

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF JUNE 3, 2021, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
2:01 p.m.

R E M O T E A P P E A R A N C E S

FOR THE STATE OF TEXAS:

Mr. Stuart L. Somach
Ms. Theresa C. Barfield
Mr. Robert B. Hoffman
Mr. Francis Goldsberry II
SOMACH SIMMONS & DUNN
500 Capitol Mall, Suite 1000
Sacramento, California 95814
(916) 446-7979
ssomach@somachlaw.com
tbarfield@somachlaw.com
rhoffman@somachlaw.com
mgoldsberry@somachlaw.com

-and-

Ms. Sarah A. Klahn
SOMACH SIMMONS & DUNN
2701 Lawrence Street, Suite 113
Denver, Colorado 80205
(720) 279-7868
sklahn@somachlaw.com

-and-

Ms. Priscilla M. Hubenak
STATE OF TEXAS ATTORNEY GENERAL'S OFFICE
Post Office Box 12548
Austin, Texas 78711
(512) 463-2012
priscilla.hubenak@oag.texas.gov

FOR THE STATE OF NEW MEXICO:

Mr. Jeffrey Wechsler
MONTGOMERY & ANDREWS
325 Paseo De Peralta
Santa Fe, New Mexico 87501
(505) 986-2637
jwechsler@montand.com

-and-

1 Ms. Lisa M. Thompson
Mr. Michael A. Kopp
2 TROUT RALEY
1120 Lincoln Street, Suite 1600
3 Denver, Colorado 80203
(303) 861-1963
4 lthompson@troutlaw.com
mkopp@troutlaw.com

5 -and-

6
7 Mr. Luis Robles
Ms. Susan Barela
ROBLES, RAEL & ANAYA, P.C.
8 500 Marquette Avenue NW, Suite 700
Albuquerque, New Mexico 87102
9 (505) 242-2228
luis@roblesrael.com
10 susan@roblesrael.com

11 -and-

12 Mr. John Draper
DRAPER & DRAPER, LLC
13 325 Paseo De Peralta
Santa Fe, New Mexico 87501
14 (505) 570-4591
john.draper@draperllc.com

15 -and-

16
17 Ms. Cholla Khoury
Mr. Zachary E. Ogaz
NEW MEXICO ATTORNEY GENERAL'S OFFICE
18 Post Office Drawer 1508
Santa Fe, New Mexico 87501
19 (505) 329-4672
ckhoury@nmag.gov
20 zogaz@nmag.gov

21
22
23
24
25

1 FOR THE STATE OF COLORADO:

2 Mr. Chad Wallace
3 Mr. Preston V. Hartman
4 COLORADO DEPARTMENT OF LAW
5 1300 Broadway, 7th Floor
6 Denver, Colorado 80203
7 (720) 508-6281
8 chad.wallace@coag.gov
9 preston.hartman@coag.gov

10 FOR THE UNITED STATES:

11 Mr. James J. Dubois
12 Mr. R. Lee Leininger
13 U.S. DEPARTMENT OF JUSTICE
14 999 18th Street, Suite 370
15 Denver, Colorado 80202
16 (303) 844-1375
17 james.dubois@usdoj.gov
18 lee.leininger@usdoj.gov

19 -and-

20 Ms. Judith E. Coleman
21 Ms. Jennifer A. Najjar
22 U.S. Department of Justice
23 Post Office Box 7611
24 Washington, DC 20044
25 (202) 514-3553
judith.coleman@usdoj.gov
jennifer.najjar@usdoj.gov

-and-

Ms. Shelly Randel
U.S. DEPARTMENT OF THE INTERIOR
1849 C Street NW
Washington, DC 20240
(202) 208-5432
shelly.randel@sol.doi.gov

-and-

1 Mr. Christopher B. Rich
2 U.S. DEPARTMENT OF THE INTERIOR
3 125 South State Street, Suite 6201
4 Salt Lake City, Utah 84138
5 (801) 524-5677

6 FOR THE EL PASO COUNTY WATER AND IMPROVEMENT DISTRICT
7 NO. 1:

8 Ms. Maria O'Brien
9 MODRALL SPERLING ROEHL HARRIS & SISK, P.A.
10 500 Fourth Street N.W.
11 Albuquerque, New Mexico 87103
12 (505) 848-1800
13 mobrien@modrall.com

14 -and-

15 Mr. Renea Hicks
16 LAW OFFICE OF MAX RENEA HICKS
17 Post Office Box 303187
18 Austin, Texas 78703
19 (512) 480-8231
20 rhicks@renea-hicks.com

21 FOR THE ELEPHANT BUTTE IRRIGATION DISTRICT:

22 Ms. Samantha R. Barncastle
23 BARNCASTLE LAW FIRM, LLC
24 1100 South Main, Suite 20
25 Las Cruces, New Mexico 88005
(575) 636-2377
samantha@h2o-legal.com

FOR THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY
AUTHORITY:

Mr. James C. Brockmann
STEIN & BROCKMANN, P.A.
Post Office Box 2067
Santa Fe, New Mexico 87504
(505) 983-3880
jcbrockmann@newmexicowaterlaw.com

1 FOR THE CITY OF EL PASO:

2 Ms. Susan M. Maxwell

BICKERSTAFF HEATH DELGADO ACOSTA, LLP

3 3711 S. MoPac Expressway Building One, Suite 300

Austin, Texas 78746

4 (512) 472-8021

smaxwell@bickerstaff.com

5
6 FOR THE CITY OF LAS CRUCES:

7 Mr. Jay F. Stein

STEIN & BROCKMAN, P.A.

8 Post Office Box 2067

Santa Fe, New Mexico 87504

9 (505) 983-3880

jfstein@newmexicowaterlaw.com

10
11 FOR THE NEW MEXICO PECAN GROWERS:

12 Ms. Tessa T. Davidson

DAVIDSON LAW FIRM, LLC

13 4206 Corrales Road

Post Office Box 2240

14 Corrales, New Mexico 87048

(505) 792-3636

15 ttd@tessadavidson.com

16
17 FOR THE NEW MEXICO STATE UNIVERSITY:

18 Mr. John W. Utton

UTTON & KERY, P.A.

Post Office Box 2386

19 Santa Fe, New Mexico 87504

(505) 699-1445

20 john@uttonkery.com

21
22
23
24
25

1 FOR HUDSPETH COUNTY CONSERVATION AND RECLAMATION
2 DISTRICT:

3 Mr. Andrew S. "Drew" Miller
4 KEMP SMITH, LLP
5 816 Congress Avenue, Suite 1260
6 Austin, Texas 78701
7 (512) 320-5466
8 dmiller@kempsmith.com

9 FOR THE SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS
10 ASSOCIATION:

11 Mr. A.J. Olsen
12 HENNIGHAUSEN OLSEN & MCREA
13 604 North Richardson Avenue
14 Roswell, New Mexico 88202
15 (575) 624-2463
16 ajolsen@h2olawyers.com

17 COURT REPORTER:

18 Ms. Heather L. Garza
19 WORLDWIDE COURT REPORTERS
20 3000 Wesleyan Street, Suite 235
21 Houston, Texas 77027
22 (800) 745-1101
23 heather_garza@ymail.com
24
25

1 **JUDGE MELLOY:** This is the matter of
2 Original No. 141, United States Supreme Court, State
3 of Texas versus State of New Mexico and State of
4 Colorado with United States as intervenor. As usual,
5 let's start with the entry of appearances.
6 Mr. Somach?

7 **MR. SOMACH:** Yes, Your Honor. This is
8 Stuart Somach, counsel of record for the State of
9 Texas. With me from my office are Theresa Barfield,
10 Sarah Klahn, Francis Goldsberry, Robert Hoffman. Also
11 from the -- the Texas Attorney General's Office is
12 Priscilla Hubenak. The engineer advisor for the State
13 of Texas, Suzy Valentine, the former Rio Grande
14 Compact commissioner for Texas, Pat Gordon, and the
15 current and very new, I might add, Texas Rio Grande
16 Compact commissioner Bobby Skov.

17 **JUDGE MELLOY:** Okay. Then for New
18 Mexico, Mr. Wechsler?

19 **MR. WECHSLER:** Good afternoon, Your
20 Honor. Jeff Wechsler from Montgomery & Andrews for
21 the State of New Mexico. We also have John D'Antonio,
22 the state engineer, and Compact commissioner for the
23 State of New Mexico, Rolf Schmidt-Petersen, who is the
24 interstate stream commission director, Greg Ridgley,
25 the general counsel for the Office of the State

1 Engineer, Cholla Khoury and Zach Ogaz from the New
2 Mexico Attorney General's Office, Lisa Thompson and
3 Michael Kopp from Trout Raley, Luis Robles and Susan
4 Barela from Robles Rael and Anaya, and John Draper
5 from Draper & Draper.

6 **JUDGE MELLOY:** Okay. And for Colorado,
7 Mr. Wallace?

8 **MR. WALLACE:** Yes. Good afternoon, Your
9 Honor. Chad Wallace and Preston Hartman for the
10 Colorado Attorney General's office. Also with us this
11 afternoon is Mike Sullivan, the deputy state engineer
12 of Colorado.

13 **JUDGE MELLOY:** And for the United
14 States, Mr. Dubois?

15 **MR. DUBOIS:** Yes, Your Honor. Thank
16 you. James Dubois for the United States. Also from
17 Department of Justice is Judith Coleman, Lee
18 Leininger, and Jennifer Najjar, and from the
19 Solicitor's Office of Interior, Chris Rich and Shelly
20 Randel.

21 **JUDGE MELLOY:** All right. The
22 Albuquerque Bernalillo County Water Authority?

23 **MR. BROCKMANN:** Good afternoon, Your
24 Honor. This is Jim Brockmann for the Albuquerque
25 Bernalillo County Water Utility Authority, and with me

1 on the call today is also John Stomp.

2 **JUDGE MELLOY:** City of El Paso?

3 **MS. MAXWELL:** Good afternoon, Your
4 Honor. This is Susan Maxwell for the City of El Paso.

5 **JUDGE MELLOY:** City of Las Cruces?

6 **MR. STEIN:** Good afternoon, Your Honor,
7 this is Jay Stein from the City of Las Cruces. I'm
8 joined by Delilah Walsh and Adrienne Widmer from City
9 Utilities and Robert Caballo for the City attorney's
10 office.

11 **JUDGE MELLOY:** El Paso County Water
12 Improvement District No. 1.

13 **MS. O'BRIEN:** Good afternoon, Your
14 Honor. Maria O'Brien El Paso County Water Improvement
15 District No. 1. Also on today is counsel Renea Hicks,
16 general manager Jesus Reyes, and district engineer,
17 Dr. Al Blair.

18 **JUDGE MELLOY:** Elephant Butte Irrigation
19 District?

20 **MS. BARNCASTLE:** Good afternoon, Your
21 Honor. Samantha Barncastle for EBID, and joining me
22 today is Mr. Gary Esslinger, the treasurer/manager of
23 the district.

24 **JUDGE MELLOY:** The Hudspeth County
25 Conservation and Reclamation District No. 1?

1 **MR. MILLER:** Yes, good afternoon, Your
2 Honor. This is Drew Miller on behalf of the Hudspeth
3 County Conservation and Reclamation District No. 1.

4 **JUDGE MELLOY:** New Mexico Pecan Growers?

5 **MS. DAVIDSON:** Good afternoon, Your
6 Honor. This is Tessa Davidson on behalf of New Mexico
7 Pecan Growers.

8 **JUDGE MELLOY:** Anyone on for New Mexico
9 State University?

10 **MR. UTTON:** Yes, Your Honor, good
11 afternoon. This is John Utton on behalf of NMSU.

12 **JUDGE MELLOY:** And Southern Rio Grand
13 Diversified Crop Farmers Association.

14 **MR. OLSEN:** Good afternoon, Your Honor.
15 A.J. Olsen on behalf of the Diversified Crop Farmers.

16 **JUDGE MELLOY:** Anybody I've missed?

17 (No response.)

18 **JUDGE MELLOY:** All right. Thank you,
19 everyone.

