

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 MARCH 17, 2021, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
11:00 a.m.

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1 **JUDGE MELLOY:** This, of course, is in
2 Supreme Court Original No. 141, State of Texas versus
3 State of New Mexico and State of Colorado, and let's
4 start by having the parties enter their appearance.

5 Mr. Somach, who's on for the State of
6 Texas?

7 **MR. SOMACH:** Yes, Your Honor. This is
8 Stuart Somach, counsel of record for the State of
9 Texas. With me from Somach Simmons & Dunn are Theresa
10 Barfield, Sarah Klahn, Francis Goldsberry, and Robert
11 Hoffman. From the Texas Attorney General's Office,
12 Priscilla Hubenak, and the engineer advisor for the
13 State of Texas, Suzy Valentine.

14 **JUDGE MELLOY:** All right. Mr. Wechsler,
15 who's on for New Mexico?

16 **MR. WECHSLER:** Good morning, Your Honor.
17 Jeff Wechsler for the State of New Mexico. We have
18 Cholla Khoury and Zachary Ogaz from the New Mexico
19 Attorney General's Office; Susan Barela from Robles
20 Rael & Anaya; Lisa Thompson and Michael Kopp from
21 Trout Raley; John Draper from Draper & Draper. We
22 also have, I believe, state engineer John D'Antonio,
23 Greg Ridgley, the general counsel for the Office of
24 the State Engineer, Arianne Singer, the general
25 counsel for the Interstate Stream Commission, Shelly

1 Dalrymple also from the Interstate Stream Commission,
2 and one of our experts, Greg Sullivan.

3 **JUDGE MELLOY:** Thank you. Mr. Wallace,
4 are you on?

5 **MR. WALLACE:** Yes, good morning, Your
6 Honor. This is Chad Wallace for the State of
7 Colorado. Also with us today is Preston Hartman, also
8 from the Attorney General's Office.

9 **JUDGE MELLOY:** All right. And
10 Mr. Dubois, are you on for the United States?

11 **MR. DUBOIS:** I am, Your Honor. Good
12 morning. Also on the line are, I believe, Lee
13 Leininger is getting on, and Shelly Randel and Chris
14 Rich from the Solicitor's Office are on the line, and
15 also a couple of our paralegals since the scheduling
16 is going to affect their lives for the next few
17 months.

18 **JUDGE MELLOY:** Do we have any new folks
19 from the SG's Office with the change in administration
20 or is that pretty much the same?

21 **MR. DUBOIS:** It should -- at this point,
22 it is still the same. It's still Fred Liu and
23 obviously the name at the top changes, but
24 functionally, nothing has changed.

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

1 Water Utility Authority, who do we have on for them?

2 **MR. BROCKMANN:** This is Jim Brockmann,
3 Your Honor, on, on behalf of the Albuquerque
4 Bernalillo Water Utility Authority.

5 **JUDGE MELLOY:** And City of El Paso?
6 Anyone on? I see Mr. Caroom, I believe, is on the
7 call.

8 **MR. CAROOM:** Sorry.

9 **JUDGE MELLOY:** Are you there,
10 Mr. Caroom?

11 **MR. CAROOM:** Yes, I am.

12 **JUDGE MELLOY:** Okay. Anybody else for
13 the City of El Paso?

14 **MR. CAROOM:** Susan Maxwell.

15 **JUDGE MELLOY:** Okay. City of Las
16 Cruces?

17 **MR. STEIN:** Good morning, Your Honor.
18 This is Jay Stein for the City of Las Cruces.

19 **JUDGE MELLOY:** El Paso County Water
20 Improvement District No. 1?

21 **MR. HICKS:** Your Honor, this is Renea
22 Hicks. I'm subbing for Maria O'Brien for the District
23 today. She's off communing with falcons and mountain
24 lions. She's joining by phone, for a while.

25 And, Heather, the phone number for your

1 reference point if you need it is (505) 280-8745.
2 That's the number for her.

3 And then, also, joining for the District
4 is Dr. Blair, the district engineer.

5 **JUDGE MELLOY:** Okay. Then we have
6 Elephant Butte Irrigation District? Ms. Barncastle,
7 are you on?

8 **MS. BARNCASTLE:** Yes, good morning, Your
9 Honor. Samantha Barncastle for the Elephant Butte
10 Irrigation District, and I am flying solo today.

11 **JUDGE MELLOY:** All right. Thank you.
12 Hudspeth County Conservation and Reclamation District
13 No. 1? Anybody on for Hudspeth County?

14 (No response.)

15 **JUDGE MELLOY:** Okay. New Mexico Pecan
16 Growers?

17 **MS. DAVIDSON:** Good morning, Your Honor.
18 Tessa Davidson on behalf of New Mexico Pecan Growers.

19 **JUDGE MELLOY:** Anybody on for New Mexico
20 State University?

21 **MR. UTTON:** Yes, Your Honor. Good
22 morning. This is John Utton on behalf of NMSU, and
23 also joining me is Scott Eschenbrenner from the
24 University President's Office.

25 **JUDGE MELLOY:** Okay. Southern Rio

1 Grande Diversified Crop Grower's Association, anyone
2 on for them?

3 **MR. OLSEN:** Good morning, Your Honor.
4 A.J. Olsen on behalf of the crop growers.

5 **JUDGE MELLOY:** Anybody on that I didn't
6 get an appearance from?

7 **MR. WECHSLER:** Your Honor, this is Jeff
8 Wechsler. I inadvertently missed Marcus Rael, our
9 counsel of record. Apologize. He's also here with
10 us, as well.

11 **JUDGE MELLOY:** Thank you. All right.
12 We're here today to talk about future scheduling in
13 this date and hopefully set a trial date and -- but
14 before we start with that, let me just ask
15 Mr. Wechsler and Mr. Somach, I guess, primarily,
16 although anybody else is free to jump in, any -- any
17 progress on the mediation? I've deliberately avoided
18 talking to the mediator. I've had no contact with
19 him, other than he copied -- copied me on a letter, I
20 think, back in December, some time before Christmas
21 anyway, where he set up sort of a preliminary schedule
22 of meetings, but I -- I haven't heard from anybody
23 about the mediation. Is it still ongoing? Any
24 progress? Obviously I don't want to get into the
25 specifics, but just some idea of -- of where you might

1 be on that issue. Mr. Wechsler? Do you want to
2 speak?

3 **MR. WECHSLER:** Yes, Your Honor. I'm
4 happy to. The mediation is ongoing. I think all of
5 the parties are participating in good faith, and those
6 conversations continue. I don't know how to assess
7 the likelihood of reaching an agreement right now. I
8 don't know that progress has been as -- as rapid as we
9 would have liked, but nonetheless, probably the -- the
10 talks are continuing, and we remain cautiously
11 optimistic.

12 **JUDGE MELLOY:** Do you have any mediation
13 sessions scheduled or is it still -- or is at this
14 point, is the mediator, one of us talking to each of
15 the parties individually and conveying ideas back and
16 forth?

17 **MR. WECHSLER:** The latter, Your Honor.
18 We don't have a specific group mediation session
19 currently on the schedule that -- that I can think of,
20 but the mediator has been in contact as recently as, I
21 believe, last week, continuing to suggest settlement
22 proposals and -- and conveying ideas back and forth.

23 **JUDGE MELLOY:** Mr. Somach or anybody
24 else want to add anything to that?

25 **MR. SOMACH:** No. I think Mr. Wechsler

1 probably did a good job of covering where we're at.
2 He may be a little more optimistic than we are that --
3 that it'll -- we'll reach a satisfactory conclusion.
4 It's -- I would suggest that it's kind of limping
5 along at this point in time, and -- but we're
6 certainly going to continue to engage as long as we
7 feel that there is any opportunity to -- to -- to
8 resolve this short of -- of a litigated resolution,
9 but I -- I -- I don't know that I'm overly optimistic
10 that that will be the result.

