

NO. 141 Original

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In The  
SUPREME COURT OF THE UNITED STATES

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

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TRANSCRIPT OF JULY 1, 2021, REMOTE  
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL  
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH  
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at  
1:01 p.m.

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

FOR THE STATE OF TEXAS:

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

-and-

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

-and-

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

FOR THE STATE OF NEW MEXICO:

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

-and-

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

5 -and-

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

12 -and-

13 Mr. John Draper  
DRAPER & DRAPER, LLC  
14 325 Paseo De Peralta  
Santa Fe, New Mexico 87501  
15 (505) 570-4591  
john.draper@draperllc.com

16 -and-

17  
Ms. Cholla Khoury  
18 Mr. Zachary E. Ogaz  
NEW MEXICO ATTORNEY GENERAL'S OFFICE  
19 Post Office Drawer 1508  
Santa Fe, New Mexico 87501  
20 (505) 329-4672  
ckhoury@nmag.gov  
21 zogaz@nmag.gov  
22  
23  
24  
25

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

6 FOR THE UNITED STATES:  
7 Mr. James J. Dubois  
8 Mr. R. Lee Leininger  
9 U.S. DEPARTMENT OF JUSTICE  
10 999 18th Street, Suite 370  
11 Denver, Colorado 80202  
12 (303) 844-1375  
13 james.dubois@usdoj.gov  
14 lee.leininger@usdoj.gov

15 -and-

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

24 FOR THE EL PASO COUNTY WATER AND IMPROVEMENT DISTRICT  
25 NO. 1:

Mr. Renea Hicks  
LAW OFFICE OF MAX RENEH HICKS  
Post Office Box 303187  
Austin, Texas 78703  
(512) 480-8231  
rhicks@renea-hicks.com

1 FOR THE ELEPHANT BUTTE IRRIGATION DISTRICT:

2 Ms. Samantha R. Barncastle  
3 BARNCASTLE LAW FIRM, LLC  
4 1100 South Main, Suite 20  
5 Las Cruces, New Mexico 88005  
6 (575) 636-2377  
7 samantha@h2o-legal.com

8 FOR THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY  
9 AUTHORITY:

10 Mr. James C. Brockmann  
11 STEIN & BROCKMANN, P.A.  
12 Post Office Box 2067  
13 Santa Fe, New Mexico 87504  
14 (505) 983-3880  
15 jcbrockmann@newmexicowaterlaw.com

16 FOR THE CITY OF EL PASO:

17 Mr. Douglas G. Caroom  
18 Ms. Susan M. Maxwell  
19 BICKERSTAFF HEATH DELGADO ACOSTA, LLP  
20 3711 S. MoPac Expressway Building One, Suite 300  
21 Austin, Texas 78746  
22 (512) 472-8021  
23 dcaroom@bickerstaff.com  
24 smaxwell@bickerstaff.com

25 FOR THE CITY OF LAS CRUCES:

Mr. Jay F. Stein  
STEIN & BROCKMAN, P.A.  
Post Office Box 2067  
Santa Fe, New Mexico 87504  
(505) 983-3880  
jfstein@newmexicowaterlaw.com

1 FOR THE NEW MEXICO PECAN GROWERS:

2 Ms. Tessa T. Davidson  
3 DAVIDSON LAW FIRM, LLC  
4 4206 Corrales Road  
5 Post Office Box 2240  
6 Corrales, New Mexico 87048  
(505) 792-3636  
ttd@tessadavidson.com

7 FOR THE NEW MEXICO STATE UNIVERSITY:

8 Mr. John W. Utton  
9 UTTON & KERY, P.A.  
10 Post Office Box 2386  
11 Santa Fe, New Mexico 87504  
(505) 699-1445  
john@uttonkery.com

12 FOR HUDSPETH COUNTY CONSERVATION AND RECLAMATION  
13 DISTRICT:

14 Mr. Andrew S. "Drew" Miller  
15 KEMP SMITH, LLP  
16 816 Congress Avenue, Suite 1260  
17 Austin, Texas 78701  
18 (512) 320-5466  
dmiller@kempsmith.com

19 FOR THE SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS  
20 ASSOCIATION:

21 Mr. A.J. Olsen  
22 HENNIGHAUSEN OLSEN & MCREA  
23 604 North Richardson Avenue  
24 Roswell, New Mexico 88202  
25 (575) 624-2463  
ajolsen@h2olawyers.com

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COURT REPORTER:

Ms. Heather L. Garza  
WORLDWIDE COURT REPORTERS  
3000 Wesleyan Street, Suite 235  
Houston, Texas 77027  
(800) 745-1101  
heather\_garza@ymail.com

1                   **JUDGE MELLOY:** Good afternoon. This is  
2 Judge Melloy. Should we get started? I guess as we  
3 normally do, I'll start with -- let me see. My --  
4 okay. There we go. This is Judge Melloy, and let's  
5 get started. This is an Original No. 141 Texas versus  
6 New Mexico and Colorado. Let me -- we normally do  
7 start with asking folks to enter their appearance.  
8 Mr. Somach, who do you have there for Texas?

9                   **MR. SOMACH:** Yes, Your Honor. For  
10 Texas, this is Stuart Somach, counsel of record for  
11 the State of Texas. With me from my office are  
12 Theresa Barfield, Sarah Klahn, Mac Goldsberry, Robert  
13 Hoffman, Rich Deitchman. Also on the phone, I  
14 believe, is Bobby Skov, the Rio Grande commissioner  
15 for Texas; Pat Gordon, the former Rio Grande  
16 commissioner; Suzy Valentine, the engineer advisor for  
17 the Texas Rio Grande commissioner; Priscilla Hubenak  
18 with the Texas Attorney General's Office; William Cole  
19 and Beau Carter, with the Office of Solicitor General  
20 for the Texas Attorney General's Office.

21                   **JUDGE MELLOY:** Okay. How about New  
22 Mexico? Mr. Wechsler?

23                   **MR. WECHSLER:** Good morning, Your Honor.  
24 Jeff Wechsler for the State of New Mexico. We also  
25 have or will have this morning Cholla Khoury and Zach



1 Ogaz from the New Mexico Attorney General's Office;  
2 Marcus Rael, Luis Robles, and Susan Barela from Robles  
3 Rael & Anaya; Lisa Thompson and Michael Kopp from  
4 Trout Raley; John Draper from Draper and Draper;  
5 Shelly Dalrymple from the Interstate Stream  
6 Commission. We will also have our State Engineer and  
7 Rio Grande Compact Commissioner Mr. John D'Antonio;  
8 the New Mexico ISC director Rolf Schmidt-Petersen;  
9 Greg Ridgley, the general counsel for the Office of  
10 the State Engineer; and Arianne Singer, the general  
11 counsel for the ISC.

12 **JUDGE MELLOY:** All right. Mr. Wallace,  
13 anybody besides you?

14 **MR. WALLACE:** Yes. Good afternoon, Your  
15 Honor. Joining us today from Colorado are Preston  
16 Hartman from the Attorney General's Office; Scott  
17 Steinbrecher, deputy attorney general for Colorado;  
18 and Eric Olson, the solicitor general for Colorado.  
19 We also have Mike Sullivan, the deputy state engineer;  
20 and Craig Cotten, the engineer advisor for Colorado.  
21 Also present today are some representatives of  
22 Colorado water interests in the San Luis Valley, David  
23 Robbins, counsel for the Rio Grande Water Conservation  
24 District; Bill Paddock, counsel for the Rio Grande  
25 Water Users Association, and maybe joining us later

1 would be Richard Mehren, counsel for the Conejos Water  
2 Conservancy District.

3 **JUDGE MELLOY:** Okay. And for United  
4 States, Mr. Dubois?

5 **MR. DUBOIS:** Good afternoon, Your Honor.  
6 Jim Dubois for the United States. Also on from  
7 Justice is Jennifer Najjar, Lee Leininger, and Judy  
8 Coleman; and we've also got a couple of our paralegals  
9 on, Paulette Fogle, Amber Engelke, and Seth Allison;  
10 and from Reclamation, Ian Ferguson is on, and at least  
11 as I scan through the growing list, I think that's it.

12 **JUDGE MELLOY:** All right. The  
13 Albuquerque Water Utility Authority?

14 **MR. BROCKMANN:** Good morning, Your  
15 Honor. This is Jim Brockmann with the firm of Stein &  
16 Brockmann on behalf of the Albuquerque Bernalillo  
17 County Water Utility Authority, and joining me today  
18 is also John Stomp, the former COO and now law clerk.

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

20 **MR. CAROOM:** Good afternoon, Your Honor.  
21 Doug Caroom and Susan Maxwell for the City of El Paso.

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

23 **MR. STEIN:** Good afternoon, Your Honor.  
24 This is Jay Stein for the City of Las Cruces. Joining  
25 will be Delilah Walsh, the executive director of Las

1 Cruces Joint Utilities and members of her staff,  
2 including Adrienne Widmer, the deputy director, and  
3 Robert Caballo from the City Attorney's Office.

4 **JUDGE MELLOY:** All right. El Paso  
5 County Water Improvement District No. 1?

6 **MR. HICKS:** Yes, Your Honor, Renea Hicks  
7 here for the district. Ms. O'Brien could not be  
8 available today, so I'm unfortunately for her and for  
9 everybody, I suppose, standing in her stead. Joining  
10 us from the district in this call are Jesus Reyes,  
11 who's the district general manager, and Dr. Al Blair,  
12 who's the district's engineer.

13 **JUDGE MELLOY:** Elephant Butte Irrigation  
14 District?

15 **MS. BARNCASTLE:** Good afternoon, Your  
16 Honor. Samantha Barncastle for the Elephant Butte  
17 Irrigation District, and with me today is the manager  
18 of the district, Mr. Gary Esslinger, and Dr. King, our  
19 consultant.

20 **JUDGE MELLOY:** Okay. Hudspeth County  
21 Conservation and Reclamation District No. 1?

22 **MR. MILLER:** Good afternoon, Your Honor.  
23 This is Drew Miller representing the Hudspeth County  
24 District.

25 **JUDGE MELLOY:** New Mexico pecan growers?

1                   **MS. DAVIDSON:** Good afternoon, Your  
2 Honor. Tessa Davidson on behalf of New Mexico pecan  
3 growers.

4                   **JUDGE MELLOY:** New Mexico State  
5 University?

6                   **MR. UTTON:** Yes. Good afternoon, Your  
7 Honor. This is John Utton representing NMSU.

8                   **JUDGE MELLOY:** All right. Southern Rio  
9 Grand Crop Farmers -- Southern Rio Grande Diversified  
10 Crop Growers Association?

11                   **MR. OLSEN:** Good afternoon, Your Honor.  
12 A.J. Olsen on behalf of the Southern Rio Grande  
13 Diversified Crop Farmers.

14                   **JUDGE MELLOY:** I assume State of Kansas  
15 is not on. Anybody I missed?

16   (No response.)

