

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 MAY 29, 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 11:00 a.m.

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1 **JUDGE MELLOY:** This is, of course, in
2 the matter of Original No. 141, Texas versus The State
3 of New Mexico and State of Colorado with United States
4 as intervenor. I'd ask the parties to start by
5 entering their appearance. We'll start with the State
6 of Texas as the Plaintiff.

7 **MR. SOMACH:** Yes, Your Honor. This is
8 Stuart Somach, counsel of record for the State of
9 Texas. With me is Francis Goldsberry, Theresa
10 Barfield, Sarah Klahn, and Robert Hoffman of my
11 office, and from the state attorney general's office
12 is Priscilla Hubenak.

13 **JUDGE MELLOY:** All right. And for the
14 State of New Mexico?

15 **MR. WECHSLER:** Good morning, Your Honor.
16 Jeff Wechsler from Montgomery & Andrews. We also have
17 Cholla Khoury, deputy attorney general; Marcus Rael
18 and Luis Robles from the law firm Robles, Rael &
19 Anaya; Lisa Thompson and Michael Kopp from Trout
20 Raley; John Draper from Draper & Draper. We will have
21 Rolf Schmidt-Petersen, the Interstate Stream
22 Commission director; Greg Ridgley, the general counsel
23 for the New Mexico State Engineer; Arianne Singer, the
24 general counsel for the Interstate Stream Commission;
25 and, also, Shelly Dalrymple from the Interstate Stream

1 Commission.

2 **JUDGE MELLOY:** Thank you. And for the
3 State of Colorado?

4 **MR. WALLACE:** Yes, good morning, Your
5 Honor. This is Chad Wallace for the State of
6 Colorado. Also participating today is Preston
7 Hartman.

8 **JUDGE MELLOY:** Okay. And for the United
9 States?

10 **MR. DUBOIS:** Good morning, Your Honor.
11 Jim Dubois for the United States. Also on -- on the
12 phone are Lee Leininger from my office and Shelly
13 Randel from the solicitor's office.

14 **JUDGE MELLOY:** Okay. And then for the
15 amici, Albuquerque Bernalillo County Water Utility
16 Authority, anyone on?

17 **MR. BROCKMANN:** Yes, Your Honor. You
18 have Jim Brockmann on for the Albuquerque Bernalillo
19 County Water Utility Authority.

20 **JUDGE MELLOY:** All right. City of El
21 Paso? Anyone?

22 **MR. CAROOM:** Doug Caroom for the City of
23 El Paso, and Susan Maxwell is on.

24 **JUDGE MELLOY:** All right. City of Las
25 Cruces?

1 **MR. STEIN:** Your Honor, this is Jay
2 Stein for the amici City of Las Cruces.

3 **JUDGE MELLOY:** Elephant Butte Irrigation
4 District?

5 **MS. BARNCASTLE:** Good morning, Your
6 Honor. This is Samantha Barncastle for the Elephant
7 Butte Irrigation District.

8 **JUDGE MELLOY:** All right. El Paso
9 County Water Improvement District?

10 **MS. O'BRIEN:** Good morning, Your Honor.
11 This is Maria O'Brien as counsel for El Paso County
12 Water Improvement District No. 1, and Renea Hicks,
13 counsel for the district, is also on the line, and we
14 also have Dr. Al Blair, the district engineer.

15 **JUDGE MELLOY:** Okay. Hudspeth County
16 Conservation and Reclamation District?

17 **MR. MILLER:** Good morning, Your Honor.
18 This is Drew Miller on behalf of the Hudspeth County
19 Conservation and Reclamation District No. 1.

20 **JUDGE MELLOY:** I assume nobody is on for
21 The State of Kansas. New Mexico Pecan Growers?

22 **MS. DAVIDSON:** Good morning, Your Honor.
23 Tessa Davidson for New Mexico Pecan Growers.

24 **JUDGE MELLOY:** Finally, New Mexico State
25 University?

1 **MR. UTTON:** Good morning, Your Honor.
2 This is John Utton for New Mexico State University.

3 **JUDGE MELLOY:** Did I miss anyone? If
4 not, then we'll proceed. I sent out somewhat of a
5 tentative agenda. If there's other issues that we
6 need to talk about, I'm certainly willing to do so.
7 Before we get started on the agenda, let me just
8 mention one thing. I had -- early on, there was a
9 suggestion I think put forward by the State of New
10 Mexico that I should arrange or the parties should
11 arrange a site visit, and we really haven't addressed
12 that issue further since that initial discussion. My
13 view at this point is that a site visit very well may
14 be a useful exercise, but that it's probably premature
15 for several reasons to do it yet this summer. One is
16 just the general problem with travel. Secondly,
17 looking at your submissions, the discovery schedule
18 that you've set out for yourself is very aggressive,
19 and I think to take time off for a site visit is
20 probably not the best use of time at this point. And
21 then -- and then just finally, I think maybe further
22 down -- further into the case when the issues are
23 fleshed out a little more might be a more appropriate
24 time. In summary, I'm not averse to the idea, and I
25 actually think it may be useful. I'm just not sure

1 that this summer is the best time to do it, and will
2 probably be either next spring or either -- or maybe
3 even as part of the trial itself to take time out of
4 the trial to do it. But -- so anyway, that's my --
5 that's my thought about a site visit. If anybody
6 wants to respond to that, you're certainly free to do
7 so. If not then --

8 **MR. BROCKMANN:** Your Honor, this is Jim
9 Brockmann for the Water Authority. We might just, in
10 our next status letter to you, if it's appropriate,
11 put a sentence or a paragraph and outline what we
12 think might be the benefit. Mr. Stein and I were
13 involved with the Nebraska/Wyoming Original Action on
14 the North Platte. In that case, there was a site
15 visit by the Special Master and the parties, and I
16 think it went quite well, and it was found to be
17 beneficial. But rather than taking your time with
18 what's a full agenda today, I think it's more
19 appropriate maybe we just put a paragraph in about the
20 benefits of that and -- and then let you address it at
21 the appropriate time. Thank you.

22 **JUDGE MELLOY:** All right. Okay. All
23 right. Let's talk about the mediation first.
24 Mr. Somach's put forward a couple names and then we
25 have the suggestion by the State of New Mexico

1 concerning a procedure to follow, and I thought that
2 what you suggest -- suggested, Mr. Wechsler, made a
3 lot of sense. Initially having the parties discuss
4 among themselves whether they can come to some
5 agreement or not. I'm not real optimistic they can,
6 but if they can -- if they could, all the better. I'm
7 trying to figure out how to get rid of that noise. I
8 think that's on my computer, but anyway. But in any
9 event, I think that's a pretty good procedure. Does
10 anyone else have any thoughts about that, about what
11 Mr. Wechsler's outlined in his letter?

12 **MR. SOMACH:** This is Stuart Somach for
13 the State of Texas. Let me articulate a little bit.
14 I -- the first thing I'm -- I want to say is that I --
15 in terms of the mediation in general, the attorney
16 general's office in particular is concerned about --
17 about not spending a lot of time, effort, and money on
18 a effort that may go nowhere. We've had informal --
19 or at least I should say not mediated discussions with
20 the State of New Mexico. The attorney general's
21 office is not convinced that moving forward with
22 mediation will be fruitful unless there's a clear
23 understanding that the parties will be serious, that
24 they will come to the table with the ability to
25 actually settle the lawsuit. Part of the problem you

1 see in the New Mexico amici letters and elsewhere is
2 that when you deal with New Mexico, you're not just
3 dealing with a party, as in the normal and ordinary
4 case, you've got all kinds of other things going on
5 there that affects the ability of the parties to
6 resolve -- resolve the case. So I just -- I'm
7 obligated on behalf of the attorney general to say
8 that, and -- and I'm going to say something else,
9 which is -- is -- is a concern I have is I am worried
10 about whether or not the new regime in New Mexico in
11 terms of litigation, whether or not there will be a
12 good faith effort to resolve and settle the litigation
13 if we expend the time, effort, and money to move
14 into -- to mediation.

15 The other major issue that is raised is,
16 as I indicated to you last status conference, we
17 believe that having someone with water expertise
18 creates yet one more complication, that is that we'll
19 get someone with a bias. There's nobody that's
20 working in the water field that's knowledgeable that
21 doesn't carry with them a bias with respect to these
22 issues, and that's why we affirmatively believe that
23 it's important to look for a good mediator, that water
24 knowledge, per se, is not -- is -- is certainly a
25 criteria that carries with it a handicap. The

1 mediators that we put out there for you to take a look
2 at are certainly folks that are not -- not water --
3 water people at all, but are capable of mediating and
4 resolving a -- a complex piece of -- of litigation.

5 I have no problem with meeting and
6 conferring with the other parties. I just -- the
7 experience we've had in the last month or so would
8 lead me to believe that it will create a lot more heat
9 than anything else and that we may need a mediator to
10 mediate the mediation on the mediator. Your -- you
11 know, I reviewed Mr. Wechsler's letter. We have a lot
12 of significant issues there, and I'm just worried
13 that -- that absent some assistance from -- from you
14 in terms of selection of a mediator, that we won't
15 even be able to do that with -- with any satisfactory
16 result, and as you've indicated, we've got a lot of
17 things on our plate right now, and to go down through
18 and have -- have those types of fruitless discussions,
19 again, just adds a lot of time, cost, and -- and
20 effort where it should be placed elsewhere. I'm sorry
21 for -- for being that way, but I don't know any other
22 way to express myself but to express myself.

23 **JUDGE MELLOY:** Best called being a wet
24 blanket, but -- but -- well, let me just respond to a
25 couple things you just said, Mr. Somach. I understand

1 the concerns, and I -- these cases, I think, are
2 particularly difficult to -- to resolve, because there
3 are so many competing interests with -- with -- with,
4 you know, just the -- the bottom line problem is
5 there's just not enough water for everybody. So
6 somebody's got to -- somebody's going to get shorted
7 some way or the other or there's going to be
8 compromises. So the -- these are very, very difficult
9 cases, which leads me to agree with your comment that
10 I think at the end of the day, if there is to be a
11 mediation, most important thing is that it be a very,
12 very good mediator. A good mediator can sometimes
13 resolve cases that people otherwise think are totally
14 un-trackable. I'm less concerned about the water
15 expertise, quite frankly. I think if it gets down to
16 that, the mediator can -- I know there's a suggestion
17 of two mediators. I don't think we need two
18 mediators, but if -- if the mediator decides they need
19 some technical assistance, I think they can figure out
20 how to get that. I think the most important thing is
21 somebody who knows how to get cases settled. But I am
22 concerned about your comment -- I'm going to give
23 Mr. Wechsler a chance to respond -- that you don't --
24 I don't want to paraphrase what you're saying, but you
25 basically are saying that New Mexico's not going into

1 any mediation with -- in good faith, and I've always
2 been under the impression that New Mexico, as much as
3 anyone, wanted to get this case settled, maybe more so
4 than -- than the others, but -- but I'll let
5 Mr. Wechsler speak to -- speak to the comments you
6 made. Mr. Wechsler?

7 **MR. WECHSLER:** Yeah, thank you, Your
8 Honor. I -- I guess I'm -- I'm surprised to hear
9 Mr. Somach's comments, and I can assure you and assure
10 him, we certainly are interested in working with the
11 parties in good faith, both in the litigation and --
12 and in mediation. I'm not sure where that -- he feels
13 that the -- I guess, the change in attitude is coming
14 from, but, again, I'm happy to talk at any time
15 with -- with Mr. Somach or anyone from Texas or any of
16 the parties. I -- I believe that in having a
17 respectful approach to litigation, and I think it's
18 important that the parties have a good relationship.

19 In terms of the -- the approach to
20 mediation, I can assure you and -- and whatever I can
21 do to assure Mr. Somach that if we are able to go into
22 a mediation that we will take that very seriously, and
23 we will certainly approach it in good faith. I have
24 always taken the attitude in -- in these cases that
25 the best possible solution is one that's negotiated.

1 I think the Court has recognized that on multiple
2 occasions. I also agree with you, Your Honor, that
3 these cases are difficult to settle, and so I -- I
4 would offer one voice in support of -- of trying to
5 make sure that we have somebody that is both capable
6 of strong mediation skills, which I -- I agree is very
7 important, but also has -- has some water background.
8 These are complex, very complicated cases, and as you
9 point out, there are other cases that are complicated.
10 But the solutions here are likely to be ones that are
11 basin wide, that involve -- that are very unique to
12 water cases, and having someone who's both good at
13 mediation, as well as as -- as a strong background in
14 resolving water disputes, that's the ideal candidate,
15 and as we indicated in our letter, we think that we
16 have identified five to six different individuals who
17 have both of those skills, and we're -- we look
18 forward to being able to talk about that with -- with
19 Mr. Somach and the other parties.

20 **JUDGE MELLOY:** Well, as far as the
21 mediation is concerned, I'm -- I'm prepared at this
22 point to basically adopt the approach that you've
23 suggested, Mr. Wechsler. Let me just go over that.
24 You would share the names of potential mediators,
25 confer, and when I say "confer," I think on this -- on

1 this particular issue, it should mainly be the
2 principal parties, New Mexico, Texas, to the extent
3 Colorado is interested. I don't know that they are,
4 but they probably want to be heard, and the United
5 States ought to be the parties that decide on the
6 mediator. Certainly you're, you know, free to consult
7 with the amici, and I would encourage you to do that,
8 but they're the ones that -- those four parties, I
9 think, have to make this decision. And if you can
10 come to an agreement, fine; if you can't, each party
11 can submit two names, and I'll make a decision. The
12 one modification I would suggest, however, is you
13 indicated whether there's an agreement or whether I
14 determine the mediator, that you would then contact
15 the mediator to determine interest and availability.
16 I would like you to contact me before you contact the
17 mediator. I'm not sure the best way to go about the
18 initial contact with the mediator, whether I should do
19 it or whether the parties should do it, but we can
20 talk about that once we get to -- get that name.

21 **MR. SOMACH:** If I could, Your Honor, I
22 just want to say, we have not contacted anybody. We
23 thought it most appropriate for you to do the contact,
24 but because we did put out two names, which we'll
25 share with -- and have a conversation with New Mexico

1 and the United States and Colorado about, but I wanted
2 to make sure you understood, we have not talked to
3 anybody. We just provided you with -- with the names
4 and the CV of -- of those folks.

5 **JUDGE MELLOY:** And I may -- I may submit
6 another name or two. You know, I sent Mr. Boylan's --
7 or Judge Boylan's name this morning. I don't -- you
8 probably haven't had a chance to look at his -- his
9 resume, but, you know, as I say, he's -- mediated and
10 settled some complex cases, including Brady versus
11 NFL, and NFL got settled. I'm certainly not in his
12 camp or anything, I'm just thinking just some people
13 that I know of who mediated some pretty complex cases.
14 How much time do you think you need to get to that
15 point where you either come to an agreement or submit
16 the two names or do you want to take a couple weeks
17 and then give me a status report as to whether you're
18 close or whether you need to go and just submit names?

19 **MR. WECHSLER:** Your Honor, this is Jeff
20 Wechsler. I mean, I think that within two weeks,
21 we'll know whether or not we have to submit two names.
22 So my suggestion is you set a deadline in two weeks to
23 submit those two names or to contact you and inform
24 you that we have reached agreement.

25 **JUDGE MELLOY:** Any objection to that?

1 **MR. SOMACH:** No.

2 **JUDGE MELLOY:** All right. Then let's --
3 let's -- I will -- I will set that as the deadline.
4 The -- also, I would like you, as part of your
5 consultation, to talk about how you're going to split
6 the cost. At some -- you know, if you can agree among
7 yourselves, that's preferable; if not, I'll have to
8 make that decision, as well, as to how the cost is
9 going to be allocated. Does the United States have
10 any strong feelings about this, Mr. Dubois?

