

NO. 141 Original

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In The  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS  
v.  
STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF AUGUST 7, 2020, REMOTE  
STATUS HEARING BEFORE HONORABLE MICHAEL A. MELLOY,  
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111  
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401,  
beginning at 11:01 a.m.

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1                   **JUDGE MELLOY:** So let's start by -- of  
2 course, this is in Original No. 141, United States  
3 Supreme Court, Texas versus New Mexico, Colorado, and  
4 United States. Let's start by having the parties  
5 enter their appearance. For State of Texas?

6                   **MR. SOMACH:** Yes, Your Honor. For the  
7 State of Texas, this is Stuart Somach. With me are  
8 Theresa Barfield and Robert Hoffman, as well as  
9 Priscilla Hubenak from the Texas Attorney General's  
10 Office.

11                  **JUDGE MELLOY:** And for New Mexico?

12                  **MR. WECHSLER:** Good morning, Your Honor.  
13 Jeff Wechsler from Montgomery & Andrews for the State  
14 of New Mexico. We also have Cholla Khoury, the  
15 assistant attorney general; Marcus Rael and Luis  
16 Robles from Robles Rael & Anaya; Lisa Thompson and  
17 Michael Kopp from Trout Raley; John Draper from Draper  
18 & Draper; Arianne Singer, the general counsel for the  
19 Interstate Stream Commission, and Shelly Dalrymple,  
20 also from the Interstate Stream Commission.

21                  **JUDGE MELLOY:** For Colorado?

22                  **MR. WALLACE:** Good morning, Your Honor.  
23 This is Chad Wallace for the State of Colorado, and I  
24 am joined by Preston Hartman.

25                  **JUDGE MELLOY:** Okay. Then for United

1 States?

2 **MR. DUBOIS:** Good morning, Your Honor.  
3 James Dubois for the United States, and also on the  
4 line, I believe, are Lee Leininger from my office and  
5 Shelly Randel from the Solicitor's Office. I do not  
6 see anyone else.

7 **JUDGE MELLOY:** The Albuquerque  
8 Bernalillo County Water Utility Authority?

9 **MR. BROCKMANN:** Yes, Your Honor. It's  
10 Jim Brockmann on behalf of the Albuquerque Bernalillo  
11 County Water Utility Authority. You're also welcome  
12 to just call it the water authority in the future.  
13 It's kind of a shorthand we all use.

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

15 **MR. CAROOM:** Good morning, Your Honor.  
16 Doug Caroom for the City of El Paso, and Susan Maxwell  
17 is on the line, also.

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

19 **MR. BROCKMANN:** Your Honor, this is Jim  
20 Brockmann again. Mr. Stein had a doctor appointment  
21 that ran late, so I'll be sitting in on behalf of Las  
22 Cruces until he can join us, if he can get back in  
23 time.

24 **JUDGE MELLOY:** Okay. In the interest of  
25 shorting -- shortening up names, Water Improvement

1 District No. 1?

2 **MS. O'BRIEN:** Good morning, Your Honor.  
3 Maria O'Brien on behalf of El Paso County Water  
4 Improvement District No. 1. Counsel, Renea Hicks, is  
5 also on the line this morning, as well as Dr. Al  
6 Blair, the district engineer, and Jesus Reyes, the  
7 general manager for the district.

8 **JUDGE MELLOY:** Okay. Then Elephant  
9 Butte Irrigation District?

10 **MS. BARNCASTLE:** Good morning, Your  
11 Honor. Samantha Barncastle for EBID.

12 **JUDGE MELLOY:** Hudspeth County  
13 Conservation and Reclamation District?

14 (No response.)

15 **JUDGE MELLOY:** No one. All right. New  
16 Mexico pecan growers?

17 **MR. BROCKMANN:** Your Honor, it's Jim  
18 Brockmann again. Ms. Davidson indicated that she had  
19 a mediation previously scheduled that she could not  
20 get moved, so she will not be joining today.

21 **JUDGE MELLOY:** Anyone on for New Mexico  
22 State University?

23 **MR. UTTON:** Yes, Your Honor. Good  
24 morning. This is John Utton for NMSU.

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



1 (No response.)

2 **JUDGE MELLOY:** All right. And if not,  
3 we'll proceed. We had a couple things on the agenda,  
4 so to speak, from the order of two weeks ago. Let me  
5 just start by mentioning, as I -- as I indicated in  
6 Paragraph 4 of that order, I'm not going to request  
7 the parties to brief or discuss further at this time  
8 the disclosure of expert reports. I -- I pretty much  
9 decided that I'm going to wait until the dispositive  
10 motions are filed. I have a feeling a lot of those  
11 reports may come in in conjunction with the  
12 dispositive motions, and to the extent that I or any  
13 of the parties feel that we need to see any further  
14 reports, I think that'd be a more appropriate time to  
15 take up that issue. So I'm going to defer that issue  
16 until after the filing of dispositive motions. Unless  
17 anybody wants to be heard on that, that's my view at  
18 this point.

19 Then the parties were going to confer  
20 amongst themselves as to whether they even thought  
21 they would need to file supplementation of expert  
22 reports, and if so, how much time they need to do it.  
23 I think you were sort of the lead on that, Mr. Somach.  
24 Do you want to be heard?

25 **MR. SOMACH:** Yes, Your Honor, I would.

1 I had a -- I have a -- conferred with Mr. Wechsler on  
2 this, and so I'll try to explain to you exactly where  
3 we are on that point. When we left our last status  
4 conference, it was my understanding based upon the  
5 motion that had been filed, that -- that it was  
6 understood that there might be supplemental reports  
7 that needed to be filed and that the motion asked that  
8 they be filed by September 15th and mandating that the  
9 scope of any further supplemental reports be limited  
10 to either correcting inaccuracies in former reports or  
11 adding information related to stated opinions that was  
12 not available when the report was drafted. And I  
13 think I said I didn't have any inherent problem with  
14 that. I just wasn't sure about the September 15th  
15 date because I wasn't sure whether we were going to  
16 need to file any supplemental reports. Subsequently,  
17 we did confer, in fact, right after the status  
18 conference. I had a -- a Zoom meeting with our -- our  
19 modeling experts, and they informed me that -- that  
20 the modeling reports, if you'll recall, there were 10  
21 reports based upon modeling, plus the disclosure of a  
22 new expert. They informed me that -- that the 14  
23 terabytes of data and all the other data that they  
24 received, once they looked at it, revealed that the  
25 modeling had been substantially revised from what had

1     been undertaken before that we had previously seen.

2                   **JUDGE MELLOY:**   Are you talking about --  
3     excuse me.

4                   **MR. SOMACH:**    Yes.

5                   **JUDGE MELLOY:**   Are you talking about New  
6     Mexico?   Thanks.

7                   **MR. SOMACH:**    Yes.   That the modeling we  
8     got from New Mexico on July 15th was substantially  
9     different to be even new modeling from what had  
10    occurred prior to that so that they -- we've never had  
11    an opportunity to -- to see that before.   I asked --  
12    we were taking a deposition this morning of one of New  
13    Mexico's experts who confirmed that her report was  
14    wholly new, that she hadn't reported on any of -- of  
15    the material that was in this new report before, and  
16    that the modeling she was relying upon, which is the  
17    modeling I'm talking about, was significantly  
18    different than what had been produced before.   With  
19    all that said, we think that we can handle the -- what  
20    needs to be done in three supplemental reports, one by  
21    Dr. Brandes, which we believe we can get in by New  
22    Mexico's preferred date of September 15th, one by  
23    Mr. Coors, which he indicates he can get done by  
24    October 1st, and a bit longer report that  
25    Dr. Hutchison believes he could get in by October

1 15th. And those were the dates that I gave to  
2 Mr. Wechsler when we spoke a few days ago, and -- and  
3 what I did indicate, also, to Mr. Wechsler was that we  
4 understood that it would be limited -- our  
5 supplemental reports would be limited to responding to  
6 the new material and that we would make those three  
7 experts available once the reports were in at a  
8 mutually-convenient time for the depositions and that  
9 I presume that the depositions would also be limited  
10 to what was in those supplemental reports. And so we  
11 did have a discussion about that, but Mr. Wechsler  
12 could not agree to what I had proposed and, you know,  
13 perhaps Mr. Wechsler would like to explain his --  
14 his -- his concerns or his differences with what I  
15 proposed. But we believe that both the way these  
16 reports have unfolded over a period of time in terms  
17 of who went first and all that other kind of stuff,  
18 plus the fact that I believe that what we are  
19 responding to is new stuff that we have not had seen  
20 before, and that under the Rule, we're kind of  
21 obligated to do that before we get to trial and, you  
22 know, rebut this testimony at -- at trial. So --  
23 rebut the new stuff at trial. So that's -- that's our  
24 proposal, and that's what we'd like to see happen. So  
25 I'll stop there and allow Mr. Wechsler to explain why

1 that doesn't work.

