

NO. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

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

TRANSCRIPT OF AUGUST 28, 2020, REMOTE
STATUS HEARING BEFORE HONORABLE MICHAEL A. MELLOY,
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401,
beginning at 11:01 a.m.

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1 **JUDGE MELLOY:** For the record, this is
2 in United States Supreme Court Original No. 141, Texas
3 versus New Mexico, Colorado, and the United States.
4 Let me start by asking the parties to enter their
5 appearance. Mr. Somach, do you want to start for
6 Texas?

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

14 **JUDGE MELLOY:** All right. And
15 Mr. Wechsler, do you want to speak for New Mexico?

16 **MR. WECHSLER:** Good morning, Your Honor.
17 Jeff Wechsler from Montgomery & Andrews for the State
18 of New Mexico. With us today are Cholla Khoury, the
19 assistant attorney general, Marcus Rael, Luis Robles,
20 and Susan Barela from Robles, Rael, and Anaya, Lisa
21 Thompson and Michael Kopp from Trout Raley, John
22 Draper from Draper & Draper. We are joined by the
23 state engineer from the State of New Mexico and the
24 Compact commissioner, John D'Antonio, Greg Ridgley,
25 the general counsel for the Office of the State

1 Engineer, Arianne Singer, the general counsel for the
2 Interstate Stream Commission for New Mexico, and
3 Shelly Dalrymple, also with the Interstate Stream
4 Commission.

5 **JUDGE MELLOY:** Okay. And for the State
6 of Colorado?

7 **MR. WALLACE:** Good morning, Your Honor.
8 This is Chad Wallace for the State of Colorado.

9 **JUDGE MELLOY:** You're all by yourself.
10 United States?

11 **MR. DUBOIS:** Good morning, Your Honor.
12 James Dubois for the United States. Also on the
13 phone, Lee Leininger from Department of Justice and
14 Shelly Randel and Chris Rich from the Interior Office
15 of the Solicitor.

16 **JUDGE MELLOY:** All right. Okay. The
17 Albuquerque-Bernalillo County Water Utility Authority?

18 **MR. BROCKMANN:** Good morning, Your
19 Honor. It's Jim Brockmann on behalf of the Water
20 Authority.

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

22 **MR. CAROOM:** Good morning, Your Honor.
23 Doug Caroom for the City of El Paso.

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

25 **MR. STEIN:** Good morning, Your Honor.

1 This is Jay Stein for the amicus City of Las Cruces.

2 **JUDGE MELLOY:** El Paso County Water
3 Improvement District No. 1?

4 **MS. O'BRIEN:** Good morning, Your Honor.
5 Maria O'Brien for El Paso County Water Improvement
6 District No. 1. Counsel Renea Hicks is also on, and
7 we also have listening in Dr. Al Blair, Jesus Reyes,
8 the general manager, and Art Ivey, the vice president
9 of the board of directors for the district.

10 **JUDGE MELLOY:** Okay. Elephant Butte
11 Irrigation District?

12 **MS. BARNCASTLE:** Good morning, Your
13 Honor. Samantha Barncastle for the Elephant Butte
14 Irrigation District.

15 **JUDGE MELLOY:** Hudspeth County
16 Conservation Reclamation District No. 1? Anybody on?
17 Mr. Miller is not on, I assume?

18 (No response.)

19 **JUDGE MELLOY:** All right. New Mexico
20 pecan growers?

21 **MS. DAVIDSON:** Good morning, Your Honor.
22 Tessa Davidson on behalf of New Mexico pecan growers.

23 **JUDGE MELLOY:** New Mexico State
24 University?

25 **MR. UTTON:** Good morning, Your Honor.

1 This is John Utton on behalf of NMSU.

2 **JUDGE MELLOY:** All right. Anyone I
3 missed?

4 (No response.)