11 **MR. DUBOIS:** We have been in cases where
12 we've had two mediators, as suggested by New Mexico in
13 Kansas versus Nebraska. There was a split of the type
14 that Mr. Wechsler is talking about. There was one --
15 one of the mediators had some water knowledge,
16 although I wouldn't call it real deep, but he had --
17 he had some background in it, and the other had
18 been -- had mediated on international levels, you
19 know, the Tamil Tigers in Sri Lanka and Palestinians
20 and Arabs -- I mean, Israelis. So he had -- they have
21 high-level mediation skills. I don't necessarily
22 think that it's necessary to have that split, but I
23 think that as long as there is a very, very skilled
24 mediator, there's at least a chance, perhaps not any
25 kind of a certainty, but a chance. I think that we

1 can come up with names, and we will cooperate with the
2 states as far as trying to come to agreement on a
3 mediator and go forward with it. You know, it is
4 worth -- it is worth a shot.

5 **JUDGE MELLOY:** Well, I know in Georgia
6 versus Florida that they went through mediation
7 unsuccessfully, and I believe they did it multiple --

8 **MR. DUBOIS:** Several times, Your Honor.

9 **JUDGE MELLOY:** From what I've been told,
10 multiple mediations unsuccessful. Have there been any
11 that have been successful in these water original
12 actions?

13 **MR. DUBOIS:** Yes. The -- the round one
14 of Kansas versus Nebraska was successful. That's
15 where we had, actually, a two-mediator team. The
16 dynamics were somewhat different, particularly after
17 some initial rulings on Nebraska's position was that
18 groundwater pumping that affected the -- the diversion
19 water supply didn't count. Once that legal issue was
20 resolved, I think that the parties became much more
21 serious, even though there were difficulties, they
22 were able to bridge them. So it -- it does sometimes
23 work.

24 **MR. WECHSLER:** Your Honor, the South
25 Carolina versus North Carolina equitable apportionment

1 also settled, as did the Nebraska versus Wyoming case
2 that Mr. Brockmann was talking about earlier.

3 **JUDGE MELLOY:** Okay. You had also
4 suggested, Mr. Wechsler, that the mediation should not
5 occur until after dispositive motions had been filed.
6 My feeling is that once we get to a mediator, I'm not
7 going to get into a lot of the mediation issues unless
8 I absolutely have to. I -- I certainly agree that
9 with -- with the aggressive discovery schedule, and I
10 saw the list of depositions in Mr. Somach's letter of
11 how many are yet to be taken this summer, that -- that
12 to take -- your summer is going to be pretty occupied
13 with discovery, so certainly after -- I would think
14 the no mediation would occur until after discovery is
15 over. Whether we want to wait until the completion
16 of -- of dispositive motions, to some extent, I would
17 probably leave that up to the mediator and his or her
18 consultation with the -- with the parties as to -- as
19 to timing, but -- but certainly, I agree that it would
20 not appear to make much sense or there wouldn't just
21 be time to do anything yet this summer. But -- but
22 anyway, does anybody want to -- I don't think -- does
23 anybody have anymore comments about the mediation?
24 And I think the -- I think the urgency, as you
25 indicate, Mr. Wechsler, in getting somebody picked is

1 not to start the mediation, but to get it on their
2 schedule. So anyway, all right.

3 Moving on then. Discovery issues. We
4 did have that one emergency hearing, which kind of
5 went to the issue of should the parties file their
6 expert designations and/or expert reports. There
7 seems to be a consensus that filing expert
8 designations makes sense. I'm not sure everybody
9 agreed on expert reports. I wasn't entirely clear
10 from your -- whether, Mr. Somach, what your position
11 was on that.

12 **MR. SOMACH:** Well, we -- we have no
13 problem. We're fine with providing and filing with
14 those -- those expert reports, but they're voluminous
15 and the question becomes there's certainly a written
16 report, but then there are technical reports that are
17 appended to those plus then there is underlying data
18 and materials that are all integral in part of the
19 reports. But we're talking about terabytes, multiple
20 terabytes of data, and our thought was if that's what
21 you would like, we're certainly -- I want to let you
22 know, we -- we're not resisting providing you with
23 anything. We're just trying to think of a logical way
24 to move forward, and we thought that the designations
25 themselves might be the best place to start and then

1 to the extent there was a discovery dispute, then we
2 could supplement those with the specific reports and
3 maybe even portions of the reports that are -- that
4 are appropriate. We would -- these reports in the
5 aggregate, that's United States, New Mexico, and
6 Texas' reports, are so large that we would -- we would
7 almost need to -- to provide a share file site or a --
8 some kind of secure vault in order for you to even
9 access those. It's not something where we can
10 actually reproduce and file documents with -- with the
11 court and so our suggestion was merely let's go ahead
12 and provide you with all of the designations, and then
13 to the extent there's a dispute, we could supplement
14 that with the specific reports and portions of the
15 underlying data that may be relevant to the dispute.
16 But if you would like it all, I -- I want to let you
17 know, we're not resisting the idea of providing that
18 information.

19 **JUDGE MELLOY:** Well, one of the -- one
20 of the thoughts I had had, and it just came up, and
21 maybe it was in that emergency hearing or at a
22 different point -- I can't remember now -- but that I
23 believe it was Mr. Wechsler had mentioned that your
24 initial modeling report was only about 11 pages or 12
25 pages, something like that, and there was a supplement

1 that was longer. But I was thinking of those reports
2 as opposed to all of the supporting data and
3 appendices and technical information, but you may be
4 right that the designations themselves may be
5 sufficient for the initial filing. Mr. Wechsler, do
6 you have any thoughts on that?

7 **MR. WECHSLER:** I like the idea of
8 allowing you to review the reports and understanding
9 the issues in the case, which seems like something
10 that you're interested in doing, and I think rightly
11 so. I also like Mr. Somach's idea of potentially
12 setting up a share file folder that the parties could
13 collectively work on. Each of the parties' expert
14 reports could then be put in a separate folder, and
15 you could review those as the need arose.

16 **JUDGE MELLODY:** Does the United States
17 have a position on this, Mr. Dubois?

18 **MR. DUBOIS:** As we said in our letter,
19 Your Honor, that would be fine to -- to disclose the
20 designations of the reports. I think that
21 Mr. Somach's point is well taken that if you're
22 talking about the full suite of all of the exhibits to
23 all of these things is -- there's a lot. Whether
24 that's really what you want to start with or whether
25 you just simply want the reports and work out from

1 there is the question for you, I guess.

2 **JUDGE MELLOY:** Well, I think I just want
3 the reports initially. I don't want the full suite
4 of -- of appendices and supporting data, as you -- as
5 you've referred to it. How many -- how long -- how
6 long is the narrative portion of the reports? What
7 are we talking about here in terms of these -- of
8 these reports?

9 **MR. SOMACH:** I think they vary depending
10 upon the nature of the report. Some of them are
11 relatively short in the nature of under 50 pages; some
12 of them are in excess of 200 pages. Dr. Hutchison,
13 whose deposition was taken yesterday, has a base
14 report, but then he has -- he merely summarizes 18
15 technical reports and so the aggregate of his report,
16 he really can't -- his report in and of itself doesn't
17 get you where you want to go. You've got to look at
18 the 18 technical reports that are appended to it
19 where -- where the information is -- is lodged. That
20 goes -- that's at least 500 pages worth of material
21 and probably a bit more, and that's excluding all the
22 underlying, you know, technical data, the modeling
23 files and all that other stuff. That's just simply
24 written kind of narrative of what he did.

25 **JUDGE MELLOY:** Do any of the amici have

1 expert reports? We're talking just the parties,
2 right?

3 **MR. WECHSLER:** Correct.

4 **MR. DUBOIS:** Just the parties.

5 **JUDGE MELLOY:** And does Colorado have
6 anything?

7 **MR. WALLACE:** No, Your Honor. Colorado
8 has not submitted an expert disclosure in the case
9 yet.

10 **JUDGE MELLOY:** So we have basically
11 Texas, New Mexico, and United States are submitting
12 reports. So how many expert reports are we talking
13 about in the aggregate? I'll ask you, Mr. Somach.
14 How many does Texas have, do you know?

15 **MR. SOMACH:** Yeah. We have about -- if
16 you include -- I'll just -- we have about 12 or 13.
17 Some of those have also included some supplemental
18 reports so I'd say at the most, we have about 20, and
19 that may be high, as I recall.

20 **JUDGE MELLOY:** So how many experts do
21 you have?

22 **MR. SOMACH:** We have -- I think we have
23 12 experts.

24 **JUDGE MELLOY:** Okay. And in what areas?

25 **MR. SOMACH:** We have a historian, we

1 have economists, we have agronomists, and we have
2 groundwater modelers, and we have a
3 groundwater/surface water modeler, a RiverWare
4 modeler.

5 **JUDGE MELLOY:** Mr. Dubois, what do you
6 have?

7 **MR. DUBOIS:** Including supplemental
8 reports, Your Honor, I'd say maybe a dozen. 10 to 12,
9 I'd say.

10 **JUDGE MELLOY:** How many experts?

11 **MR. DUBOIS:** Four.

12 **JUDGE MELLOY:** So Texas has 12. You
13 have --

14 **MR. DUBOIS:** I take that back, Your
15 Honor. It would be -- we've designated non-party --
16 the -- the technical consultants for EBID and EP No. 1
17 as additional, so probably six witness -- six experts.

18 **JUDGE MELLOY:** Mr. Wechsler, what's New
19 Mexico have?

20 **MR. WECHSLER:** I -- I believe we have
21 14, Your Honor, and I think that there are, I believe,
22 14 reports, and we'll have approximately the same
23 number on rebuttal, generally in the same category
24 that Mr. -- categories that Mr. Somach identified with
25 the additional ones of -- we have a surface water

1 modeler, project operations expert, and an expert
2 in -- in Reclamation ad -- I'm sorry, Compact
3 administration and Reclamation issues.

4 **JUDGE MELLOY:** Well, let's do this. At
5 least for the immediate -- I say within the next week
6 to two. Let's just file the designations, and you --
7 do you want -- I was -- I was also thinking of do we
8 want those filed under seal? Is there any reason they
9 cannot be or should not be made a matter of the public
10 record? Has anybody thought about that?

11 **MR. SOMACH:** I haven't thought about it.
12 I don't see any reason why they need to be filed under
13 seal. We do have some of the -- I will say that
14 portions of the additional and supplemental data for
15 at least one of our experts, and I believe the same is
16 true for one of New Mexico's experts, was made
17 available pursuant to confidentiality agreements. If
18 we go -- if you dig that far down, that material will
19 have to be filed under seal. You know, and the other
20 thing we can do with those designations is we can let
21 you know what the underlying reports are, the length
22 of those underlying reports, so that you can at least
23 get a -- a view of the designations and then get some
24 information on what that -- what those reports look
25 like, how long they are, and then you can decide if

1 you want them or not.

2 **JUDGE MELLOY:** And that would be great.
3 That's a good idea.

4 **MR. DUBOIS:** So, Your Honor -- Your
5 Honor, this is Jim Dubois. When you say designations,
6 you're just talking about the designations, not the --
7 not their initial reports, the text of their reports?

8 **JUDGE MELLOY:** Correct.

9 **MR. DUBOIS:** Okay.

10 **MR. WECHSLER:** Your Honor, you asked
11 about whether they should be filed under seal. I
12 don't see any reason why they should be filed under
13 seal, but I will alert you that in the Florida versus
14 Georgia case, they did file their expert reports
15 subject all of them to a protective order. I don't
16 understand the reason why, but I have made inquiries
17 to get some of those expert reports and was told I --
18 I needed to work through that issue.

19 **JUDGE MELLOY:** Okay. One of the issues
20 that we talked about with -- with Mr. Roman over a
21 year ago talking about expert reports was the issue of
22 historians. The first Special Master spent a
23 considerable amount of time and effort and -- and a
24 good part of his report dealt with the history of the
25 Compact and history of the negotiations and so on so

1 forth, and there was some discussion about whether or
2 not all that, in essence, had to be replicated. Has
3 there been -- given any more thought to that issue of
4 can we -- can we use some of the work that's already
5 been done in this case? Is there a lot of dispute
6 about the history?

7 **MR. SOMACH:** Your Honor, I -- at some
8 point, we ought to sit down with New Mexico and the
9 United States and Colorado and see if we can resolve
10 some of these disputes over this historic information.
11 I -- and I think it's a good idea and I think that we
12 should do it. You know, we've been -- we've been
13 running around quite -- quite aggressively of recent.
14 There's a lot of things on my -- my list of things to
15 do, and that's -- that's one of them. I will say
16 this: After the discussion we had with Mr. Roman and
17 my views on the subject, which I think we talked about
18 in Denver, actually, we had our historian go through
19 all of the Special Master's report, and he has
20 incorporated into his report what the Special Master
21 had -- had -- had found. So it'll be in the record in
22 terms of evidentiary materials one way or another, but
23 I'm certainly willing to sit down with Mr. Wechsler,
24 Mr. Dubois, and Mr. Wallace and have a conversation
25 about how much of that material ought to come in.

1 Some of it, of course, is -- without dispute, it's
2 part of the historic record. The question is whether
3 or not there's an overlay of interpretation that the
4 Special Master gave to it that -- that others would --
5 would disagree with, and that's why it's part of our
6 expert report. But I think we could have that
7 discussion. It sure would be helpful. I will say a
8 lot of those issues we believe -- and I think you
9 indicated this in -- in one of your rulings -- would
10 be subject to early motions in any event in order
11 to -- to set the stage for -- for the -- for the
12 trial, but, again, I'm more than happy to sit down
13 with the other parties and have a conversation about
14 how to -- how to deal with -- with that historic
15 information.

16 **JUDGE MELLOY:** Well, and there's some
17 issue, I guess, obviously, as to whether or not how
18 relevant it is, you know. It's helpful to know how we
19 got to the Compact, but at the end of the day, the
20 Compact is what the Compact is, and -- and that's what
21 we're dealing with here. Does the United States have
22 a historian, Mr. Dubois?

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

24 **JUDGE MELLOY:** Okay. And is there a lot
25 of dispute from reading your reports about -- I mean,

1 is this something that we're talking about a lot of
2 differences about the stations or are there
3 fundamental disputes that are going to affect the
4 ultimate determinations of the issues in this case?

5 **MR. SOMACH:** I -- interestingly enough,
6 I think that they are limited, but I think that
7 they're significant in terms of disputes. And it --
8 you know, it -- those disputes focus on and revolve
9 around some significant issues, including, for
10 example --

11 **JUDGE MELLODY:** Can you give me some
12 examples?

13 **MR. SOMACH:** -- the scope and extent
14 that the Compact anticipated, groundwater pumping.
15 That -- that's a good dispute, that there's a
16 difference on -- on that issue. There are historic
17 disputes over even the baseline condition or whether
18 there even was a baseline condition. Those are
19 significant issues. They're important issues, and it
20 appears to me from reviewing and reading those reports
21 that there are differences in that regard.

22 **MR. WECHSLER:** I agree with that, Your
23 Honor. I do also agree that much of that can be part
24 of the record. As you know, the Court is interested
25 in having a full record, and we'd be happy to sit down

1 with -- with Mr. Somach, with or without the
2 historians, and work through and figure out what can
3 be stipulated to so that you're able to focus on
4 what's important.

5 **JUDGE MELLOY:** Well, and I -- you know,
6 I don't want to single out the historians. I'm hoping
7 that that can be the case with -- with other experts,
8 as well. I don't know -- modeling experts, I assume,
9 are probably going to each have different models and
10 will come to different results, but maybe at the end
11 of the day, those results aren't all that much
12 different. I don't know. But are there -- are there
13 other areas of expertise where there might be grounds
14 to at least significantly narrow the issues of
15 dispute?