2 **JUDGE MELLOY:** Let me ask you -- before  
3 I -- I turn to Mr. Wechsler, let me -- let me ask you  
4 a couple questions, Mr. Somach. Very early on in this  
5 case, there was some discussion about whether there  
6 could be a model that parties could agree upon and  
7 then you'd put in the numbers, and obviously that  
8 really didn't go very far, but is there -- are the  
9 models themselves significantly different from one  
10 another.

11 **MR. SOMACH:** The models -- you know,  
12 here is the quick description. We have a groundwater  
13 model of the -- there -- there are really two areas of  
14 groundwater basins in -- involved. The groundwater  
15 basin in New Mexico and a little bit of Texas is the  
16 Rincon and Mesilla basins. We both have groundwater  
17 models associated with those basins, and at this point  
18 in time -- and I -- I think I said this earlier, but  
19 Mr. Wechsler may have a different opinion. I don't  
20 think -- you know, how they get to where they get is a  
21 bit different, but the bottom line results are  
22 about -- they're not orders of magnitude different.  
23 They have a model of a Hueco, which is the basin  
24 that's in around El Paso in Texas. We're relying upon  
25 a USGS model for that same basis. We're arguing about

1 essentially whose model is better, but, again, I don't  
2 think that the results are in orders of magnitude much  
3 different. In addition to that, they have what they  
4 call a linked model, which takes the two groundwater  
5 models that they've done and link it with a surface  
6 water model. We have a lot of concern about that and  
7 whether it's been done right, and I will say the new  
8 modeling they've done was responsive to some of the  
9 concerns we had previously observed so, you know, my  
10 modelers say it's improved, but it still has  
11 significant problems. Nonetheless, the results of  
12 that, you know, it is a difficult thing to critique a  
13 model because we don't think it's -- it -- it -- it is  
14 an appropriate model, yet when you look at the bottom  
15 end and see what comes out of it, you go, well, you  
16 know, that's -- that's fine, you know, that we don't  
17 quibble with the results. So, yeah, there's a lot of  
18 technical disagreements going on, but in terms of  
19 either looking at our case in chief or their case in  
20 chief, I'm not sure that -- that the results are  
21 orders of magnitude different. It's -- it is kind of  
22 how you interpret those results and how you utilize  
23 those results. We would not be comfortable utilizing  
24 their models, however, because we do think that there  
25 are some technical issues that -- that are

1 significant, which we'll point out to you.

2 **JUDGE MELLOY:** Well, and when you  
3 say "the results," what's the ultimate result that you  
4 want to get from these models? Is it the effect of  
5 groundwater pumping on -- on the surface flow of  
6 the -- of the -- of the water below -- below Elephant  
7 Butte and the return flow? Is that essentially what  
8 you're looking at?

9 **MR. SOMACH:** Yeah. That's -- it -- at  
10 least I'm -- I'll speak for Texas. That certainly is  
11 the fundamental question, and as I said, I think -- I  
12 think all of the models show that there is an impact.  
13 Now, how you interpret that impact is critical, in  
14 addition because of the issues associated with the  
15 operating agreement and some -- some accounting  
16 issues, the New Mexico model attempts to -- to take a  
17 look at -- at those issues. In other words, how --  
18 how the whole system as a project system may or may  
19 not relate to each other. So it has that -- that  
20 extra aspect to it that -- that we don't necessarily  
21 believe is relevant to the litigation, but it is  
22 relevant, certainly, to some of the issues that --  
23 that New Mexico has raised. So that they add  
24 accounting issues to the modeling and then they take a  
25 look at different operational scenarios, other than

1 the operating agreement. So it -- it's got that --  
2 that additional nuance to it, and it -- you know, with  
3 modeling, one of the things that -- that occurs,  
4 they'll tell you that simpler is better. That -- you  
5 know, that the more complex you make the model, you  
6 compound the problems with modeling in and of itself  
7 because remember, you're -- what you're trying to do  
8 is model what would happen in the real world under  
9 various circumstances and so that's a -- an  
10 interesting exercise. This will all be part of the  
11 testimony in the case, but -- but what they've done  
12 has created a very complex model for reasons that they  
13 believe is appropriate, but we believe that -- that  
14 part of what happens when you do that is you create so  
15 many multiplying complexities that you really start  
16 losing, you know, the -- the kind of -- well, you lose  
17 a lot when you multiply complexities. You multiply  
18 errors essentially over and over again and -- but  
19 nonetheless, you know, the results of even this very  
20 complex model is -- you know, we've -- we'll talk  
21 about it. We think that it proves what we think  
22 should be proven in the case.

23 **JUDGE MELLO:** All right. Well, I'll  
24 let Mr. Wechsler speak. Just to follow up, though, on  
25 what I was just asking Mr. Somach about, do I



1 understand at least one of the things that you're  
2 attempting to do, Mr. Wechsler, is to show what the  
3 project operations would have looked like without the  
4 operating agreement and what -- what it looks like  
5 with the operating agreement?

6 **MR. WECHSLER:** Well, I think what our  
7 model is capable of doing is showing where the water  
8 is going, where it is used given all of the various  
9 complex water uses in the system, whether it's return  
10 flows, groundwater pumping, the effects of various  
11 plumbing and -- and accounting and things that have  
12 been done over the years. What I would say about the  
13 model is it's the only model -- the New Mexico model  
14 in the case is -- is the only one that provides a  
15 complete picture of the impacts of water use from  
16 Elephant Butte Reservoir all the way down to Fort  
17 Quitman, Texas. The U.S. tried to do a similar type  
18 model. Ultimately, they pulled that back and have not  
19 presented it in this case. They did use a -- a  
20 similar type model in -- in doing some NEPA analysis,  
21 though less sophisticated than the New Mexico effort  
22 and so it contains a whole number of capabilities that  
23 the Texas model simply doesn't have. What we would  
24 say is that the -- the Texas model is incomplete.  
25 Mr. Somach uses the word simple. I would say

1     simplistic in that you -- it's more important to get a  
2     model that's able to correctly model the system than  
3     one that's -- that's simple. We think that the Texas  
4     model is not capable of answering the questions -- the  
5     right questions in this case, and we're also concerned  
6     about a number of the technical problems that we see  
7     in the -- in the -- the Texas model. As an example,  
8     Texas' model is limited in geographic scope. It's  
9     limited in functionality. For example, you can't do  
10    the operation to see the overall impacts of doing  
11    things like reducing groundwater or changing return  
12    flows. All of those things are things that the  
13    Supreme Court, in prior cases, has -- have indicated  
14    that it's -- are important, and it has problems with  
15    its -- with its time step. So -- so suffice it to say  
16    that we're quite confident that the model that New  
17    Mexico is presenting is going to give us the most  
18    complete and accurate picture in this case.

19             Turning to the issues that we're talking  
20    about in terms of the supplemental reports, I think at  
21    the heart really of this dispute is Texas' ongoing  
22    dissatisfaction with the schedule for expert  
23    disclosures, and in that continuing effort to have the  
24    last word, Texas is now seeking to provide those  
25    three, what we consider to be new expert reports, in

1 the guise of supplemental reports. And we've talked  
2 about the rules where -- Rule 26 disclosure, and --  
3 and we think it's very clear that it's necessary that  
4 for a supplemental opinion, it needs to be something  
5 that is directly updating a prior opinion. We think  
6 that that supplemental report has to be based on new  
7 factual as opposed to expert information that was  
8 previously unknown. We think that this request is --  
9 is inconsistent under the Rules of Civil Procedure in  
10 the case management plan, I think for four reasons.  
11 The first is the case management plan sets out an  
12 orderly and fair process for disclosing expert  
13 reports. That procedure was designed to give each  
14 expert a reasonable opportunity to address the  
15 opinions of the other side and thereby have a full and  
16 reasonable opportunity to explore all of the issues.  
17 Precisely as contemplated, New Mexico addressed the  
18 issues and opinions that were raised by the experts of  
19 Texas and the United States in their rebuttal reports.  
20 The deadline in the CMP should be upheld, and we don't  
21 think that Texas should be able to present these new  
22 reports because they're out of time, and really,  
23 they're new expert opinions.