11 **JUDGE MELLOY:** All right. Well, that
12 leads us obviously then into the question of setting a
13 trial date. I've given this a fair amount of -- of
14 thought and -- well, let me say this. A couple things
15 about a trial. I would suggest that I agree with --
16 with the request of the parties that it be in person
17 as opposed to Zoom, with this caveat, as I think
18 within the judiciary generally, there's been a lot of
19 discussion over the past several months about the pros
20 and cons of Zoom trials, Zoom hearings. We've done
21 all of our oral arguments circa by Zoom, and while
22 we're anxious to get back to in-person arguments, I'm
23 not sure that there isn't some thought that we may
24 never a hundred percent go back to the way it was
25 before. So just -- which just leads me up to -- to

1 the suggestion is do the parties believe or have they
2 given any consideration to the possibility that it
3 would be somewhat of a hybrid scenario, that there
4 would be witnesses that we would definitely want to
5 have in the courtroom with all -- with the attorneys
6 present who want to be present and who have a right to
7 question, as -- whereas there may be other witnesses
8 where they are such a nature that we could -- you
9 could -- you could handle the examination from your
10 offices or your homes, and we wouldn't have to bring
11 everybody together in one location. I -- I don't know
12 that it has to be an either/or anymore. And, of
13 course, I also will be talking as we get closer to
14 trial that there may be witnesses we can bring in by
15 deposition. Hopefully there will be some that we can
16 either take evidentiary depositions or use existing
17 discovery depositions in lieu of live testimony. So
18 to me, it -- I'm looking at this as not a
19 one-size-fits-all for the whole trial, and this is
20 something that will probably evolve as we get closer
21 to the trial date. But -- but anyway, I just want to
22 throw that out as a suggestion that -- that there may
23 be time when we will be looking at doing Zoom trials
24 -- trial days as opposed to in person.

25 Let me start with Mr. Somach. Have you

1 given any thought -- I assume you've given some -- to
2 how many witnesses you may have and how long it's
3 going to take to present your case?

4 **MR. SOMACH:** Yes, we have. And, in
5 fact, we're in the process now of trying to -- to
6 figure that out. There are a lot of, you know,
7 different factors there. We know how many witnesses
8 we have total. We don't know, and we're trying to
9 cull down the list to see how many we actually need to
10 testify with respect to direct testimony. It may be
11 that some of the witnesses might be more appropriate
12 if -- if the Court allows rebuttal testimony, as
13 rebuttal witnesses if -- if necessary, and that was
14 one of the -- the questions I -- I was curious about
15 as we move forward today is how the Court feels about
16 a rebuttal testimony. But on this question of Zoom
17 versus in person, I actually have -- I must admit, I
18 -- we haven't talked internally about a hybrid
19 situation. We -- and I have not done a Zoom trial.
20 I've done lots of -- lots is a, you know, relative
21 term, but I've done hearings, but -- but in terms of a
22 trial, I haven't done one. I have sat in on several
23 legal education webinars on Zoom trials, one that, in
24 fact, was put on by the District Court at Washington
25 about experiences they've had. If we decide to either

1 go fully or partially, one of the things I noted that
2 they talk about greatly was the need to develop a
3 whole set of procedures by which those -- that Zoom
4 trial or portions of a Zoom trial would be conducted.
5 So that would be one thing, I think, that the parties
6 would -- would need to get together, see if we could
7 pull together a -- and there are materials out there.
8 I mean, the district court in Washington certainly has
9 a whole developed list of procedures, as I assume do
10 other districts within the -- the country. But it did
11 seem to me that if we go all or part, that would be a
12 important step to sit down and try to -- to work
13 through procedures. I don't think we're inherently
14 opposed to that at all. I just -- we haven't talked
15 about it. In fact, I hadn't even thought about it in
16 that context until you raised it here. A little bit
17 depends on how or when you -- when you decide to -- to
18 hold the trial, because some of that will require some
19 advance planning in order to figure out how best to --
20 to mix the -- the live witnesses with -- with the Zoom
21 or video witnesses. So that's -- that's an overly
22 long answer to probably haven't really thought about
23 it. I do know that if we're going to do any part of
24 it as a Zoom, we'll need to talk about the procedures
25 and work on those, and that'll take a little bit of

1 advanced time. But based upon the experience I had
2 with the other parties putting together the joint
3 status conference statement, I'm optimistic that we
4 can work together to put those procedures together.

5 **JUDGE MELLOY:** Have you thought about
6 how long your presentation is going to take?

7 **MR. SOMACH:** I have thought about it.
8 We have talked about whether or not there ought to be
9 time limits, and I've thought about it in that
10 context. In other words, if each side were allocated
11 time, we were looking at 100 to 125 hours as an
12 appropriate time period. That would include not just
13 the time that -- that we would put on our direct case,
14 but it would also include any cross-examination we did
15 of the New Mexico case or -- or any other parties that
16 put on a case. So I've thought about it in that
17 context, and so we were thinking 100, 125 hours, you
18 know, at the outside, 150 if we add 25 hours for
19 rebuttal testimony, but that was the neighborhood that
20 we were -- we were looking at. So I've thought about
21 it definitely in that context that that would be
22 sufficient to -- to put on our case, cross-examine,
23 with some additional hours if allowed for rebuttal
24 testimony.

25 **JUDGE MELLOY:** Well -- all right. Let

1 me -- I guess, let me ask Mr. Wechsler: What are your
2 thoughts on both whether it be hybrid or all in person
3 and the amount of time that would reasonably be
4 required?

5 **MR. WECHSLER:** Yeah. Thank you, Your
6 Honor. We certainly understand in a trial as complex
7 and large as this one, that flexibility is important.
8 That's been our experience in other cases, and so
9 we're certainly willing to consider a hybrid model,
10 whatever other procedures would help make for as
11 efficient a trial as possible. I will say I have had
12 the opportunity to conduct three different evidentiary
13 hearings or trials at this point. One was
14 two-and-a-half weeks long, so it wasn't insignificant,
15 and, you know, they're doable. They're, in my
16 experience, not as effective, but I do agree with
17 Mr. Somach that the parties would be quite capable of
18 getting together and developing a set of procedures.
19 I expect we'd reach agreement on most or, if not all
20 of the proceeding -- the procedures we would simply
21 bring those and dispute it to you the same way we did
22 in this joint status report. As to the amount of
23 time, we've looked at our witness list. We think the
24 total number of witnesses we're likely to call is
25 between 30 and 35 at this point. Again, my experience

1 is the closer you get to trial, and sometimes in
2 trial, you often find that certain witnesses that you
3 thought were necessary can be cut back, but that's our
4 thinking right now. We thought the total amount of
5 trial time based on, again, experience in other
6 original actions was likely to be somewhere between 50
7 and 60 days. Texas, and I don't know the United
8 States' position on the number of hours that it had
9 proposed a certain number of hours. We didn't have a
10 chance to fully discuss that. We're willing to talk
11 about the idea of being on a clock. Again, I had the
12 opportunity to do that in a trial. It can be
13 effective. One thing I would point out for that,
14 though, is New Mexico, as a defendant addressing
15 issues from two different plaintiffs, should
16 essentially be given an equal amount of time as the --
17 the two plaintiffs collectively, and then on the --
18 the possibility of rebuttal, we certainly recognize
19 that that possibility is out there. I think the
20 standard -- the normal standard is it's only for those
21 things which could not be reasonably anticipated,
22 which hard to imagine today what those would be, but
23 obviously that's because that's the definition.

24 **JUDGE MELLOY:** When you say 30, 35
25 witnesses, do you feel that any of those could

1 reasonably be submitted by way of evidentiary
2 deposition as opposed to live testimony?

3 **MR. WECHSLER:** I think they could, Your
4 Honor. And if I may inquire, when you're talking
5 about an evidentiary deposition, you're talking about
6 a -- not the discovery depositions that have already
7 been taken?

8 **JUDGE MELLOY:** Well, I'm -- it could be
9 either. There may be -- I'm thinking primarily of --
10 of the parties taking a deposition directed
11 specifically for use of trial, but there may be
12 witnesses who the parties feel were significantly
13 examined in a discovery deposition that the discovery
14 deposition could double as an evidentiary deposition.
15 It could be either/or, but I'm thinking more that you
16 would take a deposition in advance of trial just to
17 limit the amount of time and the expense of bringing
18 -- maybe expense of bringing the witness to -- to a
19 trial.