16 **MR. WECHSLER:** I think there are. One
17 that occurs to me is the crop distribution in both
18 states over the years. Seem to me that there's a lot
19 of agreement on that issue.

20 **MR. SOMACH:** I -- I would agree, also,
21 that we've looked at those issues a great deal, and,
22 actually, I'll even say that, you know, the modelers
23 get there in different ways, but it's remarkable. I
24 said this, actually, two weeks ago, but it -- it's
25 remarkable to me that we will be spending a lot of

1 time making the distinction where at the end of the
2 day, the difference isn't much, and it really does go
3 to the -- the important legal overlay of what does
4 that mean, you know, and -- and I -- I'll have that
5 conversation with Mr. Wechsler, too, because I think
6 that we're spending an awful lot of time on areas
7 where the difference at the end of the day is not
8 significant. It really is a question of so what does
9 it mean.

10 **MR. WECHSLER:** Yeah, I'm afraid on the
11 modeling issues, I don't quite agree with Mr. Somach,
12 but I do think that would be a fruitful conversation.

13 **JUDGE MELLOY:** Well, I mean, I think at
14 the end of the day what -- as with any type of complex
15 litigation, we want to try to narrow the issues and
16 talk about where the real disputes are and -- and I
17 don't have to tell you that, but -- but certainly as
18 we go through over the next year and get ready for
19 trial, that we'll have to -- that'll be a -- you know,
20 something we'll hopefully can do.

21 Let me ask either Mr. Somach or
22 Mr. Wechsler, Mr. Dubois, I noticed in your report,
23 Mr. Somach, you have 35 depositions between now and
24 the end of the summer to be taken yet if I counted
25 correctly, but maybe at least a couple more to be

1 scheduled. So is -- is -- are those all pretty firm?

2 **MR. SOMACH:** Yeah. In fact, Ms.
3 Barfield has taken the lead with, I think, Ms.
4 Dalrymple in -- in Jeff's -- on New Mexico's side
5 scheduling those, so if I could turn to her and just
6 have her explain where that is. I -- there are a
7 little disputes that we discovered after we sent this
8 out, particularly with some of the EBID and EP No. 1
9 witnesses. They either -- and I'll let them speak to
10 that, but -- but, Theresa, could you just speak to the
11 question of where we were on scheduling?

12 **MS. BARFIELD:** Absolutely. So, Your
13 Honor, the status reports that Texas submitted
14 yesterday, we noted 39 confirmed depositions on the
15 calendar. Four, indeed, have been completed, as of
16 yesterday, leaving 35 depositions that are firm. So
17 they're agreed-upon dates between the parties, and all
18 that's left is the parties to serve their subpoenas
19 firming up the dates even further. There are six more
20 depositions that have been put into play from a
21 meet-and-confer perspective by New Mexico. I do
22 understand that the districts have objections to those
23 depositions. There are discussions that have occurred
24 that I have not been privy to so I won't speak to
25 those, but I am only speaking to the depositions that

1 are in the meet-and-confer process. So as of today,
2 we have 35 additional depositions firm.

3 **JUDGE MELLOY:** Does anybody know the
4 number that's been taken to date?

5 **MS. BARFIELD:** It is in the arena of
6 close to 30. We had, I think, completed
7 approximately -- well, we completed 25 fact witnesses,
8 plus we had completed some expert depositions and then
9 the four that have been completed in the past two
10 weeks. So, actually, we're closer to 40.

11 **JUDGE MELLOY:** So at the end of the day,
12 we're looking somewhere in the range of 75, 80 total
13 depositions?

14 **MS. BARFIELD:** That is a reasonable
15 estimate, Your Honor.

16 **JUDGE MELLOY:** And is it anticipated
17 that all of those people will be called as witnesses
18 or some --

19 **MR. SOMACH:** If we --

20 **JUDGE MELLOY:** Go ahead.

21 **MR. SOMACH:** I was going to say at least
22 from Texas' perspective, we're still looking at that.
23 I don't anticipate that everyone that we've either
24 deposed in terms of fact witnesses or that we've
25 offered as expert witnesses will testify. We will

1 attempt to wean that number down to something that's
2 not cumulative in terms of the nature of the -- of the
3 testimony.

4 **MR. WECHSLER:** And, Your Honor, I
5 anticipate a number of those will testify. I don't
6 know the exact. We are also in the process of pairing
7 down our witness list. As a point of reference, my
8 recollection in the -- the Yellowstone case is there
9 were over 50 witnesses that testified on behalf of --
10 there it was really only two -- two parties that were
11 litigating the two states. The United States was
12 present, but not actively participating.

13 **JUDGE MELLOY:** Does anybody -- do any of
14 the amici want to jump in on any of these topics I
15 have turned to? I don't want to cut you off, but if
16 not, I will ask Ms. Barncastle: You had raised some
17 discovery issues or felt there were some discovery
18 things we should talk about. Do you want to be heard?

19 **MS. BARNCASTLE:** Your Honor, I believe
20 there are a few discovery issues that are going to be
21 pending between EBID and the State, and I'm not
22 exactly sure which you're referring to at this point,
23 whether it be my letter this morning or --

24 **JUDGE MELLOY:** This morning.

25 **MS. BARNCASTLE:** -- other issues?

1 **JUDGE MELLOY:** I guess is there anything
2 in your letter of this morning that you want to --
3 feel need to be addressed today?

4 **MS. BARNCASTLE:** Yeah. I certainly do
5 want to get a little bit further into why I sent that
6 letter at the last minute this morning. The issue
7 really comes down to the fact that EBID is really
8 under fire here because of how the deposition of
9 Dr. King was handled, when in reality, that is
10 consistent with how several prior depositions have
11 been handled in this case up until this point, and the
12 point of that letter this morning was to show you,
13 Your Honor, that the New Mexico meeting letter didn't
14 exactly give a full set of facts related to what
15 happened at Mr. Daviet's deposition, and if the
16 parties moving forward are going to be limited to one
17 attorney defending these depositions, I will have a
18 significant problem with that if, for example, the --
19 say, the State of Texas or the United States wants to
20 take the lead in something that affects my client
21 directly where they may not have information related
22 to what is or is not considered attorney/client
23 privilege or, for example, where I take the lead in
24 the continuation of the deposition of Dr. King, but I
25 don't necessarily know when particular deposition

1 questions are running afoul of, say, the Texas case or
2 what Texas has designated him as an expert on. So
3 these situations are complex, because you have one
4 witness that potentially needs to be dealt with by
5 multiple attorneys to make sure those attorneys can
6 represent their clients' interest, and it has not been
7 uncommon up until now to have multiple attorneys
8 objecting to questions. For example, even Mr. Wallace
9 has objected to questions on the basis that the
10 question is an unfair characterization related to
11 something related to the Colorado interests. So
12 the -- the amici letter was a little bit disingenuous.
13 I felt that it was not fair to EBID in terms of how
14 moving forward this process should look, but I also
15 don't think I'm the only one who will have a
16 significant issue if you limit the defense of
17 depositions to a single attorney. Ms. O'Brien is
18 going to have this issue coming up with the deposition
19 of her expert that's been designated by both Texas and
20 the United States. There are other overlapping
21 issues, and, you know, quite frankly, Your Honor,
22 that's not how this case has been handled until now,
23 so I was a little taken aback by the idea that all of
24 a sudden, New Mexico has this concern.

25 **MR. WECHSLER:** And I do think, Your

1 Honor, it was a concern that we did raise --

2 **JUDGE MELLOY:** Let me ask you this,
3 Mr. Wechsler, and -- you -- there's been several
4 references to the -- the federal rule that limits a
5 party -- one person defending a deposition. To be --
6 to be honest with you, I'm having trouble finding that
7 rule. What is the rule that you're referring to?

8 **MR. WECHSLER:** I think it's Rule 30,
9 Your Honor, and I think you get there through the case
10 law. I think what Rule 30 tells you is that the
11 deposition shall proceed in the same manner as at
12 trial, and at trial, the rule typically is that any
13 given witness is presented by and defended by a single
14 attorney and so there is case law -- sorry, I don't
15 have cases to cite to you today -- that indicates that
16 any given deponent should be defended by a single
17 defendant. But -- but I do think -- I'm --

18 **JUDGE MELLOY:** Let me just interrupt you
19 for a second there. My -- my understanding of that
20 rule or practice -- and I'm not sure it's a rule. I
21 think it's a practice. But I understand what you're
22 talking about -- is generally that each party can only
23 have one attorney speak on behalf of that party. So
24 if you have -- if Texas has three attorneys sitting at
25 counsel table, they can't gang up and say one attorney

1 file one -- make one objection, one attorney for Texas
2 has to make all the objections. I'm not sure that
3 that rule says that when there's multiple parties,
4 that each party isn't entitled to make an objection.
5 You're required to.

6 **MR. WECHSLER:** Your Honor, I agree with
7 you that it is a practice. I will say that we're
8 certainly not trying to limit people from making
9 objections that are specific to them. I'll also say
10 that different judges handle that particular issue
11 differently than I have been before. Our concern is
12 we're just looking for guidance from you and a
13 reasonable approach here. We didn't raise this during
14 the deposition or -- or at the beginning of either of
15 the EBID depositions that have taken place so far. We
16 raise it now because the -- the -- those objections
17 got to the point where they were somewhat disruptive,
18 and we thought it would be helpful to get guidance
19 rather than create some confrontation at the
20 deposition itself as to what you consider to be a
21 reasonable approach, because I -- I do recognize each
22 party has different interests that they're attempting
23 to protect. They're entitled to object to protect
24 those interests, and we're not trying to prevent that.
25 But when you get into the numbers, you know, 50 plus

1 objections from each of the parties, and particularly
2 here where you have coordination amongst those parties
3 all against New Mexico, it starts to be -- create a
4 problem for discovery.

5 **MS. O'BRIEN:** Your Honor, this is Maria
6 O'Brien for -- if I could have a moment -- for EP No.
7 1 on this particular issue.

8 **JUDGE MELLODY:** Go ahead.

9 **MS. O'BRIEN:** Yeah, so I join in what
10 Ms. Barncastle articulated with regard to this issue,
11 and I do think that New Mexico's articulating this as
12 some kind of significant or disruptive issue is
13 disingenuous. There's a very narrow universe we're
14 going to find in this case and have found over the
15 course of the 50 depositions where you're going to
16 have multiple attorneys with a diverse interest, and
17 it's very -- it is a very narrow universe. We do have
18 upcoming Dr. Blair's deposition in which I will be
19 defending him as a -- the district engineer. He has
20 been listed as a non-retained expert for both Texas
21 and the United States, and all three counsel will be
22 entitled to voice objections. It has not been
23 disruptive. We do have an issue that we have raised
24 in the letter we sent to you yesterday that we feel in
25 terms of questioning of -- of the witnesses for the

1 districts, we feel guidance from the Court would
2 provide some greater efficiency, but I don't feel that
3 the issue raised by New Mexico presents anything, and
4 wholeheartedly agree with Your Honor that there is no
5 basis in the federal rule for preventing objections by
6 the attorneys representing the different interests,
7 and the districts cannot be precluded from
8 representing their clients when they're being deposed,
9 and United States and Texas cannot be precluded from
10 representing their interests, having listed district
11 interests as non-retained experts.

12 **MS. BARNCASTLE:** Your Honor, may I
13 follow up just a moment? Ms. O'Brien makes a very
14 good point related to this second issue that was
15 brought up related to the number of objections that
16 occurred in the deposition of Dr. King. The issue
17 being that there is a significant dispute between New
18 Mexico -- the New Mexico side and what we'll call the
19 operating agreement side, the two districts and the
20 United States, related to what still remains relevant
21 and discoverable following one of your orders or both
22 of your orders of recent dates, and that was the
23 primary reason for the number of objections that
24 occurred at Dr. King's deposition. In fact, part of
25 that was laying the foundation for getting before you

1 for further discussion on that issue and so at no time
2 was it raised -- was the issue raised that that was
3 becoming disruptive. Those were not speaking
4 objections. They were by the book a hundred percent,
5 but the issue being that there is a significant
6 dispute related to what is still discoverable, and
7 that's going to continue to come up so long as Ms.
8 O'Brien and I are dealing with our experts, our -- our
9 consultants' depositions, and then also related to
10 this issue of the additional four witnesses New Mexico
11 is seeking to depose or re-depose, we presume, related
12 to operating agreement issues.

13 **JUDGE MELLODY:** What do you see is the
14 issue about the operating --

15 **MS. O'BRIEN:** Your Honor, if I could
16 speak to that, as I raised it in our letter. I think
17 I could put some questions on that for you. The issue
18 is as we set out in our letters, the scope of
19 appropriate questioning, in some depositions,
20 depending on the subject matter, given your ruling in
21 your March 31st order, and, Your Honor, in dismissing
22 New Mexico's counterclaims, in particular Counterclaim
23 2, Your Honor held that the validity of the operating
24 agreement is not at issue. You specifically held that
25 in going forward, there were two areas that remained

1 legitimate bases for exploration in the case as -- as
2 a factual matter relating to the operating agreement,
3 and those two areas were -- were relatively narrow,
4 the receipt of water under the operating agreement to
5 the respective states or within the respective states
6 and current operations. How the operating agreement
7 was arrived at or the negotiations leading up to it or
8 the authority for the operating agreement all relate
9 to the validity of the operating agreement, and New
10 Mexico, we feel, the questioning at a couple of the
11 depositions to date, notably Dr. King's, completely
12 ignore, we believe, the ruling of -- of March 31st.
13 By way of specific example, at least the full page
14 format, New Mexico counsel spent over 15 pages asking
15 questions of who was at the negotiations, who was
16 invited to the negotiations, who got to comment on --
17 on the operating agreement, who drafted the operating
18 agreement, Dr. King, did you ever consider that the
19 drafting of the operating agreement should include the
20 State of New Mexico. These actually are questions if
21 you go to Counterclaim 2 that were the very factual
22 basis for Counterclaim 2 seeking invalidation of the
23 operating agreement, which Your Honor has ruled is not
24 in the case any longer. So we feel at this point that
25 New Mexico counsel is going down a path that if

1 nothing else, Your Honor, is creating great
2 inefficiencies in these depositions. You know, we've
3 been talking about how many there are. Dr. Blair is
4 set for deposition of three days. We are making him
5 available and are looking forward to providing
6 substantive testimony. We are not looking forward to
7 having questions that go to what we believe are now
8 irrelevant issues. Relevancy, you know, is relatively
9 broad. It relates to is it going to result in an
10 issue that will be triable, you know, admissible at
11 trial, and given Your Honor's ruling, how the
12 operating agreement was arrived at, the authority for
13 it, are no longer part of the case as opposed to how
14 does the operating agreement work, how does it
15 effectuate current operations, and how -- how does
16 that effect water in each state. So that is our
17 concern, and we brought it up because we feel that
18 some guidance from Your Honor would hopefully provide
19 a greater efficiency to some upcoming depositions.

20 **MR. WECHSLER:** Your Honor, may I?

21 **JUDGE MELLOY:** Mr. Wechsler.

22 **MR. WECHSLER:** First, Your Honor, I do
23 want to say I don't agree with the characterization
24 that most of those objections had to do with the
25 operating agreement, so I would separate that issue.