17                   **JUDGE MELLOY:** All right. Well, we have  
18 a number of things to talk about this afternoon,  
19 mainly in the area of logistics, so let's -- let me  
20 start in no particular order, I guess, with the  
21 question that a couple parties have raised and one  
22 that I know is -- we need to talk about is -- is the  
23 video feed. What I -- what I am proposing we do is we  
24 will have a live video feed to any of the attorneys'  
25 offices who want to watch the video feed from the

1 courtroom. It will be -- it will be video only. The  
2 -- in other words, the -- the viewers in New Mexico or  
3 Colorado, Texas, California will not have the ability  
4 to participate. The only people who would be able to  
5 participate would be the people in the courtroom, and  
6 it's my current view that we would limit it to the  
7 attorney offices only. If clients or other interested  
8 parties wanted to view it, they're going to have to  
9 come to the attorney offices to do so. The -- I have  
10 talked with the technical -- technical folks here, IT  
11 people, here at the district court, and I think we can  
12 quite easily accommodate that. I also visited for a  
13 short time this morning with Brandon Brown with  
14 Worldwide technologies just to make sure that we're  
15 not promising something we can't do, and essentially  
16 what this would look like would be that the courtroom  
17 is equipped with four cameras, so we could have a  
18 screen in four -- in four sections if we wanted to;  
19 however, I would anticipate that for the trial  
20 purposes, that we'd only have a two -- a two-screen  
21 split screen. We would have one camera on the  
22 attorney questioning and one camera on the witness.  
23 We would also have the capability of having a third  
24 screen, which would be the evidence presentation, and  
25 the courtroom has the capability, as I understand it,

1 to have any attorney plug into their -- into the  
2 electronic system in the courtroom, their laptops or  
3 -- I assume via laptop or some type of computer and --  
4 and project any evidence or demonstrative exhibit they  
5 want onto both the courtroom monitors and onto the  
6 live stream. I specifically asked the clerk's office  
7 this morning whether any special software is needed to  
8 interface with the courtroom technology and the  
9 laptops, and I was told it's not. Any -- anything  
10 that you -- that shows up on your computer screen will  
11 show up on both the courtroom monitors and on the live  
12 feed, and the way the live feed would be handled is  
13 what I talked about with the district court was they  
14 -- they said it can just be done through Zoom, and we  
15 would just set up a Zoom session and -- and we would  
16 be able to then project the courtroom images through  
17 Zoom to the law firms who might be interested in doing  
18 it. It would -- it would be unlike what we're seeing  
19 right now where we have the little boxes across the  
20 top or -- or the -- sometimes people call it the Brady  
21 Bunch, multiple different screens. All you would see  
22 on the screen would be the two -- the split screen of  
23 the witness and attorney or -- or if an exhibit is  
24 being exhibited, the third screen with the -- with the  
25 exhibit. As I understand it, it's not overly

1 difficult to do any of this, particularly since we  
2 already -- the courtroom is already all wired and has  
3 all the cameras in place already. In talking to  
4 Mr. Brown this morning, he indicated there is another  
5 service called Courtroom Connect. He said he can do  
6 it either way, either through Zoom or through  
7 Courtroom Connect. The district court is not familiar  
8 with Courtroom Connect, so we may want to talk -- have  
9 those IT folks talk with Brandon or somebody else from  
10 Worldwide Reporting next week about whether one's  
11 better than the other. My -- my suggestion would be  
12 that some time within the next two weeks after we've  
13 had a chance to kind of do a little more work here on  
14 our end and, also, to check out the pros and cons of  
15 Courtroom Connect versus Zoom, that we do a demo, and  
16 I'm -- I would like to do it within the -- like I say,  
17 within the next two weeks where we would actually have  
18 it in the courtroom. We could have somebody, you  
19 know, playing the part of the attorneys' questioning,  
20 check the audio quality, check the video quality,  
21 check to see -- see if there's any technical issues  
22 that we're not anticipating that might arise. We can  
23 also then bring up some dummy exhibits, see how they  
24 work, and then -- then go from there. But -- but I've  
25 been assured from both the district court IT folks and

1 from Brandon that this is very doable and isn't overly  
2 complicated to do since we -- since the courtrooms are  
3 all wired anyway. So -- now, if we do that, we may  
4 have to set up two separate sessions if I do a demo,  
5 we may have to set up two separate sessions because if  
6 I do -- if I do a real-live demo, nobody will be able  
7 to give me any feedback or give us any feedback  
8 because what we're -- because it'll be -- it'll be  
9 view only from your perspective. We may have to have  
10 a view-only session, and you can have your technical  
11 folks there watching and -- and we'll run through the  
12 whole demo and then maybe sign off and come back on  
13 five or ten minutes later with -- with -- with your  
14 participation so you can tell us what problems you had  
15 or what feedback you think we need.

16 The question was raised in one of the  
17 letters if I have any objection to your technical  
18 folks talking to the IT people at the district court,  
19 and the -- and the answer to that is no, and I will in  
20 an order or notice to counsel subsequent to this  
21 hearing, I'll give you the names, e-mails, and  
22 telephone numbers of the -- of the contact people here  
23 at the district court who are most knowledgeable about  
24 these issues. So having said all that, questions,  
25 comments, concerns?



1                   **MS. DAVIDSON:** Your Honor, if I may, I'm  
2 going to jump in and presume to speak for New Mexico  
3 amici. None of the attorneys that represent New  
4 Mexico amici have offices below Elephant Butte  
5 Reservoir. I'm wondering if there is a way we could  
6 do a central location somewhere in Las Cruces where  
7 our clients could watch or have -- have access to the  
8 video. For them to have to travel to Santa Fe and  
9 surrounding areas in Roswell is -- is a three-hour  
10 drive at least, and I know that the stakeholders in  
11 the lower Rio Grande really do want to watch, at least  
12 my clients do, portions of the trial.

13                   **JUDGE MELLOY:** Okay. Well, it's  
14 something I can -- I'll give consideration to, to see  
15 if we can figure out something. I don't know -- I  
16 don't want to impose too much on the Las Cruces  
17 district court, but maybe there's some place in the  
18 Las Cruces courthouse that we could -- I'll just have  
19 to check with those folks. But let me just say this.  
20 I know that there probably would be a lot of clients  
21 who like to have it in their office. When I told the  
22 Supreme Court what we were doing, I indicated it would  
23 be attorney offices only. I'm reluctant to expand  
24 that beyond that or maybe a courthouse or something  
25 like that, but -- but I -- I'm reluctant to go beyond

1 the attorney offices.

2 **MS. DAVIDSON:** And, Your Honor, if it  
3 would help, we have a very close working relationship  
4 with the clerk at the district court office through  
5 the lower Rio Grande adjudication, and if it would  
6 help, I could contact them and see if they could set  
7 aside a room for us.

8 **JUDGE MELLOY:** Now, are you talking the  
9 state court or the district court -- federal district  
10 court?

11 **MS. DAVIDSON:** The state court.

12 **JUDGE MELLOY:** Okay. All right. I was  
13 thinking the federal court, but -- but we'll -- but  
14 the state court is also an option. Okay.

15 **MR. HICKS:** Your Honor?

16 **JUDGE MELLOY:** Yes.

17 **MR. HICKS:** Renea Hicks for the El Paso  
18 District. I think what we will try to do since my  
19 office is about 700 miles from the district office,  
20 and Ms. O'Brien's office is a four-hour drive from the  
21 district office in El Paso, I think we will try to see  
22 if we can make arrangements with the federal court in  
23 El Paso to find a room maybe for our people to go to  
24 if they want to, but my -- I have one other -- I just  
25 wanted to point that out. One other question I had is

1 Your Honor will be probably asking some questions of  
2 the witnesses, I'm guessing, who knows, and have  
3 comments. Will the screen be set up so that when that  
4 happens, we can see what you're saying?

5 **JUDGE MELLOY:** Yes and no. The short  
6 answer is that that's certainly possible. If it --  
7 if, as I understand it, the -- to move the camera over  
8 to me, if it -- or to -- let me -- let me say this.  
9 The same thing could come up with -- with a  
10 non-questioning attorney who wants to make an  
11 objection. What -- in talking to the district court  
12 and -- and subject to further consideration of this,  
13 it's -- it's not going to -- it's not going to be easy  
14 to switch -- switch -- swing the camera over as soon  
15 as the attorney asks -- wants to stand up and make an  
16 objection, then swing the camera back. So we -- you  
17 can hear -- you'll hear the objection. The mics will  
18 be live, but you probably won't see the objector. As  
19 far as putting the camera on me if I'm asking  
20 questions, we can certainly move the camera over to be  
21 on me, if it's -- you know, it's just a question of --  
22 of working the tech -- certainly the technology exists  
23 to do that or we could have a camera on me and that  
24 one turned off and then if I -- they can just push a  
25 button, as I understand it, and, now, we've got three

1 screens, the attorney, the witness, and me. So, I  
2 mean, it's doable, but there are certain logistical  
3 issues in moving cameras around the courtroom and  
4 swinging them around, but -- but it's doable.

5 **MR. HICKS:** Right. I understand if  
6 you're saying tell your witness just to speak up, we  
7 don't need to see you say that, but if you're asking  
8 some extended question, it would be helpful. But I  
9 understand the complications. Thank you.

10 **JUDGE MELLOY:** All right. Other  
11 questions or comments?

12 (No response.)

13 **JUDGE MELLOY:** Let me ask you this, if I  
14 were to set up a demo, let's say a week from Tuesday  
15 -- and let me look at my calendar here -- which would  
16 be the 13th, would that work? Is anybody -- you know,  
17 this is the kind of thing I don't think everybody has  
18 to be here for, but if we were to do a demo at, say,  
19 roughly the same time, 1:00 Central, would that work  
20 for everybody? Anybody have a problem.

21 **MR. SOMACH:** That works for Texas.

22 **JUDGE MELLOY:** Anybody who really -- and  
23 I assume that everybody would -- anybody think that's  
24 not a good idea, I think -- I think we should sooner  
25 rather than later see how this is going to work and if

1 it's -- it's as easy as you seem to think it's going  
2 to be.

3 **MR. WECHSLER:** Your Honor, this is Jeff  
4 Wechsler. We -- we think it's a good idea. We'll  
5 make ourselves available. I do have one question.

6 **JUDGE MELLOY:** Sure.

7 **MR. WECHSLER:** Which is at one point we  
8 had been discussing the possibility of some witnesses  
9 being able to appear remotely, but thus far, what  
10 we've been talking about is a live feed that was  
11 available to observe, but not participate. Are you  
12 still anticipating some ability for some witnesses to  
13 participate remotely?

14 **JUDGE MELLOY:** Yes. And, in fact, what  
15 -- I actually talked to Mr. Brown about that. I'm  
16 glad you brought that up. I forgot to mention that.  
17 Basically if we had a witness appearing remotely, it  
18 would be really no different than the way you've done  
19 your depositions. You would -- you -- we probably  
20 wouldn't -- there would be no need to even be in the  
21 courtroom if the witness were appearing remotely. If  
22 a witness were in Las Cruces, for instance, and -- and  
23 -- or El Paso and Ms. O'Brien was there, or Las  
24 Cruces, and Ms. Barncastle was there, and they could  
25 be in that location, we'd just set up a Zoom, be

1 really not that much different than a Zoom deposition.  
2 And we may actually -- and it may actually be a couple  
3 days when it would be a good idea to do that, because  
4 in the time of the trial block that we're talking  
5 about, we have two federal holidays that I really  
6 can't open the courthouse for, Columbus Day and  
7 Veterans Day. I don't mind working on either of those  
8 days, but those might be good days to do some -- if we  
9 need to do some Zoom testimony to maybe block those  
10 days aside for that type of testimony. But -- but,  
11 yes, we can do it, but it just -- it's going to  
12 basically look like a Zoom deposition, and like I say,  
13 nobody really needs to even be in the courtroom when  
14 we're doing it. You can do the questioning from  
15 wherever you want to. Does that answer your question?

16 **MR. WECHSLER:** It does. Thank you.

17 **JUDGE MELLOY:** Let me ask a couple -- a  
18 couple other questions. The -- there was some  
19 discussion at some point about wanting daily copy. Is  
20 that still something that you're going to want or can  
21 you rely upon the -- the rough -- the rough transcript  
22 that's available almost immediately or -- or what --  
23 what's your thoughts on that?

24 **MR. SOMACH:** Well, we'll want something  
25 daily. Whether it's a final or a rough, I -- I don't

1 think is important, but we will want something on a  
2 daily basis.

3 **JUDGE MELLOY:** I think it's important to  
4 the court reporter. I mean, I think I -- I don't want  
5 to speak for Heather, but a final daily copy is --  
6 requires multiple reporters doing the -- doing -- it's  
7 a lot more resources involved in doing daily copy. Is  
8 it your intent to have the court reporter here or the  
9 court reporter participate by -- remotely? Have you  
10 thought about that?

11 **MR. DUBOIS:** We have talked to Heather  
12 about that, Your Honor, and she is willing -- she is  
13 willing to do it either way. Obviously, I mean, she's  
14 based out of Houston. To the extent she can do it  
15 remotely, that would be fine, but she has said that if  
16 the parties prefer her to be in the courtroom, she  
17 will be in the courtroom. And, frankly, if it's  
18 Heather doing the roughs, I'm fairly comfortable with  
19 -- with the roughs, because they're scarily not very  
20 rough.

21 **JUDGE MELLOY:** Okay. Good. Let me ask  
22 Heather since, if she doesn't mind. What -- would you  
23 -- if we just use roughs, would you do the whole thing  
24 or would you have to have a second reporter?

25 **THE REPORTER:** I plan on doing the whole

1 thing either way, and I'm capable of doing daily copy  
2 finals or rough drafts. It's whatever the parties  
3 want.