20 Well, we were able to get out the order
21 and summary judgment a couple of weeks ago, and I
22 think it's appropriate that we have a status
23 conference to talk about some of the issues going
24 forward. I anticipate that this is going to be an
25 ongoing discussion over the summer months and that

1 some issues we can resolve today. Some will probably
2 require further discussion, but for -- for purposes of
3 today, let me start with Mr. Somach. What is -- what
4 is -- what is the amendment or clarification or
5 whatever you want to call it that you want to do to
6 the pleadings? Do you want to talk -- tell us what --
7 what you -- what you're thinking about, Mr. Somach?

8 **MR. SOMACH:** Yes, Your Honor. And I
9 want to preface this by saying that I want to apprise
10 you of this. We are still working with the attorney
11 general's office to obtain the authorization to
12 actually move forward with it, but we believe that
13 there is a current violation of Article 6 of the
14 Compact, which would relate to a violation of Article
15 4 of the Compact, and that is that there are accrued
16 credits -- I mean, debits that New Mexico has accrued
17 to it. Under Article 6, they are supposed to retain
18 water in storage equal to the amount of accrued
19 debits, and our view is they have not done that.
20 Instead, the water is being released for use in the
21 Rio Grande. They are precluded from storing in post
22 1929 reservoirs under the Compact when the reservoir
23 is under 400,000 acre-feet, that is Elephant Butte
24 Reservoir is under 400,000 acre-feet, which it is now.
25 So we believe, number one, there have been releases

1 made from the reservoir, and we believe there are
2 continual use of water that ought to be going to the
3 reservoir for use by Texas and by EBID that are not
4 being conserved in any way, and that violates the
5 Compact. We think that's a current violation of the
6 Compact. Under the Compact, the Texas Rio Grande
7 Commissioner, in January, will demand release of those
8 debit water, and they don't have them to release
9 because of what they've done. And so we believe that
10 it does relate to the Article 4 obligation, which, of
11 course, is caught up in litigation. It's a current
12 violation. It's current right now. And believe, you
13 know, it's appropriate to supplement the complaint to
14 add those -- those allegations.

15 **JUDGE MELLOY:** Well, let me ask you
16 this, without getting into the merits of it too much,
17 I mean, this is one of the things that -- that is --
18 is difficult about this case, as you say New Mexico's
19 responsible for releasing this water, but I thought
20 Reclamation was responsible for releasing the water.
21 I mean, and -- as I understand it, New Mexico has no
22 control over -- over the reservoir.

23 **MR. SOMACH:** This isn't Elephant Butte
24 Reservoir. These are the upstream reservoirs that are
25 --

1 **JUDGE MELLOY:** Oh, okay.

2 **MR. SOMACH:** -- that you mentioned in
3 your order as you went through the articles. So we're
4 focusing here on Article 6 primarily, and then the
5 ultimate Article 8, ability to demand releases from
6 those upstream reservoirs to the extent of the accrued
7 debits. And so that's what we're -- we're talking
8 about. The issue is complicated by the fact that
9 Elephant Butte reservoir is so low, below 400,000
10 acre-feet, but nonetheless, we believe there are
11 obligations associated with that water equal to the
12 accrued debits that tie New Mexico's hands on what
13 they can do with that water, among other things. We
14 don't think they can utilize them in the middle Rio
15 Grande, but, of course, that's -- that would be the
16 purpose of -- of the supplement, would be to look at
17 those -- those issues. But we're looking at the
18 express language of Article 6, which requires New
19 Mexico to retain at all times in storage an amount
20 equal to their accrued debits.

21 **JUDGE MELLOY:** What would be the relief
22 you would seek? Would you want immediate injunctive
23 relief almost in the nature of a preliminary
24 injunction or are you -- is this one more air on the
25 quiver, so to speak, of damages?

1 **MR. SOMACH:** I think it's both, Your
2 Honor, but it is an injunction that says as long as
3 you owe us that water, you can't be utilizing that in
4 the middle Rio Grande. An amount equal to the -- the
5 debit ought to be either retained in some way or it
6 could be released into Elephant Butte reservoir
7 because there is no preclusion of storage in Elephant
8 Butte reservoir under the Compact. But you can't use
9 it at the same time that you're accruing a deficit
10 under Article 4.

11 **JUDGE MELLOY:** How soon do you
12 anticipate you can make a decision as to whether you
13 want to bring this forward?

14 **MR. SOMACH:** I'm drafting the papers
15 right now. I am told the Attorney General's Office is
16 looking at the issue, and I should have an answer
17 within a week.

18 **JUDGE MELLOY:** What's your position,
19 Mr. Wechsler?

20 **MR. WECHSLER:** Yeah. Thank you, Your
21 Honor. It won't surprise you to learn that we're
22 quite confident that we're within the contours of the
23 -- the Compact. We're following all of our
24 obligations. I won't get into any of the statutory
25 interpretation issues, except to say that we feel very

1 strong about our position here. It's one that's been
2 followed for a very long time, and it's the one that's
3 by far the most consistent with the plain language of
4 the -- the Compact. And -- and I think, just so that
5 you have some background, it would be helpful if we
6 provided you the dueling letters from the two
7 commissioners, the former commissioner from the State
8 of Texas provided a letter to the State of New Mexico
9 indicating their position, and in response, New Mexico
10 outlined its position on this issue. So just so that
11 you have some background, I would suggest that we
12 provide those to you.

13 What I will say in terms of amendment to
14 the pleadings and that sort of thing, there's -- the
15 Court has adopted a very stringent standard for
16 amending pleadings in an intrastate case. The
17 operative case comes from the Nebraska versus Wyoming
18 case. I believe it was some time in the '90s. And
19 you can see there that one of the parties attempted to
20 amend the pleadings, and the Court indicated that the
21 -- the liberal nature of amendment of pleadings that
22 exists in other cases isn't true in original
23 jurisdiction proceedings in part because of the -- the
24 important nature of the cases and because of the
25 gatekeeping function that the Court applies in these

1 cases, which is, of course, unique. We would say, you
2 know, the issues having to do with the lower Rio
3 Grande, we're very anxious to resolve those. As -- as
4 you know, we feel like under the current status quo,
5 New Mexico hasn't been receiving its share of water
6 for many years and so we're anxious to resolve those
7 issues as quickly as possible. And as you heard from
8 Mr. Somach, this claim is not about the lower Rio
9 Grande. It's about the middle Rio Grande. And so
10 what you'd be talking about is a whole new set of
11 issues, a whole new set of Compact interpretation, a
12 whole new set of discovery, potentially a separate set
13 of amici and -- and certainly separate witnesses. So
14 we just don't see the value here. If Texas wants to
15 file a separate motion for leave to file a separate
16 complaint to be heard on a separate track, you know,
17 that obviously is their choice. Again, we feel very
18 comfortable that we're fully and compliant with the
19 Compact. We just don't think that this last-minute
20 effort should delay our trial at all.

21 **MR. SOMACH:** Let me quickly agree with
22 Mr. Wechsler there. We -- our intent is not to delay
23 the trial. We already have a bifurcated trial
24 schedule. We believe we can move forward with the
25 trial that's scheduled to begin in September and then

1 look to how best to deal with these issues. In some
2 respects, we believe that these issues could be dealt
3 with on summary judgment, in any event, because we
4 don't believe that there's much dispute of fact that
5 our interpretation of the Compact is under the
6 language of the Compact, and it may be amenable. In
7 fact, Mr. Wechsler and I have talked about that on a
8 -- on a couple of occasions unsuccessfully, in terms
9 of trying to come up with a path forward.

10 I do know in the Wyoming case, there was
11 -- amendments were allowed in that case, and there is
12 a -- a written opinion, of course, that goes through
13 and discusses all of -- all of that. Whether we have
14 to file a petition with the court, which we're
15 prepared to do, or whether we can do as New Mexico did
16 when it files its -- its counterclaims, just simply
17 file with -- with you is -- is certainly a -- a
18 question for some discussion. With respect to the
19 duelling letters, I will say that our letter to New
20 Mexico doesn't fully articulate the nuances of our
21 position. At that point in time, we were hopeful that
22 we would be able to sit down and negotiate a
23 resolution and tried not to -- to draw lines in the
24 sand. Unfortunately, we have not been able to -- to
25 resolve this amicably and so we're now facing an

1 impasse in that regard requiring litigation, so -- but
2 we don't intend that this -- we want to also proceed
3 with trial on the issues that are ready for trial, but
4 we believe that this issue ought to be looked at,
5 also, in the context of this broader litigation.

6 **JUDGE MELLOY:** Well, let me just say
7 this: If you're going to file something, Mr. Somach,
8 let's get it on file in the next ten days so we know
9 what it is and whether it has to go to the Supreme
10 Court or whether it's something I can deal with. I
11 guess I'm not prepared to say at this point because I
12 haven't seen it. But I do think if it's a separate
13 injunctive relief against -- involving a different
14 portion of the river, I -- I would think it may be a
15 -- if not a separate complaint, at least a
16 substantive-enough amendment that the Supreme Court
17 may have to be involved. But I -- I'll have to think
18 about that.

19 **MR. SOMACH:** And I think that that -- we
20 will proceed that way. I wanted to not surprise you
21 by simply filing something. We do believe it relates
22 -- it relates to Article 4 and the delivery obligation
23 and so we do think that it is appropriate for this --
24 this particular original action, it -- it falls right
25 within that ambit, but we will -- we will proceed.

1 We'll try to get that done within ten days. The --
2 the papers will be approved, and we'll try to get the
3 -- the approval through the Attorney General's Office
4 as quickly as possible. I'll also inform you if we
5 are not going to proceed just so that you're not
6 waiting for a shoe that's not going to drop, to drop.

7 **JUDGE MELLOY:** Is there any chance you
8 can sit down and resolve this? Mr. Wechsler, what do
9 you think?

10 **MR. WECHSLER:** It doesn't seem like it,
11 Your Honor. I agree with Mr. Somach, we have had
12 discussions about this, including potential ways to
13 resolve this, but I don't -- it feels like, at base,
14 it's simply a difference in the interpretation of the
15 Compact as to what the obligations of the states are
16 and -- and so I haven't seen a way to resolve it. We,
17 of course, are -- remain open to discussions. I'll
18 note that Texas first raised the issue as part of the
19 ongoing mediation in which we're having continuing
20 talks so, again, happy to continue the discussions,
21 but I -- we haven't seen a path forward for resolving
22 it yet.

23 **JUDGE MELLOY:** Are you getting any place
24 on the mediation?

25 **MR. WECHSLER:** Well, I -- I have a hard

1 time assessing if we're making progress. We're
2 certainly having productive conversations.

3 **JUDGE MELLOY:** All right. Does anybody
4 else want to be heard on this issue before we move on?

5 **MR. WALLACE:** Yes, Your Honor. This is
6 Chad Wallace for Colorado, and I just wanted to let
7 you know that Colorado would be in opposition to any
8 effort to amend the pleadings on this issue with the
9 Special Master at this point. Interpretations of
10 Articles 6, 7, and 8, especially upstream of Elephant
11 Butte Reservoir, directly affect Colorado and
12 Colorado's own ability to store water within its
13 state, so it involves us to a degree that we have not
14 been involved in this case before, and we would likely
15 need to conduct discovery, potentially evaluate the
16 need for expert reports. We agree with New Mexico
17 that the proper course, if Texas wants to pursue
18 litigation, is to file a motion with the Supreme Court
19 for leave to do so, that is not appropriate to try and
20 bootstrap a different issue in a different part of the
21 river into this current case.

22 **JUDGE MELLOY:** All right. Well, let's
23 see where -- where we are in ten days, and then we'll
24 go from there.

