  
25 claim for relief, which we had kind of a mini argument

1 or discussion about at the last status conference. I  
2 didn't want to belabor it, but I did want to  
3 underscore what we were saying there is that there is  
4 a difference between an affirmative counterclaim  
5 against Texas based upon actions that Texas has  
6 absolutely no control over. I mean, you can move to  
7 the question of, well, even if you're right, what  
8 would the remedy for that be since Texas has no  
9 control over the operation of the project or the  
10 operating agreement or the contracts that are wrapped  
11 up in all of that stuff. We just simply have nothing  
12 to do with that. That is in -- in -- in contrast to  
13 the idea that somehow they be -- you know, if -- if  
14 the argument that New Mexico is making is not an  
15 affirmative argument, that Texas, you're harming us by  
16 doing all of these things, what I'm saying there is  
17 we're not doing anything. We don't have any control  
18 over any of that stuff. If what they're saying is  
19 we're not harming you, Texas, the harm that you're  
20 suffering is being caused by all these other things,  
21 that's quite a different case, and we're not  
22 suggesting that they can't claim, for example, that  
23 groundwater pumping in New Mexico is not the cause of  
24 Texas' harm, but rather it's the way the project is  
25 operated and the operating agreement and all those

1 things. They certainly can make that case if -- if  
2 they want to, as an affirmative defense against our  
3 claim that groundwater pumping is causing a problem.  
4 What they can't do is make the argument somehow that  
5 we are liable for the actions of third parties to  
6 which we are absolute strangers to. And I contrast  
7 that, of course, with -- with our claim against New  
8 Mexico, which doesn't involve third parties. It just  
9 says you've authorized and permitted the interception  
10 of water that otherwise was intended and apportioned  
11 to Texas. So -- so I just wanted to clarify that  
12 because we had had discussion last week about it.

13 The other motion I wanted to -- to at  
14 least elaborate a little bit on was this 1938  
15 condition situation. You know, in some respects, that  
16 issue got litigated out to a degree in the motions for  
17 summary judgment, but up until the motion for summary  
18 judgment, New Mexico's position had been there is no  
19 1938 condition, so there is no disclosure of an expert  
20 to talk about what the contours of a 1938 condition,  
21 which is where the -- the summary judgment order left  
22 us. There is no expert they've disclosed to -- to  
23 talk about what the contours of the '38 condition are.  
24 There's been no one disclosed on that point  
25 whatsoever, and we've asked. We've asked their



1 30(b)(6) witness. We've asked their experts. And --  
2 and the unanimous reframe is there is no 1938  
3 condition. What we're saying in our motion is, well,  
4 you can't come up for the first time when you put a  
5 witness on trial and then all of a sudden explain what  
6 the 1938 condition are, what the contours of that  
7 condition are. And -- and that's what the motion goes  
8 to.

9           The last one I want to talk about is  
10 this question of injury to New Mexico. They've made  
11 no disclosure. They've got no witness disclosed or  
12 otherwise to talk about injury. I was astounded when  
13 I read the New Mexico opposition to the continuance  
14 motion, as well as their amici. It's loaded with  
15 allegations of injury. I want to let you know that  
16 those letters and that opposition is the first time  
17 anywhere you'll see anything about injury to New  
18 Mexico. So what our motion goes to is the fact that  
19 you can't -- if you haven't disclosed stuff, you can't  
20 for the first time argue that or put on evidence of  
21 that at the time of trial. That's just simply --  
22 that's plain old Rule 26.101. It has nothing to do  
23 with original actions or anything like that. Those  
24 are the -- those are the --

25           **JUDGE MELLOY:** How does that argument

1 tie into the bifurcation?

2 **MR. SOMACH:** Well, to a degree, it does.  
3 You have -- you haven't indicated whether or not there  
4 will be new Rule 26 disclosures with respect to the  
5 question of -- of damages. I had some assumption that  
6 maybe you would do that and that those issues would be  
7 renewed. But herein for basically what the New Mexico  
8 argument has been is that violation of the Compact  
9 alone is injury. We don't disagree with that. We  
10 don't disagree with that. What I indicated to you, we  
11 talked about our injury witness list, we wanted to  
12 show you that beyond mere violation, there were  
13 injuries that we could describe and would describe to  
14 you at the time of trial. There is no counterpart in  
15 any evidence, any disclosure that New Mexico has made,  
16 that would be the counterpart to that, and that is --  
17 that is something beyond just the mere violation of  
18 the Compact is -- is sufficient injury. That's what  
19 I'm talking about. To the extent that you want to  
20 monetize that or you want to deal with damages,  
21 including their fourth claim to the extent they can  
22 make an unjust enrichment argument, it seems to me  
23 that that's where that stuff belongs. We should have  
24 some opportunity if they're going to make new  
25 disclosures in that regard before the remedy phase,

1 that -- that they be put to the test of doing that,  
2 and then we can take depositions and undertake  
3 discovery on whatever it is that they're alleging,  
4 including all this new stuff that we've seen for the  
5 first time in -- in these letters that have been  
6 submitted related to the -- to the continuance motion.

7 **JUDGE MELLODY:** Mr. Wechsler, do you want  
8 to respond?

9 **MR. WECHSLER:** Yes. I'll -- I'll focus  
10 on each of the motions in limine that Mr. Somach just  
11 identified. So the first -- and I'll take them in  
12 order. The first was his Motion in Limine No. 4,  
13 which deals with the fourth counterclaim. So as we  
14 point out in the briefing, it's not the time or place  
15 for a dispositive motion. This has been addressed  
16 already. You've denied their motions. We signed a  
17 robust body of law that indicates you can't bring that  
18 as a motion in limine, and any attempt to do so must  
19 be denied, and they don't make any attempt to argue  
20 otherwise. The Motion in Limine No. 4 rests on this  
21 false distinction that it's very hard to understand in  
22 that Texas has struggled and been unable to explain,  
23 and that is that the Court has held that the project  
24 is inextricably intertwined with the Compact and that  
25 the apportionment can only be accomplished because of

1 Reclamation's operations. And then you, in turn, held  
2 that New Mexico is entitled to 57 percent of project  
3 supply, which necessarily means that the division of  
4 project supply is relevant in this Compact action.  
5 And in case there was any question about it, you have  
6 been clear. This is a quote from your order on the  
7 counterclaims dismissal where you said the operating  
8 agreement may be relevant on the issue of whether each  
9 state is receiving the water to which it is entitled  
10 under the Compact. To the extent current operations  
11 are inconsistent with the Court's ultimate decree on  
12 apportionment, any operating agreement will have to be  
13 brought into conformity with the decree. If New  
14 Mexico or Texas has been deprived of its equitable  
15 apportionment under the Compact, it is very possible  
16 that any such short fall may be the result of a  
17 combination of factors, including United States  
18 project operations and New Mexican Texan -- or Mexican  
19 surface groundwater diversions. New Mexico's  
20 counterclaim provides more than ample opportunity for  
21 the parties to flesh out their theories regarding the  
22 impact of project operations on the State's receipt of  
23 their Compact apportionments. And that's really all  
24 we're asking to do here. New Mexico's counterclaims  
25 collectively claim that there's a Compact violation

1 when New Mexico receives less than 57 percent of  
2 supply, and Texas receives more of that same supply.  
3 And in those circumstances, it is the State of Texas  
4 that benefits from that extra water, and it -- as  
5 Texas has acknowledged throughout this litigation, it  
6 is responsible for the actions of its citizens and --  
7 and of its Compact commissioner. And then Texas  
8 suggests as part of this motion that New Mexico can  
9 address the allegations of unjust enrichment in the  
10 remedies phase, but that misunderstands the basic  
11 nature of -- of claims. I mean, New Mexico is  
12 entitled to seek a remedy only if it establishes the  
13 elements of the claim, and here for unjust enrichment,  
14 those elements are a benefit for Texas in the form of  
15 extra water under the Compact; No. 2, at New Mexico's  
16 expense; and, 3, for which it would be unjust for  
17 Texas to retain. New Mexico is entitled to put on  
18 evidence of each of those claims, and because of that,  
19 it seems obvious that motion should be denied.