4 **JUDGE MELLOY:** You can do daily copies  
5 yourself?

6 **THE REPORTER:** Yes.

7 **JUDGE MELLOY:** Well, what do you think  
8 about doing -- doing reporting remotely? Is it  
9 something you -- you feel comfortable doing? I mean,  
10 it -- normally, we'd have the reporter right in front  
11 of the witness.

12 **THE REPORTER:** Correct. Yeah, I mean, I  
13 think it can definitely be done. I'm sorry. I'm  
14 trying to talk and take down my own words at the same  
15 time. But I've been told it definitely can be done.  
16 We would need to just wire the courtroom to make sure  
17 that I can hear everybody appropriately. But like I  
18 said, I'm willing to do -- I'm really leaving it up to  
19 you guys. I'm willing to be there live if that's kind  
20 of everybody's preference. It's -- it's really up to  
21 y'all.

22 **JUDGE MELLOY:** Okay. Well, let's --  
23 we'll have to give that some more thought. Well, let  
24 me ask --

25 **THE REPORTER:** And maybe --



1                   **JUDGE MELLOY:** Let me ask -- oh, go  
2 ahead. I'm sorry.

3                   **THE REPORTER:** Sorry to interrupt. I  
4 was going to say maybe whenever this demo is done in  
5 about a week or so, we could give that a trial run, as  
6 well, and see if I'm able to hear then. I think that  
7 would be a good trial run, too, to make sure that I'm  
8 able to hear everything then, if that's the case.

9                   **JUDGE MELLOY:** Okay. And I -- I should  
10 mention that we will be -- be asking the attorneys to  
11 do their examination seated from counsel table. What  
12 I've been told is the -- from the district court is  
13 the -- the audio quality is -- and microphones when  
14 people are at the counsel table are much -- much  
15 superior to when they're at the lectern. If -- if --  
16 it just works a lot better if people are at counsel  
17 table and the mics and so on, and, also, you'll  
18 probably have your laptops there, so we will be doing  
19 -- that's -- that's the way we're going to be doing  
20 the examination. Also, it would be -- I would not  
21 allow recording of the proceedings. I don't think  
22 you're probably going to have the capability of the  
23 view only in any event, but -- but there would be no  
24 -- there would be no recording allowed. Whether we  
25 want to record from the courtroom, probably not, but

1 it's -- it's an issue we could -- we can think about  
2 going forward. I think that pretty much covers my  
3 thoughts on the -- on the video feed. If anybody's  
4 got any other questions? And let me ask --

5 **MR. BROCKMANN:** Your Honor?

6 **JUDGE MELLOY:** Yeah.

7 **MR. BROCKMANN:** This is Jim Brockmann.  
8 On the 13th, the day that you're talking about the  
9 demo, I've got a meeting outside the office. Would  
10 the demo be limited to the live feed to the attorneys'  
11 offices only or if you're proposing that by Zoom, I  
12 could participate from a different location other than  
13 my office?

14 **JUDGE MELLOY:** You can participate --  
15 well, that's -- well, as I understand it -- well, when  
16 I say "attorneys' offices," I think I want to -- what  
17 I'm saying, and I don't want to get too far out on a  
18 limb on my technical knowledge here, is I'm really  
19 talking the attorneys, and -- and, you know, if you  
20 want to -- if you want to observe from your home, you  
21 want to observe from a remote location, that's -- you  
22 know, you'll have the -- you'll have the Zoom  
23 invitation, and you can -- you can dial in from  
24 anywhere, as I understand it. And so I -- I -- I'm --  
25 as I understand it, I'm not limiting it to you having

1 to physically be in your office. You can watch the  
2 demo anywhere.

3 **MR. BROCKMANN:** I think that's helpful  
4 to know, because my understanding was somehow it would  
5 be limited to the physical location. I think, if I'm  
6 understanding right, you just don't want counsel of  
7 record to essentially share the link so that several  
8 other people would join using that link?

9 **JUDGE MELLOY:** Exactly. Exactly.

10 **MR. BROCKMANN:** Okay. Thank you.

11 **JUDGE MELLOY:** Let me just look if I  
12 have any other notes here. I think that kind of  
13 covers what I -- what I wanted to discuss about that  
14 issue. Anybody -- anybody have anything further they  
15 want to -- they want to talk about? Let me -- let me  
16 ask you this: Other than if I request any paper  
17 copies of exhibits, does anybody anticipate using any  
18 paper for the trial? Are all exhibits going to be on  
19 your laptops and exhibited electronically? Anybody  
20 want to --

21 **MR. WECHSLER:** Yeah. For the State of  
22 New Mexico, our plan is to have three working copies  
23 available, one for the questioning witness -- rather  
24 the questioning attorney, one for the witness, and  
25 then a bench copy for you for convenience. I've just

1 run into too many issues at trials with purely  
2 electronic exhibits, and I also find sometimes with  
3 larger exhibits, it's helpful for the witness to be  
4 able to look themselves to find a location of  
5 something. But we -- we will also have electronic  
6 exhibits, obviously, and will be displaying those  
7 exhibits using Trial Director technology.

8 **JUDGE MELLOY:** So you'll -- so people  
9 who are watching remotely will be able to see what  
10 you're asking about?

11 **MR. WECHSLER:** Yes, Your Honor. The --  
12 we will have somebody operating Trial Director, and  
13 they're be following as carefully as they can on the  
14 exhibits.

15 **JUDGE MELLOY:** Okay. Mr. Somach, what  
16 do you think?

17 **MR. SOMACH:** That sounds about right,  
18 but I was curious as to whether or not there would be  
19 a hard copy for opposing counsel, also?

20 **MR. WECHSLER:** Your Honor, to answer  
21 Mr. Somach's question, we -- we hadn't planned on it,  
22 Mr. Somach, but if you want to talk about, you know,  
23 each of the parties simply reproducing an extra copy  
24 for the -- for the other parties, we'd be happy to  
25 have that conversation.

1                   **JUDGE MELLOY:** Okay.

2                   **MR. SOMACH:** We can have that  
3 conversation. That's fine.

4                   **MR. WECHSLER:** Okay.

5                   **JUDGE MELLOY:** Let's just kind of segue  
6 a little bit about the issue of having space within  
7 the courthouse, and what you just said, Mr. Wechsler,  
8 helps me with that a little bit. So you will probably  
9 want some space to -- to store exhibits; is that  
10 accurate?

11                   **MR. WECHSLER:** It is accurate, Your  
12 Honor. What I've done in the past with, again, large  
13 document intensive cases is we were able to, after  
14 consulting with courtroom security, bring in -- you  
15 know, at Home Depot or places like that, you can get  
16 plastic shelving that is easy to set up, and so our  
17 intent, subject to your direction and the -- the  
18 advice of the security is to bring in some of those  
19 plastic shelving and to put our exhibit notebooks  
20 directly on that wherever space is provided.

21                   **JUDGE MELLOY:** You're not talking about  
22 in the courtroom?

23                   **MR. WECHSLER:** Wherever. It could be at  
24 the back of the courtroom. It could be in a separate  
25 room. Wherever you prefer.

1                   **JUDGE MELLOY:** Okay. Well, we have --  
2 we have plenty of space available for -- that we can  
3 give each of the parties their own breakout area, and  
4 we have what was known as an ADR suite, which -- which  
5 we really don't used, which the court -- district  
6 court really doesn't use anymore, which is quite  
7 large. We could give that to a party. We also have  
8 the jury room that's immediately adjacent to this  
9 courtroom, which is quite -- I think would be quite  
10 comfortable for somebody who was looking -- you know,  
11 is fully wired and everything, and we have other  
12 spaces. And we have attorney witness rooms, and we  
13 have other spaces, as well. I guess the question I  
14 have -- well, first of all, let me ask Mr. Dubois: Do  
15 you anticipate working out of the U.S. Attorney's  
16 Office?

17                   **MR. DUBOIS:** We are trying to work with  
18 them to get space. It is still a bit up in the air, I  
19 believe.

20                   **JUDGE MELLOY:** And I should just  
21 mention, I did talk to the acting U.S. attorney  
22 yesterday or the day before, and I think they're  
23 anticipating that you will probably get space in their  
24 -- within their office suite, because they have plenty  
25 of space. The only -- the only qualification is that

1 right now, DOJ has very severe limits on the number of  
2 people who can be in the office. They're still under  
3 COVID protocol. But assuming the COVID protocol is  
4 lifted by then, there should be plenty of space.

5 **MR. DUBOIS:** Right. We're getting sort  
6 of the -- the keyword in your -- in your statement,  
7 Your Honor, was probably, and that's unfortunately  
8 kind of where we still are is probably.

9 **JUDGE MELLOY:** Yeah.

10 **MR. DUBOIS:** But that is -- but that is  
11 our anticipation. I mean, I -- we're hoping that by  
12 then, things are running smoothly enough that we -- we  
13 have access to space.

14 **JUDGE MELLOY:** And -- and is there any  
15 desire between Texas and United States to have space  
16 together or adjacent or anything of that nature, given  
17 your alignment in presentation of testimony and so on?

18 **MR. SOMACH:** That certainly would be  
19 helpful logistically if that could be arranged.

20 **JUDGE MELLOY:** Okay. Well, I think we  
21 can probably work out a couple different things there.  
22 One is we're going to have to wait until after July  
23 20th, because I understand from the U.S. Attorney that  
24 that's the date that the DOJ is going to advise all  
25 the local offices as to what the COVID protocol, if

1 any, will be going forward, and so we'll have a better  
2 idea what's available within U.S. Attorney's Office  
3 and whether they would give both Texas and the U.S.  
4 space adjacent to each other. That's something I can  
5 discuss with the U.S. Attorney, but we can probably  
6 work something out along that would be -- that would  
7 be workable. Do you need -- well, we'll -- let's wait  
8 until the 20th, and we'll have to figure that out.  
9 But -- but just -- just know that there's plenty of  
10 space available, and we can find -- we can find space  
11 for -- for, I think, everybody who may need it.

12 Do any of the amici feel they're going  
13 to want space in the courthouse?

14 **MS. BARNCASTLE:** Your Honor, this is  
15 Samantha Barncastle for the Elephant Butte Irrigation  
16 District. I do anticipate attending trial in person  
17 for large portions of the trial, and I don't know that  
18 I'm necessarily going to need separate space, but I am  
19 sensitive to the fact that some of the parties may  
20 need their own discussions separate and apart from us,  
21 and we may need our own room while we're there.

22 **JUDGE MELLOY:** I can certainly get you  
23 that. As long as you don't need a lot of -- a lot of  
24 room to store files, we have several attorney  
25 conference rooms that we can -- that we can set aside.



1 You know, they're usually big enough for a table that  
2 seats four or six people.

3 **MS. BARNCASTLE:** Well, I'm a one-person  
4 circus, so I won't have a whole ton of people in tow,  
5 and I don't anticipate needing too many files of my  
6 own unless and until things get off the rails, and I'm  
7 asking for the ability to participate separate and  
8 apart from the main parties. I don't certainly hope  
9 that that happens, but at least as I stand here today,  
10 I think a small room, a closet -- room closet  
11 somewhere would accommodate me.

12 **MR. HICKS:** Your Honor?

13 **JUDGE MELLOY:** Yeah.

14 **MR. HICKS:** Your Honor, Renea Hicks for  
15 the district, El Paso District, and I anticipate we  
16 will have a small contingent there. Maybe not quite  
17 as small as EBID, but pretty close to that small, so I  
18 anticipate we would need a small space, too.

19 **JUDGE MELLOY:** Well, we -- we have, like  
20 I say, several attorney conference rooms that'll  
21 accommodate four or six people, particularly if you're  
22 not doing a lot of file storage.

23 **MR. BROCKMANN:** Your Honor, this is Jim  
24 Brockmann. Just a quick question along those same  
25 lines. I think similarly, if -- if we come in and out

1 during separate portions, we'd probably be looking for  
2 a small conference room, but can you remind me, also,  
3 the size of the courtroom, and you also mentioned an  
4 overflow courtroom for people that will actually be  
5 observing the trial.