1 As to the operating agreement issue, however, New
2 Mexico understands your order on the 2008 operating
3 agreement, and we're not attempting to violate that.
4 While we reserve the right to take an exception at the
5 appropriate time, for now, we recognize and accept
6 that decision. And I want to be clear, we are not
7 seeking discovery to challenge the validity of the
8 2008 operating agreement, but the 2008 operating
9 agreement is the current method by which water is
10 divided as between the states, and that division is at
11 the heart of the case. We think that the method is
12 flawed and gives significantly more water to Texas
13 than the Compact contemplates. So in discovery, we've
14 learned that that agreement was simply a compromise,
15 really that there was not a -- a strong technical
16 basis for that, and that it wasn't based on the needs
17 of the Compact. We're seeking to understand and get
18 to the heart of what the basis for that is, so we can
19 understand what the division as between the two states
20 is, what the current division is, and to see if that
21 division is consistent with the Compact. If -- if the
22 basis for underlying principles for the operating
23 agreement are flawed, it stands to reason that the
24 division is also flawed. That's something that we
25 very much believe is a big part of this case and is at

1 the heart of the case. I mean, in short, we're trying
2 to understand the reasons for the current division of
3 the water and see if those are consistent with -- with
4 the -- the Compact. And I'll say that is consistent
5 with your order, and I'll read a couple of quotes from
6 your order. You said, "To the extent current
7 operations are inconsistent with the Court's ultimate
8 decree on apportionment. Any operating agreement will
9 have to be brought into conformity with the decree."
10 There's several others. I'll read one more.
11 "Evidence associated with such claims may be relevant
12 to the broad pending claims, and for that precise
13 reason, I do not at this time purport to exclude
14 evidence from the case." The last thing, Your Honor,
15 I would say, is that I think it's telling that EP No.
16 1 is attempting to limit discovery on the reasons and
17 basis for the allocation methodology that's contained
18 in the 2008 operating agreement when in the same
19 letter that they raised that issue, EP No. 1, without
20 a hint of irony, advocates for adoption of that same
21 method, and this is at Page 2. They say an issue is
22 does the 2008 operating agreement provide the
23 appropriate perspective remedy in this original
24 action? I mean, if -- if that's an issue that they
25 are identifying, of course we need to get at the

1 principles and bases for the operating agreement.
2 Again, not trying to get to the validity, but only to
3 the issues of division of water, which that document
4 currently controls.

5 **MS. O'BRIEN:** Your Honor, if I could
6 just make a couple comments. First, I do think that
7 Mr. Wechsler's characterization of Dr. King's
8 testimony, the testimony regarding the operating
9 agreement to date, is certainly a mischaracterization,
10 if not a gross mischaracterization of what Dr. King
11 stated, but we don't -- we don't -- you know, you
12 don't have the full transcript in front of you, Your
13 Honor. And there is no irony with regard to EP No.
14 1's view in terms of the operating agreement as the
15 appropriate prospective remedy. Our concerns that we
16 have raised at this point with regard to discovery is,
17 again, not the methodology underlying the operating
18 agreement in terms of how that effectuates where water
19 goes and -- and why. That is absolutely based on Your
20 Honor's current order, and we believe that is
21 appropriate for discovery in this case and essential
22 for discovery in that case. But Mr. Wechsler's -- the
23 majority of Mr. Wechsler's deposition questions to
24 Dr. King were not focused on those technical questions
25 to understand why water was getting where. It was he

1 was asking -- you know, I won't repeat what he asks in
2 terms of who was invited to the room, was, you know,
3 Mr. D'Antonio ever given a phone call, how did you
4 choose to let, you know, Mr. Gordon come to the
5 meetings, you know, in addition to that, what is the
6 limit on the discretion of the allocation committee,
7 all going to, again, the validity of the operating
8 agreement instead of focusing on, okay, how does it
9 work, right, how does it work, vis-a-vis current
10 operations. We are very interested and anxious to get
11 to that, to explain to that, but those are not the
12 kind of questions that New Mexico is focusing on.
13 They are intent on the -- the process of how it -- it
14 came to being, and we believe that those kinds of
15 questions, not the methodology kinds of questions that
16 Mr. Wechsler referenced, those -- those are -- those
17 are fair game. In fact, we look forward to those
18 kinds of questions. We raised this, again, with the
19 hope of providing for more efficient deposition
20 questioning as we go forward.

21 **MR. WECHSLER:** Without belaboring the
22 point, Your Honor, I'll just say I couldn't disagree
23 with -- with Ms. O'Brien's characterization of the
24 deposition more.

25 **JUDGE MELLOY:** Well, let me ask --

1 **MR. BROCKMANN:** Your Honor, if I may,
2 this is Jim Brockmann for the New Mexico amici, and we
3 raised this issue, also, in our letter. And the
4 reason I'd like to be heard for just a second on this
5 is -- is at the time, I believe it might have even
6 been the Water Authority that suggested in the
7 briefing on the dispositive motions that the operating
8 agreement should be declared null and void right now
9 basis on -- based on the Court's ruling that there was
10 what we viewed as their interpretation that there was,
11 in fact, an apportionment between the states below
12 Elephant Butte and the two states were not
13 signatories. The way we interpreted your order is you
14 disagreed with the fact that it should be declared
15 null and void at this time, but that New Mexico would
16 still be allowed to largely pursue its theory of the
17 case, and as I understood your order, what you viewed
18 as important were understanding the relationship
19 between project operations and the Compact or how the
20 project and the Compact has historically been
21 operated, which gives you a -- an indication of how
22 the parties have historically interpreted the Compact.
23 So I think those issues that actually go into the
24 basis for the negotiations are important. That said,
25 at the end of our letter, we also suggested that until

1 there was a specific dispute among the parties, we
2 didn't know if it was appropriate for Your Honor to
3 sort of make an advisory ruling, but, of course,
4 having heard argument today, you'll -- you'll make
5 that decision. Thank you for the opportunity to be
6 heard.

7 **JUDGE MELLOY:** Anyone else want to be
8 heard before I --

9 **MS. BARNCASTLE:** Your Honor, this is
10 Samantha Barncastle again. I just want to point out
11 that a great many of the questions we're discussing at
12 this point in time get right directly to the reason I
13 called you during the deposition, albeit the reason I
14 called you was related to a different issue. These
15 operating agreement questions that were coming from
16 New Mexico that were drawing objections, at least from
17 me, were in large part related to discussions that
18 occurred internally within EBID, and there are other
19 cases that are currently pending, one particular case
20 that New Mexico is currently maintaining against EBID,
21 EP No. 1, and the United States to invalidate the
22 operating agreement. So when you -- when you consider
23 that we are being attacked -- collaterally attacked in
24 this case for fodder in that case, it is
25 disconcerting, and we don't believe it's appropriate

1 no matter where we are to get into internal
2 discussions related to why EBID did something that it
3 did. Now, if it's something that the constituents of
4 EBID are unhappy with, they know there's an electoral
5 process to handle that, but at this point in time, we
6 agree wholeheartedly with Maria O'Brien that this --
7 these issues that were being discussed by New Mexico
8 related to questions about how we got where we got,
9 who was at the table, why certain things were agreed
10 to are not relevant to what this case is about.

11 **JUDGE MELLOY:** All right. Well, let me
12 make a couple comments. And I guess I, to some
13 extent, agree with Mr. Brockmann. It's difficult --
14 I'm not going to -- it's difficult to make any rulings
15 without a specific motion or context within to make
16 the motion -- or the ruling, but as a general
17 proposition, let me just say this. As to what we --
18 where this discussion started with Mr. Wechsler was
19 whether Texas, United States, and the water district
20 attorney would be allowed to each make an objection, I
21 don't think at this point I can say they can't do
22 that. I think each party is entitled to object, and
23 as I say, they may be required to object in order to
24 preserve their record. Obviously if the objections
25 become oppressive, become frivolous, there are --

1 there are provisions under the Federal Rules of
2 Discovery that allow for an appropriate motion to be
3 made for either some type of protective order or for
4 sanctions if that becomes the case. But I don't think
5 I can cut off a party from making an objection in
6 order to preserve their record for trial. So on that
7 issue, at least at this point, I'm not inclined to do
8 anything beyond what I've just said.

9 **MS. DAVIDSON:** Your Honor, this is Tessa
10 Davidson. May I ask for a point of clarification,
11 please?

12 **JUDGE MELLODY:** Go ahead.

13 **MS. DAVIDSON:** The transcript that was
14 attached to the New Mexico amici letter pointed out an
15 issue that arose last year -- early last year, and in
16 that deposition, I actually represented the fact
17 witness as a private client who is a water user, who
18 is currently in the lower Rio Grande adjudication. I
19 represented him for many years. The subpoena for his
20 deposition testimony was served on Ms. Barncastle, not
21 on me, and I did provide notice to Texas counsel that
22 I would be attending the deposition at his request on
23 his behalf, and at the beginning of the deposition, I
24 was -- there was an objection made by Texas counsel
25 that only one attorney could defend a deposition, and

1 also, the fact that I also represent New Mexico pecan
2 growers as amici in this case, that I personally was
3 prevented from making any objections or participating
4 at all in any deposition in this matter. They quoted
5 to the case management plan language where amici
6 weren't automatically given the right to ask
7 questions, but only the districts could ask questions
8 dealing with the operating agreement. And so I do
9 want to ask a clarification, Your Honor, because I --
10 during -- it was quite a heated discussion, and we did
11 not attach the entire transcript, but it was Texas'
12 counsel's position that I was absolutely prohibited
13 from even defending my private client in a deposition
14 over Ms. Barncastle's objection that it was her right
15 to defend the deposition. And we did settle the
16 issue. We walked into a room, and the agreement we
17 made was that I was to give all form and foundation
18 objections to Ms. Barncastle to make on the record,
19 but if I had any privileged issues that I wanted to
20 protect in the record, I could make privileged
21 objections, which I made two during that deposition.
22 But going forward, Your Honor, we have some fact
23 witnesses that I represent in their individual
24 capacity. They're farmers. And I want to make sure
25 that there's not going to be the same objection raised

1 that because I am also the attorney for New Mexico
2 pecan growers, that I personally am not allowed to
3 participate in depositions to defend my clients.

4 **JUDGE MELLOY:** Well, let me -- let me
5 say this: Again, it's a little difficult to make a
6 decision that's not related to a specific issue in a
7 specific deposition, but my -- my tentative view on
8 this, Ms. Davidson, is that if you're
9 representing a client individually, just as I said,
10 the other parties who are representing a party to the
11 deposition can make objections, you should be allowed
12 to participate. If Texas or any other party believes
13 you should not, then the onus is on them to file a
14 motion to exclude you.

15 **MS. DAVIDSON:** Thank you, Your Honor.

16 **JUDGE MELLOY:** I'm going to put the
17 burden on the objecting party to file the motion to
18 exclude you from participation. If you're
19 participating as an attorney for the individual who's
20 being deposed. So somebody feels that you cannot or
21 any other attorney for that matter should not be
22 allowed to -- to be heard at that deposition, then
23 they're going to have to file something to -- to
24 prohibit -- to prohibit it.

25 All right. On the issue of the

1 operating agreement, I guess I'm somewhat in
2 Mr. Brockmann's camp on this one. It's really hard
3 without context to say what is and is not within the
4 balance of -- of project operations versus validity of
5 the operating agreement itself. You know, probably
6 who was at the negotiations may be ongoing on a range
7 of what would be allowable, but Ms. O'Brien, you made
8 the question or raised the issue of one of the
9 questions was, well, what discretion does the Board
10 have that administers the operating agreement. To me,
11 that sounds pretty discoverable. So I -- it's pretty
12 hard for me at this point, without some context, to --
13 to make any kind of determination, and -- and I think
14 we haven't -- I haven't made a definitive ruling on
15 this issue, but I think there's been some discussion,
16 and I don't want to say consensus, but understanding
17 that the trial of this case will probably proceed in
18 two phases. I'm hoping not three, but two, and
19 what -- the first being liability and damages, and
20 then if it's determined that whatever ruling I make to
21 the Supreme Court is -- is either adopted or modified
22 in whatever the Supreme Court does as to who's liable
23 to whom and what the damages are, we'll then probably
24 have a separate trial on remedy, and that's where I
25 think, as I've indicated in my ruling in March, that

1 the operating agreement may become much more relevant,
2 and if we don't -- and so I think those issues are
3 probably for a later phase, whether or not we're going
4 to -- how much discovery we're going to need on
5 remedy. We'll probably have to cross that bridge at
6 that time. I -- you know, I'm hoping that we don't
7 end up going to the Supreme Court three times. It's
8 certainly possible that depending upon how the
9 dispositive motions play out in this case, that, you
10 know, reading the -- some of these original
11 jurisdiction cases, sometimes the Supreme Court has to
12 weigh in at -- at the motion for summary judgment
13 stage. I'm hoping we're not going to end up there,
14 but, you know, obviously that's depending upon what
15 the motions are and how they're resolved and they may
16 be of such significance that the Supreme Court is
17 going to have to get involved at that point. That's,
18 again, something down the road.

19 Anything else we want to talk about
20 concerning discovery issues at this time anybody wants
21 to raise? I will say I -- I would like to do this
22 again in about two or three weeks just to keep the
23 process moving and -- and hopefully if there are
24 issues that we need to talk about, we'll have a
25 regularly-scheduled time.

1 **MR. BROCKMANN:** Your Honor, this is Jim
2 Brockmann. I -- just as a matter of housekeeping, I
3 would like to raise one other thing that we neglected
4 to get in our -- our letter. There has been some
5 discussion of the present case management order
6 requires the amici to give a couple weeks' notice to
7 attend depositions. I think at the time that that
8 order was entered, our situation was much different.
9 There was concern about scheduling depositions because
10 of amici needing to be consulted. There were concerns
11 about the time, of the size of the rooms and the
12 ability of people to attend those depositions. So
13 far, the parties have worked with the amici quite
14 well, I would say, given our new format of video
15 depositions where the notices are coming out fairly
16 last minute and the amici have continued to send
17 letters and no one has objected, but I just want to
18 raise it to you. If you're satisfied that the parties
19 are able to work it out now and -- and not have
20 objections, then we're fine to proceed that way. If
21 you believe it's appropriate to maybe make an
22 amendment to the case management order to address the
23 present situation, as I said, we have given less than
24 two weeks' notice. I don't think our attendance has
25 been disruptive. There's been no objections on behalf

1 of any of the amici -- of the New Mexico amici. So,
2 again, we're fine with the practice, but it is a bit
3 inconsistent right now with the case management order,
4 so we'd follow your direction about whether we should
5 just continue until there's an issue or clean that
6 matter up in the case management order at this time.
7 Thank you.

8 **JUDGE MELLODY:** Well, let's just continue
9 until there is an issue. I think the -- I -- I'm
10 going to be available over the summer. I don't have
11 any -- what travel plans we did have are now out the
12 window and so I should be available if not the same
13 day, within a day, to -- to get on -- get on a call.
14 So if there's an issue that comes up, I'll be
15 available.

16 **MR. BROCKMANN:** Okay. Thank you, Your
17 Honor. Again, there's not a present issue and the
18 parties have worked well with us, but we didn't want
19 to be caught in a situation where we hadn't complied
20 directly with the case management order. Thank you.

21 **MR. SOMACH:** Your Honor, if I could just
22 say something about discovery. Number one, you've
23 noted -- we've all noted how many depositions we have
24 to take over the summer. My assumption is that we'll
25 continue to do those remotely, but if that should

1 change, and I see nothing on the horizon that would
2 change that, it will be very difficult to get those
3 depositions in. One of the beauties of dealing with
4 these things remotely is, number one, we don't have to
5 worry about the issues that Mr. Brockmann just said
6 because the size of the room is not an issue. But we
7 also can be efficient and take those in multiple days
8 because there's no travel-related issues, so I did
9 want to put a little point on that, that the
10 assumption in scheduling all these depositions is that
11 we'll continue to handle those remotely. I -- I have
12 no reason to believe anybody doesn't want to do that,
13 but I just did want to make that point.