20 The next motion that Mr. Somach raised  
21 was -- was Motion in Limine No. 2, which is this  
22 baseline condition, and -- and, again, in their motion  
23 and here today again, Mr. Somach argues that, well,  
24 New Mexico hasn't offered any facts relating to this  
25 baseline condition, and -- and I can't -- it's hard

1 for me to tell if Texas is not paying attention to our  
2 case or if they're intentionally distorting New  
3 Mexico's position, but this is -- it's simply  
4 categorically false that we didn't put on evidence of  
5 a baseline condition, and that took multiple forms, as  
6 we outlined in our -- our brief on this. We do have  
7 experts that point out the problems with the 1938  
8 condition. We don't believe that this Compact has a  
9 1938 condition. We do have experts that explain, for  
10 example, things like in other Compacts, this is what a  
11 year condition looks like, for example, the 1947  
12 condition in the Pecos Compact, and that the -- what  
13 Texas advocates for looks nothing like that because  
14 they ignore all of the actions that are going on in  
15 Texas. All of this is part of our Rule 26  
16 disclosures. New Mexico has always advocated for a  
17 baseline condition, and specifically, we argue that  
18 the Compact intended to protect project operations in  
19 order to meet irrigation demand. We have expert  
20 witnesses that show that what that baseline looks like  
21 is 57 percent of project supply based on an equal  
22 amount of project water to each acre, but there's  
23 supplemental groundwater pumping to meet irrigation  
24 demands and then continued operation of the project to  
25 limit waste, and then that's translated into a -- a

1 baseline. And we have also explained this is  
2 consistent with the long-time accepted standard, which  
3 was the D2 baseline condition. But we also put on  
4 modeling evidence that shows that if the Special  
5 Master chooses to select a different baseline, we have  
6 multiple model runs done by, you know, our multiple  
7 modeling experts, which are showing modifications of  
8 this -- this -- this baseline, including various  
9 aspects of what Texas' 1938 condition would look like  
10 so that it -- it shows that there would still be, even  
11 under that scenario, an impact to New Mexico. So I  
12 don't -- I don't know if Mr. Somach simply hasn't read  
13 those reports or what's going on. So, again, the very  
14 basis on which Mr. Somach is -- is -- is making this  
15 argument is simply incorrect.

16 And then finally turning to their Motion  
17 in Limine No. 3, which is the evidence of injury,  
18 again, Mr. Somach here says today, we didn't present  
19 any evidence of this, and I -- I simply don't know  
20 what Mr. Somach has been paying attention to. We,  
21 again, as outlined in our brief, have presented very  
22 robust evidence in -- in multiple ways of -- of the  
23 injury, focusing on two things. One was the  
24 deprivation of New Mexico's equitable share of Compact  
25 water and that reduction in supply, which was, as I

1 said, it's modeling that allows us to get to that  
2 94,000 acre-foot number. We also have done that  
3 simply by looking at the reports of the -- the project  
4 operations, the project histories, to show that it's  
5 all consistent with our modeling effort, again,  
6 showing a very significant and robust injury on the  
7 part of New Mexico. And then we have had more than  
8 one witness testify that the -- about the harm that  
9 results to New Mexico from that reduction of Compact  
10 water, for example, things like our aquifers is -- is  
11 incurring significant damage from which it may never  
12 recover and so these are all part of the Rule 26  
13 disclosures. It's also misleading to suggest that we  
14 have not disclosed individual fact witnesses on this  
15 -- this point. If you want to hear more about that,  
16 I'm happy to do so, but there will be farmers who are  
17 explaining why their reduction in -- in project supply  
18 has impacted their operations and, of course,  
19 Mr. D'Antonio and -- and the ISC director,  
20 Mr. Schmidt-Petersen, will also be presenting evidence  
21 as to the impact on New Mexico. So, I mean, for all  
22 those reasons, those motions should be denied.

23 **JUDGE MELLOY:** Well, I'm -- and this is  
24 probably going to apply to some of the motions both by  
25 Texas and United States. It's really difficult to



1 rule on these in a vacuum without seeing what  
2 testimony is going to attempt to be introduced, and so  
3 generally, I'm going to deny the motions because I  
4 just don't know with -- with enough specificity as to  
5 what exactly is asked to be excluded, and it's  
6 certainly without prejudice to Texas, for instance,  
7 arguing at the time New Mexico tries to put on  
8 evidence about damages that it wasn't properly  
9 disclosed, and if it wasn't properly disclosed, it'll  
10 be excluded. But if it was -- but I don't -- I'm not  
11 going to cut off the attempt by New Mexico at this  
12 point to -- to present that evidence. The same --  
13 same with Motion in Limine No. 2 and -- and as to --  
14 as to Motion in Limine No. 1 dealing with introduction  
15 of issues relating to -- that have been decided by the  
16 prior special -- prior orders, I assume primarily the  
17 motion for summary judgment and, of course, also the  
18 motion to dismiss order, as I understand it, New  
19 Mexico says they're not going to be doing that. You  
20 know, of course, what that evidence is is in the eye  
21 of the beholder. Again, I don't know by way of motion  
22 in limine that I can say, you know, this piece of  
23 evidence can't come in. I think -- again, I think  
24 these are all things that are going to have to be  
25 sorted out at the time New Mexico tries to introduce

1 the evidence.

2 As to Point No. 4, to me, this is just  
3 the reverse of New Mexico's motion in limine as to  
4 Texas' expert witness. Texas says essentially, as I  
5 understand it, other than maybe some limited  
6 groundwater pumping out of the aquifer that straddles  
7 the Texas/New Mexico line, there's nothing that Texas  
8 does once the water gets south of the -- of the New  
9 Mexico/Texas border that has any impact on -- on New  
10 Mexico, and, therefore, any evidence about that is  
11 irrelevant. New Mexico says don't even consider  
12 Texas' expert because they didn't consider all the  
13 things that are happening south of the border, and you  
14 can't determine the -- the case without -- without  
15 that evidence and without an expert opining on -- on  
16 the effects of what Texas' pumping and use by  
17 municipalities and other uses might -- might entail.  
18 At this point, I don't think I can say one way or the  
19 other that what Texas is doing is or is not relevant.  
20 That's -- I want to hear the evidence, and -- and so  
21 I'm going to deny the motions in limine as to 1, 2, 3,  
22 and 4. As to 5, this actually ties into one that the  
23 United States also raises, motion to exclude the  
24 introduction of evidence of improper legal arguments.  
25 Well, yes, improper legal arguments should be

1 excluded. Now, what's an improper legal argument?  
2 That's a -- again, a very difficult issue to answer in  
3 a vacuum. Expert witnesses -- what I -- I think  
4 they're talking about mainly here is an expert  
5 witness. Expert witnesses cannot opine as to the  
6 meaning of the Compact; however, an expert witness can  
7 opine as to technical terms, terms of art, common  
8 usage, particularly as it might have been understood  
9 in 1938. Those certainly are areas. And, you know,  
10 in the -- in the legal parlance, there are mixed  
11 questions of law and fact, and what becomes improper  
12 legal argument as opposed to proper opinion about  
13 matter of -- of technical analysis, I think, is -- is  
14 just lines that are going to have to be drawn at the  
15 time the testimony comes in. Certainly, No. 6 is a  
16 legitimate request to an expert will not be allowed to  
17 testify outside the scope of their area of expertise,  
18 but, again, until they -- until New Mexico proffers  
19 testimony that meets that definition and is properly  
20 objected to, I don't know that I can grant the motion.  
21 So I -- I feel like I need to deny all the motions at  
22 this point, subject to them being reasserted at the  
23 time the testimony comes in. So anyway, do we want to  
24 talk about New Mexico's motions?