25 It does -- this isn't following the

1 order I necessarily have in the agenda, but it does
2 sort of lead into one -- one of the agenda items,
3 which is New Mexico's request for clarification of
4 Paragraph 9 of the Trial Management Order. It is my
5 understanding, and I'm subject to be corrected by --
6 or request for reconsideration by anyone, is that the
7 trial that's going to commence in September will deal
8 with liability and the issue of whether there are
9 damages. It will -- we will have, as a separate
10 trial, assuming the Supreme Court agrees or doesn't
11 agree, depending on how they rule, on the issue of the
12 amount of damages and the remedy. It's my
13 understanding that we need to get into damages in this
14 trial at least to the extent to address the argument
15 that, I think, New Mexico has made that even if there
16 is a Compact violation, there's no damage, and that
17 Texas and New Mexico both, as to its counterclaim,
18 have to show that there's -- there's not, in other
19 words, colloquially speaking, it's not a no-harm-no
20 -foul-type situation. So that's why I think we need
21 to get into damages to at least a little, to some
22 extent, to prove that or to show that there's been
23 damages and -- and maybe even that they're not de
24 minimus. I mean, we're not going through all this
25 expense and time and reference to the Supreme Court on

1 a matter that's, you know, a few hundred thousand
2 dollars, let's say, or even a few million dollars
3 probably. But -- but that's my -- that's my sense of
4 where we are. Does -- does anybody -- does anybody
5 view this differently?

6 **MR. WECHSLER:** Your Honor, we don't view
7 -- that's how we understood your order. The rationale
8 for asking for clarification was to make sure that we
9 understood it the same way, because obviously there
10 have been disclosed experts on the quantification of
11 -- of damages. From Texas, it's a gentleman named
12 Dr. Sunding. From New Mexico, it's a man named
13 Dr. Hoag. And so it's as we're developing our exhibit
14 list and witness list, which are due June 30th, we
15 wanted to make sure our understanding was correct so
16 that we didn't have to disclose exhibits and -- and
17 Dr. Hoag as a witness, but I -- I think you've
18 clarified your intention with the order, and I
19 appreciate that. Thank you.

20 **MR. SOMACH:** Except, I want to make sure
21 we do have an understanding. We intend to put
22 Dr. Sunding on as a witness for the purposes of
23 describing the injury. We will refrain from him
24 putting a dollar value on the injury, but we do intend
25 to -- to have him put on evidence of injury. In

1 contrast, we know of no expert from New Mexico or no
2 disclosure or expert reports that deal with the
3 question of -- of injury. Certainly, we understand
4 the quantification that they're talking about, but
5 this goes to the no-harm-no-foul issue. We know of no
6 evidence that would link a reduction in water,
7 assuming they can prove it, which I don't think they
8 can, but -- but a reduction of water that that
9 translates to any injury on behalf of -- of New
10 Mexico. And so I want to be clear. We're -- we're
11 prepared. We could put on our dollar damage
12 testimony, but we know of no -- no parallel testimony
13 offered whatsoever in terms of an expert or otherwise
14 that would -- would -- would go to the question of
15 injury. So you could make the determination of
16 whether or not a reduction in water translated to de
17 minimus or -- or valid damages.

18 **MR. WECHSLER:** Well, if I may be heard,
19 Your Honor.

20 **JUDGE MELLOY:** You may.

21 **MR. WECHSLER:** Yeah. Obviously, we very
22 much disagree with that. We -- we don't intend to put
23 on any evidence quantifying that -- that damage to New
24 Mexico, but you've already seen significant evidence
25 of New Mexico's harm in the terms of the -- the lost

1 amount of water, the -- the lost crops and, in fact,
2 the significant and long lasting damage to the
3 aquifer. So -- so to say there's no evidence or
4 expert testimony on -- on damages is simply incorrect.
5 I will say this, though, is my very concern, and that
6 is if -- if we're putting on Dr. Sunding, I don't see
7 how we aren't just trying the entire case now, which
8 was everybody's intent was to -- to bifurcate the
9 matter. Dr. Sunding is an economist. Hard to see how
10 he can testify to actual damage that occurred. And
11 the last thing I would point out, too, is because I
12 don't want to be sort of remiss, and that is there is
13 case law about whether or not, you know, what the
14 necessity of proving damages is, and I'm thinking
15 specifically of there was a case, I believe it was
16 Wyoming versus Colorado, although I apologize for not
17 having that exact citation at -- at hand, in which it
18 said, you know, determining basically whether there's
19 a Compact violation, you know, that there could be a
20 Compact violation without any harm whatsoever. That
21 issue was also joined in the Yellowstone litigation in
22 Special Master Thompson's last and final report to the
23 Court where he has some discussion of that issue. And
24 so I -- I simply wanted to make you aware of that, as
25 well.

1 **MR. SOMACH:** I -- I would agree with
2 Mr. Wechsler that a violation of the Compact is a
3 violation. But on this damage issue, we're more than
4 happy to move forward with -- with evidence on dollar
5 damages, you know, and bifurcate the physical remedy
6 from -- from damages, but we're pretty certain that
7 Dr. Sunding's testimony will -- it -- it will help
8 define the injury. It also puts a dollar number on
9 the injury, and we're more than happy to move forward
10 with that, and then they could put Dr. Hoag on and --
11 and there's no question about what -- what we're
12 dealing with, and then in terms of injunctive relief
13 and -- and remedy, we can save that for the bifurcated
14 trial. There was no bifurcation at the time we -- we
15 did disclosures, no bifurcation at the time we did
16 discovery, and so there's no prejudice to just simply
17 advance one witness and do it in the -- the September
18 13th trial. That may be preferable just so that we
19 don't have confusion later on as to -- to what gets on
20 and what doesn't get on.

21 **JUDGE MELLOY:** Is anyone going to be
22 putting on damage testimony, other than New Mexico and
23 Texas? Anybody else, either United States or -- I
24 assume Colorado won't, but what about United States?
25 Are you planning --

1 **MR. DUBOIS:** The United States -- the
2 United States, Your Honor, made no claim for damages.
3 We are simply trying to protect the project, not
4 seeking damages from either state.

5 **JUDGE MELLOY:** Well, what do you think
6 about going ahead with damages then during -- during
7 the trial, Mr. Wechsler?

8 **MR. WECHSLER:** Well, I -- I think it
9 adds a whole level of complexity. I've always thought
10 that, and the way we've done these cases in the past
11 was to address the issue of liability first and then
12 damages and remedies secondarily, in part because
13 there's a whole different set of -- of defenses, and
14 it's hard -- you know, the -- what we have found is
15 you see these economists who are struggling to say how
16 to quantify the damages and they're having to make all
17 sorts of assumptions about whether there's a -- a
18 violation, what the extent of that violation is, and
19 so if you do that in the first phase, I think what
20 you'll end up being left with is sort of, like,
21 incomplete expert reports. In other words, you may
22 end up finding something that neither side advocated
23 for and, therefore, you have incomplete analysis from
24 the experts, and you're in the position of having to
25 determine, well, should I try and Frankenstein

1 something together to come up with the damages
2 estimate, should I -- should I get the experts back
3 together to try and figure out what those damages look
4 like? And it feels a lot cleaner to simply -- we can
5 do liability and whether there's the existence of
6 damages in Phase 1, then in Phase 2, the experts know
7 exactly what numbers they should be using and then
8 when they run the information through their models,
9 it's -- it's much cleaner for your purposes.

10 **MR. SOMACH:** We have -- we're talking
11 two witnesses, one witness for New Mexico, one witness
12 for Texas. Dr. Sunding uses an econometric model. He
13 will and he can plug in whatever number you need in
14 order to determine the dollar damages. Obviously,
15 we're advocating and have a specific number, which we
16 will have other witnesses testify to at that time, but
17 to the extent that -- that we're there, we've taken
18 depositions, we've had disclosures of these experts.
19 There ought not to be any question, and I'm worried
20 that what's going to happen is we're going to get
21 motions in limine or something else precluding me from
22 putting on an expert that's been duly disclosed, has
23 been deposed, has issued an expert report, and somehow
24 I'm going to be precluded because of some
25 interpretation of -- of this rule. It's cleaner to

1 just -- let's just go ahead and -- and deal with it
2 and -- and not run into a risk of further
3 complicating, you know, these types of rulings at the
4 time of trial.

5 **JUDGE MELLOY:** Well, the -- Mr. Wechsler
6 makes a good point. There are going to be defenses
7 that are then going to have to be litigated, latches,
8 notice, so we're going to have to get into all those
9 issues, as well, then, during this phase of the trial.

10 **MR. SOMACH:** But you have to -- I don't
11 think you have to do that. I think you simply have to
12 take a look and take evidence of what the dollar
13 damages are, and in the remedy phase, you can evaluate
14 a reduction, just like one would do in any situation
15 based upon the equitable issues that you believe are
16 appropriate or to bear. All their defenses are
17 equitable in nature in terms of what -- what would
18 make a -- make an issue, and that could be dealt with
19 in -- in a remedy's phase, just quite easily on the
20 base number of damages that was decided as part of the
21 liability phase. I mean, the -- the decision after
22 liability will be interlocutory in any event and will
23 need to be refined and dealt with in the remedy phase.

24 **JUDGE MELLOY:** Well, for purposes of
25 today, let's -- let me say this: I suggest that both

1 of you should disclose your experts as potential
2 witnesses. Whether we will actually let them testify
3 or how much they testify, I want to give some more
4 thought to, and I want to also see how this evolves
5 over the next couple months as to exactly how we're
6 going to frame the issues that we have to go to trial
7 on. So at least -- I think I understand the issue.
8 You can disclose your experts and then we'll -- we'll
9 go from there at this point. You can always take them
10 back off the list if -- if you decide you don't want
11 to call them.

12 All right. Let's talk about some trial
13 management issues. To some extent, this sort of ties
14 in a little bit with -- with New Mexico's motion about
15 experts. Let me start with you, Mr. Wechsler. At one
16 point, I -- I think in the proceedings, I had talked
17 about reports basically -- or -- or written
18 submissions in lieu of direct testimony with some
19 direct testimony maybe to clarify and then cross, and
20 there seemed to be quite a bit of resistance to that.
21 Do I understand you to be saying that you do want to
22 put in your report in lieu of direct testimony or can
23 you explain to me what you want to do with the
24 reports?

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

1 to. Original jurisdiction cases, as you know, are
2 quite unique, as you have indicated in the past. It's
3 ultimately the Court who's making all determinations,
4 and they have indicated a desire to create as complete
5 a record as possible. Partly, as a result of that,
6 the -- it has become the tradition in -- in original
7 jurisdiction cases that expert reports themselves are
8 accepted into evidence as exhibits as part of the
9 record that the Supreme Court can then review in their
10 entirety as they're considering their final decision.
11 And I think in the motion that we filed, we list a
12 whole number of cases. I'll say that I'm not really
13 aware of any contrary cases in the original
14 jurisdiction. That accomplishes a number of things.
15 Number one, it creates a complete record, a record
16 that's very complex by its nature and therefore is
17 something that can go back and be reviewed by the
18 Court and its clerks, and it also creates for --
19 allows for a much more efficient trial. So as the
20 experts are on, it -- it's simply a matter of going --
21 you know, pointing out various figures that are within
22 the expert report. It allows you to read those expert
23 reports in advance and understand what's going on. I
24 think that's a little bit different than what I had
25 understood our discussion previously, which was about

1 pre-filed expert testimony, which, you know, the way
2 that we have done that in the past is -- is largely a
3 Q and A format, but you're -- you're writing all of it
4 out ahead of time. And it is true, oftentimes that
5 pre-filed expert testimony is simply converted expert
6 reports, and if that's what you want us to do, we're
7 happy to do that. You know, in recent cases you see
8 sort of a split in terms of the way Special Masters
9 have handled it so by way of example, in the Florida
10 versus Georgia case and in the Republican River most
11 recent case, those were pre-filed testimony where the
12 Master had the parties convert their expert reports
13 into pre-filed testimony. Although I will note that
14 Special Master and, now, Judge, I believe, on the
15 first or second circuit, Kay Yodda, did also admit the
16 expert reports in their entirety in the Republican
17 case, even though he also did pre-filed testimony.
18 And then on the other hand, in the Montana versus
19 Wyoming case and, also, in the ongoing Mississippi
20 versus Tennessee case, there was no pre-filed
21 testimony, it was simply live testimony by the
22 experts. But nonetheless, at least in the Yellowstone
23 case, they admitted all expert reports as part of the
24 record. I'm not sure what they did in Mississippi
25 versus Tennessee. I tried to investigate but wasn't

1 able to come to a conclusion there.