24 Second, I mean, if I understand the  
25 argument, Texas is essentially arguing that New Mexico

1 has substantially changed or I thought I heard the  
2 words completely reworked its model. That is  
3 incorrect. Certainly we have made changes, as I said,  
4 to update and address the issues raised by the Texas  
5 experts, but the structure and basic components of the  
6 New Mexico model are largely the same as they were in  
7 October when originally disclosed the October of 2019.  
8 All that New Mexico has done is to consider the issues  
9 raised by the opposing experts, some of which we  
10 considered to be legitimate, some which we just didn't  
11 see a problem updating if that was something that they  
12 were raising. And so we did that. But responding to  
13 issues that are raised in expert reports is -- is  
14 hardly remarkable. In fact, that's what is -- is  
15 contemplated by rebuttal reports and by rebuttal  
16 schedule, and it's happened in every case, every water  
17 case that I've ever been involved in.

18 Third, the rules don't contemplate  
19 allowing supplemental expert reports based on other  
20 expert opinions. That's not really new. What the  
21 rules contemplate is that a supplemental report should  
22 be supplement -- based on new factual information  
23 that's learned in the case. The expert opinions and  
24 the expert disclosures, that comes from the -- the  
25 case management deadlines.

1           And, I guess, fourth, there needs to be  
2     an end to the procedure of expert disclosures. In our  
3     motion, we pointed out the Beller [phonetic] case, and  
4     I'll read a quote from that, that failure to enforce  
5     the procedural deadlines, quote, "Would create a  
6     system where preliminary reports could be followed by  
7     supplementary reports, and there would be no finality  
8     on expert reports as each side, in order to buttress  
9     its case or position could supplement existing reports  
10    and modify opinions previously given." There needs to  
11    be an end. Those were set out in the case management  
12    deadlines, and, now, Texas is seeking to provide these  
13    three new opinions to respond to the expert -- the  
14    rebuttal expert reports that New Mexico has done.  
15    Given where the schedule is, if that is allowed by --  
16    and Texas is allowed to submit those, we would ask  
17    that a deadline be built into the schedule that would  
18    allow, if necessary, New Mexico to address those  
19    supplemental reports by Texas. We think that's fair,  
20    given the procedural issues. So we think that there's  
21    been enough expert disclosures in this case, and you  
22    ought to deny the request for these three new  
23    supplemental reports.

24           As to a schedule, if --

25           **JUDGE MELLOY:** Before -- before we go to

1 the schedule, let me ask you something, Mr. Wechsler.  
2 And maybe I need to talk to Mr. Somach more about  
3 this. What do we mean exactly by supplemental report  
4 or just -- and what I'm trying to get my head around,  
5 I guess, is Texas has a theory in the case. You have  
6 a theory in the case that your experts have put  
7 forward. Texas has some disagreements with the way  
8 your experts have set out their modeling in -- in your  
9 reply briefs -- in your reply reports, and you  
10 presumably have the same problems with their reply  
11 reports. To what extent is supplementation required  
12 to testify to those problems at trial? In other  
13 words, if we get to trial and Texas' expert gets on  
14 the stand and says, This is my model, this is mine, I  
15 think that the -- that -- that there's X amount of  
16 groundwater pumping that's having this particular  
17 effect upon surface flow and return flow and so on,  
18 and -- and here's why I think New Mexico is wrong,  
19 would they be prohibited from doing that because they  
20 hadn't supplemented?

21 **MR. WECHSLER:** I think, Your Honor,  
22 that's case-by-case determination, and I've seen it  
23 in -- in federal courts handled by judges in numerous  
24 ways. I think the general idea is that as part of the  
25 expert disclosures, the parties have to have a chance

1 to evaluate and test the expert opinions, and so if  
2 it's a new opinion, some new approach or some new  
3 theory that one of the states is trying to raise, then  
4 that raises the specter of unfair surprise and should  
5 not be allowed. However, if it's within the overall  
6 theories that have been explored and expressed within  
7 the expert reports, generally, I have seen Courts  
8 allow that kind of testimony that you're talking  
9 about.

10 **JUDGE MELLODY:** Even without  
11 supplementation.

12 **MR. WECHSLER:** That's been my general  
13 experience.

14 **JUDGE MELLODY:** I guess I'm having  
15 trouble understanding if we even need to do  
16 supplementation. If all we're talking about is Texas  
17 disagreed with your expert for -- for these reasons  
18 that are within the parameters of their original  
19 expert report, you disagree with their expert, again,  
20 within the parameters of what your experts previously  
21 testified to, do we need to do any supplementation,  
22 unless they come up with either a whole new theory or  
23 there is some new data that changes the ultimate  
24 analysis? I mean, am I wrong about where -- where I  
25 think we are in the case?

1                   **MR. WECHSLER:** I take your point. I  
2 think generally, I agree with what you're expressing.  
3 I don't know how to apply that, because I don't have  
4 as good of an understanding as Mr. Somach as to what  
5 the three supplemental reports would cover.

6                   **MR. SOMACH:** I can clarify that. You  
7 know, I'm going to say this because I said it last  
8 time. I don't want to file any supplemental reports.  
9 I'm ready to go to trial on all of this stuff. The  
10 reason that I explained this last time that I'm  
11 concerned is because what we've gotten from New Mexico  
12 in terms of their reports and their articulation of  
13 the law is one that is not quite what Mr. Wechsler  
14 just described, but one that is very rigid, that if it  
15 isn't in an expert report, it can't be testified to.  
16 That's never been my view, you know, in the years I've  
17 been practicing, that that -- that that's a rule.  
18 What you described, Your Honor, is much closer to the  
19 way I've always, you know, tried cases and proceeded  
20 with no problems in the past. But I've got expert  
21 reports from New Mexico that talk about the fact that  
22 if you don't line-by-line critique what I wrote in my  
23 expert report, it's deemed accepted or -- or  
24 uncontested, which -- which we've said to you in the  
25 last status conference isn't -- isn't right. We don't



1 agree with it. But it raises concerns about all these  
2 in limine motions. I know I mentioned this last time  
3 that you're going to be -- you're going to be hit with  
4 and arguments that we can't testify because it's not  
5 in some expert report. They filed substantially new  
6 reports. I could quote from Dr. Barroll this morning  
7 where she said she never did the analysis that she did  
8 before and that the reports she -- and that the  
9 modeling she relied upon was significantly different,  
10 if not new, significantly different than what we had  
11 previously seen before July 15th. I have no desire,  
12 quite frankly, to let, you know, Mr. Wechsler and New  
13 Mexico know any more about our views about all that  
14 than we have to. And so if he's saying I don't have  
15 to file a supplemental report and I can go to trial  
16 and we can testify as to what's wrong in those ten  
17 reports without supplementing, so be it. I'm -- I'm  
18 all for that. But my understanding of -- of their  
19 prior position and my concern is that I don't want to  
20 be precluded later on from putting on testimony,  
21 critiquing this new stuff that they've dumped on us on  
22 July 15th, because we didn't provide them with -- with  
23 a critique of that prior to the time that -- that we  
24 put people on in trial. So believe me, I have no real  
25 desire to put on supplemental reports, but I do have a

1 desire to avoid confrontation at the time of trial as  
2 to whether my experts can testify in critique of these  
3 15 new reports that have been produced -- or the 10  
4 new reports that were produced on July 15th.

5 **JUDGE MELLOY:** Well, let me think about  
6 this, and I'll get something out. But I have to say  
7 my initial opinion is -- and I'm going to think about  
8 it -- is that nothing that you don't say should be  
9 gamed as an admission by either party and that expert  
10 reports aren't necessarily required to critique the  
11 other side's expert report. It's -- it's designed to  
12 expose what your theory of the case is, what your  
13 expert thinks is the case, and by implication, it's --  
14 it means you're disagreeing with the other side. But  
15 I don't think you need to do a line-by-line critique  
16 in order to criticize a report at trial. That's part  
17 of the -- the trial process, in my view. But let me  
18 ask, does anybody else want to be heard on this issue?

19 **MR. WECHSLER:** Well, I -- Your Honor, I  
20 do want to correct something, and that is I don't  
21 think that we've taken the position that you have to  
22 do a line-by-line critique. I think that what  
23 Mr. Somach is referring to is there are a couple, two  
24 or three of our experts, who had a whole set of  
25 opinions. They had, for example, say, a summary of 20

1 opinions, and those are their main theories. And in  
2 the rebuttals then, Texas or the United States experts  
3 went through and said, oh, Opinion 1, I disagree with,  
4 Opinion 4, I disagree with, et cetera, and  
5 specifically chose not to address other of the  
6 opinions. And we're not saying there has to be a  
7 line-by-line description of everything they're going  
8 to testify to trial or else they admit it, but what is  
9 necessary as part of expert reports is that the  
10 parties are put on notice about what the disagreements  
11 are, what the major theories are, so that we have a  
12 chance to explore those, and there's not surprise.  
13 And so when, for example, experts have said, well,  
14 I'm -- you know, this whole Opinion 1, 2, and 3, I'm  
15 simply not even addressing. Our experts then went  
16 onto say, well, this wasn't addressed and so I  
17 understand that that's not something that the Texas or  
18 U.S. experts are -- are contesting as part of this  
19 case, otherwise, I would have addressed it. That's  
20 basically what you see playing out.