25 **MR. WECHSLER:** Yes, Your Honor.

1 Ms. Thompson will be talking about New Mexico's  
2 motions.

3 **MS. THOMPSON:** Good morning, Your Honor.

4 **JUDGE MELLODY:** Excuse me a second.

5 Before -- let me ask a question that may short-circuit  
6 this a little bit, for Mr. Somach. One of the motions  
7 in limine goes to the two witnesses from Land IQ that  
8 were going to testify. From the deposition, the  
9 motion to file deposition excerpts, do I understand  
10 you're not going to call anybody from Land IQ? I'm  
11 not sure I understood exactly what's going on there.  
12 Can -- can you tell me what's happening there?

13 **MR. SOMACH:** We are going to call  
14 Dr. Kimmelshue, who is the main Land IQ witness, and I  
15 believe that we've placed Mica Heilmann on the  
16 may-call list. Those were the two main Land IQ  
17 witnesses. Our intention is to offer them -- the  
18 reason why we're not certain yet with respect to -- to  
19 Ms. Heilmann is we think Dr. Kimmelshue can probably  
20 handle most of that, but we want to, in abundance of  
21 caution, if we have to put on Ms. Heilmann, we -- we  
22 will certainly do so. But, no, we -- we intend to put  
23 on Dr. Kimmelshue. He's one of our significant  
24 witnesses, and -- and so I -- I'm not sure where the  
25 confusion is, but I -- but we are going to put him on.

1                   **JUDGE MELLOY:** All right. Okay. Thank  
2 you. That cores it up. I didn't know because of the  
3 deposition designation, if that meant you weren't  
4 going to put something on for them at all so that  
5 cores that up for me.

6                   All right. Ms. Thompson, why don't you  
7 speak to that portion first because I have a couple  
8 questions about that I'd like to sort of lead off  
9 with.

10                  **MS. THOMPSON:** Sure. When you say "that  
11 portion," you mean the --

12                  **JUDGE MELLOY:** The Land IQ.

13                  **MS. THOMPSON:** Okay. Sure. So we, of  
14 course, filed three different Daubert motions, one of  
15 which was seeking to exclude the testimony from Land  
16 IQ, and specifically Dr. Kimmelshue and their may-call  
17 witness, Ms. Heilmann. New Mexico requested this  
18 exclusion because Land IQ has a methodology that they  
19 call their random forestland classification  
20 methodology. It's a proprietary methodology or was  
21 asserted as proprietary until very recently. Land IQ  
22 used this methodology in 11 different years to come up  
23 with irrigated acreage and the crop identification.  
24 We took the initial deposition of Mr. Kimmelshue. He  
25 stated repeatedly at that time that it was a

1 proprietary method, and they would not be disclosing  
2 information on it. Later on, we came to an agreement  
3 that they would disclose information under a  
4 stipulated order and a very strict confidentiality  
5 order. So you may recall that order, and there --  
6 thereafter, what we ended up agreeing to is for  
7 Mr. Kimmelshue to provide information on a thumb drive  
8 that would be sent to us, and we anxiously awaited for  
9 that thumb drive, and when we received it, there was  
10 basically one document on it that's an overview of  
11 this methodology that at the time, again, they were  
12 claiming was proprietary. Our experts, we have two  
13 experts that have reviewed the materials that they  
14 have provided, and had stated in their rebuttal  
15 reports very clearly that the information did not give  
16 enough detail for anyone to actually understand the  
17 methodology, review it, repeat it. The methodology,  
18 like I said, is 22 pages overview, and it focuses on  
19 just one of those 11 years. And I'll give a concrete  
20 example from that methodology. There's a section of  
21 it that talks about models, and it says, Oh, you can  
22 pick one of four models to run this methodology,  
23 however, we used, you know, some of these in year  
24 2018, the others, we're not sure. We don't have the  
25 inputs for those codes. We don't have the outputs for

1     that code. And even though we raised this repeatedly  
2     with Dr. Kimmelshue, and we were allowed to take his  
3     deposition, and we certainly did ask questions about  
4     it, there are no files that we have ever received that  
5     allow us to actually interpret their results and be  
6     able to repeat those results. Again, I just wanted to  
7     say that in conclusion here, that Mr. Kimmelshue  
8     himself admitted during the deposition that the  
9     methodology has not been peer reviewed. There are  
10    components. What we keep hearing, though, is that  
11    this methodology is actually a series of steps, and  
12    those steps are confidential; it's just how they put  
13    those steps together. So, in essence, the ingredients  
14    aren't secret, but the way you combine those  
15    ingredients and cook with it is secret. So we, to  
16    this date, still do not have enough information to  
17    understand this random forest methodology, and, in  
18    fact, on their disclosure, the 22-page disclosure,  
19    there is on the very front page of it, and this has  
20    been now attached to the motion so you -- you should  
21    have that at hand there, that it states the process is  
22    refined and customized every image, every crop, every  
23    date, and every area analyzed. It is never exactly  
24    the same. It also states that because of individual  
25    expertise moving throughout the analytical process, it

1 is likely impossible to ever exactly replicate the  
2 results. We think that's right. We think that's  
3 true. It is unlikely to ever be able to replicate  
4 those results. So for those reasons, we don't believe  
5 the methodology has been properly disclosed in detail  
6 for litigation. We don't believe it's repeatable. We  
7 don't believe it's been peer reviewed based on the  
8 steps that we've understood to occur so, therefore, we  
9 have asked in our Daubert motion to have that  
10 particular testimony from Land IQ excluded. I want to  
11 make clear, though, Land IQ has many other areas of  
12 testimony, and we are not seeking exclusion at this  
13 time for those other areas, just on this one  
14 particular methodology.

15 **JUDGE MELLOY:** And what they are  
16 testifying to, as I understand it, is what the crops  
17 were in different sections of the -- of the project,  
18 both in Texas and New Mexico or just Texas?

19 **MS. THOMPSON:** That's right.

20 **JUDGE MELLOY:** Or just New Mexico  
21 rather?

22 **MS. THOMPSON:** Yeah. It's in New  
23 Mexico, and it's related to in those particular 11  
24 years, how they have used satellite imagery to  
25 identify irrigated acreage and the crops.



1                   **JUDGE MELLOY:** Do you have an expert  
2 that's done essentially the same thing?

3                   **MS. THOMPSON:** We do not have an expert  
4 that has done that same methodology. We have an  
5 expert that has looked at irrigated acreage and a  
6 separate expert who has identified crops based on the  
7 Bureau of Reclamation records. So we do not have one  
8 that does this methodology.

9                   **JUDGE MELLOY:** I guess that was a  
10 question I'm -- I have in my mind is is this even  
11 something that has to be -- that even requires expert  
12 testimony? In other words, one of the things -- one  
13 of the comments that was made -- been made a couple  
14 times, including on our tour the other day, is that  
15 the Rio Grande may be the most stunning river in the  
16 United States, other than the Colorado, and I can't  
17 imagine that between Reclamation, the water districts,  
18 crop insurance companies, New Mexico State University  
19 Extension Service, that there's even a tenth of an  
20 acre that you can't tell what was being grown on any  
21 of those -- those lands. I mean, is -- aren't there  
22 just -- aren't there records out there that would tell  
23 us what the answer is to that question?