6 **JUDGE MELLOY:** Well, the courtroom is  
7 3,000 square feet, and I -- what I'll do when we do  
8 the demo is I will pan around the courtroom so you can  
9 see what's available. I'm not anticipating that, with  
10 the live feed, we'll have as many people -- there --  
11 we'll need the overflow courtroom. What I would --  
12 what we're -- would anticipate doing is for -- for any  
13 amici who are there, the -- the jury box seats 18  
14 people. We'll put the amici in the jury box. I doubt  
15 there will be more than 18 here at a time. And, plus,  
16 we'll have the gallery, which seats maybe 40 people.  
17 It's not a big gallery. You know, a new courthouse --  
18 this is a brand-new -- relatively new courthouse, and  
19 so the well takes upmost of the space. We can seat  
20 probably another 30 to 40 in -- in the spectator  
21 section if we need to. So I -- I'm not anticipating  
22 using an overflow courtroom, but if we get to that  
23 point, we can do it. We'll find some place. Which  
24 then that brings up another issue. How many people do  
25 the principal parties anticipate having on their trial

1 team in the courtroom? What are you thinking,  
2 Mr. Somach?

3 **MR. SOMACH:** We'll have four or five in  
4 the courtroom. We'll shovel people back and forth  
5 from -- I mean, with the -- the live feed, I will be  
6 able to keep folks back, but I thought at the maximum,  
7 it would be four to five at any one time. That --  
8 that appears to be the way it's breaking out at this  
9 point in time.

10 **JUDGE MELLOY:** And, Mr. Wechsler, what  
11 do you think?

12 **MR. WECHSLER:** I would say similar, Your  
13 Honor. I think it will depend on the witnesses that  
14 are up, but four to six at any given time would be the  
15 maximum.

16 **JUDGE MELLOY:** Okay. And the United  
17 States, probably fewer, I'm guessing, but maybe not?

18 **MR. DUBOIS:** I think four or five is  
19 probably about right.

20 **JUDGE MELLOY:** Okay. Well, the  
21 courtroom is set up right now for counsel table to --  
22 to accommodate six people so, and I guess I haven't  
23 really asked Mr. Wallace. What -- what do you think  
24 your level of participation is going to be?

25 **MR. WALLACE:** Your Honor, at this time I

1 don't think we'd need more than a table for two.  
2 Colorado anticipates starting off with two attorneys,  
3 and we may go down to one through significant portions  
4 of the trial, but we would request a table; and as far  
5 as a prep room, a smaller one would suffice. I  
6 imagine we're getting paper copies of the exhibits, it  
7 sounds like, from the other parties, so that'll  
8 probably take up most of the space.

9 **JUDGE MELLOY:** And do you -- do you  
10 anticipate that you will be physically present for the  
11 entire trial or would you do some of it by watching  
12 the video feed?

13 **MR. WALLACE:** At this time, we're  
14 thinking we could do remote observation, depending on  
15 the type of witnesses, but for other witnesses, we  
16 would want to be present.

17 **JUDGE MELLOY:** Okay. So I'm kind of --  
18 I sort of mapped out where I'm going to -- where the  
19 three principals, other than Colorado are going to be,  
20 we'll have to figure out where to put your small  
21 table, but we'll find a place for you, Mr. Wallace.

22 **MR. WALLACE:** Thank you.

23 **JUDGE MELLOY:** All right. Any other  
24 questions about that issue?

25 (No response.)

1                   **JUDGE MELLOY:** Then let me -- let me  
2 talk about a couple quick issues that I think we can  
3 resolve. I think it was Mr. Somach in his letter  
4 raised the issue of when I said that things were to be  
5 filed electronically in one copy for the court, did I  
6 mean all the exhibits, and -- no. I'd like the  
7 exhibit list and the witness list, but the exhibits  
8 themselves do not have to be in hard copy. As I  
9 understand it, from what we've discussed today, the  
10 attorneys will be preparing hard copies when they  
11 actually present the exhibits, but we don't need -- I  
12 don't need those before -- before trial. So -- and,  
13 also, I think Mr. Wechsler asked the question about  
14 joint exhibits. I guess my thought was that all four  
15 parties would agree if it's a joint exhibit. I  
16 suppose if -- I hadn't really thought much about if  
17 two people agree and one doesn't, how -- I supposed it  
18 isn't a joint exhibit at that point, I guess it's just  
19 proposed by two parties, but I -- I guess -- I don't  
20 know. Do you have any thoughts about that,  
21 Mr. Wechsler, or how we want to handle that?

22                   **MR. WECHSLER:** I agree that joint  
23 exhibits should be those that all four parties have  
24 agreed on, and there has been significant discussion  
25 about that. I know there's somewhere over 300 mostly

1 in categories that the parties have agreed upon. I  
2 think those exhibits that, say, one party maintains an  
3 objection upon should simply be offered in the normal  
4 course.

5 **JUDGE MELLOY:** And -- and -- and if one  
6 party wants to offer it and a second or third party  
7 wants to join in the offer, that's certainly  
8 agreeable. So all right.

9 All right. Any other logistical issues  
10 we need to talk about before we turn to the -- to the  
11 site visit? If not, let's talk about --

12 **MR. DUBOIS:** Your Honor, one of the  
13 logistical issues that was raised in -- in the letter  
14 from Texas and the U.S. was the timing of trial down  
15 in either Las Cruces or El Paso because the logistics  
16 of going back and forth, what we had suggested was  
17 that -- well, assuming -- assuming that the trial is  
18 still shooting to be finished by December 17th, that  
19 the last two weeks be perhaps done in El Paso and --  
20 and Las Cruces, but there's a significant cost and  
21 logistics issue of moving folks back and forth sort of  
22 in the middle of trial to go from Cedar Rapids to the  
23 Rio Grande Valley and then back to Cedar Rapids so  
24 that's at least something, I think, that needs some  
25 discussion and/or clarity.

1                   **JUDGE MELLOY:** Well, yes. I was going  
2 to talk about the trial schedule separately, but  
3 that's fine.

4                   **MR. DUBOIS:** Okay.

5                   **JUDGE MELLOY:** We can talk about that  
6 now. When -- I've kind of rethought -- my thinking on  
7 the trial has -- has evolved over the last several  
8 weeks or several months. I know I had at one point  
9 said two weeks on, one week off. I think that's  
10 probably not necessary if we're going to try to get  
11 the trial done in -- in a reasonably-prompt fashion.  
12 So what I'm -- what I'm proposing is that we go --  
13 take -- go pretty much straight through with exception  
14 of two weeks, and right now, I'm looking at taking off  
15 the week of October 24th and taking off the week of  
16 Thanksgiving, otherwise, we would be in trial every  
17 week. Does that present any problems for anybody?  
18 You know, I -- if -- so anyway, that's my thought. We  
19 would do five days and -- and just plow through. Now,  
20 if -- if I adopt what Texas and the United States has  
21 suggested as a trial limitation, which basically is  
22 four weeks for each party with maybe a couple days for  
23 Colorado and then some rebuttal, that would mean the  
24 trial would be done by the middle of November. Does  
25 anybody disagree with that or what is -- am I -- am I

1 reading that incorrectly, if we follow that schedule?

2 **MR. STEIN:** Your Honor, this is Jay  
3 Stein. I have a comment. I think the -- the schedule  
4 that you're suggesting is expeditious but seems to me  
5 to be very, very quick. I was -- I had the  
6 opportunity to participate in several original  
7 actions. In the initial -- in the case on the  
8 Arkansas River, the Kansas v. Colorado case in the  
9 early '90s, they presented the historian through the  
10 State of Kansas, Doug Littlefield. He was on the  
11 stand for two weeks in direct examination, Your Honor,  
12 and that was before he was turned over for  
13 cross-examination, and that took part of the third  
14 week, and then there was redirect. And that was  
15 important to provide a complete history and record of  
16 the Arkansas River Compact, which was the basis and  
17 the foundation for the Compact enforcement process in  
18 that case. That's an experience I've had that I'd  
19 like to remind the Court on with respect to the time  
20 in question. Certain important witnesses can be on a  
21 considerable period of time.

22 **MR. WECHSLER:** Your Honor, on the -- on  
23 the -- I think that the straight through, we can make  
24 that work. Those two weeks that you propose also will  
25 work for the State of New Mexico. We don't agree that



1 125 hours is enough time, and I'll say a little bit  
2 more about that. We do agree with the proposal from  
3 Texas and the United States in that we agree that  
4 Texas and the United States should be given an equal  
5 amount of time with the State of New Mexico, which you  
6 seem to agree upon, but 125 hours we think is not  
7 enough. As you know, the Court has been clear that it  
8 prefers procedures in original jurisdiction cases that  
9 allow the case to be presented in its full strength.  
10 There's a number of cases that we can point to for  
11 that proposition. In -- in preparing for this  
12 hearing, we had the benefit of looking over the  
13 exhibit -- I'm sorry -- witness lists that were  
14 exchanged, and just in thinking about our case and  
15 thinking about the will-call witnesses, there are 31  
16 will-call witnesses for New Mexico. 16 of those are  
17 experts. We went through, and we estimated the amount  
18 of time we thought it would take to present those  
19 witnesses, and we tried to be realistic, and what we  
20 came up with was 148 hours for direct testimony. We  
21 also looked at the amount of time we thought it would  
22 take to cross-examine the Texas and U.S. will-call  
23 witnesses, again, not including the may-call. In  
24 their, we estimated, again, trying to be realistic,  
25 approximately 48 hours. That gets us to about 200

1 hours per side. You know, from our perspective, we  
2 think that it's better to plan for a longer trial, and  
3 then it's always easier and better if we're able to be  
4 more efficient and finish earlier, so we think that  
5 what ought to be done is that each side be given 225  
6 hours, and I -- I -- on each side, I would include one  
7 side being Texas and the U.S., the other being New  
8 Mexico and Colorado. We think that's realistic. It  
9 sets limits. It's achievable. That would give a  
10 total of 450 hours, which ends up being more like 15  
11 weeks, if you assume six hours per day, and that would  
12 be our proposal if Your Honor is inclined to be  
13 setting limits.

14 **JUDGE MELLOY:** Which means we would not  
15 get done before the end of the year.

16 **MR. WECHSLER:** Unless we were more  
17 efficient, that's true.

18 **JUDGE MELLOY:** Mr. Somach, you had  
19 proposed significantly less. What's your thought?

20 **MR. SOMACH:** That's still what we  
21 propose. It does also allow if there's some  
22 contingencies that are -- that exist, it does allow  
23 for extra days before December 17th. You know, so it  
24 -- there could be some flexibility imbedded there, if  
25 imbedded flexibility is a thing. But, you know, based

1 upon contingencies that you could evaluate at -- at  
2 the time of trial. In response generally, you know,  
3 it's our view that what Mr. Stein said is exactly  
4 right. If there are no limits, you're going to have a  
5 historian there for weeks and weeks, which is just  
6 simply unnecessary. I think we all have faced limits  
7 in various trials that we've had, some very, very  
8 stringent in terms of limiting the number of witnesses  
9 --

10 **JUDGE MELLOY:** All of a sudden, you're  
11 muted. We lost your audio.

12 **MR. SOMACH:** Can you hear me now? Does  
13 that help?

14 **JUDGE MELLOY:** Yes.

15 **MR. SOMACH:** This is a brand-new  
16 computer, and it -- it will change my audio right in  
17 the middle so let me know if it occurs again, and I  
18 will -- will go back to whatever I was using for the  
19 last time. But, you know, our general view is unless  
20 limits are placed on it, we will be at this well into  
21 next year, and it's just not necessary. We think we  
22 evaluated the time, and we -- it wasn't just us. I  
23 mean, you can hear from Mr. Dubois, too, in terms of  
24 -- of our assessment of time, but unless there are  
25 limits placed on, then exactly what Mr. Stein said

1 will occur. We think that 450 hours is way longer  
2 than it needs to be done. We think 125 hours with  
3 some room for rebuttal is exactly appropriate for this  
4 case, and that both sides ought to be able -- all  
5 sides ought to be able to put their -- their testimony  
6 in that period of time, but Mr. Dubois, I don't know,  
7 may have some additional comments.

8 **JUDGE MELLOY:** Mr. Dubois, do you want  
9 to say anything about this?

10 **MR. DUBOIS:** Excuse me. I think that  
11 Mr. Somach is right, that if the Court would like to  
12 get this done by -- before Christmas, you're going to  
13 have to put on some tighter limits than suggested by  
14 New Mexico. The 125 hours we propose will get you  
15 done by roughly December 17th with some leeway for an  
16 additional week or two. It really is, Your Honor, a  
17 matter of -- of whether you're going to put some  
18 limits on this or whether you're willing to let this  
19 be a very, very open-ended trial and create the  
20 variables that Mr. Stein was discussing. We think  
21 that the 125 is a reasonable time frame for getting  
22 this case on for what it is. I -- we need to  
23 understand how you feel about trying to bring this to  
24 a close this year.