21 **JUDGE MELLOY:** Isn't that part of the  
22 deposition process, though? When you're deposing the  
23 other side's expert, you would ask our experts laid  
24 out these 20 points, you only responded to 5, does  
25 that mean you agree with the other 15? I mean,

1 wouldn't you ask that in a deposition?

2           **MR. WECHSLER:** We have been. Not in  
3 exactly the same language as you have just laid out,  
4 but, yes, certainly that's been something we've been  
5 covering to ensure that the opinions that they are  
6 expressing in their report are all of the opinions  
7 they intend to testify to.

8           **JUDGE MELLOY:** But what about -- have  
9 you also addressed their -- their critique of -- of  
10 your experts?

11           **MR. WECHSLER:** Of course.

12           **MR. SOMACH:** Your Honor, if I could just  
13 ask this. Again, I've said I don't -- I mean, I'm not  
14 begging to file supplemental reports here. I want to  
15 make certain that -- that you understand that. But I  
16 just don't -- what I'm really concerned about is I  
17 don't want to be precluded at the time of trial from  
18 putting on testimony that critiques what was in these  
19 July 15th reports. That's all. And if -- I'm  
20 comfortable with what you said so far as there won't  
21 be any -- won't be -- we won't be limited in -- in  
22 providing that -- that critique at the time of trial,  
23 but I -- I -- my only concern is I don't want to be  
24 precluded from putting on evidence that -- that  
25 critiques these July 15th reports. If I'm not

1 precluded, I don't need to file a supplemental report.  
2 That's -- that's not something I'm begging for. But  
3 if I will be precluded, then I really am requesting to  
4 let me put on supplemental report to fill that gap.

5 **JUDGE MELLOY:** All right. Well, let me  
6 give this some thought, and I'll -- I'll get something  
7 out. Anybody else want to be heard on this particular  
8 point?

9 **MR. DUBOIS:** Your Honor, I think that --

10 **JUDGE MELLOY:** All right --

11 **MR. DUBOIS:** This is Jim Dubois for the  
12 United States. I think that based on what you've said  
13 as far as the ability of our experts to -- to critique  
14 this last round, I -- I would agree with Mr. Somach.  
15 Based on that, I don't know that supplementation is  
16 going to be necessary, but I also think, Your Honor,  
17 that you pretty correctly, at least with respect to  
18 the dispositive motions that will be coming up in  
19 October, you pretty correctly nailed it that -- that  
20 the relevant part of all of these models is, is there  
21 an impact on -- on the surface water supply and the  
22 project water supply, and that's going to be a -- the  
23 fundamental thing, and as Mr. Somach said, they're not  
24 that different in their end result on that. So I  
25 think that -- that we have enough now in the various

1 reports to go forward on dispositive motions, but just  
2 really kind of have the threshold question going  
3 forward.

4 **JUDGE MELLOY:** Well, and that's the  
5 other thing is if somebody thinks that the testimony  
6 or -- or evidence, affidavits, whatever form it comes  
7 in, depositions that are filed either in support or  
8 opposition to the other side's dispositive motions, if  
9 they think there's a problem with the admissibility of  
10 that, I would anticipate that would be brought up at  
11 summary judgment, so that hopefully most of these  
12 issues can be fleshed out before we get to trial or  
13 even before we get to an in limine motions stage.

14 But, all right, let's move on to the  
15 other issue. You had the motion, Mr. Wechsler, on the  
16 government's United States' disclosure documents. You  
17 want to tell me where you think we are on that? What  
18 you want --

19 **MR. WECHSLER:** I can. I mean, and I  
20 think the genesis, as context of the dispute, is the  
21 U.S. failed to produce the ESI, as was agreed upon at  
22 the end of May, based on the agreed-upon search terms.  
23 And the reason I say that is had we received the  
24 documents at that time, I believe we would have been  
25 able to process them regardless of the number and been

1 put in place to meaningfully conduct discovery on  
2 IBWC. But instead, the U.S. did not meet that  
3 deadline. They unilaterally identified their own  
4 search terms, which we would have liked to have had  
5 input on, and that led to a series of issues. As you  
6 know, there were approximately 30,000 documents  
7 produced in mid July. Another almost 6,000 produced  
8 at the end of July. Given the document dump to date,  
9 New Mexico is unable to conduct meaningful discovery  
10 before the close of discovery on IBWC and so we're  
11 forced to seek your help in -- in working this out,  
12 establishing a fair process. As I understand it now,  
13 what we're really talking about is what that fair  
14 process is and -- and how to accommodate the deadlines  
15 and what's fair. You'll see in our motion that we  
16 suggested a process whereby the parties try and work  
17 out a set of search terms in August, and I think it's  
18 important for you to understand why we're asking that,  
19 and that is when we receive those 29,000 documents in  
20 July, we uploaded those into our system, and we've run  
21 an initial search to evaluate those and we found a  
22 very large number of irrelevant documents and we could  
23 not discern any organization to those documents. And  
24 so unfortunately, we have no confidence in the process  
25 that the United States used or their -- and -- and are

1 concerned about the remainder of the documents, which  
2 is somewhere approximately 18,000, I'll call it. Now,  
3 the problem is, you know, normally you could say,  
4 well, we'll just take those documents and we'll upload  
5 them into our system and we'll run the searches  
6 ourselves, but the problem is, is that comes with an  
7 associated cost. It costs money to be uploading it  
8 into the system, in this case, tens of thousands of  
9 dollars that would be paid for by the New Mexico state  
10 taxpayers, which we don't think is fair, and that's  
11 why what we've asked for is for what we consider to be  
12 a reasonable process to work out those search terms so  
13 that we can have more confidence that when those  
14 documents are uploaded into our system, they're --  
15 they're truer documents, not irrelevant documents.

16 We had suggested a deadline to produce  
17 the -- the documents for completing the process of  
18 August 30th. We had initially said in our motion  
19 that -- that the deadline to conduct depositions on  
20 IBWC -- and I'll tell you that we have a -- a 30(b)(6)  
21 deposition that we've been -- alerted the United  
22 States about, and then there's one individual that's  
23 not listed as someone who is likely to testify that  
24 we'd like to take, and then they have also identified  
25 an additional eight people as -- from IBWC that might



1 be testifying. Hopefully that could be narrowed down  
2 now that we have no counterclaims against IBWC, and I  
3 know that October 1st will be -- is the deadline for  
4 producing an initial preliminary witness list, and  
5 that will also help us narrow the number of IBWC  
6 witnesses. My guess is we're looking at a 30(b)(6)  
7 and two to three others when all is said and done.

8           The -- we had said 90 days would give us  
9 enough time. I think that's probably not necessary.  
10 If -- if we can work out the search terms with the  
11 United States, we think we can accomplish that by  
12 October 15th. We understand the United States now to  
13 be saying if you can conduct your depositions by that  
14 time -- or their suggestion was October 1st, we think  
15 it should be October 15th to give us time. We think  
16 that -- my understanding is the United States is  
17 suggesting that we simply put any supplemental  
18 materials related to the dispositive motions that we  
19 gain from those IBWC depositions either at the  
20 response deadline that's already set of December 1st  
21 or the reply deadline for December 21st. Like I said,  
22 if we're able to work out the search terms with the  
23 U.S., I think we can live with that, provided that  
24 there's an understanding and perhaps memorialize an  
25 order by you, that we are allowed to include those

1 materials in the response in the reply.

2 That's my best understanding of where we  
3 are right now.

4 **JUDGE MELLOY:** Two questions, I guess.  
5 Have you talked with the United States about a new  
6 search terms or is this -- is this what's referred to  
7 in your reply as the hit list? I wasn't exactly sure  
8 what a hit list was and so is that -- is that what  
9 you're referring to on the hit list is -- is the new  
10 list of -- of search terms?

11 **MR. WECHSLER:** I think it is, Your  
12 Honor. The -- my understanding, and Mr. Dubois can  
13 correct me if I'm wrong, that we had talked about  
14 doing additional search terms with the United States,  
15 but my read of their most recent e-mail is that they  
16 no longer think that that's necessary, and they would  
17 prefer producing their additional 13,000 documents  
18 based on the old search terms, which as I said, when  
19 we looked at the -- the previous 29,000 documents that  
20 they looked at, we found a lot of documents that  
21 simply didn't apply.