24                   **MS. THOMPSON:** Yes, Your Honor, there  
25 are, and that is exactly what our expert has used.

1 It's a combination of the Bureau of Reclamation  
2 records, the District records, plus there are crop  
3 distribution records that are put out by travel  
4 agencies, as well.

5 **JUDGE MELLOY:** Don't the water districts  
6 keep track of which acres are being irrigated?  
7 Because they -- they charge based on irrigated acres,  
8 don't they.

9 **MS. THOMPSON:** That is correct. And  
10 they do in more recent time.

11 **JUDGE MELLOY:** So why was the 11-year  
12 time period picked?

13 **MS. THOMPSON:** It was 11 separate years,  
14 so back in time, it's roughly one per decade back in  
15 time that they used this methodology. So it wasn't 11  
16 years in a row.

17 **JUDGE MELLOY:** Okay. Is your expert  
18 doing essentially the same thing? I mean, not same  
19 method, but doing something similar a number of  
20 representative years back several decades?

21 **MS. THOMPSON:** We do have an expert  
22 that's looking back in time and identifying irrigated  
23 acreage. The specific crop identification that the  
24 crop mix during those times, we're using the records  
25 as opposed to this type of satellite imagery

1 interpretation.

2 **JUDGE MELLOY:** I guess I'll ask  
3 Mr. Somach the same question maybe or whoever is  
4 responsible for this particular witness. Why don't  
5 you just go to the records?

6 **MS. KLAHN:** Your Honor, Sarah Klahn for  
7 the State of Texas. I'm going to be handling this  
8 argument. Just take -- the -- the reason you don't  
9 just go to the records is that back in time, the  
10 records are quite accurate. More recently, the  
11 records are much less accurate. So if you're just  
12 relying on Bureau of Reclamation or most recently  
13 district records, it's true the districts do track how  
14 many acres are irrigated, but that doesn't answer the  
15 question of which crops are grown, and as the Court is  
16 aware, the fight in this case is over the amount of  
17 water that New Mexico is consuming and how much of the  
18 water that New Mexico is consuming is actually water  
19 that Texas is entitled to. And so in order to answer  
20 the second question, how much is -- how much of that  
21 was Texas entitled to, we have to know how much they  
22 consumed. And so that's why the crop mix is so  
23 important, and so going back in time, if you're using  
24 the methodology that Land IQ used -- and I'll -- I can  
25 address the specific objections that New Mexico's put

1 in their motion in a minute. Just putting it in  
2 context, if you go back in time, and you use images,  
3 aerial images, and you can really only go back to the  
4 '50s to do this, because prior to that, the aerial  
5 imagery is not very good. But if you go back in time,  
6 it's possible to look at the aeriels, and there's data  
7 inside somehow in the -- in the -- in the images, and  
8 you can use that to train -- essentially train  
9 computers to recognize different crop types. And so  
10 what the argument that Ms. Thompson's motion is making  
11 is that because New Mexico doesn't have an expert --  
12 well, New Mexico doesn't have an expert who's done  
13 this work, and I think she said that. So there's  
14 really no dispute about that. The -- in deposition,  
15 Mr. Jordan, their expert, testified he's never used  
16 the random forest type of model, which is one of the  
17 types that Land IQ uses. So if you -- but if you are  
18 able to use those things, you can actually go back in  
19 time and get a good representation of which crops were  
20 grown. Now, I want to make it clear, this is just one  
21 of the steps that Land IQ uses in order to get to that  
22 particular crop mix in those 11 years. So what they  
23 did was say from 1938 to 2018, let's pick a decadal  
24 year, one of 11 of them, and let's try and map what  
25 happened during that year, which will give us a better

1 ability to -- to evaluate whether those records on  
2 either side of the year we mapped are accurate. Now,  
3 obviously crop mixes change and that kind of stuff,  
4 but, you know, the big crops in the Rio Grande Valley  
5 is, as you may be aware now after your tour, pecans,  
6 alfalfa, and cotton, and so it's important to track  
7 when those -- when the cotton went down and when  
8 pecans went up, because that's what tracks with  
9 consumptive use of water by New Mexico during those  
10 years and during this entire study period. So you  
11 didn't ask me, but can I just go ahead and address the  
12 motion, the merits of the motion, or do you have a  
13 question?

14 **JUDGE MELLOY:** Well, I had one question,  
15 and this is not information that the New Mexico State  
16 University Extension Service has?

17 **MS. KLAHN:** No.

18 **JUDGE MELLOY:** I mean, or crop insurance  
19 companies have? Because around here, you know,  
20 farmers have to report X number of acres of soybeans  
21 and X number of acres of corn every year, both for  
22 crop insurance purposes, the Extension Office tracks  
23 that. I mean, there isn't an acre you could go back  
24 on without knowing pretty much what was planted on it  
25 for the last 50 years. Those kind of records don't

1 exist in New Mexico?

2 MS. KLAHN: Well, they exist in the  
3 project. And like I say, when the Bureau was in  
4 charge of the project, and I would say the world was a  
5 different place prior to our electronic world, the  
6 data sheets -- and we'll show these to you during  
7 trial. The data sheets are very -- they're very  
8 detailed. So they ask farmers to fill these out every  
9 year where there is, like, a lot of different crops to  
10 choose from. In more recent years, the crop types are  
11 much many fewer listed so you don't have the  
12 opportunity to say if you're a farmer, you know, it's  
13 still cotton, alfalfa, and pecans, but did you grow  
14 chile, did you grow onions, did you grow spring wheat?  
15 Those things aren't even necessarily listed. And then  
16 there's not the -- the checking. You know, the Bureau  
17 had a lot of folks that went out in the field, and  
18 they checked and said is this right, is this what's  
19 really happening? So there's some question about the  
20 reliability of more recent years, and I think that's  
21 why New Mexico and Texas both did these -- these field  
22 surveys where, like, Land IQ went out on four  
23 occasions, and they drove around EBID, and they have a  
24 whole methodology, which they'll describe. I think  
25 Mr. -- Dr. Kimmelshue's declaration goes into this

1 where they identified what was happening in the  
2 fields, and they used that as a basis for their  
3 mapping, and then they -- they used this technical  
4 method that is the subject of the motion to -- to map  
5 the acres they didn't see because the records are just  
6 not that reliable. So that's why that -- that's why  
7 it's been handled that way.

8 **JUDGE MELLOY:** Okay. All right. And  
9 you said you wanted to speak more to the merits of the  
10 motion? Go ahead.

11 **MS. KLAHN:** I want to -- I want to start  
12 with this idea of peer review, which New Mexico seems  
13 to limit to the concept of publication in a  
14 peer-reviewed scientific journal. That certainly is  
15 one type of peer review, but peer review can be  
16 defined in different ways, and the California  
17 Department of Water Resources has hired Land IQ for  
18 the last seven years to do -- to do mapping of  
19 irrigated acres and crop types in California, which is  
20 mandated by state statute. So they map 10 million  
21 acres. They -- they spend every year, a couple of  
22 days every year, kind of work shopping with the DWR  
23 employees to -- to explain the methodology, to explain  
24 what they're doing, and Department of Water Resources  
25 in California historically has done this work

1 themselves, but when this new law was passed a number  
2 of years ago, they didn't have the manpower to do it  
3 all because it now has to be done every year instead  
4 of every five years. So Land IQ was brought in to do  
5 this. They've also been hired to do the same types of  
6 mapping by a number of commodity groups, including the  
7 pecan counsel of America. So there's -- there may not  
8 be peer review in the sense of published journal  
9 articles about the steps that they use, but there's  
10 peer reviews in the sense that the people that are  
11 regulating this in California and the commodity groups  
12 that rely on this for their, you know, marketing --  
13 how many -- how many acres are in pecans, that's going  
14 to help them figure out how much the yield might be,  
15 what should they -- what should their budget be.  
16 They're relying on this. So this is a type of peer  
17 review that I think speaks to the reliability of the  
18 methods that Land IQ has used in this case.