14 The other point, without belaboring it,
15 is there were a number of allegations in the New
16 Mexico status conference letter related to discovery,
17 and I definitely don't want to get into them other
18 than to say that we -- we disagree with the
19 characterizations in that letter. We don't think this
20 is necessarily the time to pick at those, but
21 certainly if there are issues, and I think you've
22 already said this, and if a motion is filed, we will
23 respond at that time to anything that has been alleged
24 in the New Mexico letter. But we feel confident that
25 we have proceeded in an appropriate way with respect

1 to each and every one of the allegations that were
2 made in that -- in that letter, as well as in the
3 amici letter.

4 **JUDGE MELLOY:** That's fine. We've been
5 at this for a while. I don't want to spend a lot of
6 time on the -- on the legal issues unless anybody
7 thinks there's something we need to talk about, but I
8 do want to just throw out one issue that has troubled
9 me, and I -- and I mentioned this before, is there has
10 been reference to the fact that the Compact is clear
11 on its face yet nobody seems to know what the
12 apportionment of the water is, and how do we get to
13 that issue? How do we even decide how much water is
14 apportioned to Texas, how much water is apportioned to
15 New Mexico, if any. I understand Texas says there's
16 none. How -- how do we resolve that?

17 **MR. SOMACH:** My -- my view -- I -- I
18 listened carefully. You said this two weeks ago, and
19 we've thought quite a bit about it. I'm assuming that
20 the best place to address that issue may well be
21 immediately after discovery ends in dispositive
22 motions where we can lay that out in a manner that, I
23 think, if -- if -- if you decide that summary judgment
24 is not appropriate, then at least the issues are laid
25 out in the manner that will focus the trial on

1 whatever limited factual issues are associated with
2 that. But I agree with you that I think those are
3 foundational and fundamental issues. I think they
4 need to be decided up front. I think they are
5 susceptible to partial summary judgment motions. I
6 assume New Mexico will do the same. But -- and at
7 that point in time, if -- if factual issues are
8 identified, at least the motions ought to focus down
9 the factual inquiry onto whatever limited factual
10 issues may be in dispute that need to be resolved.
11 But I'm thinking the first place to do that is
12 dispositive motions. We've turned our attention to
13 trying to outline and -- and address those issues. A
14 lot of those issues were certainly touched on, as you
15 noted in the first Special Master's report. I think
16 what we need to do, based upon your ruling, and we
17 focused a great deal on the ruling in terms of taking
18 a look at the nuance, but important issues that you've
19 noted that weren't addressed in -- in that opinion and
20 so I think that in the first instance, that's the best
21 way to -- to -- to deal with the issues. You'll be
22 able to look at them, and at that point in time, not
23 only if you decide that summary judgment is not
24 appropriate because of disputed factual issues that
25 need to be tried, you at least can assist us in

1 focusing on what you need in order to -- to resolve
2 those issues.

3 **MR. WECHSLER:** So, Your Honor, I -- my
4 thought is I agree with you, the Compact is not clear.
5 It was also the subject of conflicting litigation over
6 decades, exactly what that meant. As to how that
7 issue gets resolved, I would offer --

8 **JUDGE MELLOY:** I'm just saying that it's
9 interesting that if it is clear, that people don't --
10 normally you would think you could look at the Compact
11 and say Texas gets X and New Mexico gets Y, but nobody
12 seems to be able to do that, at least up to this
13 point.

14 **MR. WECHSLER:** Understood. I would
15 point that three sources of -- of evidence that can
16 help you and the Court resolve that question. The
17 number one is the history, and you do have some
18 historians who are offering -- will be offering
19 evidence, some of which goes directly to the
20 apportionment and what the Compact -- what the intent
21 of the parties when they entered the Compact was. The
22 Court has held on numerous occasions that the parties'
23 course of conduct is also relevant as to the meaning
24 of the Compact and the apportionment, and New Mexico
25 is prepared to be putting forth evidence on that

1 course of conduct. And the last I would say is you
2 have expert reports and so to give you one example,
3 New Mexico has an expert, he's a former commissioner
4 for the Bureau of -- United States Bureau of
5 Reclamation, has dealt with numerous Compacts, and is
6 able to offer some -- a set of principles on that
7 issue. I do agree that the dispositive motion route
8 would be a helpful way to at least -- at the very
9 least, narrow that issue.

10 **JUDGE MELLOY:** Because it -- it seems to
11 me that until we decide that issue, it's hard to
12 decide just about anything else in this case, I
13 assume.

14 **MR. WECHSLER:** Agreed.

15 **MR. SOMACH:** I agree. But I -- I do
16 want to -- I don't want to leave you with the
17 impression that I think that the Compact isn't clear.
18 It really does depend a little bit on interpretation
19 of some of the language in the Compact, and we think
20 that it is clear with respect to -- to that, and --
21 and we've briefed it already. To the extent there may
22 be some nuances, we'll -- we'll discuss those. But
23 I -- I don't think it's unclear. There seems to be a
24 resistance to what we believe the clear interpretation
25 of the Compact is, but it does revolve around that

1 Article 4 where -- where there's a delivery to Texas
2 of something, and -- but we -- I don't want to get
3 into the -- the argument now, but I -- I didn't want
4 to leave the impression that we thought that the
5 Compact wasn't clear. It may require us to explain
6 what we mean by that, but -- but we do think it is
7 clear.

8 **JUDGE MELLOY:** Okay. All right.
9 Anybody else want to be heard on this issue?

10 **MR. WECHSLER:** Well, I -- the one thing
11 I would offer last, Your Honor, I actually, when you
12 look at the pleadings and filings of the -- the
13 parties in this case, including the direction from the
14 Supreme Court, I'm -- I think you will find that there
15 is more agreement on the apportionment than might
16 appear meets the eye, but we'll be prepared to brief
17 that or address it when you're ready.

18 **JUDGE MELLOY:** Okay. Anything you can
19 agree on, more power to you.

20 All right. Is there anything else we
21 want to talk about today? Let's reconvene in two
22 weeks because then we'll have -- we'll either have
23 come to an agreement on a mediator or we'll know you
24 haven't. We can talk a little bit more about that at
25 that time, but let's plan again -- does this time work

1 and Friday mornings work for everybody? Two weeks,
2 and I'll get an order out a little more promptly on
3 this time. I have something on Monday or Tuesday, but
4 we'll plan again 11:00 Central Time, 10:00 Mountain,
5 and 9:00 west coast time. So all right. Nothing
6 further. Thank you, everyone.

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

8 **MR. WECHSLER:** Thank you, Your Honor.

9 (The proceedings adjourned at 12:31
10 p.m.)

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

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on this, the 8th day of June, 2020.



Heather L. Garza

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A				
a.m 1:14	affect 33:3	ahead 24:11	37:3 38:13	arrived 46:7
aback 40:23	affirmatively 13:22	37:20 43:8	59:20 62:12	47:12
ability 12:24	afoul 40:1	55:12	63:6 67:9	Article 67:1
13:5 60:12	afraid 35:10	Al 9:14	anymore 22:23	articulate 12:13
able 14:15 16:21	agenda 10:5,7	albeit 53:13	anyway 11:4	articulated
17:18 21:22	11:18	Albuquerque	12:8 22:22	43:10
34:3 60:19	aggregate 24:5	3:8 4:15 5:1	23:2	articulating
64:22 65:12	26:15 27:13	8:15,18	appear 22:20	43:11
66:6	aggressive 10:18	alert 30:13	67:16	asked 30:10
absent 14:13	22:9	allegations	appearance 7:5	asking 46:14
absolutely 22:8	aggressively	62:15 63:1	appears 33:20	51:1
36:12 50:19	31:13	alleged 62:23	appended 23:17	asks 51:1
56:12	ago 30:21 34:24	allocated 20:9	26:18	assist 64:25
accept 48:5	63:18	allocation 49:17	appendices 25:3	assistance 14:13
access 24:9	agree 15:9 17:2	51:6	26:4	15:19
ACOSTA 5:8	17:6 20:6 22:8	allow 55:2	apportioned	associated 49:11
action 11:13	22:19 33:22,23	allowable 58:7	63:14,14	64:1
49:24	34:20 35:11	allowed 52:16	apportionment	assume 9:20
actions 21:12	42:6 44:4	54:20 57:2,11	21:25 49:8	34:8 64:6
actively 38:12	47:23 54:6,13	57:22	52:11 63:12	66:13
ad 29:2	64:2 65:4 66:7	allowing 25:8	65:20,24 67:15	assuming 63:19
addition 51:5	66:15 67:19	amendment	approach 16:17	assumption
additional 28:17	agreed 23:9 54:9	60:22	16:19,23 17:22	61:24 62:10
28:25 29:14	66:14	amici 8:15 9:2	42:13,21	assure 16:9,9,20
37:2 45:10	agreed-upon	13:1 18:7	appropriate	16:21
address 11:20	36:17	26:25 38:14	10:23 11:10,19	attach 56:11
60:22 63:20	agreement 12:5	40:12 52:2	11:21 18:23	attached 55:14
64:13 67:17	18:10,13 19:15	55:14 56:2,5	24:4 45:19	attacked 53:23
addressed 10:11	19:24 21:2	60:6,10,13,16	48:5 49:23	53:23
39:3 64:19	34:19 44:19	61:1,1 63:3	50:15,21 53:2	attempt 38:1
adds 14:19	45:12,24 46:2	amount 30:23	53:25 55:2	attempting
adjourned 68:9	46:4,6,8,9,17	Anaya 3:7 7:19	60:21 62:25	42:22 48:3
adjudication	46:18,19,23	and- 2:10,14,24	63:24 64:24	49:16
55:18	47:12,14,25	3:5,11,15 4:6	approximately	attend 60:7,12
administers	48:1,3,8,9,14	4:17	28:22 37:7	attendance
58:10	48:23 49:8,18	and/or 23:6	Arabs 20:20	60:24
administration	49:22 50:1,9	Andrew 5:19	areas 27:24	attending 55:22
29:3	50:14,18 51:8	Andrews 2:21	34:13 35:6	attention 64:12
admissible	52:8 53:15,22	7:16	45:25 46:3	attitude 16:13
47:10	56:8,16 58:1,5	anticipate 37:23	arena 37:5	16:24
adopt 17:22	58:10 59:1	38:5	argument 53:4	attorney 2:16
adopted 58:21	67:15,23	anticipated	67:3	3:17 7:11,17
adoption 49:20	agreements	33:14 37:16	Ariane 7:23	12:15,20 13:7
advisory 53:3	29:17	anxious 51:10	arose 25:15	39:17 40:17
advocates 49:20	agronomists	anybody 11:5	55:15	41:14,23,25
	28:1	18:22 19:3	arrange 10:10	42:1 54:20
		22:22,23 29:10	10:11	55:25 57:1,19

clients 44:8 57:3	completed 36:15	consensus 23:7	30:8 69:7	cumulative 38:2
clients' 40:6	37:6,7,8,9	58:16	correctly 35:25	current 46:6
close 19:18 37:6	completely	Conservation	cost 14:19 20:6,8	47:15 48:9,20
closer 37:10	46:11	5:18 9:16,19	counsel 7:8,22	49:2,6 50:20
coast 68:5	completion	consider 42:20	7:24 9:11,13	51:9
collaterally	22:15	46:18 53:22	41:25 43:21	currently 50:4
53:23	complex 14:4	considerable	46:14,25 55:21	53:19,20 55:18
collectively	17:8 19:10,13	30:23	55:24 69:14	cut 38:15 55:5
25:13	35:14 40:3	considered	counsel's 56:12	CV 19:4
Colorado 1:9	complicated	39:22	count 21:19	
2:12 3:3,20,22	17:8,9	consistent 39:10	counted 35:24	D
3:23 4:4 7:3	complication	48:21 49:3,4	Counterclaim	D'Antonio 51:3
8:3,6 18:3 19:1	13:18	constituents	45:22 46:21,22	Dalrymple 7:25
27:5,7 31:9	complied 61:19	54:3	counterclaims	36:4
40:11	comprise 69:7	consult 18:6	45:22	damages 58:19
come 12:4,24	compromise	consultants	County 4:12 5:1	58:23
18:10 19:15	48:14	28:16	5:18 8:15,19	data 23:17,20
21:1,2 31:25	compromises	consultants'	9:9,11,15,18	24:15 25:2
34:10 45:7	15:8	45:9	couple 11:24	26:4,22 29:14
51:4 67:23	computer 12:8	consultation	14:25 19:16	date 37:4 46:11
comes 39:7	concern 13:9	20:5 22:18	35:25 46:10	50:9 69:20
61:14	40:24 41:1	consulted 60:10	49:5 50:6	dates 36:17,19
coming 16:13	42:11 47:17	contact 18:14,16	54:12 60:6	44:22
40:18 53:15	60:9	18:16,18,23	course 7:1 32:1	Davidson 6:2,2
60:15	concerned 12:16	19:23	43:15 49:25	9:22,23 55:9
comment 15:9	15:14,22 17:21	contacted 18:22	53:3 65:23	55:10,13 57:8
15:22 46:16	concerning 12:1	contained 49:17	66:1	57:15
comments 16:5	59:20	contemplates	court 1:4 6:12	Daviet's 39:15
16:9 22:23	concerns 15:1	48:13	6:13 17:1	day 15:10 32:19
50:6 54:12	50:15 60:10	context 54:15	24:11 33:24	34:11 35:2,7
Commission	condition 33:17	58:3,12	44:1 58:21,22	35:14 37:11
7:22,24 8:1	33:18	continuation	59:7,11,16	61:13,13 69:17
commissioner	conduct 65:23	39:24	65:16,22 67:14	days 47:4 62:7
66:3	66:1	continue 45:7	69:23	DC 4:9
committee 51:6	confer 17:25,25	61:5,8,25	Court's 49:7	dcaroom@bic...
Compact 29:2	conference	62:11	52:9	5:10
30:25 32:19,20	13:16 62:16	continued 60:16	create 14:8	De 2:21 3:13
32:20 33:14	conferring 14:6	controls 50:4	42:19 43:3	deadline 19:22
48:13,17,21	confident 62:24	conversation	creates 13:18	20:3
49:4 52:19,20	confidentiality	18:25 31:24	creating 47:1	deal 13:2 32:14
52:22 63:10	29:17	32:13 35:5,12	criteria 13:25	34:21 64:17,21
65:4,10,20,21	confirmed 36:14	convinced 12:21	crop 34:17	dealing 13:3
65:24 66:17,19	conflicting 65:5	cooperate 21:1	cross 59:5	32:21 45:8
66:25 67:5	conformity 49:9	coordination	CRR 69:19	56:8 62:3
Compacts 66:5	confrontation	43:2	Cruces 4:24	dealt 30:24 40:4
competing 15:3	42:19	Corrales 6:3,4	5:12 8:25 9:2	66:5
complete 69:7	Congress 5:20	correct 27:3	CSR 69:19	decades 65:6