5 **JUDGE MELLOY:** All right. Let's
6 proceed. We don't have a huge agenda today unless the
7 parties have something they -- they need to address.
8 I guess, let me just start by asking, we're a couple
9 days short of end of the discovery with exception of
10 those -- of the issues that were raised at the last
11 hearing involving the United States and New Mexico
12 over the border commission, but aside from that, is
13 there any other discovery disputes at this point that
14 anybody anticipates bringing before the Special Master
15 or are you pretty much ready to switch into
16 dispositive motion mode at this point?

17 **MR. DUBOIS:** Your Honor, this is Jim
18 Dubois for the United States. There are a couple of
19 depositions that I think have been all worked out to
20 trickle into September because we've kind of run out
21 of time on things. I believe we've got agreement on
22 all of those so I don't expect a controversy, but I
23 just wanted to let you aware -- to be aware that in
24 addition to the IBWC, there are -- I think there are
25 some Texas Environmental Quality and then we have been

1 negotiating with New Mexico about a 30(b)(6), and I
2 think we're -- I think we've reached a tentative
3 agreement. We don't anticipate there will be a
4 problem, but -- but there will be a couple of
5 depositions that trail into September by agreement.

6 **JUDGE MELLOY:** All right. Anybody have
7 anything else they want to add about that, Mr. Somach
8 or Mr. Wechsler?

9 **MR. SOMACH:** No. I think, you know,
10 that Jim covered it. The TCEQ was a 30(b)(6), and the
11 individual was also on a -- the hurricane task force
12 and so wasn't available during the period of time
13 because of -- of work on -- on that effort and so --
14 so that will trail into next week, but I think
15 Mr. Dubois covered the -- covered it all.

16 **JUDGE MELLOY:** Well, just -- does
17 anybody have anything they want to talk about on
18 discovery? Otherwise, we'll -- I'll move on. Then
19 the other issue is the one I raised about the
20 apportionment. I know Ms. O'Brien still would like
21 that issue resolved earlier rather than later, but
22 everybody else seems to be in agreement that included
23 as part of the dispositive motions as a group, my
24 inclination at this point is to not change anything as
25 far as the briefing schedule is concerned. I'll

1 certainly take a look at that issue when the briefs
2 are filed and -- and if it's possible to decide that
3 issue early -- early, as I indicated previously, I'll
4 certainly endeavor to do that, but it may be that it's
5 -- it may be so intertwined with all the other issues
6 that they'll all have to be decided together. I just
7 don't know at this point without seeing how the briefs
8 come in and what they look like.

9 Mr. Stein alluded to an issue that I've
10 thought about quite a bit, and we've talked about in
11 my office and that is depending on how the dispositive
12 motions are framed and, I guess, depending upon what
13 the ultimate ruling is, whether or not there's going
14 to be a side trip to the Supreme Court before the
15 trial, I hope not, but, you know, I suppose if -- if
16 -- if I decide that one side is going to have so
17 clearly undisputed that a particular legal proposition
18 or factual and legal proposition is -- is going to
19 enure to the benefit of one party or the other, I
20 certainly would anticipate there may be somebody who
21 wants to ask the Supreme Court to take a look at that
22 before we go into a full-blown trial. That's, I
23 think, obviously a bridge we'll cross when we get to
24 it.

25 Anybody want to be heard on any of those

1 issues? Otherwise, this is going to be a pretty short
2 hearing. I don't want to waste everybody's time. Is
3 there anything that needs -- needs to be brought up?

4 **MR. SOMACH:** I did actually -- I hadn't
5 thought about it until I started seeing letters coming
6 in, and I agree with Mr. Stein in the letter that the
7 New Mexico amici raised that, I mean, after all the
8 dispositive motion will dispose of what might be a
9 very significant issue, and that my assumption would
10 be at a certain point in time, if there were rulings
11 that -- that affected the trial and what people could
12 put on, that those would be bundled together in some
13 report in some way, shape, or form. That was another
14 reason why I thought that -- that briefing that issue
15 separately wouldn't get us very far in terms of
16 everything, but I'll -- I'll tell you, the issue I --
17 my assumption has been that it'll be the parties that
18 file dispositive motions. This is a little stranger
19 case than I've ever experienced before. You know, I
20 would -- I would assume that dispositive motions will
21 be filed by parties and amici, depending upon what
22 those motions say, will participate in terms of frames
23 of the court briefs to the Court. In order to
24 understand, since we're getting into this and October
25 15th is right around the corner in reality, I want to

1 make sure my understanding that it would be the
2 parties filing dispositive motions and not everybody
3 that's participating in some way, shape, or form in
4 the trial so far in the case before.