20 **MR. WECHSLER:** Yes, Your Honor. I do
21 think that some of the witnesses could be done by
22 either existing or an evidently deposition. Again, my
23 experience with doing that, is that it's most
24 effective I think for the judge and for our
25 presentation if we set out a procedure for doing those

1 deposition designations, obviously there will be cross
2 designations, as well, and then we actually provide
3 those to you in -- in a particular order. And by
4 that, I say that because oftentimes, you know, a
5 certain witness matters in a certain context, right,
6 and so we're hoping that you'll understand things in a
7 particular order, and so, again, in the cases where I
8 have had experience doing that, what we did was
9 present those two days in advance of when we thought
10 that it would make sense for the -- the judge to read.
11 So that's more detail than maybe you were looking for,
12 but, yes, the answer is I do think some of those
13 witnesses could be done by deposition designation.

14 **JUDGE MELLOY:** And certainly, I would
15 anticipate in setting out a -- a trial order in this
16 case that -- that there would be specific provisions
17 dealing with the designation and cross designation of
18 exhibits. I've been looking at some form trial orders
19 here in addition to what you've submitted and so I
20 would anticipate I'll be putting something together
21 that'll probably blend several different concepts.
22 United States have anything to say about this,
23 Mr. Dubois?

24 **MR. DUBOIS:** Sorry about that, Your
25 Honor. My Internet is a little slow in moving my

1 cursor around. Not -- not really much to add. I
2 think that the -- the idea of some of the -- of
3 setting up some depositions to -- to preserve that
4 testimony in far more of a -- sort of a cross-examine
5 mode than -- than a simple discovery mode makes
6 certain the trial will be useful. As far as Zoom and
7 trial, I don't see any reason a hybrid can't work. As
8 a matter of fact, given sort of the scatter of -- of
9 parties in Texas and New Mexico, it might be that
10 having the trial -- the live portions available on --
11 on Zoom may save an awful lot of the smaller parties a
12 lot of money in travel and lodgings and so that may be
13 -- that may be something that is -- is helpful for the
14 -- the sweep of interested parties that are -- that
15 are involved as amici in this case, as well.

16 **JUDGE MELLOY:** Well, that sort of leads
17 into one issue I wanted to talk about. It would be
18 nice to talk about it right now. I guess before I do
19 that, does Colorado have anything they want to add to
20 this, Mr. Wallace?

21 **MR. WALLACE:** Yes, thank you, Your
22 Honor. We -- we have thought about remote versus
23 in-person trials, and -- and have, in fact, thought of
24 some sort of hybrid procedure as -- as being optimal
25 at this stage since we really don't know what our

1 situation is going to be, and we're looking at a
2 complex and lengthy trial as a whole. So we agree
3 that the parties, along with Your Honor, should work
4 out procedures for either remote or hybrid
5 proceedings. So that -- that seems like a good idea
6 to us. We still have a lot of logistics that are up
7 in the air, so we'll need to sort of call that
8 situation as we get closer to the trial date.

9 **JUDGE MELLOY:** Let me -- let me turn to
10 the amici. If we assume that the amici will have a
11 very limited role, if any, in the -- the actual
12 examination of witnesses, and I know that the two
13 water districts want a role, but putting that aside
14 for a minute, assuming that their role is -- is, as I
15 say, very limited, do the amici anticipate that they
16 would actually physically come to the trial? And --
17 and let me just say this before I -- you answer that
18 question. I would anticipate, in spite of what you've
19 requested, that the trial will be -- will be here in
20 Cedar Rapids. We have the facilities. If I try to
21 move it to Denver, we would have to get district
22 court, courtroom, at least. We have the facilities.
23 We have the capability here. The Supreme Court has
24 asked that it be done here, and so that's my
25 anticipation at this time. I'm not adverse to maybe

1 doing some of the hearings in Denver if we need to do
2 some pretrial hearings, but the trial itself, I think
3 is going to have to be here. But having said that, in
4 talking to the IT folks here and the court, they would
5 certainly have the capability if a particular amici --
6 or amicus, I guess, if you're one, does not want to
7 physically be here for the entire trial or for any of
8 the trial for that matter, to observe the trial from
9 their office. We could -- we have the capability of
10 -- of, in essence, broadcasting the trial live, so
11 that a person could sit at their office in some remote
12 location and -- and be here and observe the trial,
13 and, in fact, I'm not sure even using the special
14 proceedings courtroom, which is as big as any
15 courtroom you're going to find any place, that we can
16 have much more than the principal parties in that
17 courtroom. If -- if we're going to have a number of
18 amici here who want to be physically present, we may
19 have to use an overflow courtroom or they're going to
20 be either sitting in a gallery, or we're going to be
21 using an overflow courtroom, probably an overflow
22 courtroom, which we would have the capability of doing
23 here in Cedar Rapids, and having the trial broadcast
24 to that courtroom. And it would seem to me that if
25 that's going to be the situation, you might be doing

1 it from your office in Santa Fe or Albuquerque or
2 Denver or -- or wherever you might be located. But
3 having said that, do any amici want to speak to this
4 issue? Ms. Barncastle?

5 **MS. BARNCASTLE:** Yes, Your Honor. This
6 is Samantha Barncastle for the Elephant Butte
7 Irrigation District, and I appreciate your comments.
8 They're very much along the lines of what I had
9 anticipated for at least my participation, that I
10 initially would only be seeking to observe hopefully
11 from my office without the need to travel. I have
12 still a very high-risk baby that I -- even though I
13 have been vaccinated, I can still get my child sick
14 after being in courtrooms or airports or what have
15 you, but my instructions from my client are if my
16 client is called into court in Denver, Cedar Rapids,
17 or Hong Kong for that matter, I go with them. So if
18 at the point in time, my experts or clients are going
19 to be called up for testimony, if it's in person, I
20 will be there in person, even if I'm asked to sit in
21 the hall and wait. That being said, I do also
22 anticipate that there will be large portions of the
23 trial that I will want to physically be there in
24 person for. As a limited example, and there are lots
25 of examples, and I -- I don't intend to pick on New

1 Mexico, but this is the easiest example, and that is
2 when New Mexico starts presenting any of their
3 evidence related to the operating agreement, certainly
4 that affects EBID, and we will want to be there.
5 Whether we have an opportunity to participate or not,
6 there's a lot that goes on behind the scenes that we
7 will need to help and -- and participate with. So
8 initially like I said, I -- it would be my hope that I
9 could do the most of my work from my desk in Las
10 Cruces, New Mexico without ever leaving the comfort of
11 my office, but I don't anticipate that that will be
12 the case for the entire trial.

13 **JUDGE MELLOY:** Well, and I also would --
14 I guess I should have added this further caveat that I
15 -- I would anticipate that most of the amici would
16 want to be physically present if their clients were
17 testifying. I assume you're not the only person that
18 -- that if -- if somebody from the El Paso -- City of
19 El Paso is called to testify, I assume Mr. Caroom is
20 going to want to be here or his client will want to be
21 here so -- but anybody else want to speak to this?
22 Does anybody feel that they would want to be here
23 physically for the whole trial?

24 **MR. STEIN:** Your Honor, this is Jay
25 Stein. We will be attending the trial when our

1 witness will be appearing as a state witness. Lee
2 Wilson is testifying. I do want to make a comment on
3 the Zoom trial process. I participated in a two-week
4 Zoom trial in December on a -- a Compact compliance
5 issue on the Pecos. We found that there were two
6 problems that arose. You can do it. But there are
7 technical glitches that occasionally intervene, and
8 one persistent problem that we've encountered is the
9 transcriptions contain more inaudible passages than we
10 would like. Those two issues, we found to be present
11 in -- in a Zoom presentation, in a multi-party case
12 trial.

13 **MR. HICKS:** Your Honor -- sorry.

14 **JUDGE MELLOY:** Go ahead.

15 **MR. HICKS:** I hate to interrupt. This
16 is Renea Hicks for the El Paso Water Improvement
17 District No. 1. I'm confident that we will want, if
18 not a full-time presence during the trial of some
19 people from our district, nearly a full-time presence
20 there. I think the Zoom availability, the live
21 Zooming will allow us to let some people not have to
22 travel there, at least for the full time, but I
23 anticipate that we will want to be there the full time
24 because, frankly, we're not just observers here.
25 We're intimately tied into what's going on in the

1 case.

2 **JUDGE MELLOY:** Anybody else who thinks
3 that they would want to be here for any substantial
4 periods of time, other than when one of their own
5 witnesses may be testifying or one of their own
6 employees?