19 The -- the second thing I just want to  
20 touch on is this idea that somehow New Mexico hasn't  
21 had a chance to discover these things. The -- they --  
22 they took one -- one-and-a-half days of deposition in  
23 2019 at the time when Land IQ was asserting that this  
24 was proprietary. Since 2019, the -- their methods  
25 have changed enough in what they're doing with



1 Department of Water Resources that they don't consider  
2 this proprietary anymore, and I -- I can't speak to it  
3 any more than that. That's just what Dr. Kimmelshue  
4 has said. They took about a half-a-day deposition of  
5 Dr. Kimmelshue in June of 2020. So we're over a year  
6 later. If they want to take another deposition of  
7 Dr. Kimmelshue and Ms. Heilmann, we're certainly  
8 willing to make them available. They should perhaps  
9 find somebody who can also advise them about how to  
10 ask the questions and that kind of thing because I'm  
11 afraid that Mr. Jordan's testimony in his deposition  
12 demonstrates that whatever the merits of Mr. Jordan's  
13 work for New Mexico, he may not be the right person to  
14 help them understand what Land IQ did. So -- so I  
15 think that's -- I'll stop there, and if you have  
16 specific questions about -- about anything else, I'm  
17 happy to answer them.

18 **JUDGE MELLOY:** No. I'm going to  
19 overrule the motion. I think this goes to the weight,  
20 and certainly New Mexico will have an opportunity, if  
21 they want to, to voir dire the Land IQ witnesses as to  
22 their qualifications, but I -- I think this goes to  
23 the weight.

24 Let me just say this one other thing  
25 before I let Ms. Thompson talk about Brandes and

1 Hutchison. As I understand it, Texas does not plan to  
2 call Hornberger as a witness; is that correct?

3 **MR. SOMACH:** That's correct. We have no  
4 plans of calling Dr. Hornberger.

5 **JUDGE MELLODY:** Okay. So what I'm going  
6 to do as to that motion is I'm going to reserve my  
7 ruling on that. If he's not called, then it becomes a  
8 moot issue. If he is called, it'll still be a live  
9 motion. New Mexico can certainly re-urge it at the  
10 time. Two hours isn't a lot of time to prepare, but  
11 we'll make a final ruling on that if -- if, in fact,  
12 Hornberger is ever actually called as a witness, so  
13 I'll just reserve ruling on that and that portion of  
14 the motion.

15 What about Hutchison and Brandes,  
16 Ms. Thompson?

17 **MS. THOMPSON:** Your Honor, we have one  
18 more Daubert motion dealing with Dr. Hutchison, and  
19 then we have two separate motions in limine seeking to  
20 exclude the expanded scope of Dr. Brandes and  
21 Dr. Hutchison. I will say on those last two items,  
22 when Mr. Somach just spoke to the idea that because of  
23 additional time, maybe we should talk about additional  
24 depositions. I think if it's acceptable to you, Your  
25 Honor, that we would have those discussions with

1 Dr. -- with Mr. Somach on those expanded scope areas  
2 and then bring that back to you next week on those  
3 last two, and then I'll go ahead and address the  
4 remaining Daubert if that's okay.

5 **JUDGE MELLOY:** Go ahead.

6 **MS. THOMPSON:** All right. To start off,  
7 we certainly recognize your comment, Your Honor, that  
8 in special -- or Original actions, the Court is  
9 reluctant to rule on pre-trial Daubert motions because  
10 generally, certainly the approach is to allow for a  
11 full -- full record. But I do want to point out,  
12 though, that Special Master Thompson in the Montana  
13 case did recognize that Daubert motions are certainly  
14 relevant in original actions. He just chose to hold  
15 off until trial, as you have stated may be your  
16 preference here, as well. Likewise, Special Master  
17 Kayatta did the same thing, said that Dauberts are  
18 certainly appropriate in original actions, but favored  
19 under the facts of that case or the limited facts of  
20 the record of that case to wait until trial. On the  
21 specific motion related to Dr. Hutchison's modeling, I  
22 would assert that, frankly, we have an extensive  
23 record already before you related to the modeling, the  
24 different approaches of the model, and there's very  
25 limited time or there has been very limited time for

1 trial on expert testimony. The general standard, as  
2 you know, is laid out in Rule 702. It relates  
3 specifically to did those experts rely upon sufficient  
4 facts and data, and then did they apply their  
5 methodology utilizing those important facts and data.  
6 We assert that Dr. Horn -- excuse me -- Dr. Hutchison  
7 did not.

8 Mr. Somach admitted last week that the  
9 Texas model is a groundwater model that only measures  
10 increases or decreases in flow at a single gage on the  
11 Rio Grande. It's at the El Paso gage. Mr. Somach  
12 also acknowledged that that is not a Compact  
13 compliance point. It's not a project delivery point.  
14 Their model has no project operations incorporated  
15 into it. It is a simple groundwater model focused  
16 solely on New Mexico. It also only operates on an  
17 annual basis, so it doesn't even operate on the same  
18 time step or same basis as project releases occurred.  
19 Dr. Hutchison model assumes -- and this is an  
20 important point here -- that all of the increased  
21 flows and drains in the river that may occur when he  
22 reduces his pumping all show up at the El Paso gage  
23 and all is owed to Texas. This is simply not how the  
24 project or the river is operated. He ignores that the  
25 project releases are actually continually adjusted to

1 make sure that those project flows are meeting project  
2 demands at project delivery points. Under the New  
3 Mexico model, these additional flows that all go to  
4 Texas exceed project demands, exceed project orders,  
5 exceed a full supply, and, frankly, show up as waste  
6 at the bottom of the system. This in no way has any  
7 bearing towards reality of how historically this river  
8 has been managed, has no reality on any other project  
9 operations, but Dr. Hutchison's model completely  
10 ignores this. We have raised this repeatedly  
11 throughout our expert reports, and Dr. Hutchison chose  
12 not to file a rebuttal report addressing any of these  
13 concerns. I also want to just make sure that I  
14 mention that the U.S.'s key modeling expert, Ms.  
15 Moran, also raises many of these same concerns. So  
16 this is an area where Texas and the U.S. diverge. Ms.  
17 Moran stated expressly in her report that you needed  
18 to have something less than an annual model, at least  
19 a seasonal model, to look at the fact that releases  
20 are only occurring during irrigation season. Project  
21 deliveries are only occurring during that sub part in  
22 time. She also acknowledges that there are no project  
23 operations in Dr. Hutchison's model, therefore, she  
24 attempted to do some type of reallocation herself;  
25 however, she acknowledges that under his existing

1 model, the way it is a simplified MODFLOW model, does  
2 not reflect reality. So it's New Mexico's position  
3 then, Your Honor, that we shouldn't have to sit  
4 through hours and hours of testimony on a groundwater  
5 model that, frankly, doesn't have any basis in  
6 reality. It does not reflect those project operations  
7 that are critical, therefore, in addition to the fact  
8 that you have ruled that there is a 57/43 split, it  
9 can't measure 43 of anything. It can't measure  
10 whether or not Texas is getting more or less than that  
11 43 percent. Therefore, we ask that the testimony from  
12 Dr. Hutchison be excluded on his groundwater model  
13 only. He certainly had filed a limited rebuttal  
14 report on a different issue. It was related solely to  
15 his statements related to New Mexico's Hueco or  
16 basically the El Paso Valley groundwater model. We  
17 are not seeking to exclude those opinions at all, just  
18 the opinions on the groundwater model. Thank you,  
19 Your Honor.