25 **JUDGE MELLOY:** That's certainly my

1 intention. You know, if -- if this -- if this case  
2 drags on too long, what's going to happen is  
3 presumably the attorneys are going to want some --  
4 some period of -- of -- of time to file post-trial  
5 briefs, and that gets us then well into the spring of  
6 -- of -- of 2022. May not get a report out until  
7 summer/fall of 2022, and it's -- it would not be -- it  
8 would not be beyond the realm of possibility that --  
9 that we could miss the whole 2022/'23 Supreme Court  
10 term, and it would be -- I'm sort of looking at the  
11 whole -- the whole schedule trying to make sure  
12 there's sufficient time for the -- for the Supreme  
13 Court to take this up in the '22/'23 term, and if we  
14 push it back too far, we're pushing it back to a whole  
15 separate term of the Supreme Court. Now, maybe they  
16 won't schedule argument. Who knows. But -- but  
17 assuming they do, if you don't have something ready  
18 for their submission by July -- or by January or  
19 February, they're probably not going to hear it until  
20 the next -- until the next fall.

21 **MR. BROCKMANN:** Your Honor, if I might,  
22 this is Jim Brockmann. The -- I guess my concern in  
23 terms of trying to go too fast is we're not talking  
24 about typical district court matter. I -- I mean, I  
25 know you've got your order of reference from the

1 court. We all know about the jurisprudence about the  
2 full development of the facts in original actions, but  
3 we've got hundreds of millions of dollars of  
4 livelihood at stake here between farming and municipal  
5 interests, and to put an artificial limit on it, it  
6 just -- I don't think we want to end up in another  
7 Florida/Georgia situation where it has to be remanded  
8 back to the Master for further development of the  
9 facts if we put artificial limits on it. I -- I'm --  
10 you've got a long history on the bench, and I'm sure  
11 you can prod the parties along if people are wasting  
12 time, but for my two cents, it's just too important of  
13 a case to -- to rush to artificial limits. I think  
14 with your direction and some discretion from counsel,  
15 that can be hurried along, but not in such a way that  
16 the parties can't present their -- fully present their  
17 cases. Thanks for letting me be heard.

18 **MR. WECHSLER:** If --

19 **MS. BARNCastle:** Your Honor -- I  
20 apologize, Mr. Wechsler. Go ahead.

21 **MR. WECHSLER:** Thank you. If I may,  
22 Your Honor, I just wanted to address a couple of the  
23 points that were made. It is true, I have tried cases  
24 with limits, and I do understand that that is  
25 workable. I can tell you in none of the cases --

1 original cases that I've been involved in were there  
2 limits, nor am I aware of any being placed. There  
3 were other mechanisms by which Special Masters tried  
4 to expedite the proceedings, but not hard-capped time  
5 limits. I appreciate that Texas and the United States  
6 think they can put on their case in 125 hours, and  
7 they ought to be allowed to do so, but I don't think  
8 that they should try and place limits on our case that  
9 we don't think are realistic. All of that being said,  
10 I don't want it to sound like we are suggesting no  
11 limits. I mean, we are mindful of your needs, the  
12 court's needs, the parties' needs. We simply think  
13 that the 225 is a realistic, but achievable limit that  
14 will still expedite matters. As to the court  
15 schedule, again, in my experience, if we're able to,  
16 let's say, finish in January, post-hearing briefs are  
17 due within a couple of months, it gives you several  
18 months to be able to complete the, I guess it would be  
19 third interim report at this point, deliver it to the  
20 court prior to the reconvening of the court in the  
21 fall. Oftentimes that would then be taken up at the  
22 court's first conference. There will be an order on  
23 the scheduling of potential exceptions in the first  
24 omnibus order of the court's session, which comes at  
25 the end of September or the beginning of October, and

1 in our experience when Special Master reports are  
2 taken up at that omnibus order, then there's a  
3 briefing period, and we've seen those cases argued as  
4 early as January of the -- you know, the following  
5 that September.

6 **JUDGE MELLOY:** Well, I understand the  
7 argument about developing the record, and I certainly  
8 want to do that, but on the -- the flip side of this  
9 is -- is as you've alluded to, Mr. Wechsler, is the  
10 fact that other Special Masters have used other  
11 techniques to move the cases along, and, you know --  
12 and we've agreed, at least at this -- up to this  
13 point, to not require any of the direct testimony to  
14 be in written form. I mean, that's one way we could  
15 shorten up the trial right there is we could just say,  
16 okay, put -- put your -- put your direct in by written  
17 testimony and -- and then we'll just open up for  
18 cross-examination. I mean, that would shorten it up  
19 significantly. So I think there has to be some  
20 tradeoffs here of -- of not opening it up to an  
21 unlimited amount of time without then putting some  
22 other restrictions in, and -- so -- well, I want to  
23 think about this a little bit, but I -- I really would  
24 like to finish it this year, to be honest with you,  
25 and not carry it over to the -- to the -- past the



1 holidays and into the new year. But let me go back to  
2 what I sort of started this whole conversation with,  
3 which was the two weeks in El Paso and Las Cruces. I  
4 don't necessarily object or have a problem with that  
5 being at the end of the trial, understanding that the  
6 end of the trial may not be exactly the days we think  
7 it's going to be. How does that work with the witness  
8 presentation, though? I -- I had assumed that we  
9 would tend to take the two -- we'd use those weeks for  
10 -- for more local witnesses who we wouldn't want to  
11 necessarily fly up here, but would -- are those -- are  
12 those witnesses that can be taken at the end of the  
13 trial? Are they some that need to be taken earlier so  
14 that their testimony can provide foundation for other  
15 testimony? How do people feel that's going to work?

16 **MR. STEIN:** This is Jay Stein. There  
17 may be an issue with one Las Cruces witness that is  
18 appearing through the State of New Mexico, Dr. Jorge  
19 Garcia. I will have to review his calendar. As I  
20 recall, he will be out of the country at some point  
21 beginning in late -- or mid/late November into early  
22 December.

23 **MR. WECHSLER:** Your Honor, from New  
24 Mexico's perspective, I mean, we have obviously  
25 established a trial plan. We have an idea for what

1 witnesses ought to be presented in what order, both  
2 for evidentiary reasons and for ease of -- of  
3 presentation to help make it understandable and  
4 digestible, and in that sense, I think we're talking  
5 about taking, you know, the end of the trial would  
6 likely be New Mexico's portion of the presentation and  
7 so we would prefer not to be scheduling that around  
8 specific witnesses, given how we would like to present  
9 our case.

10 **JUDGE MELLOY:** And I assume, to some  
11 extent, New Mexico's case is going to be dependent  
12 upon Texas' case. I mean, in other words, you may  
13 decide that you don't need a particular witness  
14 because of the way Texas' case came in or you don't  
15 need to emphasize a particular witness as much or take  
16 as -- or get into as much testimony with a witness. I  
17 -- I assume there's some flex -- there's going to be  
18 some fluidity in how -- how particularly New Mexico  
19 presents this case.

20 **MR. WECHSLER:** That is certainly true,  
21 Your Honor. At this point, we have a solid feel for  
22 what we think Texas and the United States will be  
23 presenting. We try to base our will-call and may-call  
24 witnesses on those principles, but as you point out,  
25 if certain concepts are not addressed in the direct

1 case of the plaintiffs, then they may not be necessary  
2 for us to raise and we do have that flexibility. That  
3 being said, we do have our own affirmative case that  
4 we intend to present.

5 **JUDGE MELLOY:** What about -- I was  
6 looking for Mr. Somach's letter, and for some reason,  
7 I don't have it right in front of me, his first  
8 letter. You had suggested, Mr. Somach, that in order  
9 to expedite things, that there be a summary of each  
10 expert's testimony at some -- a few days before. Am I  
11 understanding correctly? Let me look here. I've got  
12 it now.

13 **MR. SOMACH:** Yes. It's the third bullet  
14 point in the letter.

15 **JUDGE MELLOY:** Yeah. The no later than  
16 48 hours prior to the presentation of expert  
17 testimony, the parties will submit written summary of  
18 the testimony along with exhibits to be used to  
19 opposing parties. Hopefully some of those exhibits  
20 can be resolved prior to the taking up the testimony.  
21 What do you think about that, Mr. Wechsler?

22 **MR. WECHSLER:** Actually, I was puzzled  
23 by it, Your Honor. It's not clear to me whether  
24 Mr. Somach views those summaries as evidentiary in  
25 nature. Obviously, there is a rule that allows for

1 large documents to be summarized, and that in and of  
2 itself becomes evidence. I'm not aware of a rule that  
3 would allow sort of a summary of -- of expected  
4 testimony to be presented. Now, that being said, I am  
5 aware and have in other cases had judges allow or  
6 request what they typically will call, like, a rolling  
7 opening, and by that typically what a judge will do,  
8 there might be some short openings at the beginning,  
9 just sort of introduce the general concepts, but then  
10 before certain witnesses or before certain segments of  
11 the trial, you know, the judge asks for, like, a small  
12 summary. The next three witnesses will be farmers who  
13 will be discussing farming techniques and the impacts  
14 of -- of certain things on -- on their farming  
15 operation, something like that, right, where the  
16 attorney is explaining what to expect in the next  
17 section. If those summaries that Texas is thinking  
18 about is something along those lines, I guess we don't  
19 have a problem with that. I don't view that as a tool  
20 for expediting the proceedings, however, because I  
21 don't understand those summaries to be evidentiary in  
22 nature.

23 **JUDGE MELLOY:** Do you want to explain  
24 what you're talking about there, Mr. Somach?

25 **MR. SOMACH:** Yeah. And I'll also defer

1 to -- a little bit to -- to Mr. Dubois in terms of  
2 description, but we didn't intend for this to be  
3 evidentiary submissions, but rather to allow the  
4 opposing party to, number one, get advance on the  
5 scope of the direct, as well as the exhibits so that  
6 the parties, if possible, could iron out any  
7 opposition, any questions, any issues to avoid all of  
8 that stuff happening on the record necessarily, unless  
9 there could be no resolution, which, of course, that  
10 would have to be dealt with on the record. There's a  
11 lot of that kind of stuff that we observed over the  
12 years that takes up court time that otherwise could be  
13 dealt with if the other party has some advanced notice  
14 and understanding of what's going to occur. But,  
15 again, I'll -- I'll defer a bit to -- to United States  
16 on this to make sure I cover our joint intention.

17 **MR. DUBOIS:** Your Honor, we -- my  
18 sections over the last year or so have a couple of  
19 large trials that were lengthy, and in at least some  
20 of them, the -- this kind of summary has been done to  
21 -- to try and focus -- it helps the -- the Court sort  
22 of have a focus on what's going to be coming from the  
23 witness, but it's not evidentiary. It is just a -- a  
24 summary to sort of give you a -- and the other side a  
25 preview, so that disputes over evidence can be

1 resolved presumably early in the day or at the  
2 beginning more efficiently, but then that would be  
3 followed by live testimony by that person who would  
4 then actually testify and be cross-examined live.

5 **JUDGE MELLOY:** And do you anticipate --

6 **MR. DUBOIS:** That --

7 **JUDGE MELLOY:** I'm sorry. Go ahead.

8 **MR. DUBOIS:** I was just going to say  
9 counsel in those cases felt that did help move things  
10 along.

11 **JUDGE MELLOY:** Do you anticipate that  
12 going back to this question about developing a full  
13 record, that when an expert, particularly experts  
14 testify, that -- that they will identify, and you will  
15 move for admission of their report.

16 **MR. DUBOIS:** I believe New Mexico wants  
17 to do that. I don't anticipate that we would be doing  
18 that. They -- frankly, that -- that is, you know,  
19 actually, hearsay. Portions of it are going to  
20 undoubtedly come in. Some of the graphics will  
21 undoubtedly come in, but that's what they're there  
22 for, live testimony. I mean, if you -- if you were  
23 just going to cut all of this short and say, well,  
24 submit the -- the reports as their -- as their direct,  
25 I -- I don't think that that is a sound approach. But

1 having --

2 **JUDGE MELLOY:** It's often done, though.  
3 It's not -- certainly not unheard of.