7 **MS. DAVIDSON:** Your Honor, this is Tessa
8 Davidson. My clients have indicated an interest to
9 attend in person full time during the trial. Some of
10 them are also witnesses and, of course, if they're
11 testifying in person, I would be there. This was all
12 before we knew what was going to happen with the COVID
13 situation. I'm sure people will be flexible, but as
14 far as I know, they had intended to participate as
15 much as possible in person, at least observing, Your
16 Honor.

17 **JUDGE MELLOY:** Well, do you feel that
18 observing by video is not as -- they would not find
19 that adequate?

20 **MS. DAVIDSON:** They may, Your Honor.
21 I'm sure if that was available, I'm sure some of them
22 would even appreciate the convenience.

23 **JUDGE MELLOY:** Or after the first week
24 and they find out how boring it is?

25 **MS. DAVIDSON:** Possibly. Possibly.

1 **JUDGE MELLOY:** All right.

2 **MR. BROCKMANN:** Your Honor, this is Jim
3 Brockmann, and I would say on behalf of the Water
4 Authority, it would primarily be some Zoom
5 participation on the portions of trial that -- that
6 are of interest to them where the issues that could
7 affect the Water Authority would come up, and it is
8 possible that -- that in specific areas or specific
9 witnesses, they may want to attend in person, but I
10 think it would be a fairly limited basis. As you
11 pointed out, these trials, when you're actually in
12 them, tend to -- to create for very long days, and
13 nobody really likes to be away from home and in hotels
14 that long. So I think our -- our actual participation
15 in Cedar Rapids would be limited to specific issues of
16 witnesses, and most of our participation otherwise
17 would be by Zoom. If we are participating or watching
18 by Zoom, I think it gives us an opportunity to -- to
19 understand the direction of the testimony, and -- and
20 I also do agree with Ms. Barncastle that -- that
21 sometimes having a physical presence even to be able
22 to talk with the other attorneys on breaks at nights,
23 on lunch breaks, et cetera, can -- can be a way that
24 we can participate through the State of New Mexico and
25 make sure our concerns are known. Of course, it's

1 cheaper to do that through phones and e-mails if
2 that's possible, but sometimes it is not as effective
3 as -- on an issue that directly affects us.

4 **JUDGE MELLOY:** Well, and the type of
5 witness that you're talking about is your client. I
6 -- you know, without knowing exactly what the
7 testimony is, but I suspect that there may be what I
8 would call fact witnesses who are going to be laying
9 foundational testimony about just how the project
10 operates, what -- what their city has done or what
11 their water district has done that while there may be
12 some cross-examination, isn't all that controversial.
13 It's more, you know, this is the foundational
14 information we need for the experts to take off on,
15 and it's those kind of witnesses that I was thinking
16 we could either maybe do by evidentiary depositions to
17 avoid using up too much trial time or by some type of
18 Zoom presentation. Now, maybe -- maybe, as Mr. Stein
19 indicates, there's just too many technical glitches
20 with -- with Zoom trials, but I like to at least think
21 that there might be some alternatives to having, you
22 know, 20 lawyers sitting in a courtroom on a given
23 day.

24 **MR. BROCKMANN:** Well, and as we've done
25 in the past, Your Honor, I think we'll do our best to

1 work through New Mexico and with New Mexico on -- on
2 issues so that we -- I think we -- we've -- so far,
3 the amici participation has been pretty reasonable in
4 this matter. I -- we've -- we've written our briefs
5 when we've had those opportunities. We haven't gotten
6 in the way of scheduling issues, and I anticipate that
7 that would be the -- the case, also, at trial.

8 **MR. UTTON:** Your Honor, this is John
9 Utton. I just wanted to echo some of the comments of
10 the other amici. I think there are several client
11 witnesses that are on the witness list. I don't know
12 that they're going to be called, but if they are, I
13 would want to be present. But I think otherwise, the
14 opportunity to attend by Zoom is much more efficient.
15 I was also in a two-day trial with Mr. Stein back in
16 December. I actually found that despite the
17 transcript glitch, overall to be quite efficient,
18 probably more efficient than an in-person -- in-person
19 trial. So I think I agree with Ms. Barncastle and
20 others and their description of how we might want to
21 participate. Thank you.

22 **JUDGE MELLOY:** This is a minor
23 procedural point, but -- but just so I don't forget
24 it, do you -- do you anticipate -- this is probably
25 for the main parties -- that you're going to want

1 daily copy of a transcript? And if so, we're going to
2 have to probably have you -- rely upon you to provide
3 the court reporters for that.

4 **MR. SOMACH:** Yes. I know that we well
5 want dailies and we're more than happy to -- to
6 arrange, along with the other parties, court
7 reporters.

8 **JUDGE MELLOY:** All right. Well, let's
9 talk about a trial date. Here's my thought. We're
10 first still dealing with the COVID situation, and I'm
11 just -- I'm reluctant to get everybody together for a
12 full-blown trial before the end of the summer. I just
13 -- I don't know what's going to happen with -- with
14 COVID, but that's sort of the -- what I am looking at
15 as a date. I also have been somewhat influenced by
16 the number of objections to exhibits. They're
17 obviously well into the thousands when you look at the
18 multiple objections to just one exhibit, and if we're
19 going to have that many evidentiary objections, I
20 think we've got a lot of work to do before we even
21 start the trial where those whatever number of hours
22 we're going to use in the courtroom are going to be
23 eaten up very quickly by just talking about foundation
24 and all the other things that have been raised by the
25 parties of the case. And what I am -- what I am

1 anticipating doing is setting a date at least 60 days
2 before the trial, maybe even a little further, whereby
3 the parties will be exchanging their exhibit lists and
4 then requiring opposing counsel to indicate the nature
5 and -- well, whether and to what -- what is the nature
6 of any objections, so that we can maybe get as many of
7 those resolved before the trial ever starts as we can.
8 Some probably can't be, but particularly if we're
9 talking about, you know, you didn't -- you didn't
10 include the attestation page, which I don't really hear
11 an objection around here very often. But those kinds
12 of objections, I would hope we could get worked out
13 well in advance of trial, but I -- it just seems to me
14 there's a lot of work to be done before we ever start
15 at trial or the time spent at the trial is going to be
16 consumed with -- with a lot of things that really
17 aren't advancing the ball very -- very far down the
18 field. So what I'm -- what I would suggest, and I'm
19 going to throw this date out, is we start Monday,
20 August 30th. That will give -- after the first week,
21 there will be a three-day weekend then with Labor Day,
22 but I thought about starting after Labor Day, but I
23 don't want everybody to have to travel over Labor Day
24 weekend to start the trial so do we have a short week.
25 So anyway, I'm thinking of August 30th as the start of

1 a trial date, and I throw that out. Does anybody have
2 a problem with that or think it's too soon or too far
3 down the road?

4 **MR. SOMACH:** It's -- I mean, we knew
5 that August was the date that we were looking at.
6 We've been looking at that date for a long time. A
7 little bit of that depends on the ability to travel, I
8 think. I think I was thinking -- I'll just throw this
9 out. I was thinking, actually, another month down.
10 September would be a -- a better, you know, starting
11 time. I realize that August 30th is essentially
12 September. I figured that out. But, you know, some
13 time deeper into September might be a better time to
14 start. Things would clarify itself. I am worried
15 about all this pre-trial stuff. We did -- we took a
16 look at August, September, October, November. We took
17 a look at some of the dates that we were -- that we
18 had put in the joint status conference statement that
19 you've got in front of you, and we worked backwards
20 from those dates, and August moves us into, you know,
21 we -- we will need to start moving through some of
22 those issues as early as the end of April, beginning
23 of May, and we thought, given the fact that we didn't
24 know when the trial was going to start, some of that
25 stuff is in various stages of moving forward and

1 getting ready. So having a little bit of extra time,
2 and here, I'm not talking about, you know, six months.
3 I'm really talking about two weeks to -- to a month
4 back from that August 30th date. But if we -- if --
5 if you want August 30th, we certainly will be ready.
6 But I was looking -- I was just counting backwards
7 from -- from the beginning of trial and looking at
8 when things would -- would otherwise have to be due
9 and thought that it was going to be pretty ambitious
10 if we start in -- in August.