2 **JUDGE MELLOY:** All right. Well, let me
3 ask Mr. Somach's response. I guess I don't quite
4 understand your objection, Mr. Somach. I thought
5 expert reports are going to be routinely admitted in
6 these cases.

7 **MR. SOMACH:** I don't think that's the
8 case, and we're prepared to pick through the examples
9 that are in that exhibit. In fact -- in the motion.
10 In fact, we're in the process of doing that. We only
11 got the motion on, I think, Tuesday night. We don't
12 think it's traditional. We think a lot of that, where
13 it was done, was done by stipulation, but we'll pick
14 through all of the examples that they've given. We're
15 -- you know, our -- our kind of view is pretty simple.
16 It is we're not objecting to New Mexico seeking to
17 introduce expert reports when they put their expert
18 witness on the stand, but we believe they have to --
19 to do so in an appropriate evidentiary manner. We
20 believe that -- that many of their experts are not
21 qualified as expert in the area that they're opining
22 on --

23 **JUDGE MELLOY:** That's a different issue,
24 but go ahead.

25 **MR. SOMACH:** Well, but -- but I think --

1 I think the question of the fact that if you were to
2 admit them now, which if admitted, is hearsay, with no
3 testimony, no ability on our part to voir dire the
4 witnesses with respect to their qualifications or
5 cross-examine them with respect to -- to what's in
6 those expert reports. The request, as I understand
7 it, is to admit them as evidence. I think they have
8 to go through, introduce them as an exhibit, have
9 their witness testify to it, allow us to voir dire
10 that witness in terms of qualifications, and -- and
11 all of the other issues that we'd be able to do under
12 the normal rules in terms of something being
13 introduced as -- as evidence in terms of reliability.
14 In addition to that, the expert reports were issued
15 before your ruling -- your first ruling on -- on the
16 motions to dismiss portions of their complaints. They
17 were issued before certainly your last order on
18 summary judgment. They contain all kinds of
19 irrelevant information that will cause an undue burden
20 on us in terms of -- of moving through and having to
21 -- to -- to object text and line to -- to what they're
22 -- they're -- what's in those expert reports. But --
23 but they're free to attempt to introduce those reports
24 and use them. What is -- what is being proposed is a
25 way that prejudices our ability in the normal and

1 ordinary way to be able to challenge those reports and
2 the credibility and expertise of -- of folks that put
3 those reports together. And there's some significant
4 issues with respect to those expert reports on the
5 grounds of relevance, on the grounds of whether
6 they're even competent to testify on the issues that
7 they're testifying to. We ought to be able to put
8 that before you and -- and until they -- they testify
9 to those things, it's -- it's just a bunch of hearsay
10 anyway.

11 **JUDGE MELLOY:** Well, let me make sure I
12 understand, and I -- and I didn't -- I didn't get this
13 from Mr. Wechsler's motion and maybe it's because I
14 didn't understand it. When -- when Mr. Wechsler talks
15 about hearsay objection, you're not talking about
16 hearsay within the report, you're talking about the
17 report itself being hearsay?

18 **MR. SOMACH:** In some cases, when you get
19 into the report, there's hearsay within hearsay. But
20 primarily at this point --

21 **JUDGE MELLOY:** For the most part -- for
22 the most part, experts can testify based on hearsay.

23 **MR. SOMACH:** But if -- if they're within
24 the area of expertise, number one, and to the extent
25 it's the type of thing that is normal and ordinarily

1 relied upon as hearsay by experts. We have questions
2 on both those grounds with respect to -- to these
3 reports. These reports are -- are just simply, in
4 some respects, a written narrative of -- of the New
5 Mexico theory of the case written by people that
6 aren't qualified to be able to do that, and I -- I --
7 we strenuously object to the notion that they be
8 introduced as evidence because they're, in many
9 instances, they're simply not appropriate evidence,
10 and we believe -- again, if he wants to put them on,
11 he's more than happy to attempt to introduce them at
12 the time of trial. Our objection is not to try to
13 hamstring them in that regard, but we think we are
14 entitled, in order to protect our interest in the
15 litigation, to be able to voir dire those witnesses,
16 to be able to cross-examine those witnesses on -- on
17 what's in those reports before they are made evidence.

18 **MR. WECHSLER:** May -- may I clarify,
19 Your Honor?

20 **JUDGE MELLOY:** Yes.

21 **MR. WECHSLER:** I -- if -- if Texas got
22 the wrong impression, you know, we certainly didn't
23 intend to ask for a ruling that these reports are
24 admitted today. We agree that ultimately, they will
25 have to be admitted and go through the process where

1 they're -- they're offered and admitted. We certainly
2 agree with Texas that they are fully entitled to
3 challenge the qualifications, the expertise of -- of
4 the methodology used by the experts, as -- as we
5 intend to do to Texas' experts, and -- and we think
6 that they will have preserved or are entitled to make
7 the specific objections that they're talking about,
8 whether it's relevance or -- or something outside of
9 an individual's expertise. We were trying to join
10 this issue now, again, because we're in the process of
11 -- of identifying our exhibits, and as you say, it has
12 become routine that expert reports, subject to
13 portions being stricken, which I don't mean to suggest
14 by citing any of those prior cases that portions of
15 those expert reports were not stricken. That, I
16 think, has universally been true. But we wanted to
17 clarify that expert reports, in general, will not be
18 categorically excluded based on being inadmissible
19 hearsay, which is what we were -- we understood the
20 position of Texas to be, and so we thought it would be
21 helpful to get clarification from you as early as
22 possible on that issue because, obviously, it also --
23 it affects what exhibits we're identifying, so to give
24 you a concrete example, if we have a -- a -- an expert
25 report and -- and subject to whatever objections Texas

1 is -- is wanting to make, we're allowed to admit that,
2 and if it's admitted, then we're allowed to say, you
3 know, Doctor so and so, please turn with me to Figure
4 17A, can you tell us what Figure 17A is, and then we
5 can have that discussion and present the testimony.
6 It's a lot more efficient if we're able to do that as
7 part of an expert report as opposed to if all expert
8 reports would be viewed as inadmissible hearsay, well,
9 now, we're doing things like identifying figures and
10 tables as either exhibits or demonstrative exhibits,
11 and we're structuring our examinations around that.
12 And so that's why we were seeking this guidance from
13 you early.

14 **JUDGE MELLOY:** Well, I guess I'm not
15 sure. What -- what do you see as the dispute here,
16 Mr. Wechsler? As I understand, you both agree that
17 they wouldn't be admitted until the expert testifies,
18 and you both agree that qualifications are fair game,
19 relevance is fair game. I think you both agree that
20 anything that's in the report that is the type of
21 thing an expert would normally rely upon is accepted
22 from the hearsay rule, and so it really just comes
23 down to, well, are there some things in there that an
24 expert would not normally rely upon? I -- I'm trying
25 to think of some -- an example off the top of my head.

1 I supposed if it's something that the counsel put
2 together, you know, maybe that's something you say,
3 well, an expert wouldn't normally rely upon
4 representations of counsel, but clearly the data that
5 forms the basis of these, I presume, is all going to
6 be the type of things testified they would normally
7 rely upon. I guess I'm having trouble understanding
8 what the dispute is.

9 **MR. WECHSLER:** Yes, Your Honor. I am,
10 as well. I had previously understood Texas to be
11 taking the position that -- and we did confer on this
12 issue, although I confess that I was not party to
13 those discussions. But it was our understanding that
14 Texas was taking the -- the position that expert
15 reports should be categorically excluded and not
16 subject to the various objections that you're
17 discussing, because if -- if you have correctly
18 articulated Texas' position, and I understand that to
19 be what Mr. Somach is saying today, then I agree,
20 there's no need to resolve this motion because we're
21 in agreement that we'll offer our expert reports at
22 the time of trial and subject to things like
23 qualifications or relevance or -- or specific
24 objections, you know, those are potentially
25 admissible.

1 **JUDGE MELLOY:** Am I misstating your
2 position, Mr. Somach?

3 **MR. SOMACH:** No. I'm -- I'm -- I don't
4 even know why the motion was brought. I'm befuddled.
5 Our objection is to what we thought the motion was
6 attempting to do, and that was to have those expert
7 reports introduced now as evidence. They're free to
8 try to introduce whatever they want to do, subject to
9 a limine motion that we might bring on a particular
10 issue, which doesn't include necessarily these
11 reports, but -- and then let us proceed in the normal
12 and ordinary way to voir dire those witnesses, to
13 object in an appropriate way to what we think is
14 objectionable at that point in time when -- when he
15 attempts to introduce those reports as evidence. I'm
16 not sure, you know, at that time, maybe there is an
17 objection, there isn't -- we do have objections. I
18 shouldn't be too cute here, but, I mean, you know --
19 but let the more ordinary and normal way of -- of
20 introducing exhibits as part of testimony proceed.
21 And I don't understand -- now, I'm really befuddled as
22 to why the motion was filed at all, but, you know,
23 that's -- that's all we're saying. I don't know. The
24 United States may be saying something different, but
25 that's what -- what we're saying.

1 **JUDGE MELLOY:** Mr. Dubois, do you have
2 anything you want to say about this issue?

3 **MR. DUBOIS:** Not much, Your Honor. I
4 think that your Footnote 1 in your last ruling said
5 that motions in --

6 **JUDGE MELLOY:** What did I say in
7 Footnote 1?

8 **MR. DUBOIS:** You said that motions in
9 limine and challenges to evidence would be taken up at
10 trial. That's what I think the -- we're talking about
11 here today. I think you nailed it in Footnote 1.
12 It's premature to try and get much anywhere with this
13 right now. This is something to be dealt with at
14 trial.

15 **JUDGE MELLOY:** Okay. All right. Let me
16 then continuing on -- well, just to complete the
17 circle on this, then I'm going to deny New Mexico's
18 motion at this time as moot. If something comes up
19 that New Mexico or any of the other parties for that
20 matter feel that does need further court intervention,
21 we'll take it up at that time. But for -- for now,
22 the motion is moot.

23 Talking about the trial schedule, and as
24 we kind of get into this issue of timeliness a little
25 bit, I want -- want to bring up one issue, and it sort

1 of relates to what Mr. Dubois just said, and that's
2 admissibility of exhibits. I don't mean this in a
3 critical sense, Mr. Somach, but it'll probably come
4 out this way, but, I mean, you objected on multiple
5 grounds to everything Texas wants to put in, including
6 objections I had never even heard of before, like you
7 didn't put in a signature page or you didn't put in
8 the attestation page. I don't -- maybe that's a --
9 maybe that's a practice in a different jurisdiction.
10 Around here, they waive signature half the time. Are
11 we going to be nitpicking over every single exhibit?

12 **MR. SOMACH:** No. I -- I don't think so.
13 You know, the -- motions for summary judgment were
14 particularly frustrating for us because it looked like
15 -- and, remember, when we -- what we said, and this
16 was our -- my characterization of -- of the way those
17 motions went down is we said, look, you can only rule
18 on summary judgment if there are legal issues or if
19 there are material issues of fact that are not in
20 dispute. And we said there's a lot of material issues
21 of fact that are in dispute. New Mexico threw in, in
22 our opinion, everything, including the kitchen sink,
23 and then just simply said, and their amici parroted
24 this, because New Mexico says it's not disputed, it's
25 not disputed. And so we went through, and we picked

1 through, and we went through the effort of picking
2 through all of that stuff in the context of -- of
3 ensuring and trying to demonstrate to you that there
4 were a lot of material issues in dispute and that we
5 weren't adverse to going to trial on those issues if
6 they were not things that were normally and ordinarily
7 subject to summary judgment. And I think, you know,
8 we were fine with -- with your order, and we think you
9 appropriately made decisions in appropriate areas and
10 deferred to trial in other areas. We are not, and our
11 -- our modus is not to pick through all of that, and
12 we think that the normal and ordinary trial and trial
13 procedure precludes the kind of, what I would call in
14 quotes dumping of material that we think we
15 experienced during the motions for -- for summary
16 judgment. It -- it's a different process, a different
17 procedure. And, yes, we -- we were -- we went right
18 by the book in terms of those objections. We crossed
19 Ts. We dotted Is. But we did so for -- for a
20 purpose.