22 **JUDGE MELLOY:** I guess I said two  
23 questions. I actually have three. I suspect one of  
24 the responses we're going to hear from the government,  
25 so I'll ask you to respond to it right now, is that

1 they wanted you to do this at an earlier date, and it  
2 was -- and that you -- you were reluctant to limit the  
3 search terms and that you were alerted to this  
4 potential problem and so, in other words, basically  
5 it's a problem of your own making.

6 **MR. WECHSLER:** I wasn't quite clear on  
7 what the United States is arguing there, if they're  
8 arguing -- because in their motion, they were talking  
9 about some discussion that occurred way back in 2019,  
10 which would not have changed the -- this issue at all.  
11 My understanding of the relevant documents is what  
12 happened is the U.S. did produce quite a bit of ESI  
13 related to Reclamation and some of the other entities  
14 that have relevant documents, which we appreciate.  
15 The problem was just with IBWC and so when the end of  
16 May, which was the deadline, came up, we had been  
17 anticipating that we would get the IBWC documents, and  
18 instead, on June 2nd, I believe it was, we were told,  
19 well, we've now -- we have too many documents, and we  
20 have changed the search terms, and here's what our new  
21 search terms are. You know, I think there -- probably  
22 we could have handled better overall working out  
23 search terms at that time in June, just as I suspect  
24 the United States would acknowledge they could have,  
25 as well. Ultimately, we didn't reach any agreement,

1 and we're hoping to do that now.

2 **JUDGE MELLOY:** I guess my other question  
3 is: What is it that -- what's the ultimate goal in  
4 getting these documents? What -- what is it you think  
5 you're going to learn or want to learn from the  
6 border -- border commission.

7 **MR. WECHSLER:** Yeah, I think there's  
8 really four issues that we think those documents will  
9 go to, and we would anticipate would be using in  
10 depositions, and as I -- I'll list those four subjects  
11 now, but I will tell you, of course, it's hard to  
12 predict until we see the documents. But the issues  
13 that we anticipate is New Mexico is currently being  
14 charged for all depletions caused by groundwater that  
15 have occurred since 1979, including those occurring in  
16 Texas and Mexico.

17 **JUDGE MELLOY:** All the what from  
18 groundwater?

19 **MR. WECHSLER:** Groundwater depletions.  
20 So, in other words --

21 **JUDGE MELLOY:** I just didn't hear the  
22 word. Okay.

23 **MR. WECHSLER:** The IBWC has, we think,  
24 significant information about water use, including  
25 groundwater use in Mexico. The second is when the

1 major accounting change occurred that sort of -- the  
2 method that's used to allocate the water between the  
3 two states, when that was done in the time period of,  
4 say, 1979 to 1981, IBWC was instrumental in adopting  
5 that new accounting method that the Bureau of  
6 Reclamation had consulted with IBWC in a whole series  
7 of meetings, and we have some documents, at least one  
8 of which is from IBWC, that memorialized those  
9 meetings, and we want to understand the thought  
10 process that went into that sort of method, and that  
11 method is still, in some form or fashion, being used  
12 in the current operating agreement, the method for  
13 dividing waters.

14           The last thing -- the third thing, I  
15 guess, is we understand we do not have a counterclaim  
16 against IBWC for any river maintenance issues, but  
17 under the current accounting system, New Mexico may  
18 also be charged for water that is being lost due to  
19 IBWC not fulfilling those duties and additional losses  
20 that may have occurred again since approximately 1981  
21 or so, and -- and we want to understand that, to  
22 understand whether New Mexico is receiving the full  
23 apportionment that we're entitled to.

24           And then the last one is much of that  
25 data and information may be applicable and -- and

1 relevant to the modeling, particularly as the -- the  
2 different modeling approaches treat Mexico. So that's  
3 what we're looking for in these documents and -- and  
4 from those depositions.

5 **JUDGE MELLOY:** I don't know if I heard  
6 you correctly, but is one of the issues whether Mexico  
7 is getting more than 60,000 acre-feet a year?

8 **MR. WECHSLER:** Not surface water, Your  
9 Honor. We don't think there's any issues with surface  
10 water. There are concerns about groundwater pumping  
11 in Mexico, and as I said, the concern of New Mexico is  
12 that New Mexico is being charged for all depletions  
13 that are caused by groundwater pumping in Mexico, and  
14 we don't think that that is a fair treatment of our  
15 apportionment.

16 **JUDGE MELLOY:** Well, let -- let me --  
17 before I turn to Mr. Dubois, I want to ask Mr. Somach  
18 something. Let's assume, for purposes of argument,  
19 that I ultimately agree with what I think is your  
20 position, that New Mexico has no apportionment of  
21 water below Elephant Butte and that, therefore, all  
22 the water is apportioned to Texas subject to the  
23 60,000 acre-feet that goes to Mexico and subject to  
24 the contractual rights of the two water districts,  
25 that everything that's left over goes to Mexico -- I

1 mean, to Texas. Assuming that is your position and I  
2 understand correctly, how -- how would you -- how  
3 would you think we are going to approach proving your  
4 case? Is it you're going to measure the water that  
5 Texas is getting and assume that anything that's,  
6 quote unquote, short is New Mexico's fault; or are you  
7 going to look at what's happening in New Mexico and  
8 say we only want what's being taken either by surface  
9 water diversion or groundwater pumping that affects  
10 surface water and return flows? It seems to me that  
11 those are two fundamentally-different positions,  
12 because if it's -- if you're saying we know what we're  
13 getting, and it's not what we're entitled to, who's at  
14 fault, well, then maybe -- maybe the -- maybe the  
15 water commission, maybe the water districts, it may  
16 be -- it may be New Mexico, but it opens up the -- the  
17 number of potential bad actors, so to speak, to a lot  
18 broader number of -- of entities.

19 **MR. SOMACH:** I -- I think if I  
20 understood the latter, I think it's the latter that  
21 we're -- that we're focusing on. I -- as I understood  
22 it as you -- you articulated it. I think that that's  
23 it. I don't think that --

24 **JUDGE MELLOY:** When you say -- you're  
25 going to look at groundwater -- you're going to look

1 at -- look at what New Mexico takes; you're not going  
2 to look at what Mexico takes, if they're getting  
3 80,000, that's not -- that's not part of this case?

4 **MR. SOMACH:** No. We've looked at those  
5 things. I don't want you to think we're not aware of  
6 those things. We think it's de minimus, and -- but  
7 what we're focused on is the latter. It's -- it's the  
8 impact that New Mexico is having, not the totality of  
9 what we're shorted in -- in -- in some way, shape, or  
10 form. We think it's -- it's about the same, but --  
11 but not because of focusing on all those other actors.  
12 It's just as you go through the modeling and do the  
13 accounting, that's what it shows. But it's the  
14 latter. It doesn't implicate all those other -- other  
15 folks, and I think that's what the evidence will show.

16 **JUDGE MELLODY:** All right. Mr. Dubois,  
17 what's your position on all of this?

18 **MR. DUBOIS:** Where do I start, Your  
19 Honor? As a starting point, I think that I need to  
20 reemphasize for you that the documents being produced  
21 are all relevant to the ESI terms, and when New Mexico  
22 says that it attempted to shorten that list of ESI  
23 terms, they went from 400 to 200, which still produced  
24 about 200,000 documents. That's what they have  
25 insisted that we use as the ESI terms, and we have to



1 produce the ones that are responsive to that. We do  
2 not know relevance. We can't tell if what New Mexico  
3 thinks is relevant. We can produce responsive, and we  
4 have. So those are the -- those are the search terms  
5 demanded by Mexico -- or New Mexico, excuse me. And  
6 we started at 200,000 documents, and we're down  
7 under -- we're down around 40,000 documents. But is  
8 it correct that it's going to have some documents in  
9 the -- responsive to the ESI terms that may relate to  
10 Tijuana as opposed to, you know, Juarez? Yes.  
11 Because we -- we could not unilaterally impose those  
12 search geographic modifiers, and we could not get  
13 agreement to do that. So this is where we are, and  
14 we've -- so there -- and we have actually -- my e-mail  
15 the other day proposed a set of those search of  
16 geographical modifiers that can be run. So that's  
17 where we -- our starting point is, is that these are  
18 responsive to demands made by New Mexico, and we did  
19 try -- we did try and come up with a different set of  
20 terms. That was rejected. The hit list is a  
21 meaningless thing. I think that Mr. Wechsler has not  
22 been involved in discussions of that, so it's  
23 understandable that he's not fully aware that the hit  
24 list would be a -- sort of a listing of how many hits  
25 the 200 terms would get. It isn't particularly useful