11 **JUDGE MELLODY:** Well, I don't have a
12 strong objection to moving it back a couple weeks.
13 And, actually, I think, Mr. Somach, you've been kind
14 of the one that's been pushing for an earlier date all
15 along. I'm guessing -- I'll let Mr. Wechsler speak,
16 but I assume he's probably not going to be too adverse
17 to that either. What's your feeling, Mr. Wechsler?

18 **MR. WECHSLER:** Your Honor, we could be
19 ready by August 30th. We could be ready by mid
20 September. Either one, we'll be ready. And the only
21 thing I would add is the parties have begun the
22 discussion about exhibits, so I'm hopeful that a lot
23 of the efficiencies you're talking about will be taken
24 care of, and I also very much support the process that
25 you're talking about so that we can eliminate

1 unnecessary objections at trial.

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

3 **MR. SOMACH:** Just simply, I am curious,
4 we -- I think we understood that you were thinking
5 about going two weeks on, two weeks off. I'm not
6 certain if you're still thinking of doing that. And
7 then the other question was I -- I don't know if
8 you're planning five days a week or whether you have a
9 day where you have to -- to hold off. So I -- I am
10 kind of curious as we project out once the trial
11 starts, what our day, what our weeks will look like,
12 because I think, you know, we've got to plan the --
13 the time that it's going to take, and I'm just trying
14 to figure out for planning purposes how long, once we
15 start, you know, what that looks like.

16 **JUDGE MELLOY:** Well, that's a good
17 point. I had at one point had said two weeks on, two
18 weeks off. I think -- I think I'm more inclined to
19 say two weeks on, one week off. I just think we're
20 going to need, both from my perspective and yours, a
21 week to -- to get -- gear up for the next two-week
22 cycle. I probably would prefer a four-day court week,
23 but I'm also cognizant of -- of the fact that you're
24 spending time traveling, and once you get here, you'd
25 just as soon use as much -- use as much time as

1 possible. So I'm willing to go a five-day week or at
2 least try that initially and see how it goes. If --
3 if you would prefer a four-day week, I'm certainly
4 fine with that, but it means not having to travel
5 probably on a weekend day. But -- but my -- my
6 initial -- my initial thought is we do five days.
7 Well, let's -- let's -- I'm trying to think here. If
8 we do -- you know, if -- if we -- if this turns out to
9 be a ten-week trial, which is what I'm hearing is
10 possible -- I hope we can do it in eight, but if it is
11 ten, we'd be -- we could still finish it before the
12 holidays. I think we want to try to be done by the
13 1st of December. So -- or shortly thereafter. Just
14 looking at my calendar here. Let's plan on September
15 13th being the start of the trial, and we'll work back
16 from there. Any objection to that from anyone?

17 (No response.)

18 **JUDGE MELLOY:** All right. And for the
19 most part, I don't have a lot of -- of objections to
20 your -- your -- the one thing I do probably will set
21 an earlier date on will be the exchange of exhibit
22 lists so we can start whittling down the number of
23 objections and see what really is going to require
24 evidentiary hearings, and, you know -- and I'm not
25 averse to having some pretrial hearings, as well,

1 either -- excuse me -- if it's safe to do so by in
2 person by, you know, mid August, or by Zoom if we have
3 to, to try to even, you know, get the number of
4 evidentiary objections resolved prior to trial. But
5 -- but I'm going to go through the -- through the
6 schedule here again, but I will be setting out some
7 dates, and I'll be setting out some probably further
8 requirements, particularly as it relates to exhibits,
9 before -- within the next several days, and I'll get
10 an order out. Do you think there's a necessity for
11 trial briefs in this case, given all the pleadings
12 that have been filed so far?

13 **MR. SOMACH:** I hadn't thought about
14 that, but I -- I don't know what else I would -- I
15 mean, I'm sure our trial brief would look a lot like
16 many of the briefs that we've -- we've put together.
17 I think only if it would aid the Court in some -- some
18 way, as far as the Texas position. We're willing to
19 do a trial brief. I don't know that we -- we think it
20 is critical, again, given the -- the briefing that
21 we've done and the responses to briefing that we've
22 done, but, you know, we -- we certainly -- if you want
23 one, we will put one together.

24 **JUDGE MELLOY:** Well, I think what I'm
25 going to do in the order that's coming out in the next

1 few days is just leave that issue open for the time
2 being. Not require one, but -- but -- and I'm sure
3 there will be other issues that as we go along, we're
4 going to be -- require some refinement, and I think
5 that's one that will definitely be included in that
6 category.

7 Let me ask about the issue of damages.
8 In your proposed stipulation, you indicate that
9 remedies and the amount of damages will be held for a
10 separate proceeding. What is your thought -- I guess
11 I'll start with you, Mr. Somach, since you're the
12 plaintiff. What are you going to do about damages?
13 Are you just going to -- are we just going to assume
14 damages if there's a violation? Do you -- are you
15 going to prove up the years without going into the
16 specifics? What -- what -- what's your thought?

17 **MR. SOMACH:** Well, we intended to put on
18 evidence -- number one, I -- I think that there is an
19 aspect of -- of this case that says if there's a
20 violation of the Compact, that's injury, and that's
21 sufficient, but we weren't going to stop there. The
22 reason why we separated putting a dollar number and
23 push that into the remedy phase and preserve the
24 ability to put on testimony with respect to damages
25 was to -- in addition, to just simply relying upon the

1 -- the idea that we -- the Compact was violated, go
2 one step further and put on evidence with respect to
3 the effect that the Compact violation has had on
4 Texas. But we were going to stop short and not put
5 dollar numbers on that until we got to the trial on --
6 on remedies, and the reason we decided to do it that
7 way, in large part, revolved around some of your
8 earlier orders, and the way you addressed some of the
9 motions noting that, among other things, damages might
10 be effected by equitable considerations, and we
11 thought that those also would effect the remedy and so
12 that addressing actual dollar amounts would be more
13 appropriate in tandem with -- with the remedies. We
14 do think it's a good idea to separate out remedies
15 simply because getting an idea of what the liability
16 looks like will assist us in trying to move forward
17 with proposing various remedial actions to address
18 those liabilities.

19 **JUDGE MELLOY:** All right. Mr. Wechsler,
20 do you have any thoughts on that?

21 **MR. WECHSLER:** I would only add, I think
22 the most recent case that separated those out was the
23 Montana versus Wyoming case. It was fairly effective
24 to be establishing liability and then saving remedies
25 for a separate proceeding. From -- from our view, the

1 remedies phase -- I should say the liability phase
2 includes liability and defenses, and then you move to
3 remedies where we're talking about is there
4 declaratory relief, is there injunctive relief, and
5 then from a damages perspective, it's multiple fold.
6 Money and water are the first decision point, you
7 know, so if New Mexico is successful, we're likely to
8 want damages in water. We think that that's most
9 effective for our citizens, and once you're talking
10 about that, then you're also talking about things like
11 the amount, timing, and procedure for -- for that
12 water. That's how we view the remedies phase.

13 **JUDGE MELLODY:** And what's the United
14 States' position, if any?

15 **MR. SOMACH:** Jim, you're muted.

16 **MR. DUBOIS:** Sorry. I was un-muted
17 before, and I forgot I put it back on. Apologize.
18 We're not seeking monetary damages, and we're looking
19 only at prospective relief, so I think that it -- it
20 probably makes the most sense to figure out if there
21 is a violation in liability and then -- then deal with
22 what any prospective relief looks like later. So I --
23 I don't see that there's any utility for us in -- in
24 trying to fold in prospective relief and how you
25 manage the system until you find out if there's a

1 violation.

2 **JUDGE MELLOY:** And, Mr. Wallace, as I
3 understand it, Colorado is not asking for any
4 affirmative relief; you're more in this as a making
5 sure nothing is done that it would affect your
6 existing rights. Am I correct in understanding where
7 you are in this case?

8 **MR. WALLACE:** That's essentially
9 correct, Your Honor. We're here to defend Colorado's
10 rights and -- and make sure that -- that any remedy or
11 liability finding is consistent with what the Compact
12 provides. We have no objection to how the other
13 parties have proposed at trial.