21 **JUDGE MELLOY:** But you didn't say they
22 weren't authentic. That's the one thing you didn't
23 say. I mean, that's a little -- that's what's a
24 little frustrating is, is you never once said that
25 what they've put in was not accurate.

1 **MR. SOMACH:** Well, the question in many
2 respects was --

3 **JUDGE MELLOY:** I mean, deposition
4 exhibit excerpts, you never said they didn't put in
5 accurate deposition excerpts.

6 **MR. SOMACH:** Okay. I accept that
7 criticism then. You know, rather than sitting here
8 dancing and trying to -- to justify, I just wanted to
9 explain to you the context to which those objections
10 were made. But I don't anticipate that type of
11 dumping in a trial. It just doesn't lend itself to
12 that, and -- and to the extent we object, we will, you
13 know, either, pursuant to Footnote 1, do so at -- in
14 -- in motions in limine, and quite frankly, we're very
15 comfortable with the notion that even motions in
16 limine, Daubert motions, whatever there is, can be
17 dealt with more efficiently at the time of trial when
18 you have in front of you exactly -- exactly what it
19 is, and at that point, if you think we're being too
20 technical or too whatever, you could call us on the
21 carpet. We're -- we're big boys and girls, and -- and
22 we will proceed accordingly. But I -- I did want to
23 explain why we did what we did. It was in response to
24 what we thought was occurring. But, no, we do not
25 intend to -- to -- to do that unless we're presented

1 with similar stuff at the time of trial, which I don't
2 expect. And we're all for Footnote 1. You know, we
3 join the United States in its -- its advocacy of
4 Footnote 1.

5 **JUDGE MELLOY:** All right. Mr. Wechsler,
6 do you want to be heard on this issue at all or --

7 **MR. WECHSLER:** I don't have anything to
8 add to the discussion.

9 **JUDGE MELLOY:** Okay. All right. Okay.
10 Well, then let's talk about time limits. My thought
11 was we probably might need to see the witness list
12 before we decide on this issue and maybe -- maybe
13 that's still where we are, but as you are starting to
14 develop your witness list, how many witnesses do you
15 think you're going to have, Mr. Somach?

16 **MR. SOMACH:** I've actually -- you know,
17 you asked me that the last time and caught me a little
18 flat footed because I didn't have the list with me.
19 And let me tell you this, the United States and Texas
20 have -- have talked and tried to talk about how we can
21 efficiently present our cases. And, of course,
22 Mr. Dubois can also comment on this, but I think what
23 we have decided is that we will not put on a joint
24 case, but we will integrate our case, so that we can
25 avoid the need to double call witnesses, and we have a

1 lot of -- of similar witnesses. When I counted up the
2 joint Texas and United States witnesses, we had plus
3 or minus 30 witnesses, and, you know, probably a
4 definite 28, with -- with some that we -- we're still
5 talking about in terms. But that includes not just
6 the -- the Texas witnesses, but that also includes, I
7 believe, the -- all of the United States witnesses, so
8 that would be an integrated case where only one
9 attorney would be questioning a -- a witness. So
10 we're not even talking about two attorneys questioning
11 the same -- same witness. We estimate that that --
12 and this depends upon how long a trial day is -- about
13 20 days of trial. Some of those witnesses are just
14 going to be a couple of hours, but then again, I don't
15 know how long we will go. You know, that 20 days is
16 probably six to seven hours a day so if we -- you
17 know, with motions or just simply, you know, with
18 breaks and recesses, we only get five hours in, it
19 would be in excess of 20 days, but 20 days is -- is a
20 good gauge of how long that we think that it -- it
21 would take, depending upon how long the trial day is.

22 **JUDGE MELLOY:** Well, my anticipation is
23 a typical trial day will be 9:00 to 5:00, two
24 15-minute breaks, probably an hour for lunch, so an
25 hour and a half in a 9:00 to 5:00 day is going to be

1 about six-and-a-half hours roughly.

2 **MR. SOMACH:** That's what the 20 days was
3 estimated on. So, you know, and -- and some of them
4 will be pretty quick where we can put several experts
5 on in the same day. Some will take a day, a day and a
6 half to -- to move through. And, of course, that
7 doesn't include necessarily cross-examination. So
8 that -- that will -- that will extend -- extend the
9 time, also.

10 **JUDGE MELLOY:** Well, what about -- have
11 you given consideration to something I brought up the
12 last time, which is can you put any of these on by way
13 of deposition?

14 **MR. SOMACH:** Yeah, we are -- we are
15 looking at that, some of the shorter witnesses, either
16 deposition -- you had also suggested Zoom video, which
17 quite frankly would -- you know, just the nature of
18 that, you tend to go a little quicker than perhaps if
19 you're in the courtroom. So we have looked at some of
20 those. I don't have it refined down to that degree at
21 this point. We are still kind of picking through the
22 testimony and figuring up if some would be more
23 susceptible to -- to deposition testimony. Certain
24 people that are just providing background factual
25 material might lend themselves very well to that.

1 That's what we're -- we're looking -- looking at right
2 now. We're also coordinating, I should say, with EBID
3 and EP No. 1 because some of our witnesses and the
4 United States witnesses are employees or consultants
5 of those two districts and so we're working closely
6 with those attorneys in an attempt to -- to figure out
7 how best and which ones would be appropriate for
8 either deposition or Zoom and which ones we think
9 would be aided in seeing them live in the courtroom.
10 So we are doing all of that.

11 **JUDGE MELLOY:** Well, let me ask you
12 this, and I'll turn to Mr. Wechsler in a minute, but
13 are there witnesses -- and I'm just thinking
14 specifically of -- of EBID employees, maybe
15 Reclamation officials/employees, who would be on both
16 parties' witness list, and would there be a way that
17 we could efficiently get their testimony without
18 having to -- you call them and then New Mexico call
19 them in their case in chief? Are you aware of
20 witnesses you both would want to call?

21 **MR. SOMACH:** Yeah. I -- I think that
22 there are some because we've got -- some of that 30 I
23 listed are what I would call hostile witnesses so they
24 would be New Mexico witnesses. I don't know who New
25 Mexico would like to call, so I can't -- I can't opine

1 in that regard.

2 **JUDGE MELLOY:** Are there -- I assume
3 there are witnesses that are going to be called, as
4 you refer to, fact witnesses, ones who are there
5 primarily just to talk about how the project operates,
6 and then that both -- all sides would probably want
7 that testimony. Well, let me ask Mr. Wechsler. Do
8 you think there are any witnesses that you're going to
9 want to put on that Texas will put on, and we could do
10 it in just one -- with one examination?

11 **MR. WECHSLER:** Yes, Your Honor. We
12 counted ten witnesses that we believe are -- are --
13 are witnesses that either Texas or the United States
14 or both are intending to call that also would be part
15 of our case, and we certainly agree that those people
16 should only be asked to testify one time, so we
17 assumed that if they were called by Texas or the
18 United States, they would go on as part of -- part of
19 their case, and -- and that the -- we simply wouldn't
20 be limited to the scope of the direct examination
21 since we had also identified them as -- as part of our
22 case in chief, and that way it would allow Texas and
23 the United States to elicit whatever testimony they
24 wanted from those individuals. New Mexico would have
25 to cross-examine, as well as elicit whatever separate

1 testimony we wanted from those individuals, and then
2 obviously Texas and -- and the United States would get
3 their opportunity to -- to redirect or address the
4 issues that we raise.

5 **JUDGE MELLOY:** How many -- have you put
6 together a tentative witness list?

7 **MR. WECHSLER:** Yes, Your Honor. We --
8 we have approximately 40 witnesses. 16 of those are
9 experts. I guess it would be 17 if we're asked to
10 include Dr. Hoag. The rest are percipient witnesses,
11 and as I said, ten of those witnesses are what I would
12 call hostile witnesses or -- or witnesses that are
13 more closely aligned with Texas or the United States.

14 **JUDGE MELLOY:** And what type -- can you
15 give me an example of who these type of witnesses --
16 who these witnesses might be?

17 **MR. WECHSLER:** Yeah, absolutely. So one
18 witness would be Filiberto Cortez, who was the
19 longtime -- or one of the main people operating the
20 project on behalf of Reclamation. So he has been
21 identified by Texas, the United States, and New Mexico
22 for testimony. So -- so from New Mexico's standpoint,
23 there's a fair amount of testimony about project
24 operations, both historical and current, that we would
25 want to elicit, and -- and I assume similar from Texas

1 and the United States.

2 **JUDGE MELLOY:** Do you think -- what's
3 your thought about trying to get some of these
4 witnesses testimony by way of deposition?

5 **MR. WECHSLER:** Well, we did -- we have
6 looked at that issue, Your Honor. We only identified
7 one witness that we thought we would be comfortable
8 offering by deposition. We're happy to go back and
9 look at that. It's just that, you know, as you know,
10 as you're deposing witnesses, sometimes you make
11 strategic decisions about what to -- what to ask
12 questions about or -- or more accurately not to ask
13 questions about, and they might be things that we are
14 intending to bring up at trial. And so most of those
15 witnesses, we've made the determination that we would
16 prefer having live testimony because there's
17 additional issues that we think we would raise at
18 trial.

19 **JUDGE MELLOY:** Do you have any objection
20 to doing any of these witnesses by Zoom?

21 **MR. WECHSLER:** No objection to that.
22 No, Your Honor.

23 **JUDGE MELLOY:** Okay. Well, what -- so
24 you're thinking, between the United States, if we say
25 -- so you're thinking 120 hours, Mr. Somach, between

1 United States and you?

2 **MR. SOMACH:** The question that we
3 haven't -- the United States and I, it was 100 to 125
4 hours, I think is what I originally said. So it's
5 that -- I could go back and look at what I said, and
6 what I said in the last status conference is still
7 where we're at. There is some additional time, if we
8 have to put on rebuttal testimony, but -- but in terms
9 of our case in chief, I said 100 to 125 hours. That
10 included cross-examination, also, and one of the
11 things that I -- that the United States and we have
12 not talked about is how we would handle
13 cross-examination. Whether or not we would or whether
14 we could restrain ourselves to only have one of us
15 cross-examine a New Mexico witness or whether both of
16 us would also be cross-examining a New Mexico witness.
17 So I don't know the answer to that, but in terms of
18 our case-in-chief presentation, I think we're looking
19 at about 125 hours. That would include the Texas
20 cross-examination, but I don't -- it does not really
21 include the United States examination. And we had not
22 refined that quite yet with the United States, and
23 it's -- it's -- you know, that's why I'd like to hear,
24 you know, just whether or not Mr. Dubois has thought
25 about that at all. We just talked a little bit about

1 this yesterday, I might add, but we didn't reach any
2 final conclusion on it.

3 Jim, I don't know if you have anything
4 to add.

5 **JUDGE MELLOY:** What's your thoughts,
6 Mr. Dubois?

7 **MR. DUBOIS:** I'm not quite sure what --
8 when Mr. Somach was saying, he's -- if he's including
9 cross-examination of New Mexico's witnesses and things
10 in that 125 hours, because he said both that would be
11 for the case in chief plus cross-examination. I think
12 that with 40 witnesses to cover, that would be awfully
13 aggressive to think that we could get both the case in
14 chief and all cross-examination of New Mexico's
15 witnesses done in 125 hours. If his estimation is 125
16 for the case in chief, in -- including sort of the --
17 if there is -- if there's sort of split direct
18 examination, for instance, Phil King, who is the
19 engineer for EBID, is listed as a witness for Texas,
20 we endorsed him as a rebuttal -- a non-retained
21 rebuttal expert with a narrower purview than -- than
22 the endorsement by Texas. I think those kind of
23 witnesses, you're probably going to have sequential
24 direct examination rather than any attempt at some
25 sort of a friendly cross-examination. I think that

1 because the -- the -- the things that they've been
2 endorsed for aren't necessarily a complete overlap,
3 you're going to have that sort of thing and whether
4 that counts as cross-examination, I don't know.
5 Anyway, I think the 125 hours is probably a pretty
6 reasonable estimate of the case in chief, integrated
7 case in chief, if you will, from Texas and the United
8 States, excluding cross-examination of New Mexico's
9 witnesses essentially.