4 **MR. DUBOIS:** It is sometimes done. It  
5 is sometimes done. I don't know that all of the  
6 reports were built to simply be dumped in as direct  
7 testimony, but I -- I don't -- I don't anticipate that  
8 from -- from the United States' standpoint, and I  
9 suspect that we may have some fights over that pending  
10 trial, but if you're going to do that, then why are  
11 you having direct testimony?

12 **MR. WECHSLER:** Well, on -- on that  
13 issue, Your Honor, that -- I mean, that's the precise  
14 issue that we filed our motion about ahead of last  
15 status conference, and the -- the discussion was, and  
16 the reason we agreed that that motion was moot is the  
17 parties agreed that those expert reports, as you said,  
18 typically are allowed in the original proceedings.  
19 They could be subject to all -- all the other  
20 objections, but they would not be categorically  
21 denied, and it was on that basis that you denied that  
22 motion as moot. So -- so we continue to think that  
23 that is a way to very much expedite the proceeding,  
24 having a single exhibit that we're able to refer to on  
25 the exhibits and things like that, and we'll shorten

1 significantly the testimony rather than having to go  
2 through each portion of the exhibit. Now, as to why  
3 the United States doesn't intend to do that, largely  
4 because their expert disclosures were not in the form  
5 of -- of reports with a couple of exceptions. But I  
6 do want to say that as to the -- the summary idea, if  
7 the intention is to be sharing exhibits ahead of time  
8 in order to address evidentiary objections and try and  
9 expedite the proceedings in that way, we think that is  
10 a very good idea. We had -- I think the parties had  
11 discussed early on the possibility of disclosing  
12 exhibits that we're going to be using in advance. I  
13 don't remember the exact number of days. But, yes, I  
14 can think of several examples, including an original  
15 actions, I think in the Yellowstone case where that  
16 procedure was used, you know, several days in advance,  
17 and then objections had to be sort of noted and  
18 provided to the presenting party. Also in advance,  
19 with an obligation to work things out ahead of time,  
20 if possible, and I do think that that saved valuable  
21 time and to the extent that that's what Mr. Somach and  
22 Mr. Dubois have in mind, we think that's an excellent  
23 idea and happy to work with them on that type of  
24 procedure.

25 **MR. SOMACH:** That is what we had in --



1                   **MR. HICKS:** Your Honor -- sorry. Your  
2 Honor, Renea Hicks here. May I comment briefly on the  
3 expert report issue that's just been discussed? This  
4 is an unusual -- this isn't the normal situation.  
5 Those expert reports, there are an extensive number of  
6 them, and they were prepared, many of them well in  
7 advance of the court having mirrored the scope of this  
8 case, so they are going to include a lot of the things  
9 this court has already said are not issues in the case  
10 and is going to take up, you know, way more time going  
11 through those, sifting through those that exclude  
12 parts of the report that have nothing to do with the  
13 case as the court has narrowed the scope of it. So I  
14 think there's the real problematic aspects of just in  
15 saying ahead of time that the expert reports be  
16 admitted. Thank you.

17                   **JUDGE MELLOY:** Mr. Somach, you wanted to  
18 say something?

19                   **MR. SOMACH:** I was just going to say  
20 that Mr. Wechsler's statement was consistent with what  
21 we had intended, and I will work -- if -- if the Court  
22 would like, we can work to just make sure that we have  
23 that ironed out and that we're not talking past each  
24 other, but have come up with a methodology that  
25 perhaps will help streamline. On the expert reports,

1 you know, we're -- we thought that the resolution of  
2 that issue last time was fine. New Mexico is free to  
3 offer into evidence whatever they want as long as we  
4 preserve our ability to make appropriate objections  
5 and to -- to -- to move to strike portions in a proper  
6 way.

7 **JUDGE MELLOY:** Okay. So I think where  
8 we left this is we know pretty much what the trial  
9 schedule is going to be, and I have to decide about  
10 time limits, I think, is what -- is the bottom line on  
11 where we're at, at this point. Let me ask you some --  
12 let me just throw something out before we turn to the  
13 -- the site visit. And this ties in a little bit with  
14 -- with the proposed amendment that Texas has -- has  
15 -- has put on the table. Is it possible that we're  
16 getting to a point with the drought situation that  
17 there is just no way this Compact can be performed? I  
18 mean, are we -- are we getting to where we're not  
19 talking about water, we're talking about mud and dirt?  
20 I mean, what happens if we have five more years of  
21 drought? Are we -- is this all -- all an exercise in  
22 futility?

23 **MR. SOMACH:** That's an interesting  
24 question, which I've pondered on more than one  
25 occasion, but, you know, at a certain point in time,

1 we're still downstream, and to the extent there's a  
2 drop of water upstream, then Texas feels it's entitled  
3 to some of it, and the only thing we've got dealing  
4 with that is the 1938 Rio Grande Compact. If there  
5 are physical impediments or changed physical  
6 circumstances that make it impossible to perform under  
7 the Compact, it's an interesting issue which -- which,  
8 you know, perhaps, you know, requires some thought.  
9 But as we're facing it, we've been at this -- I've  
10 been at this since 2012. It's a very long time. I  
11 was a young man when we started this at that point in  
12 time and had a lot of energy. I have no energy at  
13 this point. But it is one of the problems you have  
14 with the passage of time. It's one of the concerns I  
15 have about dragging the trial on longer than it ought  
16 to. You never get to a mediation. The issue is quite  
17 different. You know, with climate change at some  
18 point whether you can ignore --

19 **JUDGE MELLOY:** We're losing you,  
20 Mr. Somach, again.

21 **MR. SOMACH:** Can you hear me at all?

22 **JUDGE MELLOY:** Yes. A little bit.

23 **MR. SOMACH:** I'm not sure which one of  
24 my -- my microphones is picking this up, so I'll just  
25 try to talk louder. But, I mean, it is a significant

1 real world question, but I don't have an immediate  
2 answer for it, and I'm not sure that there is any  
3 apparent real world answer for it looking at the law  
4 and looking at -- at past Compact-related original  
5 actions. But I have no objection to -- to, you know,  
6 thinking more about it, but I'm not sure it gets us  
7 out of where we are currently in terms of moving  
8 forward with -- with the case.

9 **MR. WECHSLER:** Well, and I agree it's an  
10 interesting question. My answer to it is it's  
11 possible for the states to negotiate, discuss,  
12 resolve, propose a new Compact to -- to Congress.  
13 Absent that, we are obligated to follow the Compact,  
14 but this isn't the first time there's been droughts.  
15 I mean, there have been other droughts historically  
16 and so we can look to that as you acknowledged in your  
17 order to understand what the parties intended here so  
18 this isn't without historic precedent and what we know  
19 is the way they address that is -- is by conjunctively  
20 managing surface and groundwater and by -- by pumping  
21 groundwater and -- and through that, got through past  
22 droughts, some of which were equally as -- as  
23 difficult and -- and I'm certain that we'll get  
24 through this one, as well.

25 **JUDGE MELLOY:** Well, I hope so. I think

1 that's the question. I mean, I think that becomes the  
2 -- I think that's the -- the -- to use an old phrase,  
3 sixty-four dollar question in the whole thing is, is  
4 this just a cyclical drought that you will get through  
5 like you did in past droughts or is there some type of  
6 fundamental change in climate and conditions in the  
7 Rio Grande Valley that -- that may mean that we're not  
8 going to go back to the good old days. But I guess  
9 we'll just -- but anyway, just threw that out for  
10 whatever it's worth.

11 Let's talk about the tour. You were --  
12 first of all, there's a dispute about date, which I  
13 understand one of the major reasons you wanted the  
14 16th, Mr. Wechsler, apparently, is a moot issue. The  
15 United States -- well, tell me, why does the United  
16 States and Texas want the 23rd as opposed to the 16th?  
17 Any particular reason? Mr. Somach?

18 **MR. SOMACH:** I'm going to defer to Ms.  
19 Barfield and Ms. Klahn. They've done all the  
20 negotiating with New Mexico and the United States and  
21 others on the tour, so I think they -- they can give  
22 you a much better and direct answer to your question.  
23 So, Theresa, do you want to --

24 **MS. BARFIELD:** Yes. So, Your Honor, the  
25 only choice for the week of the 23rd -- well, there's

1 two -- two reasons, availability of the lawyers, also  
2 availability of the district manager for EP1, who's  
3 going to be part of the tour guide process. He is  
4 unavailable the week of August 16th. The additional  
5 reason is our proposal that we thought it would segue  
6 nicely into the idea of having the -- the trial  
7 management pretrial conference in the Las Cruces or El  
8 Paso area in conjunction with this basin tour.

9 **JUDGE MELLOY:** Mr. Wechsler, any -- are  
10 you still advocating for the 16th or does it make a  
11 difference since the -- there's not going to be water  
12 either week?

13 **MR. WECHSLER:** Well, I -- I hope that  
14 will prove to be wrong. We -- we know that these  
15 schedules are evolving. We're still told that it's a  
16 possibility to have water there, and we think that's  
17 critical. I mean, without it, it's like -- it's like  
18 visiting a baseball stadium without a baseball game.  
19 I mean, here the movement of the water through the  
20 system is the game itself, and we want to be able to  
21 see that. We'd like to be able to show that to you,  
22 and that's what the evidence at trial will be talking  
23 about. Again, we're -- we're told that's likely to  
24 still be there in mid August and -- and if that were  
25 incorrect, our suggestion would be actually move it

1 earlier, not later.

2 **JUDGE MELLOY:** Ms. Barncastle, do you --  
3 you -- you wrote a letter on this issue. What --  
4 what's your thought?

5 **MS. BARNCASTLE:** Yes, Your Honor. Thank  
6 you. I think I was fairly clear in my letter that  
7 there is no water in the EBID system right now, other  
8 than the water that we've been capturing from the  
9 latest storms, which is unrelated to releases from the  
10 reservoir, although could potentially be related in  
11 the site visit, but we're not delivering water anymore  
12 within EBID, so it's quite frustrating to me that my  
13 home state is advocating for a site visit at a time  
14 that you knew we would not have water in our system,  
15 and if it is that important, we should have scheduled  
16 this a long time ago. But frankly, Your Honor, I do  
17 think that from the perspective that we would like for  
18 you to see the project, it doesn't necessarily matter.  
19 You will get an understanding of the issues and the  
20 lay of the land, whether there's water or not in the  
21 system.

22 **JUDGE MELLOY:** Is there any chance -- do  
23 you think there will be -- well, what would it take  
24 for there to be water in the system, monsoons between  
25 now and then?

1                   **MS. BARNCASTLE:** You know, Your Honor,  
2 the -- the chance that EBID will have water in its  
3 system is long gone at this point. We -- what we do  
4 in years when we have a short supply, our water  
5 management team burns that water as quickly as  
6 possible, because that is the most efficient way to  
7 deliver the most amount of water. So when we opened  
8 up around the first of June, the instructions from the  
9 top to the people on the ground were get those water  
10 orders in and get this water spread out and be done.  
11 We have no more water, Your Honor. We will not -- and  
12 as you've probably seen from the Texas complaint, we  
13 can't even anticipate receiving more water that we  
14 could later allocate this year because of what's  
15 happening in the middle Rio Grande. So we have no  
16 chance of having water in the EBID system unless we  
17 get lots of rains and somehow the Board is able to  
18 find a way to turn back on deliveries. We have never  
19 been in that position where we've been able to do  
20 that. I can't say that it would be impossible, but,  
21 Your Honor, you should not plan based on us having  
22 water in the system at this point. We are done. We  
23 have a zero amount of water left in our account.

24                   **MR. WECHSLER:** And, Your Honor, half of  
25 the basin tour is in the Texas portion of the basin.



1 Ms. Barncastle is focusing on EBID's water. Our  
2 understanding is the release on August 16th may be for  
3 EP No. 1, not for EBID, which we still think would be  
4 valuable.

5 **MR. HICKS:** Your Honor, this is Renea  
6 Hicks. That's not correct. July 30th is what our  
7 engineer tells us is the last call for release.  
8 That's in the letter that Texas and the U.S. sent --  
9 or Texas sent.

10 **JUDGE MELLOY:** Well, partially for my  
11 own benefit, personal preference, I'm going to go with  
12 the week of the 23rd. It works better for me. I  
13 could make the other week work, but the 23rd just  
14 works better, and -- and I don't at this point see any  
15 compelling reason why we should do it the week earlier  
16 based upon what's been said here today, so let's plan  
17 on the week of the 23rd.