5 **JUDGE MELLOY:** Well, let me ask the
6 amici. Does any of the amici disagree with that and
7 believe that they want to file their own dispositive
8 motions? As I understand what you're saying,
9 Mr. Somach, just so we're clear, the amici would be
10 allowed to respond to the motion that you or New
11 Mexico, the United States or Colorado might file, but
12 they would not be filing their own motion that you
13 would have to respond to?

14 **MR. SOMACH:** Right.

15 **JUDGE MELLOY:** May file a reply to their
16 motion, but you wouldn't be responding to their
17 motion.

18 **MR. SOMACH:** Right. Right. That's
19 exactly right. I just know we've got four parties,
20 presumably at least three parties will -- will file
21 dispositive motions, perhaps Colorado, and I just want
22 to make sure I knew what -- what to expect come
23 October 15th.

24 **MR. BROCKMANN:** Your Honor, this is Jim
25 Brockmann. The water authority is one of the amici

1 that joined in -- in the letter that you refer to as
2 being the one from Mr. Stein. I did want to make
3 clear that for the water authority at least, we
4 anticipate that we would participate as amici as we
5 have in the past, which is with briefs in support or
6 in opposition to one of the parties, not that we would
7 file motions on our own behalf. I think that's been
8 the more traditional role of amici in the original
9 action is not to file their own motion, but to file
10 support or opposition on behalf of a party with which
11 they agree on an issue and we anticipate that here.
12 In terms of the issue of the potential apportionment
13 issue or anything else going up, I -- I believe that
14 just is going to play out as the case goes on. If
15 there's an early ruling from you that could really
16 affect the -- the disposition of the case, an early
17 apportionment issue, I can understand where a party
18 might say the whole case flows from here, and it's
19 important to -- to have that resolved by the Court if
20 there is a sharp dispute. If everything gets packaged
21 together as -- as a file, after resolution at trial, I
22 think then that's going to be probably a single
23 report. We were just trying to -- to point out maybe
24 that some of the concerns of trying to start
25 segmenting too much of the case. So that's -- that's

1 all we've got to say on those particular issues, the
2 water authority has to say.

3 **JUDGE MELLOY:** As I said earlier, I've
4 been giving that some thought, that depending on how
5 the dispositive motions play out, if -- if it ends up
6 that I feel I could rule in a manner that is going to
7 really substantially impact the case and how it's --
8 how the trial is presented, I've always thought that
9 it's very possible that one party or the other may ask
10 -- want to -- or I may decide I want the Supreme Court
11 to take a look at that before we spend potentially
12 weeks of -- of evidence on -- on an assumption that
13 ultimately turns out to be incorrect so --

14 **MR. UTTON:** Your Honor --

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

16 **MR. UTTON:** Sorry, Your Honor. This is
17 John Utton. I just want to quickly confirm our
18 understanding of how the briefing would proceed, as
19 Mr. Somach and Mr. Brockmann described it. We would
20 expect to be responding in an amici capacity.

21 **JUDGE MELLOY:** Okay. Ms. O'Brien?

22 **MS. O'BRIEN:** Yes, Your Honor. As
23 Mr. Somach himself acknowledged, this case is -- has
24 some very unique aspects, and in the context of
25 dispositive briefing, El Paso County Water Improvement

1 District No. 1 on some discrete issues that directly
2 affect it, we had intended -- do intend to file a
3 brief and, you know, the reason being we have all
4 acknowledged and Your Honor has acknowledged from the
5 commencement of this case that the Rio Grande Project
6 of which EP No. 1 is one of two beneficiaries, is
7 integral and integrally intertwined with -- with the
8 Compact, and we feel that on some discrete issues,
9 that it is appropriate for us to file a -- a brief as
10 part of our participation in the case and in -- in the
11 briefing presented by the other parties.