10 **MR. SOMACH:** Let me just clarify. That
11 is what I was talking about. If you take the 20 days
12 I estimated and multiplied it times -- times six hours
13 of trial days, you come up with 120 hours. So 120,
14 125 hours is what we estimate for the case in chief.
15 I didn't know, I still don't know entirely how many
16 witnesses New Mexico has and so how much time we need
17 to cross-examine depends, at a fundamental level, on
18 how many witnesses they have. Some, I presume, will
19 take little cross-examination, and some, I think,
20 will, particularly if they have 17 expert witnesses,
21 where we have significant issues with respect to what
22 they've done, it'll take more -- more time.

23 **JUDGE MELLOY:** How many experts do you
24 think you're going to call, Mr. Somach?

25 **MR. SOMACH:** We have roughly 12 expert

1 witnesses.

2 **JUDGE MELLOY:** Mr. Wechsler, what's your
3 thought about time?

4 **MR. WECHSLER:** So in terms of the time,
5 let me preface this by saying it's always my opinion
6 that it's better to schedule more time with the idea
7 that it's relatively easy to cut that back rather than
8 to schedule too little time, in which case we're
9 looking at rescheduling or scrambling. And I would
10 also point out, and you were just alluding to this,
11 Your Honor, that some of the experts in our experience
12 in these cases take significant amount of time so they
13 -- if you're doing the direct live as well as
14 cross-examination, we've seen some experts on the
15 stand for four or five days to -- to over a week even,
16 and so when we looked at it, we had counted up
17 somewhere between 70 and 80 unique witnesses we
18 expected to be called. When you're looking at Texas,
19 United States, New Mexico, and Colorado, for
20 comparison sake, the Yellowstone case had
21 approximately 50 witnesses. It took roughly 50 trial
22 days. And so we think total trial, everything all
23 said and done, is likely to be somewhere between 75 to
24 80 days. If we broke that into hours, we think that
25 you should be allocating basically 500 total hours.

1 We're assuming roughly six hours per day, which,
2 again, my experience, six hours a day of actual
3 testimony time is -- is ambitious, doable, but on some
4 days, you're not going to realize that.

5 **JUDGE MELLOY:** So you're basically
6 saying we won't finish by Christmas?

7 **MR. WECHSLER:** I guess it depends on if
8 we're taking weeks off or not. But I am worried about
9 that.

10 **MR. SOMACH:** I --

11 **JUDGE MELLOY:** Well -- go ahead.

12 **MR. SOMACH:** I was just going to say,
13 this is one of those things, if you are limited in
14 time, then you limit to the time. If it's unlimited
15 -- and that's part of why we suggested time limits --
16 I think -- I think that time will get filled. And so
17 it's not unusual to just limit the parties to -- to a
18 -- a time limit, a reasonable time limit. I -- I
19 can't imagine all of the time that I just heard being
20 necessary, and, you know, our preference is to -- to
21 establish reasonable time limits and -- and adhere to
22 them. And that's -- you know, I've tried plenty of
23 cases where -- where I have time limits, and you just
24 adhere to them. This is no different in that regard.
25 And I'm just worried that with unlimited time, which

1 is what I'm hearing, we'll be at this in February of
2 next year. We could be at this in March next year.
3 And I -- I have -- we'd prefer not -- not being at
4 trial in this case beyond mid December of this year.

5 **JUDGE MELLOY:** Well, I'm not going to
6 make any final decision today. I have to think about
7 this. I also have to -- I'd like to see some -- let's
8 see. I think we need to talk about this after the
9 witness lists are actually disclosed, and you have a
10 better sense of who is going to be called. And I --
11 and I do think that there could be a little more --
12 you know, there could be a little more effort directed
13 towards possibly getting some of these witnesses in by
14 deposition. That would significantly shorten up the
15 time. And if -- and if the deposition -- it doesn't
16 have to be the discovery deposition. It can be -- it
17 can be an evidentiary deposition. There are -- there
18 are ways to shorten up the trial without calling every
19 single witness live, and so -- let me think about that
20 some more.

21 I think the other major issue -- well,
22 two -- couple things. I know that a lot of the
23 objections and motions that were filed prior to the
24 ruling on the summary judgment were directed towards
25 the summary judgment motion. What -- what I would

1 like is for the parties to tell me -- and I'll do -- I
2 won't ask them to do it today, but within the next
3 seven to ten days, if what they believe is outstanding
4 and still needs a ruling now that we're past the
5 summary judgment stage. I don't -- I know there's a
6 couple motions to strike, some of which may still
7 require some ruling, but -- but I'm going to ask
8 everybody within ten days, a week from -- I guess, a
9 week from Monday, to tell me what you -- what is
10 currently on file that you think still needs to be
11 resolved, and -- and then we'll go from there. And if
12 I need to set a hearing on it, I'll do it at that
13 point.

14 I should -- I should say -- let me go
15 back for a second about this whole issue of time
16 limits. I didn't give you -- give you a chance to
17 speak, Mr. Wallace. Do you want to have anything to
18 say about all this?

19 **MR. WALLACE:** Thank you, Your Honor. I
20 don't really have much to add to the conversation. I
21 think we're still on the same point, Colorado is -- is
22 currently scheduled to go last. I'm hoping through
23 that, we will identify the absence of a need to
24 present witnesses. If something comes up, I'm
25 thinking that we wouldn't present any more than two

1 witnesses, obviously on a fact basis, and we certainly
2 wouldn't exceed two days of time for that. I'm
3 hoping, however, it will be much smaller given our
4 observation of the trial to that point.

5 **JUDGE MELLOY:** Then I think the one
6 other big issue we need to talk about today is
7 Colorado's motion slash objections or whatever we want
8 to call it for a site visit. I will certainly give
9 Mr. Somach and Mr. Dubois a chance to tell me why they
10 think that's a bad idea, but I have to tell you, I'm
11 strongly inclined to think that it would be -- it
12 would be useful for a couple reasons. First of all, I
13 think it will be useful in terms of just understanding
14 the -- how -- how the whole system works and to put
15 into context, particularly when these experts are
16 testifying, what it is they're testifying about. I
17 have -- in my experience, that can be very valuable
18 background to just understand when they're talking
19 about a particular piece of equipment or where the --
20 the hydrology works and -- and just to see these
21 things, I think, is extremely important. The other
22 thing that I -- I will tell you, in my mind, and I've
23 actually discussed this with the clerk at the Supreme
24 Court, I -- I understand, having been on this case now
25 for, what was it, three years, I guess, that this

1 issue is -- is extremely, extremely important to all
2 the farmers and communities in both the middle and
3 lower Rio Grande valley, and I think it's important
4 that they both understand that we take it seriously,
5 that they know that there is some presence there,
6 whether it's just the pre-trial -- final pre-trial
7 conference in the site visit. You know, I'm going to
8 really throw you a curve ball. I had even given some
9 thought to maybe a week of testimony in Las Cruces or
10 El Paso, just to -- just so the people who are
11 effected by these decisions don't think it's some
12 judge up in Cedar Rapids, Iowa and nine justices in
13 Washington DC who are deciding the fate of the people
14 who are dependent upon this water, and I just think
15 there's something very fundamentally important about
16 seeing the judge who's going to do it to them or to it
17 for them, whichever way it turns out, and -- and so
18 having said that, you know where I'm coming from,
19 Mr. Somach. What's your big objection to a site
20 visit?

21 **MR. SOMACH:** Well, you know, let me
22 actually comment on something you just said, though,
23 and we have no objection and -- and think it
24 appropriate. If you want to do a week of trial in Las
25 Cruces and a week of trial in El Paso, I think that's

1 a wonderful idea and, you know, we will -- I do -- we
2 think that's a good idea. I know that's a separate
3 issue, but I think it's appropriate for me to at least
4 tell you that. We'll assist in any way we can to
5 figure out how best to -- to accommodate witnesses and
6 how that should happen.

7 With respect to the site visit, you
8 know, we -- we are reacting in some respects to the
9 itinerary that was put together. We don't think that
10 the itinerary is particularly appropriate, that it
11 includes facilities that are just not relevant to the
12 lawsuit, and -- so that's -- that's the first thing is
13 we'd have to, seems to us, negotiate a -- an
14 itinerary. We think that it would be appropriate to
15 look a little bit further upstream so you've got a
16 feel for those -- those upstream reservoirs that
17 certainly play into where the water is coming from.
18 We thought that if you want to do a site visit, the
19 better way of doing it, and a little bit of this was
20 to avoid -- and I'll use the word chaotic, but -- but
21 -- but I -- you know, to avoid some of the chaos of a
22 three-day, I guess, bus trip or something, with, you
23 know, would be a -- a flyover where you could, in
24 fact, see all of the facilities. They could be
25 pointed out to you in terms of location, in terms of

1 -- of pretty easy in a benign way. With site visits,
2 I worry about all of the, in essence, discussion and
3 chatter that goes -- goes on. If you have a site
4 visit and you have people that are not under oath
5 explaining and -- and lobbying you in some way, shape,
6 or form, it -- it really does create a -- a
7 evidentiary nightmare in that regard. Now, some of
8 that, I think, can be dealt with with respect to
9 procedures you put in place. We would want a court
10 reporter to -- to be available. It's not that we
11 haven't or I haven't done site visits. I've done a
12 ton of them in my career. I find them quite chaotic.
13 I find the control of all of the -- I mean, you can
14 control the lawyers just fine, but it's everybody else
15 that -- that will be there, what they say, what they
16 do, what they point out, what they argue, what they
17 try to lobby you with, those are all issues and
18 problems that complicate the trial. In essence, you
19 get a mini trial before the trial, and it's got to
20 affect what 's going on. We don't object to you
21 seeing these things. We don't object to you looking
22 at them and understanding where they are, but -- but
23 do worry about the -- number one, the chaos associated
24 with it, but -- but more importantly than the chaos is
25 just how we -- we preserve a record, you know, that

1 isn't tainted by all of that other stuff that
2 invariably happens when you have a -- a site visit
3 like is being proposed in the proposed agenda by New
4 Mexico. And then, of course, my original statement
5 that we -- we don't like that agenda, we don't think
6 that some of those things are relevant, but -- but I
7 assume if you want to move in this direction, you'll
8 instruct us to try to arrange or to put something
9 together.

10 **JUDGE MELLOY:** Well, and I think
11 Mr. Wechsler has indicated that in his motion, that he
12 is willing to work out the agenda, as well as the
13 mechanics, through -- through consultation.

14 Mr. Dubois, you also oppose it; is that
15 right?

16 **MR. DUBOIS:** Yes, Your Honor. I think
17 that there are a whole lot of logistical problems, and
18 it seems like a situation in particular -- I mean,
19 we've got how many folks? We've got 60 participants
20 just on this call because --

21 **JUDGE MELLOY:** They wouldn't all be --

22 **MR. DUBOIS:** Well, I understand that,
23 but you -- you'd have all of the lobbying by all of
24 the amici to have their particular ax to grind, and I
25 do find that problematic. I think that you would have

1 to have some very tight rules, perhaps even if people
2 want to have the Court look at particular structures,
3 I -- I know Mr. Leininger has -- has done some field
4 trips with essentially, for lack of better, a
5 guidebook. You know, not the attorneys or consultants
6 lobbying you, but a written presentation of this is
7 what this is, you know, showing you the -- showing you
8 and outlining the -- the kinds of structures that you
9 want to see for context, but keeping the -- the prior
10 to the trial attempt to influence the Court and to
11 lobby the Court out of the consideration, because I --
12 I do think that the concern we have is, particularly
13 if you've got the -- the cast of thousands of amici in
14 tow with this and their consultants and consultants
15 for all parties.

16 **JUDGE MELLODY:** Well, we wouldn't have
17 that. We wouldn't have that.