20 **JUDGE MELLODY:** Does Texas have a  
21 response?

22 **MS. KLAHN:** Yes, Your Honor. Sarah  
23 Klahn for Texas. New Mexico's motion assumes the  
24 predicate. They assume, A, that their modeling is  
25 accurate; B, it assumes that the model -- the modeled

1 project operations accurately reflect project  
2 operations; and, C, it assumes New Mexico's choice to  
3 model project operations is necessary to answer the  
4 questions in this case. So we think that the New  
5 Mexico model is -- or the New Mexico motion is not a  
6 Daubert motion at all. It's a -- it's a dispute -- it  
7 reflects a dispute between the two states about how  
8 our experts have chosen to approach the question of  
9 New Mexico's consumption of water and modeling that  
10 consumption over the period of record. I would say  
11 that the fact that the El Paso gage, which is what  
12 Mr. Hutchison ties his modeling to and it's sometimes  
13 called the Courchesne gage, it's -- it's at the  
14 narrows. It's at the point where all the water below  
15 that goes to Texas. It's -- it's also in the New  
16 Mexico model. Whether or not it's a Compact  
17 compliance point is irrelevant. It's the right point  
18 to -- to take a look at how much water would have  
19 passed the El Paso gage in the absence of New Mexico's  
20 pumping. Ms. -- the -- the invocation of United  
21 States' expert, what Dr. Moran says, is --  
22 oversimplifies her report. At the end of the day, Ms.  
23 Moran concludes that the Texas model is adequate and  
24 appropriate for the uses for which it is being  
25 offered, and that's an issue that will come out during

1 Ms. Moran's testimony. It's something that New Mexico  
2 can cross on, and we simply don't think that this even  
3 rises to the level of raising Daubert issues. It just  
4 is seeking an advantage to -- to try and make their  
5 model the only model in the case. We'd ask you to --  
6 to deny the motion.

7 **JUDGE MELLOY:** All right. I'm going to  
8 deny the motion. I think this goes to the weight and  
9 not the admissibility of the testimony, and if it  
10 turns out that Dr. Hutchison didn't include all  
11 relevant factors, well then presumably his testimony  
12 won't be given a lot of weight, and if the New Mexico  
13 model is a better model, their numbers will be the one  
14 that controls. But I -- but I think that's a matter  
15 for trial, not a matter for a Daubert motion at this  
16 point so -- so anyway, I'm going to overrule that  
17 motion.

18 Any -- I think that disposes of New  
19 Mexico's motions. United States, you want to be  
20 heard, Mr. Dubois?

21 **MR. DUBOIS:** Ms. Coleman is going to  
22 take on the motions in limine for the United States,  
23 Your Honor.

24 **JUDGE MELLOY:** Okay.

25 **MS. COLEMAN:** Good afternoon, Your



1 Honor. Judy Coleman for the United States. I heard  
2 and appreciate everything that you stated with respect  
3 to Texas' overlapping motions, and I -- I do want to  
4 address a few things that I think we still can get on  
5 the record today that address our concerns, fully  
6 understanding the Special Master's interest in having  
7 a full and robust record for the court and in having  
8 specific evidence in front of him to consider with  
9 these motions. We were very clear in our motions that  
10 we were seeking prophylactic rulings, largely for  
11 trial management purposes. As you may have seen, New  
12 Mexico has listed almost 2,500 exhibits on its exhibit  
13 list. We should also take up Colorado's 1,400  
14 exhibits perhaps later in this conference. And so I  
15 think we do have a clear need to have some sort of  
16 guidance, and especially with this -- perhaps some of  
17 this extra time we have for the parties to be further  
18 refining their -- their list. I'd like to think the  
19 United States has done so going from 2,600 to about  
20 600 exhibits. And so to that end, I think there's  
21 some relief, short of a granting of an exclusionary  
22 motion, that can help us here. First, I think we'd be  
23 looking for some guidance that the 15 statements that  
24 we had listed in our summary judgment motion in limine  
25 should be treated as established for purposes of

1 trial. I -- I know, and Mr. Wechsler said and New  
2 Mexico said in its brief, they will abide by the  
3 summary judgment ruling, but I think we also heard  
4 some statements just now from Mr. Wechsler that shows  
5 that they are not. I will read directly from the  
6 transcript on this. "We don't believe that this  
7 Compact has a 1938 condition. New Mexico has always  
8 advocated for a baseline condition, and specifically,  
9 we argue that the Compact intended to protect project  
10 operations in order to meet irrigation demand. We  
11 have expert witnesses that show that what the baseline  
12 looks like is 57 percent of project supply based on  
13 equal amount of project water to each acre, but  
14 there's supplemental groundwater pumping to meet  
15 irrigation demands and then continued operation to  
16 limit waste, and that becomes the baseline or that's  
17 translated into the baseline." These statements, in  
18 several respects, directly contradict the statements  
19 in your summary judgment order. You say on Pages 6  
20 and 24 that the Compact is a 1938 condition. We leave  
21 the details of that to be determined at trial. Why  
22 are we still hearing New Mexico say that it's not a  
23 1938 condition? I understand there's course and  
24 performance arguments, and those go to what the intent  
25 is. I know there's acquiescence arguments that go to

1    how much damage, you know, Texas can really be  
2    asserting if it's, you know, agreed to or acquiesced  
3    in some amount of pumping, but when we talk about that  
4    the 1938 condition is, as you said, the baseline, and  
5    it's a summary judgment ruling to that effect. And  
6    the fact that we are still hearing things like that  
7    from New Mexico at this late stage on the record after  
8    saying they would not contest summary judgment is why  
9    we need guidance, we -- we suggest, on the record.

10           So, first, we'd like to have those 15  
11   statements that have confirmed to be established New  
12   Mexico did not identify any substantive dispute with  
13   them, and surely the Special Master is free to edit  
14   them as he wishes to conform to -- to what he wrote in  
15   May.

16           The second relief, short of -- short of  
17   a grant -- full-on grant of an exclusion is direction  
18   to counsel, I think, to avoid lines of testimony that  
19   are -- that are inconsistent with the ruling. And I  
20   -- that's gauzy, but it's something that the United  
21   States can point to, and Texas, and if New Mexico  
22   wants to for itself, we can point to at trial. We  
23   just want a piece of paper or electronics to hold up  
24   and say the Special Master said that ruling was real.  
25   Similarly for the counterclaims motion, which I do

1 want to get into a little bit more, we did provide  
2 some examples, you know, for -- we all know by now  
3 that there are -- there's going to be significant  
4 disputes about what Estevan Lopez can testify to. We  
5 take that as granted, it'll come up at trial. That's  
6 an example of where we would like some direction that  
7 that testimony should be confined to some extent, much  
8 as Dr. Littlefield's testimony was confined in Montana  
9 versus Wyoming in advance of trial. That's the sort  
10 of guidance that would be helpful. Similarly, we did  
11 not see anything as glaring, I think, in Dr. Steven's  
12 testimony, but since he's in the same realm as  
13 Dr. Littlefield and worked with him, in fact, that's  
14 just another sort of advisory that we would be  
15 interested in pursuing. Similarly, to the extent that  
16 there's lengthy discussion of acquiescence or lots of  
17 talk about everyone intended to protect groundwater  
18 pumping that was minimal at the time of the Compact  
19 but is now maximal, that sort of guidance, I think,  
20 needs to be entered.