14 **JUDGE MELLOY:** All right. Let me ask
15 you this, going back to the trial date for a moment.
16 Obviously, the parties at this point don't know what
17 the ruling on the summary judgment is going to be.
18 I'm not a hundred percent certain I've totally decided
19 it yet, so it's -- it's going to take some more study
20 and hopefully get something out in the next several
21 weeks, but does either -- does anybody think there's a
22 -- any chance that they would try to go to the Supreme
23 Court on the summary judgment order? Mr. Wallace,
24 you're probably not the person who's the best to speak
25 to that, but since you're up on the screen, go ahead.

1 **MR. WALLACE:** All I can really say, Your
2 Honor, is we're going to wait and see what your order
3 says and then determine whether we believe that
4 materially impacts our reading of the Compact. I
5 realize we have no water at stake, but our -- our
6 analysis would really only go to methods of Compact
7 interpretation.

8 **JUDGE MELLOY:** Okay. All right.
9 Mr. Somach or Mr. Wechsler, either of you want to
10 speak to that?

11 **MR. SOMACH:** Well, it really does depend
12 upon the nature and extent of -- of whatever rulings
13 you may make. I certainly can envision a desire not
14 to go to trial if a significant issue becomes a
15 dispositive motion is out of the case, and we're
16 precluded from litigating the issue. So I -- you
17 know, we've thought about it and I just don't know the
18 answer and I won't know the answer until I see exactly
19 what -- how you'll address and deal with the issues
20 that are in play in those dispositive motions.

21 **JUDGE MELLOY:** I suppose that your
22 response, Mr. Wechsler, will be similar, you've got to
23 see the ruling?

24 **MR. WECHSLER:** It is, Your Honor. The
25 only thing that I would add is I believe the Court

1 including in the order of reference leaves the timing
2 of interim reports to you and so I think in the first
3 instance, if we felt like that was necessary, we would
4 obviously be appealing to you to send up a report.

5 **JUDGE MELLOY:** Well, you know, and then,
6 you know, that is one glitch that could obviously
7 impact the whole schedule if -- if -- if the ruling is
8 such that one side or the other feels it's
9 significantly dispositive that they want to get the
10 Supreme Court's view on it before we go further. One
11 thing I noticed in your proposed order, you're not --
12 you're not asking for the exclusion of witnesses. Is
13 that -- am I -- sequestration of witnesses. Is that
14 my understanding that parties -- witnesses will be
15 able to observe the trial, even before they testify?

16 **MR. WECHSLER:** Yes, your Honor. That's
17 the impact of Paragraph 2.3.

18 **MR. SOMACH:** I do have a question
19 related to that. We agree that they're not to be
20 excluded, but earlier, there was a discussion of
21 possible rebuttal testimony, and I think Mr. Wechsler
22 indicated that he thought that the rule was you could
23 do rebuttal testimony if you could not reasonably
24 anticipate what it is that you're rebutting. This
25 goes to -- to some of our trial planning and so I'd

1 like to ask this question. You know, we will put on
2 our case first. Mr. Wechsler's case is both an
3 affirmative and a defensive case. In his affirmative
4 case, among other things, they've developed a lot of
5 modeling and other information. I had anticipated
6 allowing him to move forward with the introduction of
7 that modeling and other information and then address
8 it in terms of a rebuttal testimony. Otherwise, if I
9 have to rebut in my direct testimony, I actually have
10 to bear the burden of explaining what hasn't been
11 explained yet by New Mexico. And so for trial
12 planning purposes, and we're certainly moving forward
13 pretty rapidly to needing to do that on a very
14 specific basis, I had assumed that we would first hear
15 from New Mexico on all of their modeling and technical
16 information and then we would put on, if appropriate,
17 rebuttal testimony to that, even though, of course,
18 we've deposed all these folks, and it's -- it's -- we
19 anticipate they're going to put on this testimony, but
20 to have the burden of first explaining what they
21 haven't put on yet and then rebutting what they
22 haven't put on yet is, I think, inappropriate, but I
23 wanted to make sure so that as we plan, we can plan
24 appropriately for our trial presentation.

25 **JUDGE MELLOY:** What's your position

1 about that, Mr. Wechsler?

2 **MR. WECHSLER:** I think, Your Honor, the
3 procedure that occurs in federal district courts
4 throughout the country is that regardless of what the
5 issues are and who's putting on a model, the plaintiff
6 puts on its case, including all of the opinions from
7 the experts that they are aware of, including those
8 that might be responsive so that ultimately first
9 creates the most efficient trial presentation, and
10 secondly, it may very well be that there are issues
11 that their witnesses are raising. They already know
12 what our experts' opinions are, and -- and as the
13 defending, we're entitled to then hear those and
14 address them. As to this idea that our model is only
15 for defensive purposes, that's not correct. I mean,
16 our -- our model was created. It allows us to
17 evaluate all of the claims, including Plaintiff's
18 claims, and it's not simply being put forward as some
19 sort of support of our countering.

20 **JUDGE MELLOY:** Well, let me say this.
21 For today's purposes, I would indicate that Texas or
22 the United States for that matter would be allowed to
23 present rebuttal testimony. I'm not -- I'm not
24 prepared today, without -- as I said, I think this is
25 going to be part of what we're going to be talking

1 about over the summer, exactly how that is going --
2 what the scope of that is going to be, the parameters,
3 and -- and how it's actually going to come in, but I
4 would say I certainly can see where, particularly
5 given the extent and number of counterclaims that New
6 Mexico has, that at least part of the response to the
7 counterclaim would -- would come in through rebuttal.
8 And I don't know that Texas or the United States
9 should be expected to anticipate every one of the
10 defenses or anticipate exactly how the case comes in
11 from New Mexico's perspective, particularly on the
12 counterclaims. So some rebuttal will be allowed. I'm
13 not sure how much. And as I said, I think that's one
14 of the issues we'll be working through over the summer
15 as we get ready for trial.

16 Is there anything else we need to talk
17 about today? What I would --

18 **MR. HICKS:** Your Honor.

19 **JUDGE MELLOY:** Go ahead.

20 **MR. HICKS:** Renea Hicks for El Paso
21 District. This goes to the question about our limited
22 participation, as we had requested in the March 15th
23 letter. We understand that you may be deferring
24 making the decision about that, but we just want to
25 re-urge that and think it's important. It worked well

1 with only the most minor stats during the deposition
2 process to do that. Nothing ever got to you, rose to
3 the level of getting to you, and, of course, we'd all,
4 I'm sure, be on better behavior when we're in front of
5 you. So I don't anticipate that being disruptive at
6 all, and it seems consistent with the way EBID and the
7 El Paso County Water Improvement District have been
8 treated during the preceding phases with the case.

9 **JUDGE MELLOY:** Well, again, without
10 making a final dispositive ruling on that issue, my
11 current thinking is that participation by any of the
12 amici will be very limited, if at all, and that it
13 would only be with -- with leave of the Court. That,
14 in other words, if it turns out there's a specific
15 witness that one of the amici -- I wouldn't limit it
16 to just the two water districts -- feel that they need
17 to question that witness and that whatever
18 presentation is being made by Texas or New Mexico or
19 the United States does not adequately cover their
20 ground, they're going to have to seek permission to do
21 that, and it'll probably be given fairly sparingly.
22 But I'm not going to totally cut it off, but that's my
23 -- that's my initial thought, if -- if this case is
24 going to proceed on any kind of basis that's
25 reasonably efficient and so -- and that's not to say,

1 though, that I will not -- I would -- I would
2 anticipate that if -- I shouldn't say if. I assume
3 there will be post-trial briefs filed, and I would --
4 I would anticipate allowing the amici some -- some
5 role in that process, that they would, just as we did
6 on the motion for summary judgment, that they would be
7 allowed to at least be heard on post-trial briefing
8 and so they'll have a participation of that respect.

9 **MR. HICKS:** Thank you. The leave of
10 Court thing sounds -- sounds good to us. I hope it's
11 not too sparing, but anyway, that sounds like a
12 workable prospect. Thank you.

13 **JUDGE MELLOY:** Anything else?