12 **JUDGE MELLOY:** Do you have -- do you
13 believe you have to file anything beyond a response to
14 -- to another party? I mean, presumably Texas is
15 going to present its interpretation of the contract.
16 New Mexico -- or Compact. New Mexico will present its
17 interpretation. United States may have a third view
18 of it. It seems to me there will be plenty of
19 opportunity for you to respond in either disagreement
20 or agreement with any of those views.

21 **MS. O'BRIEN:** Yes, Your Honor, I -- I
22 understand that point. But I do believe that we are
23 uniquely situated such that we do have a view that --
24 that may -- yes, may overlap with views of the
25 parties, but in terms of our vantage point and

1 articulation, I believe that it would be best if we
2 were provided the opportunity to file initial briefs
3 and not just re -- respond to -- to the other parties.
4 As you can see, we do have somewhat of a disagreement
5 procedurally I would say at this point with -- with
6 the other parties. While we certainly, you know,
7 understand the desire and articulation to keep the
8 briefing schedule as-is, and we certainly agree with
9 what Your Honor has stated and the parties have
10 stated, that the briefing itself, I think, will assist
11 Your Honor as well as the parties and amici in
12 determining what the next steps in the case will be.
13 I think it will become clearer that, in fact, this
14 threshold issue of what our entitlements below
15 Elephant Butte will become clearer, but, you know,
16 again, going back to really procedural question, we
17 believe, we being El Paso County Water Improvement
18 District No. 1 believes we should be afforded the
19 opportunity on -- certainly on the issue of
20 entitlements below Elephant Butte to file a brief on
21 its own behalf. We don't -- we don't think that is
22 anything out of the ordinary in the context of the
23 particular issues in this case, as well as an original
24 action, and we're -- Your Honor has a fair amount of
25 discretion or a lot of discretion to determine the

1 best way to get all the issues out for both Your Honor
2 and the parties.

3 **JUDGE MELLOY:** Would you and Ms.
4 Barncastle be anticipating you would file -- are you
5 -- are you two on the same page, let me put it that
6 way, as far as your position in my briefing?

7 **MS. BARNCASTLE:** Your Honor, this is
8 Samantha Barncastle for the Elephant Butte Irrigation
9 District, and I am still in the process of evaluating
10 whether the dispositive motions that will be filed
11 will seek the proper relief that will adequately cover
12 what EBID believes needs to be covered. So it's not
13 necessarily just a matter of whether the issues will
14 be generally raised sufficient to allow us to file a
15 response brief, but also whether the relief requested
16 in those briefs and those motions will adequately
17 cover what EBID believes needs to be covered to
18 protect EBID and so I am still, like Ms. O'Brien,
19 considering the possibility and the necessity of
20 filing my own dispositive motion on some discrete
21 issues that affect EBID.

22 **JUDGE MELLOY:** Well, let me say this:
23 We're going to have probably three parties filing
24 briefs. I assume Colorado probably won't, but
25 potentially four, but likely three. If I would --

1 what I would request is that Ms. Barncastle, Ms.
2 O'Brien confer with counsel to see if the issues that
3 they are concerned about are going to be raised in the
4 briefing and the relief that they're seeking can be
5 adjudicated through either the brief summary or the
6 motion someone else is filing or through a response.
7 If you feel it cannot and you need to file a brief or
8 motion on a specific discrete issue, I'm going to
9 direct that you seek leave to file and indicate what
10 you're going to file and -- and why you think you need
11 to file a separate motion. And I'll -- I'll -- I'll
12 say that for any of you. But -- but at this point,
13 the amici do not have leave to file briefs without --
14 without filing a motion and getting an order from the
15 Court to that effect. Any question about that? I'll
16 put that in the order.