decide 18:5 29:25 63:13,23 64:23 66:11,12	36:14,16,20,23 36:25 37:2,8 37:13 39:10,17 40:17 42:15 43:15 45:9,19 46:11 47:2,19 57:3 60:7,9,12 60:15 61:23 62:3,10	director 7:22	45:6 53:1 64:10	Drew 5:19 9:18
decided 64:4	deputy 7:17	disagree 32:5 51:22 62:18	disputed 64:24	Dubois 4:2 8:10 8:11 20:10,11 21:8,13 25:17 25:18 27:4 28:5,7,11,14 30:4,5,9 31:24 32:22,23 35:22
decides 15:18	designated 28:15 40:2,19	disagreed 52:14	disputes 17:14 31:10 33:3,7,8 33:17 35:16 36:7	DUNN 2:5,11
decision 18:9,11 20:8 48:6 53:5 57:6	designations 23:6,8,24 24:12 25:4,20 29:6,20,23 30:5,6	disclose 25:19	disconcerting 53:25	dynamics 21:16
declared 52:8,14	determination 58:13	disclosure 27:8	discoverable 44:21 45:6 58:11	<hr/> E <hr/>
decree 49:8,9	determinations 33:4	disconcerting 53:25	discovered 36:7	E 2:1,1,1,1
deep 20:16	determine 18:14 18:15	discovery 10:17 22:9,13,14 23:3 24:1 38:17,17,20 43:4 48:7,13 49:16 50:16,21 50:22 55:2 59:4,20 61:22 62:16 63:21	distinction 35:1	earlier 22:2
defend 55:25 56:15 57:3	determined 58:20	discretion 51:6 58:9	distribution 34:17	early 10:8 32:10 55:15
defendant 41:17	difference 33:16 35:2,7	discuss 12:3 66:22	district 4:12,21 5:18 9:4,7,9,12 9:13,14,16,19 43:19 44:10 54:19	EBID 28:16 36:8 38:21 39:7 40:13 42:15 53:18,20 54:2,4
defended 41:13 41:16	differences 33:2 33:21	discussed 54:7	districts 36:22 44:1,7,19 56:7	economists 28:1
defending 39:17 41:5 43:19 56:13	different 17:16 21:16 24:22 34:9,10,12,23 42:10,22 44:6 53:14 60:8	discussion 10:12 31:1,16 32:7 45:1 54:18 56:10 58:15 60:5	diverse 43:16	effect 47:16
defense 40:16	differently 42:11	discussing 53:11	diversion 21:18	effectuate 47:15
definitely 62:17	difficult 15:2,8 17:3 54:13,14 57:5 62:2	discussion 10:12 31:1,16 32:7 45:1 54:18 56:10 58:15 60:5	divided 48:10	effectuates 50:18
definitive 58:14	difficulties 21:21	discussing 53:11	division 48:10 48:19,20,21,24 49:2 50:3	efficiency 44:2 47:19
DELGADO 5:8	dig 29:18	discussing 53:11	dmiller@kem... 5:22	efficient 51:19 62:7
delivery 67:1	direction 61:4 67:13	discussion 10:12 31:1,16 32:7 45:1 54:18 56:10 58:15 60:5	document 50:3	effort 12:17,18 13:12,13 14:20 30:23
Denver 3:3,23 4:4 31:18	directly 39:21	discussions 12:19 14:18 36:23 53:17 54:2	documents 24:10	either 11:2,2 19:15 35:21 36:9 37:23 42:14 55:3 58:21 67:22
DEPARTME... 3:22 4:3,8	direction 61:4 67:13	discussions 12:19 14:18 36:23 53:17 54:2	doing 25:10	El 4:12 5:6 8:20 8:23 9:8,11
depend 66:18	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	Doug 8:22	electoral 54:4
depending 26:9 45:20 59:8,14	dispositive 22:5 22:16 52:7 59:9 63:21 64:12 66:7	discussions 12:19 14:18 36:23 53:17 54:2	Douglas 5:7	Elephant 4:21 9:3,6 52:12
deponent 41:16	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	dozen 28:8	emergency 23:4 24:21
depose 45:11	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	Dr 9:14 26:12 39:9,24 43:18 44:16,24 46:11 46:18 47:3 50:7,10,24	employ 69:12
deposed 37:24 44:8 57:20	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	drafted 46:17	employee 69:10
deposition 26:13 39:8,15,24,25 40:18 41:5,11 42:14,20 43:18 44:16,24 47:4 50:23 51:19,24 53:13 55:16,20 55:22,23,25 56:4,13,15,21 57:7,11,22	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	drafting 46:19	
depositions 22:10 35:23	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	Draper 3:12,12 3:12 7:20,20 7:20	
	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	Drawer 3:17	
	dispute 24:1,13 24:15 31:5 32:1,25 33:15 34:15 44:17	discussions 12:19 14:18 36:23 53:17 54:2	drawing 53:16	

encourage 18:7	37:8,25 40:2	46:24 47:17	focusing 51:8,12	further 10:12,21
ends 63:21	40:19 43:20	62:24	65:1	10:22 36:19
engineer 7:23	66:2,3	feeling 22:6	fodder 53:24	39:5 45:1 68:6
9:14 43:19	expertise 13:17	feelings 20:10	folder 25:12,14	69:9
entered 60:8	15:15 34:13	feels 16:12 57:20	folks 14:2 19:4	
65:21	experts 27:20,23	felt 38:17 40:13	follow 12:1	
entering 7:5	28:10,17 29:15	field 13:20	44:13 61:4	G
entire 56:11	29:16 34:7,8	figure 12:7	following 44:21	G 5:7
entirely 23:9	44:11 45:8	15:19 34:2	foregoing 69:6	game 51:17
entitled 42:4,23	Expiration	file 23:5 24:7,10	form 56:17	gang 41:25
43:22 54:22	69:20	25:12 29:6	format 46:14	Garza 6:13 69:3
EP 28:16 36:8	explain 36:6	30:14 42:1	60:14	69:19
43:6 49:15,19	51:11 67:5	57:13,17,23	former 66:3	general 7:17,22
50:13 53:21	exploration 46:1	filed 22:5 29:8	forth 31:1 65:25	7:24 10:16
equitable 21:25	express 14:22,22	29:12,19 30:11	forward 10:9	12:15 13:7
essence 31:2	Expressway 5:9	30:12 62:22	11:24 12:21	54:16
essential 50:21	extent 18:2	files 26:23	17:18 21:3	general's 2:16
estimate 37:15	22:16 24:1,13	filing 23:7,13	23:24 39:16	3:17 7:11
event 12:9 32:10	33:13 49:6	25:5	40:14 45:25	12:16,20
everybody 15:5	54:13 66:21	filings 67:12	47:5,6 51:17	generally 28:23
23:8 68:1	eye 67:16	finally 9:24	51:20 56:22	41:22
evidence 49:11	F	10:21	found 11:16	Georgia 21:5
49:14 65:15,19	F 5:13	find 43:14 67:14	31:21 43:14	30:14
65:25	face 63:11	finding 41:6	foundation	getting 22:25
evidentiary	fact 36:2 37:7,24	fine 18:10 23:13	44:25 56:17	44:25 50:25
31:22	39:7 44:24	25:19 60:20	foundational	give 15:22 19:17
exact 38:6	51:17 52:11,14	61:2 63:4	64:3	33:11 39:14
exactly 38:22	55:16 56:1,22	fire 39:8	four 18:8 28:11	56:17 60:6
39:14 65:6	63:10	firm 4:23 6:2	36:15 37:9	66:2
example 33:10	facts 39:14 69:5	7:18 36:1,16	45:10	given 31:3 41:13
39:18,23 40:8	factual 46:2,21	37:2 69:23	Fourth 4:14	41:16 45:20
46:13 66:2	64:1,7,9,9,24	firmer 36:19	Francis 2:4 7:9	47:11 51:3
examples 33:12	fair 40:13 51:17	first 11:23 12:14	frankly 15:15	56:6 60:14,23
exception 48:4	fairly 60:15	30:22 47:22	40:21	69:16
excess 26:12	faith 13:12 16:1	50:6 58:19	free 11:6 18:6	gives 48:12
exclude 49:13	16:11,23	64:11,15,20	Friday 68:1	52:21
57:14,18	far 17:20 21:2	five 17:16	frivolous 54:25	go 12:18 14:17
excluding 26:21	29:18 42:15	flawed 48:12,23	front 50:12 64:4	16:21 17:23
exercise 10:14	60:13	48:24	fruitful 12:22	18:17 19:18
exhibits 25:22	farmers 56:24	fleshed 10:23	35:12	21:3 24:11
expend 13:13	Fe 2:22 3:13,18	Floor 3:23	fruitless 14:18	26:17 29:18
experience 14:7	5:4,15 6:9	Florida 21:6	full 11:18 25:22	31:18 35:2,18
expert 23:6,6,7	federal 41:4	30:13	26:3 33:25	37:20 43:8
23:9,14 25:13	44:5 55:1	focus 33:8 34:3	39:14 46:13	46:21 47:7
27:1,8,12 29:1	feel 39:3 43:24	63:25 64:8	50:12	51:20 52:23
29:1 30:14,17	44:1,2 46:10	focused 50:24	fundamental	55:12
30:21 32:6		64:17	33:3 64:3	goes 26:20 50:19
				65:19

going 13:4,8 15:6,7,22,25 20:5,9 22:7,12 33:3 34:9 37:21 38:20 39:16 40:18 43:14,15 45:7 45:25 46:25 47:9 51:7 54:14 56:22,25 57:16,23 59:3 59:4,7,13,17 61:10	47:18 <hr/> H HAND 69:16 handicap 13:25 handle 42:10 54:5 62:11 handled 39:9,11 40:22 happened 39:15 happy 16:14 32:12 33:25 hard 58:2,12 66:11 HARRIS 4:14 Hartman 3:22 8:7 hear 16:8 heard 18:4 38:18 52:4 53:4,6,8 57:22 67:9 hearing 1:13 23:4 24:21 69:8,11 heart 48:11,18 49:1 heat 14:8 heated 56:10 HEATH 5:8 Heather 6:13 69:3,19 heather_garza... 6:15 held 45:23,24 65:22 help 65:16 helpful 32:7,18 42:18 66:8 hereto 69:6 Hicks 4:18,18 9:12 high 27:19 high-level 20:21 hint 49:20 historian 27:25 31:18 32:22	historians 30:22 34:2,6 65:18 historic 31:10 32:2,14 33:16 historically 52:20,22 history 30:24,25 31:6 65:17 Hoffman 2:5 7:10 honest 41:6 Honor 7:7,15 8:5,10,17 9:1,6 9:10,17,22 10:1 11:8 16:8 17:2 18:21 19:19 21:8,24 25:19 27:7 28:8,15,21 30:4,5,10 31:7 32:23 33:23 36:13 37:15 38:4,19 39:13 40:21 41:1,9 42:6 43:5 44:4 44:12 45:15,21 45:23 46:23 47:1,18,20,22 49:14 50:5,13 51:22 52:1 53:2,9 55:9 56:9,22 57:15 60:1 61:17,21 65:3 67:11 68:7,8 Honor's 47:11 50:20 HONORABLE 1:13 hope 51:19 hopefully 35:20 47:18 59:23 hoping 34:6 58:18 59:6,13 horizon 62:1 housekeeping 60:2	Houston 6:14 69:24 Hubenak 2:15 7:12 Hudspeth 5:18 9:15,18 hundred 45:4 Hutchison 26:12 <hr/> I idea 10:24 24:17 25:7,11 30:3 31:11 40:23 ideal 17:14 identified 17:16 28:24 64:8 identifying 49:25 ignore 46:12 II 2:4 immediate 29:5 immediately 63:21 important 13:23 15:11,20 16:18 17:7 33:19 34:4 35:3 52:18,24 64:18 impression 16:2 66:17 67:4 Improvement 4:12 9:9,12 inclined 55:7 include 27:16 46:19 included 27:17 including 19:10 28:7 33:9 67:13 inconsistent 49:7 61:3 incorporated 31:20 indicate 22:25 indicated 13:16 14:16 17:15 18:13 32:9	58:25 indicates 41:15 indication 52:21 individual 56:23 57:19 individually 57:9 individuals 17:16 inefficiencies 47:2 inform 19:23 informal 12:18 information 24:18 25:3 26:19 29:24 31:10 32:15 39:21 initial 10:12 18:18 21:17 24:24 25:5 30:7 initially 12:3 26:3 inquiries 30:16 inquiry 64:9 instance 64:20 integral 23:18 intent 51:13 65:20 interest 18:15 40:6 43:16 interested 16:10 18:3 25:10 33:24 51:10 69:13 interesting 65:9 interestingly 33:5 interests 15:3 40:11 42:22,24 44:6,10,11 INTERIOR 4:8 internal 54:1 internally 53:18 international 20:18
---	---	---	---	--

interpretation 32:3 52:10 66:18,24	22:7 23:3 25:9 29:3 30:19 32:8 33:4,9,19	24:19 25:16 26:2,25 27:5 27:10,20,24	Klahn 2:11 7:10 know 14:11,21 15:4,16 18:3,6	leads 15:9 learned 48:14 leave 22:17 66:16 67:4
interpreted 52:13,22	33:19 34:14,21 35:11,15 38:17	28:5,10,12,18 29:4 30:2,8,19	19:6,9,13,21 20:6,19 21:3,5	leaving 36:16 Lee 4:2 8:12
interrupt 41:18	38:20,25 40:21	32:16,24 33:11	23:22 24:17	lee.leininger@...
Interstate 7:21	45:12 47:8	34:5 35:13	26:22 27:14	4:5
7:24,25	50:3 52:23	37:3,11,16,20	29:19,21 31:12	left 36:18
intervenor 7:4	54:7 56:19	38:13,24 39:1	32:18,18 33:8	legal 21:19 35:3
invalidate 53:21	59:2,20,24	41:2,18 43:8	33:24 34:5,8	63:6
invalidation	62:5,8,21 63:6	45:13 47:21	34:12,22 35:4	legitimate 46:1
46:22	63:24 64:1,3,7	51:25 53:7	35:19 37:3	Leininger 4:2
invited 46:16	64:10,13,14,18	54:11 55:12	38:6 39:25	8:12
51:2	64:21,24 65:2	57:4,16 61:8	40:21 42:25	length 29:21
involve 17:11	it'll 31:21	63:4 65:8	47:2,8,10	let's 11:23 20:2
involved 11:13		66:10 67:8,18	50:11 51:1,2,4	20:3 24:11
59:17	J	judges 42:10	51:5 53:2 54:4	29:4,6 61:8
IOWA 1:14	J 3:6 4:2	judgment 59:12	58:5 59:6,10	67:21,25
irony 49:20	James 4:2 5:2	63:23 64:5,23	59:14 63:11	letter 11:10
50:13	james.dubois...	jump 38:14	67:23	12:11 14:11
irrelevant 47:8	4:5	June 69:17	knowledge	17:15 22:10
Irrigation 4:21	Jay 5:13 9:1	jurisdiction	13:24 20:15	25:18 38:23
9:3,7	jcbrockmann...	59:11	knowledgeable	39:2,6,12,13
Israelis 20:20	5:5	JUSTICE 4:3	13:20	40:12 43:24
issue 10:12	Jeff 7:16 19:19	jwechsler@m...	knows 15:21	45:16 49:19
13:15 18:1	Jeff's 36:4	2:23	Kopp 3:1 7:19	52:3,25 55:14
21:19 23:5	Jeffrey 2:20	K		60:4 62:16,19
30:18,21 31:3	jfstein@newm...	Kansas 9:21	L	62:24 63:2,3
32:17 33:16	5:16	20:13 21:14	L 2:3 6:13 69:3	letters 13:1
34:19 39:6	Jim 8:11,18 11:8	20:13 21:14	69:19	45:18 60:17
40:16,18 42:10	30:5 52:2 60:1	keep 59:22	laid 63:24	levels 20:18
43:7,10,12,23	John 3:12 6:8	KEMP 5:20	language 56:5	liability 58:19
44:3,14,16	7:20 10:2	KERY 6:8	66:19	liable 58:22
45:1,2,5,10,14	john.draper@...	Khoury 3:16	Lanka 20:19	limit 40:16 42:8
45:17,24 47:10	3:14	7:17	large 24:6 53:17	49:16 51:6
47:25 48:1	john@uttonke...	kin 69:13	largely 52:16	limited 33:6
49:19,21,24	6:10	kind 20:25 23:4	Las 4:24 5:12	39:16 64:1,9
52:3 53:14	join 43:9	24:8 26:24	8:24 9:2	limits 41:4
55:7,15 56:16	Jr 3:6	43:12 51:12	law 3:22 4:18,23	Lincoln 3:2
57:6,25 58:8	Judge 1:13 7:1	58:13	6:2 7:18 41:10	line 9:13 15:4
58:15 61:5,9	7:13 8:2,8,14	kinds 13:4 51:14	41:14	Lisa 3:1 7:19
61:14,17 62:6	8:20,24 9:3,8	51:15,18	lawsuit 12:25	list 22:10 31:14
63:8,13,20	9:15,20,24	King 39:9,24	lay 63:22	38:7
65:7 66:7,9,11	10:3 11:22	44:16 46:18	laying 44:25	listed 43:20
67:9	14:23 17:20	50:10,24	lead 14:8 36:3	44:10
issues 10:5,22	19:5,7,25 20:2	King's 44:24	39:20,23	listened 63:18
13:22 14:12	21:5,9 22:3	46:11 50:7	leading 46:7	