1     except to show that when you use these 200 terms, you  
2     get a lot of crap, and that's what we were trying to  
3     convey. So we have produced something over 30,000.  
4     We are going to -- assuming New Mexico agrees to the  
5     geographic limiters we sent to them, we will produce  
6     the rest of the documents culled by those geographic  
7     filters, I guess, would be better than limiters. So  
8     that's what we're intending to produce to New Mexico  
9     next week, which will probably make the total  
10    production something over 40,000 documents, and  
11    they've already got those. So that's really where we  
12    are. All those documents are searchable. They can  
13    run those geographic limiters or filters on the 30 odd  
14    thousand that have already been produced, and it  
15    sounds like they've already got uploaded. And the  
16    rest of the documents will be coming. So doing a new  
17    list and then doing a new search on what amounts to a  
18    half a million documents is, frankly, a waste of time.  
19    They want a whole new list. We've tried. They've now  
20    got the documents. They will have the rest of the  
21    documents. They can -- they can run their own filters  
22    on -- on the documents they've got because, frankly,  
23    looking at their list of issues, all those documents,  
24    to the extent that they exist, should be in there. I  
25    think it's sort of naive with New Mexico to think that

1 we are -- that through the IBWC, we are spying on  
2 the -- the country of Mexico to determine their local  
3 well production, but to the extent documents are  
4 there, they will be -- they should be in the documents  
5 produced. So as far as the date of the depo, they  
6 make the assertion that we did not ever get back to  
7 them. Actually, we had tentative dates set for IBWC.  
8 We had three dates set aside in August before this  
9 controversy flared up. Now, we -- we have offered to  
10 make those folks available in October. No dates have  
11 yet been proposed, but we also don't have an agreement  
12 on -- on when the -- the depositions would occur. New  
13 Mexico currently is still on a 90-day track wanting to  
14 do depositions, you know, well into the briefing,  
15 which doesn't actually make complete sense to me,  
16 but -- but, you know, the people that they want to  
17 talk to, we can make available in September. That  
18 gives them a full six weeks, not two weeks, as they  
19 assert, to look at the documents and to cull what they  
20 want out of it. The --

21 **JUDGE MELLOY:** Let me ask you this. You  
22 said the --

23 **MR. DUBOIS:** Sure.

24 **JUDGE MELLOY:** -- documents you're going  
25 to produce next week are -- have been run through the

1 geographic filter; is that correct?

2 **MR. DUBOIS:** We are in -- we are in the  
3 process of doing that.

4 **JUDGE MELLODY:** Or they would?

5 **MR. DUBOIS:** We have not gotten  
6 agreement from New Mexico that they think that's an  
7 acceptable thing to do. We've sent them the list. We  
8 don't know yet -- they may still agree, but that is  
9 what our plan is, is to use those geographical  
10 limiters, whether New Mexico agrees or not, depending,  
11 of course, on what Your Honor does, and that will --  
12 that will limit some of the ones that -- that would be  
13 otherwise produced as responsive to the ESI terms, but  
14 not necessarily meaningful in this case. It's -- you  
15 know, it forces us to decide what New Mexico thinks  
16 is, quote, relevant, and that's -- you know, we don't  
17 want to be in the position, Your Honor, of trying to  
18 do exactly what they're saying and then having them  
19 turn around and say, well, now you've got to do it all  
20 over again because we've decided to -- you know, we  
21 don't like what you've done, and we -- we haven't  
22 filtered it down to what they determine is relevant or  
23 we want you to run an entirely new search on half a  
24 million documents with what we now define as relevant.  
25 I don't think that's reasonable or fair, Your Honor.

1                   **JUDGE MELLOY:** Okay. So --

2                   **MR. DUBOIS:** Go ahead.

3                   **JUDGE MELLOY:** -- at this point, you  
4 have not gotten the formal acquiescence from New  
5 Mexico to use the geographic filters; is that what  
6 you're saying?

7                   **MR. DUBOIS:** I have not seen that as of  
8 when I got on this, this morning. I haven't looked at  
9 my e-mail in the last --

10                  **JUDGE MELLOY:** At the start of this  
11 call?

12                  **MR. DUBOIS:** Yes. But, you know, that  
13 is our intent is that the remaining documents, to use  
14 those -- those filters, and that it -- it still will  
15 be a total of -- of probably something over 40,000  
16 documents ultimately produced. You know, there --  
17 that is not an unreasonable number of documents given  
18 the start and given the limitations and given the fact  
19 that we were responding to the -- the ESI list  
20 after -- after New Mexico limited it to 200 and  
21 something, which we -- as I think we said in their  
22 motion, we told them that's still going to produce  
23 200,000 documents. So it's just -- it's not -- it's  
24 not reasonable in this context. We are attempting to  
25 work with New Mexico and have an additional time for

1 IBWC depositions. They'll have six weeks with the  
2 documents, and they can -- that's plenty of time. The  
3 issues -- the issues they're looking at, according to  
4 Mr. Wechsler are pretty darn narrow about pumping  
5 in -- pumping in -- in Mexico, currently, which I  
6 suspect will be a fairly nonexistent data set.  
7 Accounting changes and IB -- IBWC accounting, but  
8 they've got the accounting data that we have from  
9 IB -- that the United States has from IBWC, because  
10 all of that is also within the BOR data documents so  
11 they've had that for months as far as the -- the  
12 accounting information.

13 As far as the modeling, it appears to be  
14 that, again, they are looking for pumping information  
15 in Mexico on the assumption that IBWC has pumping  
16 information regarding Mexico, and to the extent that  
17 we have that, that should be in the documents that are  
18 being produced, and they can search for that. So the  
19 notion that they need 90 days, which is what their  
20 response from yesterday still is claiming, seems  
21 completely unreasonable, and I would also note that,  
22 frankly, I think there's some misconstruing on -- on  
23 what the United States has said about an extension of  
24 time for briefing. I -- Mr. Wechsler, I think, was  
25 correct in saying that obviously all of the data --

1 anything they come up with from the documents or from  
2 the depositions is going to be usable in their  
3 responses and reply briefs. I mean, there's nothing  
4 in the current schedule to prevent that. There's  
5 nothing in the rules that I know of that would prevent  
6 that. However, they seem to be saying they want to  
7 file an additional dispositive motion related to IBWC,  
8 and that, we can't agree to, because there are no  
9 claims against IBWC, and the list of stuff that  
10 they're talking about isn't going to change anything  
11 other than whether this is perhaps -- perhaps a  
12 question of material fact regarding -- and I think  
13 this goes to your questions to Mr. Somach. Apparently  
14 regarding whether or not Texas is claiming a right to  
15 be compensated for water taken by Mexican pumping, I  
16 guess. That's -- that's, I think, where we are. So  
17 as far as the use of the documents or the information  
18 from the depositions, obviously New Mexico can use  
19 that. New Mexico can use that in their responses and  
20 replies to raise whether or not there's a question of  
21 material fact. That's -- I -- I think that that's --  
22 agreeing to that was a bit of the sleeves off of my  
23 vest in saying yes, you can use that, but that is not  
24 an agreement to a -- an additional dispositive motion  
25 regarding the data that they've got, and they will

1 have eight weeks roughly before dispositive motions  
2 are due. So in that respect, no, we do not agree to  
3 a -- a supplemental dispositive motion, and we think  
4 that the accommodation of 30 days for initial 30 days  
5 of -- for depositions, not all discovery, depositions,  
6 is a reasonable compromise acknowledging the -- the  
7 problems we've had with the IBWC documents.

8 **JUDGE MELLOY:** Mr. Wechsler, I'll give  
9 you the final word, I guess. Let me first of all ask:  
10 Have the documents that have been disclosed already in  
11 the, what is it, 30,000 plus, have they already been  
12 uploaded to Veritext?

13 **MR. DUBOIS:** Yes, Your Honor.

14 **MR. WECHSLER:** Are you asking me?

15 **JUDGE MELLOY:** I was asking  
16 Mr. Wechsler.

17 **MR. WECHSLER:** Well, the -- the 40 --  
18 it's actually closer to 40,000, I'm told, in total,  
19 and Veritext is the shared vault. We actually have  
20 taken those documents and uploaded them into our  
21 discovery system. So we're less concerned about those  
22 ones. So what I would say about this is Mr. Dubois  
23 ran through a litany of issues, but I don't think  
24 we're as far apart as it sounded. You know, he  
25 said -- suggested that they were willing to work with



1 us at least on geographic terms. That's really all  
2 we're asking for in terms of the last, say, 15,000 to  
3 18,000 documents is take our input on the geographic  
4 terms and whether or not there's some additional  
5 search terms since they haven't run that search yet.  
6 That'll be very helpful to us. It'll save tens of  
7 thousands of dollars to us, and then from there, you  
8 know, if we can have until October 15th to conduct the  
9 depositions, I'm certain we can get that done, and the  
10 December 1st and December 21st deadlines for briefing  
11 we're comfortable with. We are not intending to file  
12 a separate or supplemental dispositive motion related  
13 to IBWC. It would simply be related to ones that were  
14 filed in October 15th.