21           Earlier, I believe you already addressed  
22 what my third statement was going to be, which is some  
23 direction that testimony going to interpretation of  
24 the Compact will not be permitted except, you know, to  
25 the extent that it's consistent with expertise and the

1     like. I think we all understand that and can defer  
2     that for trial.

3                     Now, the counterclaims. So I was  
4     listening to the August 17th status conference from an  
5     Uber on my one day of vacation this year, so I -- I  
6     might have messed up, but based on the transcript, I  
7     think the one issue does seem to be important to  
8     clarify, which is this distinction between affirmative  
9     defenses and counterclaims. There was some discussion  
10    of this. Mr. Dubois made clear the United States'  
11    position that we understand affirmative defenses are  
12    -- are in this case, and there's overlap. But I think  
13    it -- it's worth looking at what New Mexico's  
14    affirmative defenses actually are and going to our --  
15    back a bit to our summary judgment motion, whether  
16    they -- to what extent they survive and are available  
17    against the United States. Now, again, this is not  
18    intended for, you know, categorical exclusion of broad  
19    swaths of testimony, but for purposes of guidance. So  
20    looking at New Mexico's answer to the United States'  
21    complaint, we have eight affirmative defenses. I will  
22    dispatch with them quickly. No. 1, ripeness on the  
23    ground that the harm was speculative. This was  
24    rejected on summary judgment. The Special Master  
25    concluded that New Mexico interfered with project

1 deliveries in 2003 and 2004.

2 No. 2, notice. This was rejected as to  
3 Texas because New Mexico's motion only went to Texas,  
4 but the logic that the Special Master applied applies  
5 equally to the United States so that affirmative  
6 defense is rejected.

7 No. 3, failure to mitigate. Now, this  
8 is where we get into the most overlap with the New  
9 Mexico true affirmative defenses, I would say, which  
10 is that there's groundwater pumping in Texas,  
11 groundwater pumping in New Mexico -- sorry,  
12 groundwater -- there's obviously groundwater pumping  
13 in New Mexico -- groundwater pumping in Mexico, and  
14 channel maintenance sediment vegetation. Those were  
15 the three things that New Mexico identified, and we  
16 agree that if New Mexico -- that New Mexico can put on  
17 evidence that is relevant to show that depletions  
18 associated with things other than New Mexico  
19 groundwater pumping are alternative or additional  
20 contributing causes to shortages to Texas. We accept  
21 that. We don't think they necessarily have that  
22 evidence as to maintenance, but if they want to point  
23 to it, they're welcome to. But the question is the  
24 United States' failure to mitigate, and to the extent  
25 there was summary judgment for us on -- you know, on

1 declaratory relief, that one has been extinguished.  
2 Failure to exhaust also rejected, and for the same  
3 reasons it was rejected as to Texas. And then we get  
4 into three equitable defenses, unclean hands,  
5 acceptance and laches. These are not available  
6 against the United States, and I think that -- and I  
7 would be happy to cite additional cases on top of the  
8 ones we cited. In addition, the unclean hands one is  
9 essentially a counterclaim one against Texas.

10 Finally, we get to failure to state a  
11 claim. Paragraph 48 in the answer, groundwater is not  
12 a part of project supply. That argument was rejected  
13 in summary judgment. We can talk about details,  
14 extent to which, et cetera, but as far as that  
15 affirmative defense, it does not apply the United  
16 States on declaratory relief.

17 And then the next is about the federal  
18 contracts to pump groundwater, which is a legal issue  
19 and not a factual one. So when you look at that, I  
20 think the -- what it boils down to on affirmative  
21 defenses is groundwater pumping in Texas, groundwater  
22 pumping in Mexico, and channel maintenance, and then  
23 New Mexico's counterclaim against Texas, which is that  
24 New Mexico's argument that it has been shorted water  
25 and has not received water to which it is entitled,

1    which is a numerical -- it's a quantification applied  
2    to the baseline condition or adjustments thereto that  
3    may be appropriate.  So these are the limited  
4    categories that -- that we agree are relevant.  I  
5    would just -- going through -- and that's -- and I  
6    think it's important to compare the defenses to the  
7    counterclaims in order to figure out what -- what is  
8    really available to New Mexico and so this request  
9    finally that we would suggest would be to have some  
10   guidance on the record looking at the New Mexico  
11   counterclaims and -- and saying what is and is not  
12   there or what is and is not relevant or appropriate so  
13   that New Mexico and the United States and Texas can  
14   shape their cases.

15                So I want to turn back, finally, to  
16   Ms. Barncastle's letter, and things Ms. O'Brien said  
17   earlier, which is the New Mexico oppositions to the  
18   Texas motion for continuance, even if they did not --  
19   even if the line was cut before filing clearly presume  
20   that New Mexico is seeking an order invalidating and  
21   enjoining the operating agreement out of this trial.  
22   We thought that the Special Master had put that to bed  
23   by saying, quote, this is neither the time nor the  
24   forum to address the validity of the 2008 operating  
25   agreement, but all the responses we saw last night are



1 180 degrees to the contrary of that. So we would just  
2 appreciate some guidance on the record to help us  
3 prepare for trial. Thank you.

4 **JUDGE MELLOY:** Thank you. Who for New  
5 Mexico wants to respond, if anybody?

6 **MR. WECHSLER:** I'll respond, Your Honor.  
7 This is Jeff Wechsler. So I'll try and take that  
8 argument, which is quite different than the papers  
9 that were filed, in some order and then address some  
10 of the things that actually were filed. So as to this  
11 first issue, Ms. Coleman seems to suggest this  
12 baseline condition that we're saying something  
13 inconsistent with that. So let's just read directly  
14 from your order. You say -- you're summarizing. You  
15 say on Page 5 to 6, "The Compacting states intended to  
16 protect not merely water deliveries into the  
17 reservoir, but also a baseline level of project  
18 operations generally as reflected in project  
19 operations prior to Compact formation. The Compacting  
20 states did not express and intend for agricultural  
21 practices, irrigation practices, and other forms of  
22 development to remain static." And let me pause right  
23 there and say this 1938 condition that they're arguing  
24 for is exactly that so to the extent this is  
25 inconsistent with anyone's position, it's of the

1 United States and Texas. You continue, "But they also  
2 did not express an intent to allow unlimited indirect  
3 capture of Rio Grande surface flows through the  
4 unregulated capture of hydrologically-connected water  
5 or the illumination of project return flows." I'll  
6 pause there again and say -- and that's exactly the  
7 position that New Mexico has articulated to you  
8 multiple times then you go on and say, "The protection  
9 of baseline level of project operations required at a  
10 minimum the protection of return flows to effectuate  
11 the Compact's apportionment." Again, precisely what  
12 New Mexico has argued. In fact, as I said, we've  
13 offered a number of alternative baselines. And then  
14 you conclude, "In broad strokes, this condition can be  
15 viewed as akin to a 1938 condition, as urged  
16 generally, by Texas, but the exact contours of that  
17 condition remain to be established at trial." And  
18 then you go onto point out multiple times that one of  
19 the primary issues that we will be dealing with at  
20 trial is, in fact, that baseline condition. Now, I  
21 could go on and on and explain why that 1938 condition  
22 that Texas has -- and the United States have advocated  
23 for are inconsistent with -- with your prior rulings,  
24 but I think that's a substantive issue, which really  
25 brings me to the next point that I have, and that is