litigating 38:11	Main 4:23	19:9,13 20:18	51:25 53:7	9:18
litigation 13:11	maintaining	mediating 14:3	54:11 55:12	minute 39:6
13:12 14:4	53:20	mediation 11:23	57:4,16 61:8	60:16
16:11,17 35:15	major 13:15	12:15,22 13:14	63:4 65:8	mischaracteri...
65:5	majority 50:23	14:10 15:11	66:10 67:8,18	50:9,10
little 10:23	making 35:1	16:1,12,20,22	mention 10:8	mkopp@trout...
12:13 36:7	42:8 47:4 55:5	17:6,13,21	mentioned	3:4
39:5 40:12,23	56:3	20:21 21:6	24:23 63:9	mobrien@mo...
57:5 62:9	Mall 2:6	22:4,7,14,23	merely 24:11	4:16
66:18 67:24	management	23:1	26:14	modeler 28:3,4
68:2	56:5 60:5,22	mediations	method 48:9,11	29:1
LLC 3:12 4:23	61:3,6,20	21:10	49:21	modelers 28:2
6:2	manner 41:11	mediator 13:23	methodology	34:22
LLP 5:8,20	63:22,25	14:9,10,14	49:17 50:17	modeling 24:24
lodged 26:19	March 45:21	15:12,12,16,18	51:15	26:22 34:8
logical 23:23	46:12 58:25	18:6,14,15,17	Mexico 1:9 2:19	35:11
long 20:23 26:5	Marcus 3:6 7:17	18:18 20:24	2:22 3:8,13,17	models 34:9
26:6 29:25	marcus@robl...	21:3 22:6,17	3:18 4:15,24	modification
45:7	3:9	67:23	5:4,15 6:1,4,7	18:12
longer 25:1	Maria 4:13 9:11	mediators 14:1	6:9 7:3,14,23	modified 58:21
46:24 47:13	43:5 54:6	15:17,18 17:24	9:21,23,24	MODRALL
look 13:23 14:1	Marquette 3:8	20:12,15	10:2,10 11:25	4:14
17:17 19:8	Master 1:13	meet-and-conf...	12:20 13:1,2	moment 43:6
26:17 29:24	11:15 30:22	36:21 37:1	13:10 16:2	44:13
40:14 51:17	31:20 32:4	meeting 14:5	18:2,25 20:12	Monday 68:3
64:18,22 65:10	Master's 31:19	39:13	24:5 27:11	money 12:17
67:12	64:15	meetings 51:5	28:19 31:8	13:13
looked 34:21	material 26:20	meets 67:16	36:21 39:13	Montgomery
looking 10:17	29:18 31:25	MELLOY 1:13	40:24 43:3	2:21 7:16
37:12,22 42:12	materials 23:18	7:1,13 8:2,8,14	44:3,18,18	month 14:7
47:5,6	31:22	8:20,24 9:3,8	45:10 46:10,14	MoPac 5:9
lot 12:3,17 14:8	matter 7:2 29:9	9:15,20,24	46:20,25 48:2	morning 7:15
14:11,16,19	45:20 46:2	10:3 11:22	51:12 52:2,15	8:4,10 9:5,10
22:7 25:23	54:1 56:4	14:23 17:20	53:16,20 54:7	9:17,22 10:1
31:5,14 32:8	57:21 60:2	19:5,25 20:2	55:14 56:1	19:7 38:23,24
32:24 33:1	61:6	21:5,9 22:3	57:1 61:1	39:2,6,12
34:18,25 35:6	MAX 4:18	24:19 25:16	62:16,24 63:15	mornings 68:1
63:5 64:14	Maxwell 5:8	26:2,25 27:5	64:6 65:11,24	motion 54:15,16
lower 55:18	8:23	27:10,20,24	66:3	55:2 57:14,17
lthompson@t...	mean 19:20	28:5,10,12,18	Mexico's 15:25	59:12 62:22
3:4	20:20 32:25	29:4 30:2,8,19	29:16 36:4	66:7
Luis 3:7 7:18	35:4,9,13 49:1	32:16,24 33:11	43:11 45:22	motions 22:5,16
luis@roblesra...	49:24 67:6	34:5 35:13	mgoldsberry...	32:10 52:7
3:10	meaning 65:23	37:3,11,16,20	2:8	59:9,15 63:22
<hr/>	meant 65:6	38:13,24 39:1	Michael 1:13	64:5,8,12
M	mediate 14:10	41:2,18 43:8	3:1 7:19	Mountain 68:4
M 2:1,15 3:1 5:8	mediated 12:19	45:13 47:21	Miller 5:19 9:17	move 13:13

partial 64:5	15:13 19:12	portion 26:6	Priscilla 2:15	55:3
participate 57:3	37:17 42:8	portions 24:3,14	7:12	provide 24:7,12
57:12	60:12 65:9	29:14	priscilla.hube...	44:2 47:18
participating	Peralta 2:21	position 21:17	2:18	49:22 55:21
8:6 38:12 56:3	3:13	23:10 25:17	private 55:17	provided 19:3
57:19	percent 45:4	56:12	56:13	providing 23:13
participation	person 41:5	possible 16:25	privilege 39:23	23:22 24:17
57:18	personally 56:2	59:8	privileged 56:19	47:5 51:19
particular 12:16	57:2	Post 2:16 3:17	56:20	provisions 55:1
18:1 39:25	perspective	4:19 5:3,14 6:3	privy 36:24	public 29:9
42:10 43:7	36:21 37:22	6:9	probably 10:14	pumping 21:18
45:22 53:19	49:23	potential 17:24	10:20 11:2	33:14
particularly	phase 59:3	potentially	18:4 19:8	purport 49:13
15:2 21:16	phases 58:18	25:11 40:4	22:17 26:21	pursuant 29:17
36:8 43:1	phone 8:12 51:3	power 67:19	28:17 34:9	pursue 52:16
parties 7:4	pick 62:20	practice 41:20	58:5,17,23	put 10:9 11:11
10:10 11:15	picked 22:25	41:21 42:7	59:3,5	11:19,24 14:1
12:3,23 13:5	piece 14:4	61:2	problem 10:16	18:24 25:14
14:6 16:11,16	place 23:25	precise 49:12	12:25 14:5	36:20 45:17
16:18 17:19	42:15 63:20	precluded 44:7	15:4 23:13	57:16 62:9
18:2,5,8,19	64:11	44:9	39:18 43:4	putting 65:25
21:20 22:18	placed 14:20	preferable 20:7	procedure 12:1	
23:5 25:12	Plaintiff 7:6	premature	12:9	Q
27:1,4 32:13	plan 56:5 67:25	10:14	proceed 10:4	question 23:15
36:17,18 38:10	68:4	prepared 17:21	41:11 58:17	26:1 32:2 35:8
39:16 42:3	plans 61:11	65:25 67:16	60:20	36:11 40:10
43:1,2 52:22	plate 14:17	present 38:12	proceeded 62:25	58:8 65:16
53:1 57:10	Platte 11:14	60:5,23 61:17	proceedings	questioning
60:13,18 61:18	play 36:20 59:9	presented 41:13	68:9 69:8	43:25 45:19
65:21 67:13	pleadings 67:12	presents 44:3	process 37:1	46:10 51:20
69:10,14	please 55:11	preserve 54:24	38:6 40:14	questions 40:1,8
parties' 25:13	plus 23:17 37:8	55:6	51:13 54:5	40:9 45:17
65:22	42:25	Preston 3:22 8:6	59:23	46:15,20 47:7
party 13:3 18:10	point 10:13,20	preston.hartm...	prohibit 57:24	50:23,24 51:12
41:5,22,23	17:9,22 19:15	3:25	57:24	51:15,15,18
42:4,22 54:22	24:22 25:21	presume 45:11	prohibited	53:11,15 54:8
55:5 57:10,12	31:8 38:7,22	pretty 12:9	56:12	56:7,7 58:9
57:17	39:11,12 42:17	19:13 22:12	project 29:1	quite 11:16
Paseo 2:21 3:13	44:14 46:24	36:1 58:11,11	52:19,20 58:4	15:15 31:13,13
Paso 4:12 5:6	50:16 51:22	prevent 42:24	promptly 68:2	35:11 40:21
8:21,23 9:8,11	53:10,12 54:5	prevented 56:3	proposition	56:10 60:13
path 46:25	54:21 55:7,10	preventing 44:5	54:17	63:19
pecan 6:1 9:21	58:12 59:17	primary 44:23	prospective	quoted 56:4
9:23 56:1 57:2	62:9,13,14	principal 18:2	50:15	quotes 49:5
pending 38:21	64:7,22 65:13	principles 48:22	protect 42:23,23	
49:12 53:19	65:15	50:1 66:6	56:20	R
people 14:3	pointed 55:14	prior 39:10	protective 30:15	R 2:1,1 4:2,22

Rael 3:6,7 7:17 7:18	48:5	remedy 49:23 50:15 58:24 59:5	resistance 66:24	road 6:3 59:18
raise 41:1 42:13 42:16 59:21 60:3,18	recognized 17:1	remember 24:22	resisting 23:22 24:17	Robert 2:5 7:10
raised 13:15 38:16 43:23 44:3 45:2,2,16 49:19 50:16 51:18 52:3 56:25 58:8	recollection 38:8	REMOTE 1:12	resolve 13:6,6 13:12 15:2,13 31:9 63:16 65:1,16	Robles 3:7,7 7:18,18
Raley 3:2 7:20	reconvene 67:21	remotely 61:25 62:4,11	resolved 21:20 59:15 64:10 65:7	ROEHL 4:14
Randel 4:7 8:13	record 7:8 29:10 31:21 32:2 33:24,25 54:24 55:6 56:18,20	Renea 4:18,18 9:12	resolving 14:4 17:14	Rolf 7:21
range 37:12 58:6	reference 38:7 63:10	repeat 51:1	respect 13:21 62:25 66:20	Roman 30:20 31:16
RAPIDS 1:14	referenced 51:16	replicated 31:2	respectful 16:17	room 51:2 56:16 62:6
re-depose 45:11	references 41:4	report 19:17 23:16 24:24 26:10,14,15,16 30:24 31:19,20 32:6 35:22 64:15	respective 46:5 46:5	rooms 60:11
reached 19:24	referred 26:5	Reporter 6:12 69:4	respond 11:6 14:24 15:23 62:23	round 21:13
read 49:5,10	referring 38:22 41:7	Reporters 6:13 69:23	result 14:16 47:9	route 66:7
reading 32:25 33:20 59:10	regard 33:21 43:10 50:13,16	reports 23:6,9 23:14,16,19 24:2,3,4,6,14 25:1,8,14,20 25:25 26:3,6,8 26:15,18 27:1 27:12,12,18 28:8,22 29:21 29:22,24 30:7 30:7,14,17,21 32:25 33:20 36:13 66:2	results 34:10,11	RPR 69:19
ready 35:18 67:17	regime 13:10	represent 40:6 56:1,23	resume 19:9	rule 41:4,7,7,8 41:10,12,20,20 42:3 44:5
real 12:5 20:16 35:16	Registration 69:23	represented 55:16,19	review 25:8,15	ruled 46:23
reality 39:9	regular 69:10,12	representing 44:6,8,10 57:9 57:10	reviewed 14:11	Rules 55:1
really 10:11 25:24 26:16 35:2,8 38:10 39:7,7 48:15 58:2 66:18	regularly-sche... 59:25	reproduce 24:10	reviewing 33:20	ruling 45:20 46:12 47:11 52:9 53:3 54:16 58:14,20 58:25 64:16,17
reason 29:8,12 30:12,16 44:23 48:23 49:13 52:4 53:12,13 62:12	related 39:14,21 40:10,11 44:14 44:15,20 45:6 45:9,11 53:14 53:17 54:2,8 57:6 62:16	request 55:22	revolve 33:8 66:25	rulings 21:17 32:9 54:14
reasonable 37:14 42:13,21	relates 47:9	require 67:5	rhicks@renea... 4:20	running 31:13 40:1
reasons 10:15 49:2,16	relating 46:2	required 42:5 54:23	rhoffman@so... 2:9	
rebuttal 28:23	relationship 16:18 52:18	requires 60:6	rid 12:7	<hr/> S <hr/>
recall 27:19	relatively 26:11 46:3 47:8	reserve 48:4	Ridgley 7:22	S 2:1 5:9,19
receipt 46:4	Relevancy 47:8		right 7:13 8:20 8:24 9:8 11:22 11:23 14:17 20:2 23:2 25:4 27:2 48:4 51:9 52:8 53:12 54:11 56:6,14 57:25 61:3 67:8,20 68:5	Sacramento 2:6
Reclamation 5:18 9:16,19 29:2,3 66:5	relevant 24:15 32:18 44:20 49:11 54:10 59:1 65:23		Rio 55:18	Samantha 4:22 9:6 53:10
recognize 42:21	remained 45:25		RiverWare 28:3	samantha@h2... 4:25
	remains 44:20			sanctions 55:4
	remarkable 34:23,25			Santa 2:22 3:13 3:18 5:4,15 6:9
				Sarah 2:11 7:10
				satisfactory 14:15
				satisfied 60:18
				saw 22:10
				saying 15:24,25 65:8
				says 42:3 63:15