17 All right. Anything else we need to
18 talk about?

19 **MR. SOMACH:** Your Honor, we don't need
20 to talk about this, but I was curious on when the
21 parties were putting together the letter, we were
22 aware of the storms in Iowa and where you were and
23 were curious about whether you had, so to speak,
24 weathered the storm.

25 **JUDGE MELLOY:** I weathered the storm.

1 Thank you very much. It was -- it was like a mini
2 hurricane. It was a hundred mile an hour winds for
3 about 30 minutes, anywhere from 50 to 60 percent of
4 the trees in Cedar Rapids have been destroyed. My
5 house sustained fairly minimal damage. I had some
6 lattice work around an exposed part of the underside
7 of one of my house, part of my house, that blew out
8 and the light post, the top was blown off, but -- but
9 we have a wooded area behind our house. We lost about
10 20 trees and so that's the biggest. But -- but I'm
11 very lucky in that none of them fell on my house,
12 unlike a lot of people. My neighbor right behind me,
13 I was talking to him yesterday, and he -- he's already
14 up to over \$70,000 in damage on his insurance claim
15 because he had two trees fall into his house, and
16 between repairing the roof and the decking and the new
17 roof and the removing the trees and -- and maybe even
18 having to replace trusses, he said he's at at least 70
19 ,00, but it was pretty unbelievable. But we're
20 getting through it. Thank you for asking.

21 **MR. SOMACH:** We're glad you're safe.

22 **JUDGE MELLOY:** Thank you. I was home
23 watching it at the time. We were in our basement. So
24 thank you very much. I appreciate that.

25 I do have a quick -- somewhat off

1 subject a little bit. Has -- has anybody heard
2 anything from the -- all of a sudden I'm drawing a
3 blank -- other potential intervenors, the -- Dr. --
4 what's -- all of a sudden I'm drawing a blank on the
5 name. From the -- ones from the 19 -- early 1900s.

6 **MS. DAVIDSON:** Boyd Estate.

7 **JUDGE MELLOY:** Anyone hear anything from
8 Boyd Estate?

9 **MS. BARNCASTLE:** Your Honor, this is
10 Samantha Barncastle from EBID. Mr. Boyd regularly
11 harasses my general manager, Gary Esslinger, and
12 occasionally sends me harassing e-mails, but I haven't
13 heard from him in a little over a month or two now.

14 **JUDGE MELLOY:** Well, good, good. Well,
15 I think I've disclosed some parties. He did call. I
16 didn't talk to him, but my -- he did call and harangue
17 my judicial assistant about -- about the decision, but
18 that goes with the territory.

19 All right. Well, if there's nothing
20 further -- let me just say this. I don't want to take
21 up people's time so unless there's a need for a
22 hearing, I'm not going to schedule one right now.
23 Maybe if -- if something comes up in a few weeks, we
24 may do one towards the end of September, but I don't
25 see -- I assume at this point you're all going to be

1 working very hard to get your dispositive motions
2 together so I don't see any need to waste anybody's
3 time by -- by hearings like this.

4 **MR. WALLACE:** Your Honor, in light of
5 that, would you like us to start filing status reports
6 beginning in October?

7 **JUDGE MELLOY:** Yes, please. Although if
8 all the status report says is you're working -- no,
9 actually, no I don't. I assume the status report will
10 just say you're working on your motion for summary
11 judgment.

12 **MR. WALLACE:** That's probably true.

13 **JUDGE MELLOY:** So -- so unless there's
14 something -- unless there's something that comes up,
15 no, you don't need to file a status report to tell me
16 you're working on motions. Well, there's nothing any
17 -- anything else, thank you, everyone.

18 (The proceedings adjourned at 11:25
19 a.m.)
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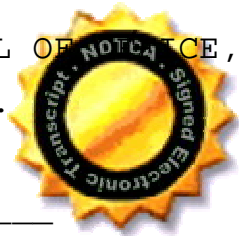
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CERTIFICATE

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

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

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on this, the 24th day of September, 2020.



Heather L. Garza

HEATHER L. GARZA, CSR, RPR, CRR

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