18 **MR. DUBOIS:** Okay. That would help,
19 frankly, Your Honor. I mean, the parameters of what
20 we're talking about is part of the problem. I mean,
21 for instance, Albuquerque 's infrastructure has no
22 relevance to this case of what's going on below
23 Elephant Butte reservoir, and spending time on that is
24 going to take you an extra, what, half-day of driving.
25 It -- these kinds of things would have to be worked

1 out very carefully, I think, but that would be the --
2 if you're going to go, I think the -- that avoiding
3 prejudice to any party is going to be the trick.

4 **JUDGE MELLOY:** Well, you know, I -- when
5 I got the motion, I was initially thinking that I
6 would -- I -- that I would tentatively agree, I guess,
7 with Mr. Wechsler that we probably wouldn't need a
8 court reporter, but I guess I wouldn't be objecting to
9 that, nor would I -- or as an alternative, maybe even
10 a better alternative would be a videographer who, if
11 you want to send somebody along with a camera to tape
12 the whole thing, that might be -- that might even be
13 preferable to a court reporter. But -- but anyway,
14 what's your thought, Mr. Wechsler?

15 **MR. WECHSLER:** Well, yes, Your Honor. I
16 -- just run through a couple of points. We also
17 agree, we like the idea of conducting part of the
18 trial somewhere in the basin. We -- I think you've
19 correctly identified our position that we didn't
20 intend that itinerary to be final or what we were
21 asking for. We fully understand that the parties
22 would have to cooperate to develop a -- a -- an
23 itinerary, and I'm sure that will include some things
24 that Texas or the United States wish to emphasize and
25 some things that we wish to emphasize. My experience

1 with these is they're not chaotic so long as you put
2 in appropriate ground rules and -- and, really, we
3 have found them to be invaluable or the Masters we
4 have spoken with have found them to be invaluable.
5 And it is true that the ground rules and procedures
6 that you put in place are -- are very important. We
7 acknowledge that those will be necessary in order to
8 make it defined and manageable, which we think is --
9 is very doable. As I said, I think that the parties
10 can likely agree on -- on hopefully all, but at least
11 most of these issues. On the issue of a court
12 reporter or videographer, we actually looked into a
13 videographer in preparation for today's hearing, and
14 it's relatively inexpensive. It sounded to me it was
15 between 70 and 80 dollars per hour, which is a
16 small-enough cost for something like this. We found
17 cases in which they have allowed videographers as part
18 of the record in order to preserve that. And then if
19 there were certain parts of the record that either you
20 or the parties wanted to have transcribed, then we
21 certainly could do that. We talked to a court
22 reporter who said that that's -- you know, that is
23 something that they are able and allowed to do from --
24 from a proper video. And so I think all of these
25 issues are things that can be managed and worked out

1 by the parties. And -- and I can't emphasize enough
2 how valuable we do think that it would be for you to
3 understand the evidence, and we don't think you can
4 get a full perspective by simply flying over the top
5 of the basin.

6 **MS. O'BRIEN:** Your Honor, if I may just
7 speak really briefly.

8 **JUDGE MELLOY:** Sure.

9 **MS. O'BRIEN:** This is Maria O'Brien on
10 behalf of El Paso County Water Improvement District
11 No. 1. Your Honor, we certainly appreciate and
12 understand your desire to get on the ground and
13 certainly appreciate your comments of the importance
14 of this case to the parties that will be effected, for
15 the most part, the farmers and the two districts were
16 the beneficiaries of the critical Rio Grande project,
17 and we think that, you know, I think, as there seems
18 to be some agreement that the timing and the itinerary
19 and the participation in that itinerary are absolutely
20 critical to having a successful, non-prejudicial site
21 -- site visit. And so, you know, given the
22 criticality of the project, that I think hopefully at
23 this point we all acknowledge, and I think Your Honor
24 deeply understands, we think that, you know, Ms.
25 Barncastle could speak for herself, but I -- I assume

1 Mr. Dubois was not including the two districts in the
2 cast of thousands as -- when he made his comments,
3 because the two districts absolutely need to be
4 involved in the planning of any site visit and full
5 participants. Most of the things that would be at
6 issue are, in fact, district facilities so --

7 **JUDGE MELLOY:** Well, what I would --
8 what I would envision is that there, hopefully with
9 some cooperation here, that maybe you or Ms.
10 Barncastle could be the representative. You know each
11 other's districts. You don't -- you don't both have
12 to be there. I mean, I -- I would really like to
13 limit the number of people, and we're getting into
14 mechanics now, but, you know, of no more than six or
15 seven lawyers. One -- I mean, each -- each party be
16 limited to one -- one attorney, maybe one
17 representative from the two districts, and that's
18 about it. I mean, I think the other amici are
19 represented by, you know -- you know, both district --
20 both -- almost all of the amici have at one point or
21 the other indicated that they're aligned with one
22 party or the other in this case, and I would think
23 that -- that they would just have to rely upon their
24 aligned representatives, so to speak, to be the person
25 or -- or could become chaotic. Certainly don't need a

1 bunch of consultants there and, you know, I do think
2 it would be necessary that we have somebody, probably
3 in case of the water districts, designated by you or
4 Ms. Barncastle, to explain, in an objective manner,
5 just how the system works, and what we're looking at,
6 same way with the -- at the reservoir and other
7 structures. But -- but I -- I -- I really think it
8 needs to be limited to very finite number of people.

9 **MS. O'BRIEN:** Your Honor, we appreciate
10 that, and I certainly -- I would take issue that while
11 the districts certainly work together incredibly well
12 with regard to running this project for, you know,
13 decades now and continue to do so, we're not
14 completely fungible, neither counsel or the districts,
15 and I -- I would make a plea that each district have a
16 representative. There are some unique issues within
17 the districts that I -- I think, in all fairness, each
18 district does need their own representative, but
19 certainly appreciate your comments and certainly share
20 your desire and goal in having this be limited,
21 surgical, and objective.

22 **JUDGE MELLOY:** Ms. Barncastle, do you
23 want to speak at all since you're the other district?

24 **MS. BARNCASTLE:** Thank you, Your Honor.
25 Samantha Barncastle for EBID. I'll just start by

1 addressing what you just said to Ms. O'Brien, that one
2 or the other could be there on behalf of the
3 districts. With all due respect, Your Honor, I can
4 run water in my district. Most attorneys actually
5 can't even run the water, but I can. Once it crosses
6 the state line and leaves our 6A/6B area, I have no
7 idea what EP No. 1 does with it.

8 **JUDGE MELLOY:** So maybe you'd be the
9 representative of when we're on the New Mexico side,
10 and --

11 **MS. BARNCASTLE:** Yeah. I think that
12 would be far more appropriate. I don't know that I
13 need to participate as we cross the state line, other
14 than in the 6A/6B area, which is, as you know, where
15 we deliver to EP No. 1 and EP No. 1 delivers to our
16 farmers. With that, that's the only real crossover
17 area. But from there, I -- I agree, Ms. O'Brien could
18 take over some representative of her entity. My
19 concern would be that while I certainly have the
20 knowledge necessary to speak for our manager, our
21 hydrology manager or our consultant, Dr. King, in
22 terms of how we run water in this district, I would be
23 concerned about the idea that counsel would be
24 testifying, and so I would want to get some clearer
25 understanding of how you would want me to weigh in as

1 we go up and down the EBID facilities. I --

2 **JUDGE MELLOY:** I would -- I would
3 anticipate that we'd have very little participation by
4 counsel. I -- I would -- I would anticipate that it
5 would be your water manager who is going to describe
6 the facilities. I mean, I haven't done a ton of site
7 visits, but those I've done, that's the way it's
8 always been done. You have whoever the manager is,
9 the operator, the owner of the property, whatever it
10 might be, they're the ones who do the -- do the
11 talking, not the lawyers. Because as soon as the
12 lawyers start talking, then the other lawyers want to
13 start talking, and it's not going to work.

14 **MS. BARNCASTLE:** I have experience doing
15 it both ways.

16 **MR. BROCKMANN:** Your Honor, this is
17 Mr. Brockmann.

18 **JUDGE MELLOY:** Just a second,
19 Mr. Brockmann.

20 **MS. BARNCASTLE:** I have had experience
21 doing it both ways and with counsel, it's a little
22 unwieldy. So I understood you to be saying you wanted
23 to limit the people and the districts might only get
24 one representative. If that's the case --

25 **JUDGE MELLOY:** I'm not talking about non

1 -- non-attorney representatives. I'm assuming that --
2 that when we -- when we go to EBID and look at their
3 facilities, that you may have one or two of your
4 managers there, but they wouldn't be -- they wouldn't
5 necessarily be at another facility. While at your
6 facility, you and one or two of your managers would be
7 there to describe the facility.

8 **MS. BARNCASTLE:** That makes far more
9 sense to me, Your Honor. Frankly, I actually agree
10 that a site visit is a good idea. I just have quite a
11 bit of concern with two of the -- two other issues,
12 one being, of course, the itinerary. It looks -- and
13 I wasn't aware that there was not much discussion
14 until now, but it looks a little one-sided. There are
15 certainly things on that agenda that look unnecessary,
16 like a visit to San Marcial. That's not even where
17 deliveries are made anymore under the Compact, so why
18 need to look at that. But there are certain things on
19 EBID's infrastructure list that aren't here that are
20 far more important than some of the things that are
21 listed. Failed mention of any of our weather
22 stations, even though those provide us data and
23 information for water coming into the system where the
24 lines at their location doesn't actually do any of
25 that. So there's certainly work to be done on the

1 agenda. I think all of that could be overcome and
2 worked through. The biggest concern I have at this
3 point is timing, and Ms. O'Brien mentioned this, but
4 we are not working with very much water this year.
5 It's going to be a fast and furious sort of fasten
6 your seatbelt hold on for the ride sort of water year,
7 and EBID is looking at about 35 days of run time. We
8 are going to be burning through water, and we are
9 going to be moving fast, and we cannot avoid -- you
10 know, we really just can't use disruptions during that
11 period of time. We tend to run hopefully a little
12 long if there's more water coming in, but given the
13 ongoing Compact dispute in northern New Mexico, we
14 don't anticipate more water, but you never know. So
15 the June, July, and into August time frame gets a
16 little bit dicey for us. By August, EBID will be
17 offline, I'm almost a hundred percent sure, probably
18 early July. But with monsoons, we may run into
19 August, and it's not unheard of. So I would just ask
20 for your -- for everybody here to pay attention to the
21 fact that when we're out on the ground down here in
22 EBID, our ditch riders, our -- our personnel are
23 working furiously this year because they have very
24 little to work with, and I don't want that to end
25 upholding us up. So we'll need to plan around that.

1 **JUDGE MELLOY:** Thank you.

2 Mr. Brockmann, you wanted to say something?

3 **MR. BROCKMANN:** Yeah. I'll try to --
4 I'll be brief, Your Honor. The -- I was one that did
5 help organize and participate in the north plat tour
6 and the Nebraska Wyoming case, and I do think it was
7 valuable. It was a more extensive tour. It was
8 probably four days, five days that went from the
9 headwaters through the central part of the reach, and
10 there were many more people than what you're talking
11 about here. I think ultimately, your suggestion that
12 the parties get together and put -- put forth whatever
13 agreement they can reach and then take the issues back
14 to you if -- if they can't resolve everything is good.
15 I'm a little concerned today that we're getting too
16 much into detail. In that case, we did put together a
17 briefing book similar to what Mr. Dubois described
18 that -- that might have some maps of the projects or
19 informational things, and certainly some of the
20 on-ground irrigation managers or project facility
21 directors did do the briefings. I would not describe
22 those tours, the tour that I participated in as
23 chaotic at all. I think in that case, the Special
24 Master was careful to sit in the bus with -- with
25 various people and keep the conversation away from the

1 evidence. So I think that can be handled. And,
2 again, I -- I'd like to rely on the states maybe to do
3 the first draft and then work with the amici on how we
4 will or will not be involved. You've heard the
5 refrain from us many times, but the New Mexico amici
6 have -- have the water users whose interests are at
7 stake here, both municipal and agricultural, and so we
8 will -- we will rely on New Mexico initially to
9 protect our interest and lobby from there and then see
10 what the tour looks like and raise any issues if we
11 feel like we need to. Thank you.