schedule 10:17 22:9 23:2	16:3 19:10,11 22:1	size 60:11 62:6	speaking 36:25 45:3	27:11 31:9 32:21 34:18
scheduled 36:1	SEVENTH 1:14	skilled 20:23	Special 1:13	38:11,11 39:19
scheduling 36:5 36:11 60:9 62:10	share 17:24 18:25 24:7 25:12	skills 17:6,17 20:21	11:15 30:22	40:20 43:21
Schmidt-Peter...	Shelly 4:7 7:25 8:12	sklahn@soma... 2:13	31:19,20 32:4 64:15	44:9,20 46:5,5 48:10,19 52:11 52:12 53:21 54:19 66:4
scope 33:13 45:18	shelly.randel... 4:10	smaxwell@bic... 5:11	specific 24:2,14 42:9 46:13 53:1 54:15 57:6,7	stations 33:2
se 1:14 13:24	short 26:11 49:1	SMITH 5:20	specifically 45:24	status 1:13 11:10 13:16 19:17 36:13 62:16 69:8,11
seal 29:8,13,19 30:11,13 69:16	shorted 15:6	solicitor's 8:13	spend 63:5	Stein 5:3,13,14 9:1,2 11:12
second 41:19 44:14 52:4	Shorthand 69:4	solution 16:25	spending 12:17 34:25 35:6	stipulated 34:3
Secondly 10:16	shot 21:4	solutions 17:10	spent 30:22 46:14	Stream 7:21,24 7:25
secure 24:8	show 39:12	Somach 2:3,5,11 7:7,8 12:12,12 14:25 16:15,21 17:19 18:21 20:1 23:10,12 26:9 27:13,15 27:22,25 28:24 29:11 31:7 33:5,13 34:1 34:20 35:11,21 35:23 36:2 37:19,21 61:21 63:17 66:15 68:7	SPERLING 4:14	strong 17:6,13 20:10 48:15
see 13:1 29:12 30:12 31:9 45:13 48:20 49:3 62:1	side 36:4 44:18 44:19	Somach's 11:24 16:9 22:10 25:11,21	split 20:5,13,22	stipulated 34:3
seeking 45:11 46:22 48:7,17	signatories 52:13	somebody 15:21 17:5 22:25 57:20	spring 11:2	Stream 7:21,24 7:25
selection 14:14	significance 59:16	Somach's 11:24 16:9 22:10 25:11,21	Sri 20:19	Street 2:12 3:2 4:3,8,14 6:14
send 60:16	significant 14:12 33:7,9 33:19 35:8 39:18 40:16 43:12 44:17 45:5	somebody 15:21 17:5 22:25 57:20	ssomach@so... 2:7	strong 17:6,13 20:10 48:15
sense 12:3 22:20 23:8	significantly 34:14 48:12	Somach's 11:24 16:9 22:10 25:11,21	stage 32:11 59:13	Stuart 2:3 7:8 12:12
sent 10:4 19:6 36:7 39:5 43:24	SIMMONS 2:5 2:11	somebody's 15:6 15:6	stands 48:23	stuff 26:23 subject 30:15 31:17 32:10 45:20 65:5
sentence 11:11	simply 25:25 26:23 48:14	somebody's 15:6 15:6	start 7:4,5 23:1 23:25 25:24	submissions 10:17
separate 25:14 47:25 58:24	Singer 7:23	somebody's 15:6 15:6	started 10:7 54:18	submit 18:11 19:5,15,18,21 19:23
serious 12:23 21:21	single 34:6 40:17 41:13,16	somewhat 10:4 21:16 42:17 58:1	state 1:7,9,9 2:2 2:16,19 3:20 6:7 7:2,3,5,8 7:11,14,23 8:3 8:5 9:21,24 10:2,9 11:25 12:13,20 38:21 39:19 46:20 47:16 69:4	submitted 27:8 36:13
seriously 16:22	SISK 4:14	sort 53:3	stated 50:11 69:5	submitting 27:11
serve 36:18	sit 31:8,23 32:12 33:25	sounds 58:11	states 1:4,13 4:1 7:3 8:9,11 18:5 19:1 20:9 21:2 24:5 25:16	subpoena 55:19
served 55:20	site 10:11,13,19 11:5,14 24:7	sources 65:15		subpoenas 36:18
set 10:18 19:22 20:3 32:11 39:14 45:18 47:4 66:6	sitting 41:24	South 4:23 21:24		substantive 47:6
setting 25:12	situation 60:8 60:23 61:19	speak 16:5,5 36:9,10,24 41:23 45:16		successful 21:11 21:14
settle 12:25 13:12 17:3 56:15	situations 40:3			sudden 40:24
settled 15:21	six 17:16 28:17 28:17 36:19			sufficient 25:5
				suggest 12:2 18:12

suggested 12:2 17:23 20:12 22:4 52:6,25	take 10:19 11:3 14:1 16:22 19:16 22:12	40:13 43:25 50:14,18 51:2 64:17	15:17,19,20 16:17 17:1,15 17:25 18:9	11:1,3,17,21 12:17 13:13 14:19 16:14
suggestion 10:9 11:25 15:16 19:22 24:11	28:14 39:20,23 48:4 61:24 62:7	Tessa 6:2 9:23 55:9	19:14,20 20:22 20:23,25 21:20 22:13,22,24,24	19:14 22:21 30:23 35:1,6 45:1 48:5
suite 2:6,12 3:2 3:8 4:3,23 5:9 5:20 6:14 25:22 26:3 69:24	taken 16:24 22:11 25:21 26:13 35:24 36:3 37:4 40:23 42:15 69:11	testified 38:9 testify 37:25 38:5	23:23 25:10,20 26:2,9 27:22 28:21 31:11,11 31:17 32:6,8 33:6,6 34:16 35:5,12,13 36:3 37:6	49:13 52:5,15 53:12 54:5 59:6,20,25 60:7,11 61:6 62:20,23 63:6 64:7,22 67:25 67:25 68:3,4,5 69:8
summarizes 26:14	talk 10:6 11:23 16:14 17:18 18:20 20:5 35:16 38:18 59:19,24 63:7 67:21,24	testimony 38:3 47:6 50:8,8 55:20	40:15,25 41:8 41:9,10,17,21 43:11 45:16 48:11 49:15 50:6 52:23 54:21,22 55:4 58:13,15,25 59:2 60:7,24 61:9 62:19,21 63:23 64:2,3,4 64:15,20 65:10 66:17,19,23 67:6,14	times 21:8 59:7 timing 22:19 today 8:6 11:18 37:1 39:3 41:15 53:4 67:21
summary 10:24 59:12 63:23 64:5,23	talked 19:2 30:20 31:17	Texas 1:7 2:2,16 2:17 4:19 5:9 5:21 6:14 7:2,6 7:9 12:13 16:15 18:2 27:11,14 28:12 36:13 39:19 40:1,2,19 41:24 42:1 43:20 44:9 48:12 54:19 55:21,24 57:12 63:14,15 65:11 67:1 69:4	65:2 60:7,24 61:9 62:19,21 63:23 64:2,3,4 64:15,20 65:10 66:17,19,23 67:6,14	total 37:12 totally 15:13 touched 64:14 transcript 1:12 50:12 55:13 56:11 69:7
summer 10:15 11:1 22:11,12 22:21 35:24 61:10,24	talking 20:14 22:2 23:19 25:22 26:7 27:1,12 30:6 30:21 33:1 41:22 47:3	Texas' 24:6 37:22 56:11	67:6,14	37:1 39:3 41:15 53:4 67:21
supplement 24:2 24:13,25	tamil 20:19	text 30:7	67:6,14	told 21:9 30:17 topics 38:14 total 37:12 totally 15:13 touched 64:14 transcript 1:12 50:12 55:13 56:11 69:7
supplemental 27:17 28:7 29:14	tbarfield@so... 2:8	thank 8:2 11:21 16:7 53:5 57:15 61:7,16 61:20 68:6,7,8	thinking 19:12 25:1 29:7 64:11	travel 10:16 61:11
supply 21:19	team 21:15	theory 52:16	thinks 63:7	travel-related 62:8
support 17:4	technical 15:19 23:16 25:3 26:15,18,22 28:16 48:15 50:24	Theresa 2:4 7:9 36:10	Thompson 3:1 7:19	triable 47:10 trial 11:3,4 32:12 35:19 41:12,12 47:11 55:6 58:17,24 63:25
supporting 25:2 26:4	tell 35:17	thing 10:8 12:14 15:11,20 29:20 49:14 60:3 67:10	thought 11:5 12:1 18:23 23:20,24 29:10 29:11 31:3 42:18 63:19 65:4 67:4	tried 64:25 trouble 41:6 troubled 63:8 Trout 3:2 7:19 true 29:16 69:6 69:7
Supreme 1:4 58:21,22 59:7 59:11,16 67:14	telling 49:15	things 13:4 14:17,25 25:23 31:14,14 38:18 54:9 62:4	thoughts 12:10 24:20 25:6	try 35:15 trying 12:7 17:4 21:2 23:23
sure 10:25 16:12 17:5 18:17 19:2 23:8 32:7 38:22 40:5 41:20 42:2 56:24	tells 41:10	think 10:9,19,21 10:25 11:12,16 11:18 12:8,9 15:1,10,13,15	three 41:24 43:21 47:4 58:18 59:7,22 65:15	
surface 28:25	tentative 10:5 57:7		throw 63:8 Tigers 20:19	
surprised 16:8	terabytes 23:19 23:20		time 10:19,20,24	
Susan 5:8 8:23	terms 12:15 13:11 14:14 16:19 26:7 31:22 33:7 37:24 38:2			
susceptible 64:5				
<hr/> T <hr/>				
T 2:1 6:2				
table 12:24 41:25 54:9				

42:8,24 49:1 50:2 64:13 ttd@tessadavi... 6:5 Tuesday 68:3 turn 36:5 turned 38:15 64:12 two 15:17,17 18:11,24 19:6 19:16,20,21,22 19:23 20:12 29:6 34:24 37:9 38:10,10 38:11 44:19 45:25 46:3 48:19 52:12 56:21 58:18,18 59:22 60:24 63:18 67:21 68:1 two-mediator 21:15 TX 69:24 type 20:13 35:14 55:3 types 14:18 typically 41:12	12:23 25:8 41:19 52:18 58:16 understands 48:2 understood 19:2 52:17 65:14 unfair 40:10 unhappy 54:4 unique 17:11 United 1:4,13 4:1 7:3 8:8,11 18:4 19:1 20:9 24:5 25:16 27:11 31:9 32:21 38:11 39:19 40:20 43:21 44:9,20 53:21 54:19 66:4 universe 43:13 43:17 University 6:7 9:25 10:2 unsuccessful 21:10 unsuccessfully 21:7 upcoming 43:18 47:19 urgency 22:24 use 10:20 31:4 useful 10:14,25 user 55:17 Utility 5:1 8:15 8:19 Utton 6:8,8 10:1 10:2	20:13 21:6,14 21:25 22:1 30:13 58:4 video 60:14 view 10:13 29:23 50:14 57:7 63:17 viewed 52:10,17 views 31:17 violate 48:3 vis-a-vis 51:9 visit 10:11,13,19 11:5,15 voice 17:4 43:22 void 52:8,15 voluminous 23:14	wasn't 23:9 48:16 67:5 water 4:12 5:1 8:15,19 9:9,12 11:9 13:17,20 13:23 14:2,3 15:5,14 17:7 17:12,14 20:15 21:11,19 28:3 28:25 46:4 47:16 48:9,12 49:3 50:3,18 50:25 52:6 54:19 55:17 63:12,13,14 way 14:21,22 15:7 18:17 23:23 31:22 46:13 52:13 60:20 62:25 64:21 66:8 ways 34:23 we'll 7:5 10:4 13:18 18:24 19:21 28:22 35:19,20 44:18 58:23 59:5,24 61:24 62:11 66:22,22 67:16 67:22,22,23 68:4 we're 17:17 23:13,19,21,22 23:23 24:17 27:1 32:21 33:1 35:6 37:10,12,22 42:7,12,24 43:13 48:3,17 49:1 53:11 59:3,4,13 60:20 61:2 we've 12:18 14:7 14:16 20:12 28:15 31:12,12 34:21 37:23,24 47:2 48:13	61:23 63:4,19 64:12 66:21 wean 38:1 Wechsler 2:20 7:15,16 12:2 15:23 16:5,6,7 17:23 19:19,20 20:14 21:24 22:4,25 24:23 25:5,7 27:3 28:18,20 30:10 31:23 33:22 34:16 35:5,10 35:22 38:4 40:25 41:3,8 42:6 47:20,21 47:22 51:16,21 54:18 65:3,14 66:14 67:10 68:8 Wechsler's 12:11 14:11 50:7,22,23 week 29:5 weeks 19:16,20 19:22 34:24 37:10 59:22 63:18 67:22 68:1 weeks' 60:6,24 weigh 59:12 went 11:16 21:6 23:5 weren't 56:6 64:19 Weslayan 6:14 69:24 west 68:5 wet 14:23 wholeheartedly 44:4 54:6 wide 17:11 willing 10:6 31:23 window 61:12 witness 28:17 38:7 40:4
<hr/> U <hr/> U.S 4:3,8 ultimate 33:4 49:7 un-trackable 15:14 unclear 66:23 uncommon 40:7 underlying 23:17 24:15 26:22 29:21,22 48:22 50:17 understand 14:25 30:16 36:22 41:21 48:17,19 49:2 50:25 63:15 understanding	<hr/> V <hr/> v 1:8 3:22 validity 45:23 46:9 48:7 50:2 51:7 58:4 vary 26:9 vault 24:8 versus 7:2 19:10	<hr/> W <hr/> W 6:8 wait 22:15 walked 56:16 Wallace 3:21 8:4,5 27:7 31:24 40:8 want 12:14 15:24 18:4,22 19:16 22:15,22 23:21 24:16 25:24,25 26:2 26:3,17 29:7,8 30:1 34:6 35:15 38:14,15 38:18 39:2,5 47:23 48:6 53:7,10 56:9 56:24 58:16 59:19 60:17 61:18 62:9,12 62:13,17 63:5 63:8 66:16,16 67:2,3,9,21 wanted 16:3 19:1 56:19 wants 11:6 39:19 59:20 Washington 4:9		

41:13 55:17	0	223 69:23	570-4591 3:14	983-3880 5:4,15
witnesses 36:9	04-30-22 69:20	2240 6:3	575 4:24	986-2637 2:22
37:7,17,24,25		235 6:14 69:24		999 4:3
38:9 43:25	1	2386 6:9	6	
45:10 56:23	1 4:12 5:18 9:12	242-2228 3:9	636-2377 4:24	
work 21:23	9:19 28:16	25 37:7	699-1445 6:10	
25:13,25 30:18	36:8 43:7	29 1:12		
31:4 34:2	49:16,19 53:21		7	
47:14 51:9,9	1's 50:14		700 3:8	
60:19 67:25	10 28:8	3	720 3:24	
68:1	10:00 68:4	30 37:6 41:8,10	745-1101 6:15	
worked 60:13	1000 2:6	300 5:9	75 37:12	
61:18	11 24:24	3000 6:14 69:24	77027 6:14	
working 13:20	11:00 1:14 68:4	303 2:13 3:3 4:4	69:24	
16:10	1100 4:23	303187 4:19	78701 5:21	
Worldwide 6:13	111 1:13	31st 45:21 46:12	78703 4:19	
69:23	1120 3:2	320-5466 5:21	78711 2:17	
worried 13:9	11th 2:12	325 2:21 3:13	78746 5:9	
14:12	12 24:24 27:16	329-4672 3:18	792-3636 6:4	
worry 62:5	27:23 28:8,12	35 35:23 36:16	7th 3:23	
worth 21:4,4	12:31 68:9	37:2		
26:20	12548 2:16	370 4:3	8	
wouldn't 20:16	13 27:16	3711 5:9	80 37:12	
22:20	1300 3:23	39 36:14	800 6:15	
written 23:15	1305 5:20		800-745-1101	
26:24	14 28:21,22	4	69:25	
Wyoming 22:1	141 1:1 7:2	4 67:1	80202 4:4	
	15 46:14	40 37:10	80203 3:3,23	
X	1508 3:17	4206 6:3	80302 2:12	
X 65:11	1600 3:2	446-7979 2:7	8262 69:20	
	18 26:14,18	449-2834 2:13	844-1375 4:4	
Y	1849 4:8	463-2012 2:17	848-1800 4:15	
Y 65:11	18th 4:3	472-8021 5:10	861-1963 3:3	
Yeah 16:7 27:15		480-8231 4:20	87048 6:4	
35:10 36:2	2		87102 3:8	
39:4 43:9	2 45:23 46:21,22	5	87103 4:15	
year 30:21 35:18	49:21	5 2:12	87501 2:22 3:13	
55:15,15	20 4:23 27:18	50 26:11 38:9	3:18	
years 34:18	200 26:12	42:25 43:15	87504 5:4,15 6:9	
55:19	2008 48:2,8,8	500 2:6 3:8 4:14	88005 4:24	
Yellowstone	49:18,22	26:20	8th 69:17	
38:8	202 4:9	505 2:22 3:9,14		
yesterday 26:13	2020 1:12 69:17	3:18 4:15 5:4	9	
36:14,16 43:24	20240 4:9	5:15 6:4,10	9:00 68:5	
	2033 2:12	508-6281 3:24	916 2:7	
Z	2067 5:3,14	512 2:17 4:20	919 5:20	
	208-5432 4:9	5:10,21	95814 2:6	
		52401 1:14		