15 **JUDGE MELLODY:** Let me ask -- I have one  
16 question I do want to ask Mr. Dubois. Mr. Wechsler  
17 referenced that they would have at least two  
18 depositions of your clients in place, plus the  
19 potential of maybe eight more depending on how many  
20 people you were going to call as witnesses. Do you  
21 know or when will you know how many of the --

22 **MR. DUBOIS:** Your Honor, if I may, that  
23 was actually something I took a note on and then sort  
24 of skipped over. I apologize for that. Mr. Wechsler  
25 is -- has been misinformed. What he's talking about

1 is I believe there were maybe eight persons with  
2 knowledge, the original 26. We have informed New  
3 Mexico that six of those people would not be called in  
4 our case in chief at all. Obviously that is subject  
5 to final decisions. If that changes I would expect  
6 they would reasonably ask for a deposition. That's  
7 fine. What we're talking about as far as I know is  
8 two IB -- IBWC employees, one of whom would also be  
9 the 30(b)(6) victim. So it -- it really is those two.  
10 They're talking about a third. I do not know. There  
11 was some discussion at one point in the past about a  
12 former IBWC commissioner. What information he would  
13 have regarding the four issues that Mr. Wechsler  
14 discussed is a mystery to me. A lot of these seem to  
15 be related to records that should be in the IBWC  
16 records to the extent they exist and then the two  
17 depositions that we have talked about, three including  
18 the 30 -- the 30(b)(6). But as I said, one of the two  
19 persons that they want to depose would also be the  
20 30(b)(6). So essentially two depositions.

21 **JUDGE MELLODY:** Well, anybody else want  
22 to be heard on this? If not, I'll -- I'll get an  
23 order out next week on both of the matters that we've  
24 talked about today.

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

1                   **MS. O'BRIEN:** Your Honor, this is Maria  
2 O'Brien for EP No. 1. If I could just briefly comment  
3 on going back to the first order, I'll be very brief,  
4 but I feel I would be remiss if I didn't supplement  
5 that discussion if I may.

6                   **JUDGE MELLOY:** Go ahead.

7                   **MS. O'BRIEN:** Yes, Your Honor. Because  
8 there was representations and discussion regarding the  
9 modeling, I -- I thought I'd be remiss if I didn't  
10 articulate just a couple things. First, the technical  
11 soundness of New Mexico's model aside, it's New  
12 Mexico's use of -- of its model continues to be of  
13 concern that we feel continues to go down the path of  
14 a direct challenge to the operating agreement, which  
15 we feel is contrary to Your Honor's rulings.  
16 Regardless, Your Honor, I also did not want to leave  
17 the impression that this case is or should be about a  
18 battle of models. Facts on the ground and facts  
19 through -- sometimes through expert testimony are  
20 absolutely critical and relevant in -- in this matter.  
21 And, again, we feel the New Mexico model attempts to  
22 do really what's the impossible, which is to model the  
23 operations of the Rio Grande Project or realtime  
24 system. This results in a series of counterfactual  
25 scenarios fraught with error which create alternative

1 universes. There's, you know, hundred years of  
2 empirical factual data for the Rio Grande Project  
3 operations that we feel is germane. So I just really  
4 felt I would be remiss if I left Your Honor with the  
5 impression that this case is solely about the battle  
6 of models, in particular as it relates to Rio Grande  
7 Project operations, which should be analyzed using the  
8 empirical data and on-the-ground experience of the  
9 districts.

10 **JUDGE MELLODY:** Well, going back to the  
11 very beginning of this case, it was my understanding  
12 that one of the central issues or maybe the central  
13 issue in the case is the effect of groundwater pumping  
14 in New Mexico on Texas' apportionment of water. Is  
15 that issue something that you need a model for or is  
16 that something that is more of a -- we have meters on  
17 the well, we can measure water, we can -- is that more  
18 of a quasi there may be some analysis that goes into  
19 it that's of expert opinion, but -- but that's -- but  
20 that's not a modeling issue, I guess, is what I'm  
21 asking? Or is it a modeling issue?

22 **MS. O'BRIEN:** Groundwater pumping in New  
23 Mexico or groundwater pumping and its effect on stream  
24 flow and surface water certainly is something that can  
25 be modeled, and it is a piece that can be and should

1 be addressed in this case. What is, we believe, the  
2 district believes, is inappropriate is what New Mexico  
3 is attempting to do with its so-called linked or  
4 integrated model, and then model project operations  
5 with the groundwater pumping simply being one -- one  
6 aspect and the counterfactuals it's creating are  
7 vis-à-vis accounting issues for which there's, again,  
8 you know, a hundred plus years at this time of  
9 empirical data. So, you know, that piece of  
10 groundwater pumping impacts is something that Texas  
11 has modeled, New Mexico has modeled. I believe the  
12 United States experts, they've compared the two  
13 models, and in terms of looking at the effects of  
14 groundwater pumping in New Mexico on the project has  
15 concluded that both New Mexico and Texas indicate that  
16 it is significant in having a detriment to the ability  
17 of the surface water to reach Texas and -- and EP No.  
18 1. My -- my concern is that that is really, you know,  
19 a separate issue, very important issue, but from the  
20 issue of project operations, which New Mexico, again,  
21 is creating alternative universes when, in fact, what  
22 we have empirical data with regard to accounting and  
23 where -- you know, to use Your Honor's words, you  
24 know, where the water has gone, where it's going, you  
25 know, over the years. It's a complex realtime system,

1 and that's -- we should use facts to address that.  
2 The groundwater pumping is, you know, again, critical  
3 to ensure that that water gets to where it's going and  
4 that can be and should be subject to some modeling.  
5 As Mr. Somach indicated earlier, simple is -- is  
6 better and so Texas has approached it in terms of  
7 looking at that distinct effect and has not tried to  
8 model Rio Grande Project operations and -- and will  
9 rely on the districts to testify regarding that based  
10 on empirical data through the history of the project.

11 **JUDGE MELLOY:** Well, I -- I don't want  
12 to oversimplify the case because I know it's very  
13 complex, but at the end of the day, it seems to me  
14 that once we get by this apportionment issue, which  
15 we've talked about quite a bit, that that's going to  
16 answer a lot of the questions. If -- if Texas is  
17 correct that New Mexico does not have an entitlement  
18 under an apportionment, then -- then would it be fair  
19 to say that it would also then be Texas' position, and  
20 I assume the water districts because you're basically  
21 in alignment with Texas' position that any groundwater  
22 pumping that affects surface water flow into Texas has  
23 to be abated? Is that what -- is that where we're  
24 really -- is that the end of -- I mean, is that the --  
25 the end point where we are? And conversely, if it's

1 determined that Texas -- that New Mexico has a certain  
2 apportionment, that we then look at the groundwater  
3 pumping and say, okay, is it -- does it exceed  
4 whatever that apportionment might be? And if it  
5 doesn't exceed it, well then no harm, no foul. If it  
6 does, then there has to be some abatement or  
7 compensation for that excess groundwater pumping. At  
8 the end of the day, is that where we're -- is that one  
9 of the central questions that has to be answered in  
10 this case.

11 **MR. DUBOIS:** Your Honor, if I may.

12 **JUDGE MELLOY:** Yes, go ahead.

13 **MR. DUBOIS:** I think that to some  
14 degree, you've got it right. I think that it's  
15 perhaps more a matter of how the impacts of that  
16 groundwater pumping need to be accounted for and dealt  
17 with. I don't know -- I mean, obviously if forced, it  
18 would be an abatement problem, but there may be other  
19 solutions to dealing with that.

20 **JUDGE MELLOY:** I didn't mean --

21 **MR. DUBOIS:** Okay. But it's --

22 **JUDGE MELLOY:** I didn't mean --

23 **MR. DUBOIS:** It --

24 **JUDGE MELLOY:** We're going to have a  
25 remedy issue at some point.

1                   **MR. DUBOIS:** Correct. But ultimately,  
2                   that is the fundamental question is can -- can New  
3                   Mexico reallocate the apportionments by pumping or  
4                   does that pumping need to be dealt with and accounted  
5                   for relative to the project, and to the extent that  
6                   there is water taken away from either district. There  
7                   may -- there may or may not need to be compensation  
8                   for that. I mean, I think that those are the  
9                   fundamental issues, Your Honor.