12 **JUDGE MELLOY:** Well, let me say this. I
13 would like the parties to -- to meet and discuss these
14 issues. I think for today's purposes, what I'd like
15 to do is set a tentative date. You had suggested --
16 you said you wanted -- I think it would have to --
17 should be before the trial. Would the week of August
18 23rd work?

19 **MR. WECHSLER:** Your Honor, I think that
20 might be a better question, actually, for the
21 districts. It was my understanding that the last
22 release was scheduled for mid August, and you
23 certainly are going to want to see water flowing
24 through the facilities. So I'll allow them to answer.

25 **JUDGE MELLOY:** I understand Ms.

1 Barncastle saying she preferred it not be while the
2 water is flowing through the district. And I will
3 tell you right now, the first two weeks of August do
4 not work for me. So I could do it the week of the
5 16th. I could do it the week -- well, I could
6 actually do it any time after that. I don't have
7 anything scheduled after the -- after the first two
8 weeks of August through the trial date, but --

9 **MR. DUBOIS:** And I will -- I'll note,
10 Your Honor, that, you know, we're also taking,
11 apparently, taking a chunk of time and logistics while
12 everybody is going to be madly scrambling to be ready
13 for trial starting September 13th, so that is also a
14 consideration.

15 **MS. O'BRIEN:** Your Honor, in response, I
16 think, to your question, I need to consult with the
17 district with regard to the -- the timing of that.
18 Excuse the pun, but things remain pretty fluid
19 throughout the irrigation season depending on weather
20 and other issues, so in order for you to get, you know
21 the most objective best view and not have it be
22 onerous in terms of interfering with district
23 operations, I need just a little time to consult with
24 the district, but I'll loop back with the United
25 States and -- and Texas in terms of coordinating.

1 **JUDGE MELLOY:** All right. Well, let's
2 do this. Let's start having those discussions, and
3 since it's your motion, Mr. Wechsler, you can -- I'll
4 charge you with taking the lead on that.

5 **MR. SOMACH:** May I ask a question?
6 Would you consider also doing a flyover?

7 **JUDGE MELLOY:** Yes. But I don't think a
8 flyover without some explanation of what I'm seeing
9 would be all that useful. But maybe a flyover in
10 addition, I'm not -- I'm open to that. I'm not --
11 yeah, I'm open to that.

12 **MR. SOMACH:** That's what I meant. I
13 understand you want to do the site visit, so we'll
14 work with Mr. Wechsler and Mr. Dubois and Mr. Wallace
15 to try to put together an itinerary and then
16 coordinate time. I will say we're -- whenever you
17 want to do it, we're available to do it in terms of
18 our schedule, but I think it would be helpful in
19 tandem with that to have a flyover. There is a little
20 bit of forest and trees issue here, and I think you're
21 seeing the -- and we're only talking about three to
22 four hours, I think, for a flyover, and it might be
23 very helpful to not only see it on the ground but also
24 to get the big picture of -- of how it all fits
25 together and so if you would -- if you would consider

1 that, we'll -- we'll propose and talk to the others
2 about it, but I just wanted to check and see if you --
3 you -- if that's something that you would be -- be
4 willing to consider.

5 **JUDGE MELLOY:** Yes, I would.

6 **MR. WECHSLER:** Your Honor, I take your
7 direction, and we'll be happy to coordinate the
8 conversations amongst the parties and with others as
9 necessary. And we don't -- I don't think we have any
10 objection to also doing a flyover. That's something
11 we're happy to talk about. It actually strikes me as
12 the logistics might work being able to fly out of the
13 same airport. Those are things that, the details
14 we'll talk about.

15 **MR. SOMACH:** I assume we don't have to
16 respond to the two pending motions, that they've been
17 dealt with?

18 **JUDGE MELLOY:** Yes, that's correct.
19 Well, what I would like to do is schedule a further
20 status conference in, say, three weeks. That should
21 give you -- and by then, you'll be pretty well
22 finishing up on your witness list. We'll have a
23 little better sense of exactly what everybody is going
24 to be calling. We can talk a little bit more about
25 the trial schedule, and also maybe we'll have a better

1 sense of if you can come to an agreement about the
2 site visit or whether there's going to be some issues.
3 So does three weeks to today, same time, work for
4 everybody?

5 **MR. SOMACH:** Yes, Your Honor.

6 **MR. WECHSLER:** Your Honor, strictly
7 speaking on -- on my behalf, not the State of New
8 Mexico, I -- I -- that is the week that I'm on
9 vacation. If it were possible to do it, say, the
10 following week at the beginning of the week, I would
11 appreciate it. Otherwise, I'm sure we can find
12 someone from New Mexico to speak on our behalf.

13 **JUDGE MELLOY:** Let me see here. I don't
14 know why I didn't bring that calendar with me. Let me
15 take a look at that, Mr. Wechsler, and we'll see --
16 try to come up with something to accommodate your
17 schedule.

18 **MR. WECHSLER:** Thank you.

19 **JUDGE MELLOY:** Also, you can be talking,
20 and I'm sure Ms. Barncastle will be giving her -- your
21 concerns about travel, Ms. Barncastle, having some
22 testimony in Las Cruces, I'm sure will be music to
23 your ears, but we'll also talk about with -- think
24 about that a little bit about the logistics of doing a
25 week in Las Cruces and a week in El Paso or maybe both

1 weeks in Las Cruces. It might be just as easy. I
2 don't want to -- the only reason I say -- I said Las
3 Cruces over El Paso is I know the chief judge of New
4 Mexico fairly well. I don't know any of the judges in
5 western Texas, but I'm sure any of them would be
6 cooperative in making a courthouse available to us for
7 -- for -- but I know Chief -- is Judge Johnson still
8 the chief judge there? He was a few months ago.

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

10 **JUDGE MELLOY:** Yeah, I know him fairly
11 well. I don't know anybody in Texas, as well, but
12 that's neither here nor there.

13 **MR. SOMACH:** We can assist in Texas. I
14 think I would -- we would like you to spend some time
15 in El Paso, also.

16 **JUDGE MELLOY:** Do it both places. All
17 right.

18 **MR. SOMACH:** Yes, sir.

19 **JUDGE MELLOY:** Well, I'm sure I can work
20 that out.

21 **MR. STEIN:** Your Honor, this is Jay
22 Stein. The city will also be helpful to assist in the
23 effort to do a trial segment in Las Cruces. I think
24 it's a very good idea.

25 **JUDGE MELLOY:** Okay. All right.

1 Anything else we need to talk about today that anybody
2 wants to talk about?

3 **MR. BROCKMANN:** Your Honor, this is Jim
4 Brockmann, and I would like to just return for about
5 two minutes to the -- to your opening topic, which was
6 Texas' potential amendment to the complaint. I wanted
7 to make sure that parties had an opportunity to talk
8 initially before I -- I jumped in and then we moved to
9 the next topic, but I'm assuming that Mr. Somach is
10 probably contemplating if they're going to proceed
11 motion for leave to file that would go to the court,
12 and if, in fact, they proceed in that direction
13 because it is such a different topic in the middle Rio
14 Grande relating to Articles 6, 7, and 8 than what's in
15 the present suit, that -- that as amici, we would
16 follow the normal course in terms of briefing --
17 briefing any issues or making any arguments. If -- if
18 the court were to refer the matter to you or if, in
19 some way, you felt obligated to take up the matter as
20 opposed for a motion for leave to file, I think it's
21 important that we be heard, because I think you will
22 get a sense of the dispute when you see the two
23 letters that Mr. Wechsler offered to provide the
24 exchange between the commissioners, but the issues do
25 become much more complicated beyond what's in the

1 present suit. It involves Indian tribes and pueblos
2 who have storage rights in the middle Rio Grande. It
3 has other municipal and agricultural interests. You
4 could be looking at a new set of amici and new parties
5 that may want to join those types of claims. So I
6 don't -- I don't think it's as simple as an injunction
7 hearing, but it could involve a whole new cast of
8 characters, and I'd just ask you to keep that in mind
9 if this ends up in your lap as opposed to a motion for
10 leave to file with the court.

11 **JUDGE MELLODY:** All right. I appreciate
12 that and -- and I think from what I understand the
13 discussion to be that in all likelihood, this would
14 end up being not taken up as part of the trial in
15 September, that even if it's allowed to go forward,
16 and that would be up to, I suppose ultimately the
17 Supreme Court, if it's allowed to go forward, it'll be
18 either as part of the remedies phase or at some
19 separate proceeding. Now, whether -- I don't know
20 what that's going to be, and I -- I appreciate your
21 comment, Mr. Brockmann, that it may involve whole
22 different -- or maybe not different parties, but
23 additional parties to those that are currently before
24 the court in this dispute. We'll take it when
25 Mr. Somach makes his decision and see where we are

1 then.

2 All right. Anything -- one other thing.
3 Let me bring up one final topic. A bit of a sensitive
4 subject for some people. If we're talking about a
5 site visit some time in August, that is -- one of the
6 reasons we set the trial date that we did was because
7 of concerns about COVID. Some courts are requiring
8 that attorneys disclose their vaccination status. I'm
9 not to that point yet, but has anybody thought about
10 the fact, well, if we do a site tour, are we going to
11 have unvaccinated people, and the same, I guess, will
12 be held true for the trial. You know, has anybody
13 even thought about that, how we're going to -- if they
14 want to -- if we want to require people to disclose
15 their vaccination status, whether -- whether they want
16 to do it voluntarily?

17 **MR. SOMACH:** It's interesting you
18 mention that. I actually thought about that this
19 morning. I'm vaccinated so I'll disclose right now,
20 but it is -- you know, it is something that is of
21 concern. I don't know all of my witnesses. I have no
22 idea where they're at on that, but I -- I thought
23 about it. I don't have any -- you know, any solution,
24 but I do think we in terms of masks and -- and other
25 things.

1 **JUDGE MELLOY:** Well, one thing I can do,
2 if people are -- if people don't want to disclose
3 their vaccination status, although this in essence
4 does it, it's an indirect way to do the same thing is
5 to say that anybody who's not vaccinated has to be
6 masked, and it has the same practical effect, but
7 other than if a person wants to lie about their
8 status. But -- but think about that between now and
9 our next conference because it is an issue that I know
10 courts are wrestling with all over the country, and,
11 you know, what they can require to be disclosed and
12 not.

13 **MS. BARNCASTLE:** Your Honor, Samantha
14 Barncastle for EBID, and I -- I hate to interject
15 here, but I do have to because EBID is in a little bit
16 of a different situation. We have some consultants,
17 but we also have employees of the district, and we are
18 not sure if we can under HIPAA require them to
19 disclose to us what their vaccination status is so we
20 haven't gone there yet, and I'll tell you, I'm just
21 the water lawyer, right. I'm not the HR attorney.
22 Whole set of different people involved there, but I'll
23 tell you, I am -- if we are going to be requiring
24 disclosure, I'll need you to be entering that order.
25 I can't tell my client's employees what they have to

1 do.

2 **JUDGE MELLOY:** Well, it's my
3 understanding, and I -- this is just for whatever it's
4 worth because it's certainly not a ruling, is that
5 HIPAA does not prohibit an employer asking, but -- but
6 I -- I think there's a recent Department of Labor
7 ruling to that effect, but as something -- things are
8 evolving so quickly in this whole subject. Three
9 weeks from now, we may have a whole different view of
10 it so I'm not making any determination right now, but
11 I'm just throwing that out as an issue that we are
12 probably going to have to face at some point, and
13 almost certainly before the site visit when everybody
14 is in very close contact.

15 Anything else we need to talk about?

16 (No response.)

17 **JUDGE MELLOY:** All right. Thank you,
18 everyone. I appreciate your time.

19 (The proceedings adjourned at 3:56 p.m.)

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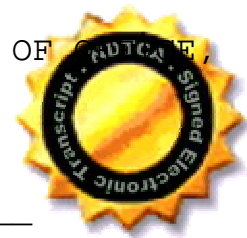
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