18 I do think addressing a couple of the  
19 other issues that have been raised, I do think the  
20 flyover is a good idea, and I'm willing to do that.  
21 Let me see, what else do we need -- are there any  
22 other issues we need to resolve concerning the tour at  
23 this point, other than the date of the flyover? I  
24 think those are the big ones.

25 **MS. BARFIELD:** Your Honor, if I might

1 just one moment, I wanted to raise one additional  
2 point. New Mexico did tag the potential of a chile  
3 farm visit and then also --

4 **JUDGE MELLOY:** Potential of what?

5 **MS. BARFIELD:** A chile farm visit.

6 **JUDGE MELLOY:** Oh.

7 **MS. BARFIELD:** Which hasn't yet been  
8 discussed with the parties, but in light of the -- the  
9 witness disclosures that went out yesterday, I wanted  
10 to raise the potential concern that admittedly the  
11 parties have not yet had an opportunity to discuss, as  
12 the disclosures were just yesterday, but two of the  
13 will-call witnesses that are tagged on the New Mexico  
14 list is the owner of the Stahmann farm, which is  
15 stated as it is right now, as a site visit, as well as  
16 who we believe to be the owner of the chile farm,  
17 which, of course, is not yet on the schedule, but that  
18 would be, as we understand it, likely the Shane  
19 Franzoy farm. Because the Stahmann farm is on the  
20 schedule, we just wanted to bring it to the Court's  
21 attention that we're going to need to discuss with New  
22 Mexico an alternative farm to visit in the EBID  
23 portion of the tour. This is not a discovery tool, of  
24 course. A site visit is designed for -- to, you know,  
25 familiarize the Special Master with the project, with

1 the Compact area, with the EBID and EP1 facilities,  
2 and we're hesitant and want to caution everyone  
3 against turning this into basically a discovery tool  
4 without the presence of a court reporter. So we're a  
5 bit nervous about going to the Stahmann farm, who is  
6 tagged to be a will-call witness at trial in the  
7 categories of farming operations and agricultural  
8 economics. I don't know if Mr. Wechsler has a  
9 response to that today, but we are requesting that  
10 they replace the Stahmann farm with a farm that's not  
11 associated with a will-call witness.

12 **MR. WECHSLER:** I do have an answer, Your  
13 Honor, and that is I find this issue to be extremely  
14 puzzling. The whole point of a basin tour is to be  
15 able to look at the locations and places where -- that  
16 are likely to be coming up at trial so, for example,  
17 we will be stopping at Elephant Butte Dam. When New  
18 Mexico designed the locations that we suggested, there  
19 were things that would be relevant to this case, not  
20 those that would be irrelevant or -- or not talked  
21 about, and so we think it's -- that -- that feature  
22 that Ms. Barfield is talking about is not an accident.  
23 That's quite intentional. We certainly understand  
24 that this -- Ms. Barfield talks about a discovery  
25 tool. I guess she's meaning sort of an evidentiary

1 tool. We will be very mindful of the fact that we're  
2 not there to persuade or offer additional information,  
3 but we think it's important for you to be able to see  
4 those parts of the basin that are relevant to the case  
5 and so it is absolutely correct that the Stahmann farm  
6 is tied to a witness, because you will see the  
7 location. You won't hear any evidence on the basin  
8 tour, but at trial, Ms. Stahmann will be discussing  
9 her farm, and it will give you context to understand  
10 what it is she's talking about.

11 **JUDGE MELLODY:** I tend to agree with  
12 Mr. Wechsler. The -- you know, the -- sort of the  
13 purpose of a visit -- a site visit is not to take  
14 testimony about any particular site but to give  
15 context to what the later testimony is going to be and  
16 so I'm not overly concerned about that myself, and if  
17 somebody makes a stray comment, I can ignore it. It's  
18 not -- it's not going to be the end of the world.

19 **MS. BARNCASTLE:** Your Honor, if I may  
20 briefly, I do have a separate issue to raise regarding  
21 Wasteway 18's inclusion in the site visit itinerary;  
22 however, I would just note for the Court that I find  
23 it to be unfair, interestingly enough to use that  
24 term, that the farms we are going to see in New Mexico  
25 are farms that New Mexico has hand selected that are

1 not necessarily representative of the Elephant Butte  
2 Irrigation District in its entirety. So if we are  
3 really approaching this with the goal of seeing the  
4 lay of the land for purposes of preparing for trial,  
5 then perhaps we have some more to do in terms of the  
6 itinerary and what we should be seeing while we're on  
7 the ground here, particularly in the realm of farms  
8 who should be included as you run along the valley,  
9 and these do not have to be stops that would add a  
10 whole ton of extra time, but if you're talking about  
11 New Mexico's witnesses being allowed to show their  
12 operations, EBID has farmers, board members, who are  
13 likewise listed as witnesses and should be in the same  
14 position.

15 **JUDGE MELLOY:** Well, I think if you want  
16 to add a couple -- I mean, I'm not -- I haven't been  
17 involved in the negotiations, but it seems to me what  
18 you're suggesting is not unreasonable, and  
19 particularly in the second day where scheduled to be  
20 done by 3:20, could give us an extra -- we could add  
21 -- we could add an extra half an hour, hour to that  
22 for a couple stops if -- if it's required. So --

23 **MS. BARNCASTLE:** Well, Your Honor, I  
24 will -- I will say I think the timing -- one of the  
25 things that I was going to raise today is the timing

1 on the proposed itinerary. I haven't been directly  
2 involved in any of the discussions related to the  
3 basin tour, but I'll tell you, EBID routinely gives  
4 tours like this. The three people representing EBID  
5 here today are the ones who typically do these tours,  
6 and I can tell you timing is not something we can lay  
7 out in advance. It's something that it depends on  
8 what's going on, on the ground that particular day,  
9 and it will depend in large part on what counsel  
10 agrees upon as the discussion or the facts that will  
11 be laid out for you at each particular stop, and so I  
12 would be so careful in looking at that itinerary  
13 timeline when you're looking at the fact that we also  
14 haven't even discussed who will be present at each  
15 site and what each party present will be allowed to  
16 say. So, you know, this could be a lot shorter. EBID  
17 has done tours of the entire project in one day, and  
18 we've done tours of just portions of EBID that have  
19 taken a full day. So that's something to remain  
20 sensitive about, but that's also exactly why I  
21 suggested that Wasteway 18 be included because even  
22 though it is somewhat out of the way, I will grant New  
23 Mexico that, it's not that far out of the way in the  
24 grand scheme of things. It's in the same direction,  
25 and it's on the road that we're going to be on.

1 Several of the stops that we are proposing are more  
2 out of the way, but if we're really looking to include  
3 all of the information that will help you when you're  
4 sitting on the bench listening to the evidence, to us,  
5 Wasteway 18 is possibly one of the most important  
6 stops.

7 **JUDGE MELLOY:** Well, why don't you talk  
8 about this some more, and maybe we'll -- after we do  
9 the demonstration on a week from Tuesday, we're going  
10 to have to have a separate Zoom where everybody can  
11 participate just to get the feedback on how the demo  
12 went, and we can talk a little bit more about, work  
13 through these issues, if you still have some concerns.  
14 One thing I did notice, it seems like -- well, let me  
15 -- let me bring up a couple issues. One is it looks  
16 like if we do the flyover, we'll be staying in El Paso  
17 on Sunday night. We'll be doing Tuesday night in El  
18 Paso and Wednesday night if we can't get out after the  
19 -- in time after the final pretrial conference, we may  
20 even be spending Wednesday night in El Paso. I wonder  
21 about moving everybody to Las Cruces for one night, if  
22 it wouldn't be more -- make more sense just to do all  
23 four -- all three or four nights, whichever it might  
24 be, in El Paso. I think the -- the one-night stay in  
25 Las Cruces sounds like it's just logistically going to

1 be somewhat difficult. As I understand it, El Paso  
2 and Las Cruces are about an hour away? Is that about  
3 the driving distance?

4 **MR. WECHSLER:** It's less, Your Honor.  
5 More like 40 minutes.

6 **JUDGE MELLOY:** So I would think just to  
7 stay -- stay -- you know, let's -- which kind of also  
8 then leads me into the second issue is I'm not  
9 necessarily opposed to doing the final pretrial  
10 conference in El Paso, but I'm just wondering about  
11 the logistics of it. Are we -- what are we going to  
12 need for the final pretrial conference? Are people  
13 going to be having to log notebooks and documents and  
14 -- I mean, we won't have the -- you know, we'll  
15 probably have some technical capability there, but I'm  
16 just concerned about the mechanics of doing the final  
17 pretrial conference in a courthouse that may not have  
18 the -- we may not have the ability to, you know, even  
19 get on the Internet very easily. Has anybody thought  
20 about that part of it?

21 **MR. WECHSLER:** I don't know that we've  
22 given thought to that. I'm not familiar with the El  
23 Paso federal courthouse. I am familiar with the New  
24 Mexico Las Cruces federal courthouse, which I can  
25 report is quite beautiful. It's a modern facility. I



1 don't think you'd have the same problem, but your  
2 point about notebooks, you know, we can make whatever  
3 work if -- if that's the preference of the other  
4 parties and of you, we'll have what is necessary for  
5 the final pretrial conference with us.

6 **JUDGE MELLOY:** Well, and I may -- and I  
7 might just do Las Cruces. I know Las Cruces is a  
8 brand new -- or relatively new courthouse, five years  
9 old maybe and Las Cruces may work a little better. If  
10 it's only a 40-minute drive, it's probably six in one,  
11 half a dozen the other by the time we do it, even if  
12 we're spending the night in El Paso. Anyone else have  
13 any particular thoughts about that aspect of it?

14 **MR. SOMACH:** No. Other than --

15 **JUDGE MELLOY:** I'm sorry. I can't --  
16 somebody is -- we don't have a -- a video. Who's  
17 speaking, please?

18 **MR. HICKS:** I was speaking over  
19 somebody, I think, and I apologize. I couldn't see  
20 who they were. I'm told that -- I haven't been to it  
21 actually, but the federal courthouse in El Paso is  
22 relatively new. It's about five years old, I'm told,  
23 so I can't vouch for the details, but I suspect it has  
24 full range of technology available.

25 **JUDGE MELLOY:** We'll pick one or the

1 other. I want to just kind of keep that option. As  
2 of right now, we'll plan on it, but if -- if it looks  
3 like it's going to be too complicated to move  
4 everything there for one day, that decision may  
5 change.

6 All right. The final thing I want to  
7 talk about is the -- and then I'll open it up if  
8 anybody else has anything they want to discuss, is the  
9 proposed amendment by the -- by State of Texas. I've  
10 given this a fair amount of thought, and I plan to  
11 talk to the clerk at the Supreme Court about this in  
12 the next week or two. The -- my thought at this point  
13 is this, subject to being convinced otherwise; I would  
14 like the parties and any amici who wishes to be heard  
15 to file a response to the motion within two weeks, but  
16 I want the response directed not to the merits of the  
17 motion necessarily, but more to the -- what does this  
18 mean in terms of the lawsuit? Does it mean additional  
19 parties? Does it mean additional amici? Does it mean  
20 -- what does it mean in terms of discovery? What does  
21 it mean in terms of -- of -- of issues that aren't  
22 currently in the case. I'm just -- I'm not -- and --  
23 and why you think the Supreme Court, assuming you  
24 think this, the Supreme Court should decide what as  
25 opposed to myself as the Special Master. My

1 inclination, and Texas, I'll give you a chance to  
2 respond to it, is that this is probably going to  
3 broaden the issues to the point where the Supreme  
4 Court probably should be involved. Now, what they'll  
5 probably do is send it back to me for including, you  
6 know, in a recommendation, but I'm -- my -- my  
7 inclination is it probably should go to the Supreme  
8 Court, but I -- I want to hear the parties' position  
9 before I make a final decision. Is there any question  
10 about that?

11 **MR. SOMACH:** I'll just indicate to you  
12 that we'll proceed in whatever manner you think  
13 appropriate, but we do emphasize this, we do believe  
14 it's important to proceed, and I'll -- I'll just  
15 underscore that, but we'll proceed in either briefing  
16 with -- with you or we will petition reports. So in  
17 terms of -- of moving forward in some way, shape, or  
18 form, we intend to.