10                  **MR. SOMACH:** We would agree with -- with  
11                  that. And quite frankly, I don't think you need a  
12                  model to prove -- I agree greatly with -- with what  
13                  Ms. O'Brien said. We've never thought you need a  
14                  model necessarily to prove the fact that there's --  
15                  that groundwater pumping in New Mexico is adversely  
16                  affecting surface water deliveries to Texas, and quite  
17                  frankly to EBID, also. And we have -- one of our  
18                  experts doesn't model anything to establish that. He  
19                  uses the empirical data that's existed. He plots that  
20                  data, and it shows what it shows. The -- the model  
21                  refines that analysis by -- by being able to pinpoint  
22                  exactly where that occurs, and quite frankly, I think  
23                  it'll be most useful in a remedy phase to figure out  
24                  how do we remediate the situation without -- while  
25                  minimizing the significant adverse effects that will



1 occur in southern New Mexico if we're not careful in  
2 how we remediate the situation. So I think -- I -- I  
3 think, though, that you've hit on exactly, from the  
4 Texas perspective, where this case ought to go. And  
5 even dealing with the issues that New Mexico raises,  
6 if -- and we don't think there's any real evidence to  
7 this, but if there is a relative proportion of impact  
8 that is caused to Texas by Texas, we've said all along  
9 that that will be accounted for, and we're not  
10 expecting New Mexico to -- to have to address that at  
11 all. But -- but I think at a very fundamental level,  
12 you've identified what the case will boil down to, and  
13 I don't -- I agree with Ms. O'Brien that for a lot of  
14 it, you don't even need a model because it -- the  
15 empirical evidence data shows what it shows.

16 **MR. WECHSLER:** Your Honor --

17 **MS. O'BRIEN:** Your Honor --

18 **JUDGE MELLODY:** I'll give you the last  
19 word, Mr. Wechsler.

20 **MS. O'BRIEN:** Yes, I'd just like to  
21 clarify that when I responded in terms of your  
22 question on is it necessary to model the groundwater  
23 pumping impacts, I think my response was really, yes,  
24 you can model those because I agree with Mr. Somach,  
25 actually, that through the course of the depositions

1 and all the expert reports, without any models, even  
2 those who have done models, clearly there's certain  
3 groundwater interconnected, groundwater is depleting  
4 and impacting the surface supply dedicated to the Rio  
5 Grande Project. And I also just want to be very  
6 clear, Your Honor, that regardless of whether New  
7 Mexico has what one would call an apportionment or  
8 whether that is limited to an allocation to EBID, the  
9 apportionment would be limited to an allocation to  
10 EBID and/or EBID would have that allocation without  
11 any label of an apportionment. But regardless of what  
12 you call it, New Mexico does not get on top of that,  
13 the entitlement to deplete the surface water supply  
14 dedicated to the Rio Grande Project without having  
15 that accounted for, and that is actually what the  
16 operating agreement did. New Mexico is now using  
17 their claim to an apportionment to say that that was  
18 an unreasonable way to address it. You know, who  
19 addressed it? The two districts and the United States  
20 have the responsibility and have for a hundred years  
21 for operating the Rio Grande Project.

22 **JUDGE MELLODY:** Mr. Wechsler?

23 **MR. WECHSLER:** You prefaced that entire  
24 discussion with the idea of if Texas is right. Let me  
25 say, I'm quite confident that Texas is not right. I

1 think you'll hear or see in the dispositive motions  
2 that when you're interpreting the -- the Compact, New  
3 Mexico very clearly has an apportionment. That  
4 apportionment is 57 percent of project supply. You'll  
5 hear that in the historic testimony. You'll see that  
6 in the Compact, the language of the Compact. You'll  
7 see that in evidence that comes from both Texas and  
8 New Mexico witnesses, that that was how the parties  
9 understood the Compact. You'll see it in the course  
10 of dealing that that's the way the parties approached  
11 it. That's the way the United States approached it,  
12 as well, in terms of accounting. You'll hear it in  
13 expert testimony, and you'll see it in the Court  
14 decision, all of which will, I think, lead to the only  
15 conclusion, which is that New Mexico has 57 percent of  
16 project supply. I don't agree that the fundamental  
17 issue that the various Texas and U.S. aligned parties  
18 are identifying. The fundamental issue, as you have  
19 explained very well in your orders, is where is the --  
20 what is the apportionment of water as between the  
21 states, and are the states getting their  
22 apportionment. I think you'll see in the evidence  
23 that that's not true, that New Mexico is not receiving  
24 its apportionment, at least since 2006.

25 As to your question, does it boil down

1 to a simple question of what are the impacts of -- of  
2 groundwater, actually, in many years, in full supply  
3 years, it won't boil down to that at all, because the  
4 water that Texas lays claim to, and they've, again,  
5 made this clear in -- in discovery, is the 43 percent  
6 of project supply that is apportioned or that gets  
7 allocated to EP No. 1 each year, and given the  
8 Compact's indication that there is a 790,000 acre-feet  
9 normal release, the -- again, the Compact -- the Texas  
10 witnesses have made clear that what they're expecting  
11 is 43 percent of that which ends up being 376,000  
12 acre-feet of surface water. In fact, that's exactly  
13 what they adjudicated to themselves in the Texas  
14 adjudication, 376,000 acre-feet. And so in years when  
15 Texas receives 376,000 feet, which happened every year  
16 between 1979 and 2002, they are not entitled to any  
17 more, and so the effects of depletion, regardless of  
18 whether or not you decide or the Court decides that  
19 that's relevant, there -- there is nothing more that  
20 they can -- they can get in any one of those years.

21 Now, as to how groundwater should be  
22 accounted for, that's a -- I think a very undecided  
23 question. If you recall in the 1950s, both states  
24 allowed significant amounts of groundwater pumping in  
25 project acreage, both in Texas and New Mexico. That

1 was encouraged by the United States as a way to  
2 protect project acreage, and since that time, water  
3 has been used as -- groundwater has been used as a  
4 supplemental source of supply in -- in times when it's  
5 necessary to satisfy irrigation demands. There's an  
6 almost exact correlation between the amount of  
7 groundwater pumping that goes on and the -- the supply  
8 of surface water. And it -- it's a system that's  
9 relatively been in balance up until --

10 **MR. DUBOIS:** Your Honor, if I may. I  
11 apologize. But are we going to do oral arguments on  
12 all sides at this point?

13 **JUDGE MELLODY:** No. I -- I did -- I did  
14 raise it. I'll let Mr. Wechsler finish. Go ahead,  
15 Mr. Wechsler.

16 **MR. WECHSLER:** The agreement was put in  
17 place. The -- actually, what -- what occurred is that  
18 they forced -- they asked New Mexico to rely  
19 exclusively on groundwater, and so if you look to the  
20 data, which the other side seems very interested in  
21 doing, we are happy to do that because you will see  
22 that there is significantly less than 57 percent of  
23 project supply now going to New Mexico.

24 **JUDGE MELLODY:** I mean, but it certainly  
25 gets back to the -- what we -- sort of my initial

1 question, though, was that if Texas is right and it's  
2 zero subject to what is allocated to Elephant Butte or  
3 Ms. Barncastle --

4 **MR. DUBOIS:** EBID.

5 **JUDGE MELLOY:** EBID.

6 **MR. DUBOIS:** EBID, Your Honor.

7 **JUDGE MELLOY:** Subject to what EBID  
8 gets, basically Texas' position is they get everything  
9 that's left over, and subject, again, to 60,000  
10 acre-feet to Mexico and the El Paso Water District.  
11 Of course, New Mexico takes a different view, and I  
12 understand that, and that's what we're going to have  
13 to resolve, I guess, hopefully at the summary judgment  
14 stage, because that is going to be the -- you know,  
15 the data will be what the data is, but the central  
16 legal issue is how much each state is entitled to  
17 under its apportionment. But anyway, I think we've  
18 beat this issue to death at this point. Unless  
19 there's anything else, what I'd like to do is maybe  
20 reconvene in about three weeks. That'll be at the end  
21 of discovery. I don't think that's -- I don't want  
22 to -- let me just double check here. I was thinking  
23 on the 28th -- Friday, the 28th. If there's any  
24 last-minute discovery hiccups, we can talk about them  
25 then and just keep things moving. So unless there's

1 anything further, let's just plan to -- to same time  
2 Friday, 11:00 Central, on the 28th. Anything else  
3 that needs to be discussed or any other questions? If  
4 not, sign off. Thank you.

5 **MR. DUBOIS:** Not from the United States.  
6 Thank you, Your Honor.

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

8 **MR. WECHSLER:** Thank you.

9 (The proceedings adjourned at 12:30  
10 p.m.)

## CERTIFICATE

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

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

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