14 **MS. BARNCASTLE:** Your Honor, this is
15 Samantha Barncastle for the Elephant Butte Irrigation
16 District. I just want to point out that, like I said
17 previously, I don't anticipate a large need for
18 participation by EBID, but I can see a situation where
19 even the presentation by the United States, Texas, or
20 New Mexico doesn't quite line up with what the
21 District's view is, and when I say "District's," I am
22 actually speaking for both districts here because we
23 run the project. We run the water. And we have a
24 very different way of presenting the -- the picture,
25 if you will, of how that happens. And so not just

1 necessarily questioning of witnesses, but potentially
2 summarizing for you, through a closing argument or
3 otherwise, what our view of the evidence is that --
4 that would impact you in a different way than maybe
5 what the parties are saying. So I appreciate that the
6 Court is leaving the opportunity open to request leave
7 of the Court to participate, because the fact of the
8 matter is, this case is taking to trial another case
9 in which EBID is a defendant, and that's the 2011
10 operating agreement case in federal district court,
11 and you are going to hear all the exact same evidence
12 that would be presented in that case, only the
13 districts will not be allowed to present evidence of
14 our own. And so that's going to become incredibly
15 important at various points in time in trial. So I do
16 appreciate, like I said, the opportunity being left on
17 the table. We certainly will use it sparingly, if at
18 all, but we -- we want to make sure you understand
19 that the reason we have such a different view is
20 because sometimes none of the parties speak for us.

21 **JUDGE MELLOY:** I understand that, and
22 that's why I said I would anticipate the amici would
23 be given a role in post-trial briefing, and you said
24 closing arguments. I'm -- I'm anticipating that there
25 will not be much, if any, oral closing arguments, that

1 the closing arguments will be through written
2 submissions, and amici will have an opportunity to
3 submit something, just as they did on the summary
4 judgment motion.

5 **MR. WALLACE:** Your Honor, this is Chad
6 Wallace. I was wondering if you wanted to resolve at
7 this time a disputed part of the case management
8 statement, which is Colorado's participation at trial?

9 **JUDGE MELLOY:** Well, let me -- let me
10 hear the -- let me hear the position. What -- let me
11 hear your position, Mr. Wallace.

12 **MR. WALLACE:** Well, it's essentially the
13 one that -- that is outlined in the exceptions portion
14 of the statement. Colorado believes it's a party and
15 will be bound by the ruling, which ruling could be
16 rather far reaching in interpretation of how the
17 Compact apportions water among the three states, and
18 because of that, we feel we're entitled to present a
19 case through argument and through witnesses. As
20 Colorado has maintained throughout this proceeding,
21 our -- our interest is in maintaining the standards of
22 juris prudence on Compact interpretation and ensuring
23 that the particular interpretation of the Rio Grande
24 Compact is not adverse to Colorado's interest. None
25 of the other parties, the states or the United States,

1 represents our interest in that, and as a sovereign
2 state, we are the only entity able to represent
3 Colorado's interest. We anticipate our case would be
4 very limited in protecting those interests, so
5 certainly would not need the same amount of time as
6 the other parties.

7 **JUDGE MELLOY:** Do you anticipate being
8 here full time for the trial?

9 **MR. WALLACE:** At this point, we do. It
10 may be that we would attend remotely if Your Honor
11 extends that privilege to certain portions of the
12 trial. I think certainly Phase 2, the liability -- or
13 the damages phase, we'd be more likely to attend
14 remotely. We'll certainly start out attending in
15 person, and may, in fact, have either myself or
16 Mr. Hartman in the courtroom for the duration.

17 **JUDGE MELLOY:** Do you anticipate
18 presenting witnesses?

19 **MR. WALLACE:** We have thought about that
20 issue. Our witness list would be very small, and
21 right now, I -- I'm thinking a handful of witnesses
22 with, at most, a week trial time, if the situation
23 presents itself.

24 **JUDGE MELLOY:** What kind of witnesses
25 would you be presenting?

1 **MR. WALLACE:** Our witnesses, we filed no
2 expert disclosures, so they'd be limited to factual
3 witnesses regarding Colorado's Compact administration
4 and participation in the Rio Grande Compact
5 Commission.

6 **JUDGE MELLOY:** Are -- is there any real
7 dispute about most of that? Is that the kind of thing
8 that could be submitted by deposition?

9 **MR. WALLACE:** I think that's something
10 that we could discuss with the other parties to see if
11 we could agree to do it that way. I think our real
12 position has been laid out most extensively in our
13 response brief to the motions for summary judgment,
14 and that really defines our current interest in the
15 case, what we're trying to defend.

16 **JUDGE MELLOY:** Mr. Somach, I understand
17 you're the one who's objecting to Colorado
18 participating in the trial. What's your view on this?

19 **MR. SOMACH:** Yes. It -- it's pretty
20 simple. There are no claims against Colorado.
21 Colorado hasn't made any claims. They haven't filed
22 an answer. They haven't filed a complaint. I was
23 surprised to hear they have a handful of witnesses.
24 Their Rule 26 disclosure only included two witnesses.
25 In this entire time, most of what Colorado has

1 provided is opinions as to, in this way, you know,
2 legal opinions as to how the Compact should be
3 interpreted. I haven't heard anything that
4 Mr. Wallace said that -- that moved into the ability
5 to actually put on a case, and that's really what we
6 were objecting to because we have no idea what that
7 case might be, because there's -- there are no
8 boundaries on it, other than what he's briefed, but
9 he's already briefed it. He's already said it. We
10 didn't object to some cross-examination with time
11 limits for -- for Colorado, so if someone says
12 something that needs to be probed, we certainly didn't
13 object to that, but -- but, you know, our objection is
14 no more complicated than what I just said.

15 **JUDGE MELLOY:** Have you deposed any of
16 Colorado's proposed witnesses?

17 **MR. SOMACH:** No. Because the two
18 witnesses that were disclosed, we -- we basically know
19 what they would testify to. It is stuff that -- that
20 is not in dispute, and -- and it could be handled
21 simply through a written document or through --
22 through deposition-type testimony, but -- and we
23 certainly don't object to that.

24 **JUDGE MELLOY:** Well, it would seem that
25 a week -- even a week would be a lot of time for

1 Colorado to be presenting a case in which it has no
2 claims, and -- and has not filed an answer. On the
3 other hand, I'm reluctant to have -- to go -- go to
4 the Supreme Court at the end of this case and say that
5 one of the main parties was precluded from presenting
6 any kind of a case. So I -- my initial feeling is
7 that they are a named party and that they should be
8 given some opportunity to present a case in a defense
9 if they feel it's necessary, but that it's going to be
10 very limited in what they're going to be presenting,
11 and as much of it could come in by stipulation of
12 depositions as possible so that we don't use up a lot
13 of trial time on something that's not really in
14 dispute. But I -- I guess I'm reluctant to say that a
15 named party should be totally precluded from
16 presenting any kind of case. What that case is going
17 to look like is probably going to, again, evolve over
18 the time as we get ready for trial, and I should just
19 add one other thing, as we go forward with the case,
20 both in terms of -- of evidentiary presentation and
21 exhibits, it's -- it's my understanding from -- from
22 cases that the Supreme Court has decided, as well as
23 the guidance in the Special Master's Manual that my
24 charge is to -- to the extent I err to err on the side
25 of inclusion. The last thing we want to do is go to

1 the Supreme Court at the end of this case and then
2 have them bounce it back and say, Well, you should
3 have let this evidence in, you should have let that
4 evidence in. It's my -- it's my understanding that
5 they would prefer to let it in, and if they decide
6 it's not relevant or hearsay, it's whatever, shouldn't
7 have been considered, they can look at it and decide
8 how to deal with it. Now, that, you know, doesn't
9 give a wholesale license to put in anything but the
10 kitchen sink, but on the other hand, on close calls,
11 it's my understanding the Supreme Court would rather
12 have the evidence in than be excluded, particularly
13 given the fact that is a non-jury proceeding, and, you
14 know, I've done enough non-jury trials over my time,
15 although not as many as recently, to know that things
16 come in in non-jury trials that you'd probably never
17 let in, in front of a jury, with the idea that at the
18 end of the day, the trial judge can hopefully sort it
19 out. But that's just sort of an observation to think
20 about as we go forward.

21 Anything else?

22 **MR. HICKS:** Your Honor, this is Renea
23 Hicks again. I'm belaboring the point, I guess.
24 While you are evaluating the -- what to allocate to
25 Colorado, I would just point out that the two project

1 districts have infinitely more interest and
2 involvement in this case than Colorado does. Its
3 interest pales in comparison to ours. I hope you
4 would take that into account when you're evaluating
5 the comparative --

6 **JUDGE MELLOY:** I'm aware of your
7 position.