19 **JUDGE MELLOY:** Is this an issue that's  
20 been rolled into the mediation, assuming you're still  
21 talking, or is it so separate that you're not even  
22 talking about it in the mediation?

23 **MR. SOMACH:** About a month ago in the  
24 mediation --

25 **JUDGE MELLOY:** We're losing you again,

1 Mr. Somach.

2 **MR. SOMACH:** I -- can you hear me?

3 **JUDGE MELLOY:** Yeah.

4 **MR. SOMACH:** Okay. I'll just keep  
5 yelling as long as my vocal chord doesn't give out. I  
6 -- we raised it. I raised it with the mediator, and I  
7 did indicate that it was going to need to be addressed  
8 prior to the time that we reached a final resolution  
9 in the mediation, but beyond that, I don't know that  
10 there's been any further discussion on the issue in  
11 the mediation.

12 **JUDGE MELLOY:** Is the mediation going  
13 any place, do you think, at this point?

14 **MR. SOMACH:** There -- there is something  
15 that was submitted by one of the parties this week.  
16 It's different. It's interesting, and certainly we'll  
17 be talking internally at Texas about that very  
18 question, whether or not it is something that we can  
19 move forward with or whether or not we should just say  
20 it's over.

21 **JUDGE MELLOY:** Okay. Anybody else want  
22 to be heard on any of these issues?

23 **MR. WECHSLER:** Yes, Your Honor. I mean,  
24 I -- I do agree with your analysis that this is the  
25 type of thing that the court ought to weigh in on. I

1 suspect, also, that your suggestion as to how the  
2 Court is likely to handle it seems like -- seems  
3 likely to me. My concern is a little bit different,  
4 and that is, you know, we can respond in the limited  
5 fashion that you suggested in two weeks. We would try  
6 and keep that fairly brief. The real concern is, you  
7 know, Texas has been mindful, and I -- we appreciate  
8 that, that this shouldn't delay the trial schedule or  
9 any way interfere with that trial schedule, and our  
10 concern is we are right now very much right in the  
11 middle of preparing for trial and -- and then we will  
12 be in trial. You know, we don't have unlimited  
13 resources. We certainly have a -- a large team, but  
14 peeling off some portion of those resources to be  
15 addressing that motion right now is -- will be  
16 challenging, I guess, is the way I would put it, and  
17 so, you know, I do think those issues are things that  
18 we could be prepared to talk about. I mean, we could  
19 talk about them today. We're certainly prepared to  
20 talk about them. I suspect others are. We could also  
21 put that on the agenda in a couple of weeks and talk  
22 about it then or, you know, again, if you give us the  
23 direction that you want that response in a couple of  
24 weeks, we will obviously fulfill that. It's just that  
25 we are presented with those challenges.

1                   **JUDGE MELLOY:** Well, I understand.  
2                   That's the reason I -- I'm not asking for full-blown  
3                   -- I just want -- I just want to get a sense of if the  
4                   amendment is granted, what does it mean to the case,  
5                   and who -- I think -- I can't remember who, but  
6                   somebody at the last time we were together indicated  
7                   that this could potentially involve significantly more  
8                   parties than are currently involved or more amici.  
9                   I'd just like to have some sense of what that is and  
10                  -- but I'm not asking for full-blown briefing at this  
11                  point. I think -- I agree with you. I think we have  
12                  enough on our plate right now to not spend a lot of  
13                  time on this issue. You know, I -- we may have to  
14                  include it as a -- as a separate section in some third  
15                  interim report. I don't know if that -- if that's the  
16                  point at which it'll be presented to the Supreme Court  
17                  or whether it's going to require a fourth interim  
18                  report in addition to the third, I don't know. But --  
19                  well, we're going to have to address it at some point,  
20                  but I'm just -- I'm just kind of trying to get a sense  
21                  of what the practical implications are, particularly  
22                  in terms of whether I should ask that that be filed  
23                  with the Supreme Court and let them take the first --  
24                  first look at it.

25                  **MR. BROCKMANN:** Your Honor -- go ahead,

1 Jeff.

2 **MR. WECHSLER:** Thanks. Just very  
3 briefly. With that guidance, we will submit a -- what  
4 will be a relatively limited filing addressing those  
5 issues that you're interested in.

6 **JUDGE MELLOY:** All right.

7 **MR. BROCKMANN:** Your Honor, this is Jim  
8 Brockmann for the Water Authority. I just want to  
9 clarify with you whether -- whether or not the  
10 response you're asking for in two weeks, I'm -- I'm  
11 assuming as -- as one of the amici that are in the  
12 middle Rio Grande, that we would also file a separate  
13 brief from the State on this but --

14 **JUDGE MELLOY:** Yes. If I wasn't clear,  
15 I welcome anything from any of the amici.

16 **MR. BROCKMANN:** The question is, I  
17 guess, are you -- for other amici or interested  
18 parties, are you looking to hear from them, too, or  
19 have the present parties that are part of this case  
20 brief the issue only? And let me expound just a bit  
21 further. You've seen the amended complaint so you  
22 understand that what's at issue is -- is essentially  
23 Articles 6, 7, and 8, and we're talking about how the  
24 middle Rio Grande is operated in terms of -- of  
25 storage and use of native flows. If you look to the

1 middle Rio Grande, you're -- you're implicating  
2 irrigation interest with the middle Rio Grande  
3 conservancy district. You're implicating other  
4 municipalities in the middle Rio Grande such as the  
5 City of Santa Fe that has two plus 29 storage  
6 reservoirs. You'll implicating tribal interests that  
7 have storage and release rights, and you're  
8 implicating endangered species issues. It's going to  
9 be, in my opinion, quite a different taste with quite  
10 different parties. Whether any of those will be  
11 allowed to weigh in on this particular two-week  
12 briefing on the change of the scope of the issues and  
13 the additional parties that will be seeking to  
14 participate to me is important, because one of -- one  
15 of the clients of our firm is the City of Santa Fe.  
16 Will they be allowed to file a brief to inform you or  
17 are you relying on the parties in this instance? Are  
18 you looking for something from the middle Rio Grande  
19 conservancy district that will weigh in on how its  
20 irrigation interests will possibly change? I think  
21 it's important to know who gets to brief this  
22 particular issue in two weeks, not brief it on the  
23 merits, but just how the case changes.

24 **JUDGE MELLOY:** At this point, I'm going  
25 to limit to the parties. I think you can speak to how



1 it changes for those -- for those entities. And,  
2 also, I'll be interested to hear from Mr. Wallace, if  
3 he wants to be heard, how it may impact Colorado,  
4 which -- which at this point has very little at stake  
5 in the case. But -- so I'm -- I'm interested in  
6 hearing about that, as well. But at this point, I'm  
7 going to limit it to those parties and amici that are  
8 before the Court.

9 **MR. BROCKMANN:** Thank you.

10 **JUDGE MELLOY:** All right.

11 **MR. WALLACE:** So, Your Honor, this is  
12 Chad Wallace. We certainly intend on filing something  
13 in two weeks, and I realize that you just gave an  
14 instruction regarding interested parties not yet in  
15 the case. We have several Colorado stakeholders that  
16 are participating in it because of this issue, they're  
17 listening in on the conference, and I know that they  
18 would be interested in filing something. Would you  
19 ask that they file a motion for leave to file any  
20 response briefs to educate you on the impacts this  
21 might have on their interests or what is your  
22 direction at this time?

23 **JUDGE MELLOY:** I'm going to have you  
24 file it at this point, Mr. Wallace. If -- if you feel  
25 that I should invite other parties, and I'll say the

1 same for Mr. Brockmann, you can indicate that in your  
2 filing, and that may be the next round of briefing,  
3 but I don't want to get too far into the weeds on this  
4 issue when we're so focused at this point in trying to  
5 get the case that's been on file for six or seven  
6 years ready for trial. That very well may invite them  
7 to file briefs or allow them to file briefs, but I  
8 don't want to get -- like I say, I don't want to get  
9 too far into this at this point, particularly since I  
10 think there's a reasonably good chance we may kick it  
11 up to the Supreme Court and let them decide how they  
12 want to proceed, whether -- whether they want to send  
13 it back to me or whether they want to invite briefing.  
14 I'm guessing they'll send it back to me, but maybe  
15 they'll ask for -- for briefs. I don't know. That's  
16 my view at this point.

17 **MR. WALLACE:** Thank you.

18 **JUDGE MELLODY:** Anybody else? We've  
19 covered quite a bit of ground today. I'll try to get  
20 something out -- I may not get it out -- well, I was  
21 going to say Monday, but Monday is the holiday. Just  
22 a second. Just got a note here. I may have to --  
23 I've just been advised. I should have checked this  
24 before that there may be a trial going on, on the --  
25 on the 13th in that courtroom where we were going to

1 do the demo. I may have to -- let me -- let me do a  
2 little checking. Would anybody have any objection if  
3 -- if we were to -- if we were to do the demo later in  
4 the day, like at after 5:00 Central Time? I think the  
5 only -- I guess for the west coast and Mountain  
6 people, that's not a big problem. I guess primarily  
7 want to be -- Mr. Dubois, that means a little later  
8 for you.

9 **MR. DUBOIS:** I'm in Denver. It's my  
10 colleagues in DC that would have to be after hours.

11 **JUDGE MELLOY:** Okay.

12 **MR. DUBOIS:** So at least Mr. Leininger  
13 and I -- let me look at my calendar at least. I -- I  
14 am available late in the day. It's not a problem for  
15 me. I don't know if -- I don't think it is for  
16 Mr. Leininger.

17 **JUDGE MELLOY:** Okay.

18 **MR. DUBOIS:** So we would -- we would --  
19 we would have at least a contingent to observe.

20 **JUDGE MELLOY:** Okay. All right. Well,  
21 I may have to move it till after 5:00, assuming this  
22 trial goes, but -- but I think I'm going to try to  
23 stick with that date because I think -- I want to keep  
24 this moving, and -- and I don't think it'd work, as I  
25 understand it, it doesn't look like the trial is

1 likely to be over by the end of the week so, you know,  
2 even moving it later in the week wouldn't make a  
3 difference. So -- so let's maybe try to -- let me do  
4 a little further checking, and I'll include that in  
5 any post-trial order that I'd issue or notice. All  
6 right. Anything else?

7 **MR. WECHSLER:** Well, Your Honor, I just  
8 want to alert you. We did -- we got the exchange of  
9 exhibits and deposition designations and witnesses,  
10 and I haven't -- we haven't had a chance to confer  
11 with the other parties, but there are some issues  
12 there. There's a number of issues that the form of  
13 the exhibits from some of the other parties aren't  
14 where we thought we had agreed to. There's some  
15 issues with deposition designations, and specifically,  
16 there's some deposition designations of individuals  
17 who are on our will call, and we expect that because  
18 those witnesses will be testifying live, that a  
19 deposition designation isn't appropriate. And then  
20 there's at least one witness that is now listed that  
21 wasn't on any previous list, hasn't been deposed,  
22 wasn't part of the trial, and so these are issues. I  
23 just wanted to flag them for you in case we have to  
24 seek further relief, but I hope that we'll be able to  
25 resolve them with the other parties, but those are

1 things that we'll be talking about in the coming days.

2 **JUDGE MELLOY:** Okay. Certainly go ahead  
3 and talk. I certainly would encourage both sides or  
4 all sides that if there are some deposition exhibits  
5 -- I mean, if there are some witnesses that can appear  
6 by deposition, that's certainly one way we could  
7 shorten up the trial and certainly be hopefully  
8 somewhat aggressive in looking at those possibilities.

9 All right. Well, if there's nothing  
10 further, then at this point, we'll be adjourned until  
11 the -- until the 13th, and if -- I'll have to get out  
12 to you the exact time of that date, but it's probably  
13 going to be later in the day. I could do it earlier  
14 in the day, but I don't think you want to do it at  
15 7:30 Iowa time, so we'll probably do it at the end of  
16 the day. All right. Thank you, everyone.

17 (The proceedings adjourned at 2:57 p.m.)  
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<b>A</b>				
<b>A.J</b> 6:18 12:12	65:18 77:15	46:20 54:7	<b>answer</b> 16:19	<b>appropriate</b>
<b>ability</b> 13:3	79:4	55:14 56:7,19	19:6 22:15	44:3 58:4
21:12 33:7	<b>adjacent</b> 30:8	57:15 78:25	28:20 60:2,3	75:13 84:19
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