1 the lengthy argument we just heard from Ms. Coleman  
2 seems to be confused as to what stage of the  
3 proceedings we're at. We're past the motion to  
4 dismiss stage. We're past the dispositive motion  
5 stage. Now, Ms. Coleman seemed to be asking for this  
6 broad prophylactic guidance, are, I think, the words  
7 that she used, but we cite to you a very robust set of  
8 cases which say specifically that's not the purpose  
9 for motions in limine, that motions in limine are not  
10 the stage to be resolving those broader issues. It is  
11 the time to be talking very specifically about  
12 specific evidence, which is -- is or is not admissible  
13 for specific purposes, which is why it's so difficult  
14 to deal with any of the United States' motions  
15 because, you know, they actually highlighted in their  
16 reply, they say, well, there are up to 200 exhibits  
17 where we've identified a problem with, and it sure  
18 would have been nice for them to actually identify  
19 those 200 exhibits, because I can assure you that we  
20 could point to specific reasons why we're offering  
21 those, and all of those would be within the contours  
22 of your order. We went through carefully each of our  
23 exhibits in order to ensure that they -- they did  
24 apply to something. This idea that you should, I  
25 guess, repackage your summary judgment order in 15

1 different statements, we don't see any real need to do  
2 that. You've already provided your order, which is,  
3 as we've been clear about, we're -- we embrace as  
4 largely consistent with our own view.

5           The -- this -- this lengthy discussion  
6 that Ms. Coleman had about the affirmative defenses,  
7 I'm not sure how to respond to. That's not something  
8 we're prepared to talk about today, because none of  
9 the motions dealt with New Mexico's affirmative  
10 defenses. They did have a motion about the  
11 counterclaims, which we're certainly prepared to talk  
12 about if you'd like to hear about those. But Ms.  
13 Coleman seems to be laboring under a sort of mistaken  
14 understanding of the difference between defenses and  
15 -- and affirmative defenses, which I think you  
16 addressed quite well in our last status conference,  
17 and that is, you know, that the broad claims here  
18 brought by Texas and the United States are that New  
19 Mexico received more than 57 percent of project  
20 supply, and Texas received less than 43 percent of  
21 project supply, and all of those things, which go to  
22 those issues, those reasons why that might be true or  
23 is not true, are things that are relevant. I want to  
24 point to a concession that New Mexico -- that the  
25 United States made in their briefing that I can't tell

1 if Ms. Coleman is backing away from those or not, but  
2 in their briefing, they say that they conceded that  
3 the evidence that we're talking about here really is  
4 admissible and agreed that, quote, "Evidence relevant  
5 to New Mexico's counterclaims against Texas, end  
6 quote, is admissible." They agree that, quote,  
7 "Evidence as to whether project deliveries since 1985  
8 have resulted in a 57 percent/43 percent split of the  
9 project water supply as it would have been under the  
10 protected baseline condition, end quote, is  
11 admissible," and they agree that, quote, "The  
12 operating agreement is relevant and testimony is  
13 appropriate to show where the water goes," end quote.  
14 Now, these concessions go to virtually all the  
15 evidence that will be presented in the case, and I'm  
16 not sure what's left. And so this whole discussion  
17 that Ms. Coleman had seems contrary to that. And --  
18 and finally, this last-ditch request from United  
19 States for more guidance on the operating agreement, I  
20 mean, again, I read to you the passage earlier where  
21 you outlined this quite nicely. We -- we, in our  
22 briefing, have cited multiple other passages, as well,  
23 but you have been quite clear that the operating  
24 agreement is, quote, "Relevant on the issue of whether  
25 each state is receiving the water to which it is

1 entitled under the Compact and to the extent current  
2 operations are consistent with the Court's ultimate  
3 decree on apportionment, any operating agreement will  
4 be brought into conformity with the decree," end  
5 quote. What New Mexico is interested in pursuing is  
6 both defenses that show we didn't receive more than 57  
7 percent of supply, which is a regular defense, not an  
8 affirmative defense, as suggested, and, also, our  
9 counterclaims, which show that, in fact, New Mexico  
10 received significantly less than 57 percent of supply,  
11 which is in itself a Compact violation against New  
12 Mexico. So -- so at this point, I'm not sure what it  
13 is the United States is -- is asking, but I think the  
14 best course of action is deny all of their motions in  
15 limine, and we can take up any specific evidentiary  
16 issues, which is what we thought we were talking about  
17 here, at trial. Thank you.

18 **JUDGE MELLOY:** Well, I want to take a  
19 look at these motions a little further. I'm going to  
20 take this particular one under -- under advisement,  
21 and I should be able to let you know by the time we  
22 have our next hearing. I just want to bring -- take  
23 up a couple other real quick points, and then I -- I  
24 think we'll be done for today, other than to set a --  
25 a date for next week, unless anybody else has

1 something to talk about.

2 Ms. Barfield, you had sent an e-mail,  
3 which I failed to address the last time, dealing with  
4 the exchange of exhibits, which I understand has been  
5 agreed upon, and when the parties will identify who a  
6 witness is and what exhibits will be used and so on.  
7 I don't have any problem with that, and certainly  
8 would modify the trial order to that extent. Does  
9 anybody have anything further they want to say about  
10 that?

11 (No response.)

12 **JUDGE MELLOY:** I would also mention that  
13 at the -- I need to go through the trial management  
14 order, and I should have done this earlier. I just  
15 thought of this. I think there may be some deadlines  
16 coming up on trial briefs and so on. Given the ruling  
17 on the motion to continue, I'll suspend those and re  
18 -- and reset them if we need to next week when we have  
19 our further conference.

20 And then finally, I have a number of  
21 letters requesting access to the video feed. I don't  
22 anticipate I will be denying any of those, but I'll  
23 take a look at them and -- and enter some type of  
24 order on those requests. Is there anything else  
25 anybody thinking we need to talk about today, other

1 than the date for next week?

2 (No response.)

3 **JUDGE MELLOY:** How does Thursday, the  
4 2nd, look? Are you going to be back, Mr. Wechsler?

5 **MR. WECHSLER:** I believe I come back on  
6 Wednesday. Thank you.

7 **JUDGE MELLOY:** Could we have the same  
8 time on Thursday, the 2nd? Does that work for  
9 everybody?

10 **MR. SOMACH:** Yes, Your Honor. It works  
11 for Texas.

12 **JUDGE MELLOY:** Okay. All right. And in  
13 the meantime, I want the parties to, as I said, look  
14 at their witness list, think about which witnesses we  
15 can take remotely, and -- and discuss that with each  
16 other, and we'll try to come up with at least a  
17 tentative list, and as we go through the trial, we may  
18 realize we can either expand it or have to contract  
19 it, but we'll at least have something to start with.

20 All right. If there's nothing further,  
21 we'll be adjourned. Thank you, everyone.

22 **MR. SOMACH:** Thank you, Your Honor.

23 **MR. DUBOIS:** Thank you, Your Honor.

24 (The proceedings adjourned at 12:59  
25 p.m.)

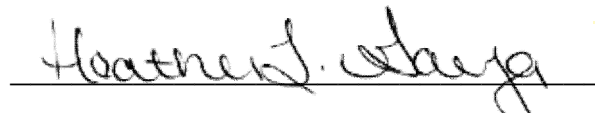


## CERTIFICATE

I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the foregoing pages comprise a true, complete and correct transcript of the proceedings had at the time of the status hearing.

I further certify that I am not, in any capacity, a regular employee of any of the parties in whose behalf this status hearing is taken, nor in the regular employ of any of the attorneys; and I certify that I am not interested in the cause, nor of kin or counsel to any of the parties.

GIVEN UNDER MY HAND AND SEAL OF  
on this, the 22nd day of September, 2021.

  
HEATHER L. GARZA, CSR, RPR, CRR  
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