8 **MR. WECHSLER:** Your Honor, I have one
9 question, and that -- that is last week, Texas had
10 filed a list of documents which you had indicated you
11 were interested in hearing about, in the order leading
12 up to last week's argument. We have a list, as well,
13 but rather than simply respond and file that, we
14 thought we would inquire with you. Would it be
15 helpful for us to provide that list and the documents?

16 **JUDGE MELLOY:** Why don't you just -- if
17 you have it, why don't you just supply it for purposes
18 of completeness? I think -- I think between the
19 written submissions and the oral arguments last week,
20 I have a pretty good idea of what each party's
21 position is, but if you want to have it in the record
22 just for purpose of completeness, I certainly am
23 willing to take a look at it, Mr. Wechsler.

24 **MR. WECHSLER:** Thank you.

25 **MS. BARNCASTLE:** Your Honor, I just have

1 one last quick question, and I apologize.

2 **JUDGE MELLOY:** Oh, no, that's fine.

3 **MS. BARNCASTLE:** Samantha Barncastle for
4 EBID. Just so that I can update my client, and I'm
5 sure other amici are interested, as well. Is it the
6 Court's view that you are going to provide Zoom or
7 some other web-based platform for us to participate or
8 observe, I should say, from afar? Can we go ahead and
9 let our clients know that that is anticipated?

10 **JUDGE MELLOY:** Yes.

11 **MS. BARNCASTLE:** Thank you.

12 **JUDGE MELLOY:** That is -- that is my
13 anticipation. And quite frankly, as I -- the reason
14 -- one of the reasons I thought about this was if
15 everybody were here in person, I'm not sure I could
16 get everybody into one courtroom. And so if you're
17 going to have to observe from a second courtroom, it
18 really doesn't make a whole -- other than to have the
19 opportunity to meet with counsel at breaks and over
20 the lunch and maybe in the even, you could observe
21 from your office just as easy as you could observe
22 from another courtroom. So the only real advantage I
23 could see of being here in person is the opportunity
24 to meet in person with the attorneys from Texas or New
25 Mexico or United States or whomever. So -- so, yes, I

1 just think it'd be much more efficient if we can --
2 and I've been assured that technology can -- is
3 available and that it will -- we can make it work. As
4 Mr. Stein said, there are glitches, so -- so if
5 there's any change in that, I'll certainly let you
6 know, but -- but I've been assured that that -- that
7 technology is available, and we can do it.

8 **MR. SOMACH:** Yeah. And following up on
9 that, I just -- because it will help because we'll
10 start, now, logistically planning for a trial in mid
11 September, September 13th, in Cedar Rapids, and my
12 assumption is that we'll have the capability that if I
13 don't bring every attorney working on the case to
14 Cedar Rapids, that those attorneys will be able to
15 participate remotely, and if something unanticipated
16 happens, and one of those attorneys needs to question
17 or be involved more directly, they'll have the
18 technical ability to do so?

19 **JUDGE MELLOY:** You're starting to -- to
20 test my technological, so I -- I don't know. That,
21 I'm not -- we may have to set up a separate link if
22 somebody wants to do that. My -- my thought was
23 observe only was what I'd been talking to our people
24 about. So if we want that additional capability, I'll
25 have to do some checking on that.

1 **MR. SOMACH:** I -- it would be helpful to
2 know because it would provide more flexibility for us,
3 and the only reason for asking now as opposed to later
4 is because we really do need to start logistically
5 doing the things we need to do to be ready to -- to
6 try the case there in -- in September. So it would be
7 helpful to know that.

8 **JUDGE MELLOY:** Well, and the other thing
9 is maybe -- I -- I know the local folks are able to do
10 the observe-only capability. Maybe if we want to go
11 beyond that, we'll have to work with Worldwide
12 Reporting to do some -- something similar to what
13 we're doing right now. I don't know. And I assume if
14 we have to do that, that the parties would be
15 agreeable to that. And -- and, you know, I don't know
16 to what extent you want to use the -- the Zoom
17 functions of meeting rooms and -- and that type of
18 thing, so we'll just have to talk about that. I'll
19 have to talk to them, and we'll talk about technical
20 aspects of it.

21 And -- and in that regard, let me ask
22 this: If you would -- if -- if each of the principal
23 parties, and to the extent, I guess amici want to, if
24 you would just send us a notice of who the -- the
25 court's people should talk to from a technical

1 standpoint. I -- I don't plan to be too involved in
2 the technology and -- and maybe Mr. Somach and
3 Mr. Wechsler and someone wants to be personally
4 involved in that, too, but if you have some people who
5 are your technical people that they can -- the
6 technical people could talk to the technical people,
7 that might be the most efficient way to handle it.
8 Let us -- let us know who would be sort of your point
9 person on -- on those issues, and just let us know who
10 those are with e-mail and phone numbers that I can
11 have the people in the clerk's office who are handling
12 the technology talk -- talk to your folks.

13 **MR. SOMACH:** We'll provide you that
14 information.

15 **MS. BARNCASTLE:** And, Your Honor, for
16 the parties' sake and for your sake, I should note
17 that EBID anticipated that there would be some amount
18 of financial expenditure necessary for a Zoom trial or
19 even a hybrid Zoom trial, and EBID is willing to share
20 in that cost, particularly if it means I don't have to
21 travel to be at trial 100 percent of the time.

22 **JUDGE MELLOY:** Well, that's certainly my
23 anticipation that you will not have to travel and be
24 here a hundred percent of the time. It'll be up to
25 you as to how often and how much you want to be here.

1 And I will be arranging, particularly for the
2 principal parties, Texas, New Mexico -- United States
3 I'm not so concerned about -- and Colorado secure
4 locations where you can have -- store files, store
5 materials, have rooms where you can adjourn to at
6 breaks and over the lunch hour and so on. I presume
7 the United States will just use the U.S. Attorney's
8 Office. They got -- they got ample space there. But
9 I'll make -- we have -- we have -- we have a new
10 courthouse. We have lots of room. It's -- it's an
11 underutilized courthouse, so we got lots of places we
12 can put people.

13 **MR. BROCKMANN:** Your Honor, if I might
14 ask one more question, just in terms of the -- the big
15 picture timing. It sounds like your -- your ruling or
16 your order would come out, I think you said in the
17 next few days setting up these deadlines.

18 **JUDGE MELLOY:** No -- oh, the deadlines.
19 I thought you were going to say summary judgment
20 order. In the next -- yes, within the next week.

21 **MR. BROCKMANN:** And then once that is
22 set with a mid -September trial date, is there any
23 anticipation, without trying to obviously pin you down
24 on a timing, but is there any anticipation on when
25 those rulings might be so that if there is an

1 adjustment to that trial schedule, when we might be --
2 when that decision might be made, whether it's a
3 matter of weeks or months?

4 **JUDGE MELLOY:** Well, without being
5 pinned down, we're now in mid March. Let me -- let me
6 put it this way: My -- my goal is to have it out some
7 time in May, hopefully earlier than later, but six to
8 eight weeks is kind of what I'm hoping for.

9 **MR. BROCKMANN:** I appreciate that. It
10 helps in terms of informing our clients what the --
11 what the schedule looks like and when decision points
12 might be if there's a change in that. Thank you, Your
13 Honor.

14 **JUDGE MELLOY:** All right. Anything
15 else?

16 All right. And the other thing is, just
17 one final thing, I don't know that there's necessarily
18 a reason to have a status conference before the ruling
19 on summary judgment. If anybody thinks one is
20 important, let me know. I'd be happy to set one up.
21 Otherwise, I anticipate that once the summary judgment
22 motion gets out, and we're start -- starting to
23 exchange exhibits and starting to get some idea of
24 where the issues are on admissibility, that we will be
25 going back to regular status conferences to try to

1 iron -- to work through those issues. But I'm not
2 going to set one at this time unless somebody thinks
3 we need one.

4 All right. If nothing else, then thank
5 you, everyone. We'll be adjourned.

6 (The proceedings adjourned at 12:28
7 p.m.)

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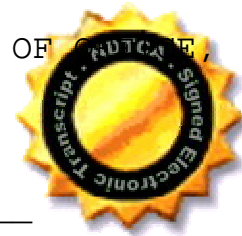
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