

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 17, 2021, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
1:01 p.m.

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1 **JUDGE MELLOY:** Good afternoon. This is
2 Judge Melloy. This is Original No. 141, United States
3 Supreme Court No. 141, State of Texas versus State of
4 New Mexico and State of Colorado with United States as
5 intervenor. As we usually do, let's start with the
6 appearances. Are you on, Mr. Somach?

7 **MR. SOMACH:** I am, Your Honor. I'm
8 sorry. I was on mute. Stuart Somach --

9 **JUDGE MELLOY:** Want to enter the
10 appearances for Texas?

11 **MR. SOMACH:** Yes. For Texas, Stuart
12 Somach. Also with me is Theresa Barfield from my
13 office, Sarah Klahn, Francis Goldsberry, Robert
14 Hoffman, and Rich Deitchman. Also on is Priscilla
15 Hubenak from the Texas Attorney General's Office; and
16 Suzy Valentine, the engineer advisor for the Texas Rio
17 Grand Commissioner.

18 **JUDGE MELLOY:** Mr. Wechsler, are you on
19 for New Mexico?

20 **MR. WECHSLER:** I am, Your Honor. Jeff
21 Wechsler for the State of New Mexico. We also have
22 Cholla Khoury and Zachary Ogaz from the Office of the
23 New Mexico Attorney General; Luis Robles and Susan
24 Barela from Robles Rael & Anaya; Lisa Thompson and
25 Michael Kopp from Trout Raley; John Draper from Draper

1 & Draper; Gregg Ridgley, the general counsel of the
2 office of the state engineer; Arianne Singer, the
3 general counsel of the Interstate Stream Commission;
4 Shelly Dalrymple from the Interstate Stream
5 Commission; and April Ferguson.

6 **JUDGE MELLOY:** Okay. And Mr. Wallace,
7 are you here for the State of Colorado?

8 **MR. HARTMAN:** Your Honor, Preston
9 Hartman in the Attorney General's Office for the State
10 of Colorado. Mr. Wallace is on, at least for now,
11 listening in, but I'll be speaking. Also with us is
12 our solicitor, Eric Olson, and Scott Steinbrecher, an
13 assistant deputy in our office.

14 **JUDGE MELLOY:** All right. Thank you.
15 Mr. Dubois, are you on for United States?

16 **MR. DUBOIS:** I am, Your Honor. This is
17 Jim Dubois for the United States. Also from Justice
18 are Lee Leininger and Jennifer Najjar; from the
19 Solicitor's Office, Shelly Randel and Chris Rich; and
20 then we've got some -- Ian Ferguson from Reclamation,
21 and Seth Allison, one of our paralegals.

22 **JUDGE MELLOY:** Before I go to the
23 others, I was going to ask you one question,
24 Mr. Dubois. Are we okay with the current service
25 list? I know I -- I understand Ms. Prelogar is no

1 longer the acting general. She's been nominated, but
2 there's a new acting. Do we need to update the list
3 or is it okay the way it is? Hopefully take the
4 acting out of her name at some point.

5 **MR. DUBOIS:** I need to double-check on
6 that. The acting may be removed very shortly or in
7 process, so I will check on Ms. Prelogar and see what
8 the status on that is and how the SG's office wants to
9 designate that in the meantime. So I will look at
10 that, Your Honor.

11 **JUDGE MELLOY:** I know she's been
12 nominated to be the associate general, so hopefully
13 that will go quickly.

14 The Albuquerque Water Utility Authority?

15 **MR. BROCKMANN:** Good afternoon, Your
16 Honor. Jim Brockmann for the Albuquerque Bernalillo
17 County Water Utility Authority.

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

19 **MR. CAROOM:** Doug Caroom for the City of
20 El Paso, Your Honor.

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

22 **MR. STEIN:** Jay Stein for the City of
23 Las Cruces, Your Honor.

24 **JUDGE MELLOY:** El Paso County Water
25 Improvement District No. 1?

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

6 **JUDGE MELLOY:** Elephant Butte Irrigation
7 District? Ms. Barncastle, are you there?

8 **MR. ESSLINGER:** Your Honor, this is Gary
9 Esslinger. Samantha has an emergency and is not in
10 attendance.

11 **JUDGE MELLOY:** Okay. Hudspeth County
12 Conservation Reclamation District No. 1? Anyone?
13 Mr. Miller?

14 (No response.)

15 **JUDGE MELLOY:** All right. Apparently
16 not. New Mexico pecan growers?

17 **MS. DAVIDSON:** Good afternoon, Your
18 Honor. Tessa Davidson on behalf of New Mexico pecan
19 growers.

20 **JUDGE MELLOY:** New Mexico State
21 University.

22 **MR. UTTON:** Yes, Your Honor, good
23 afternoon. This is John Utton for NMSU.

24 **JUDGE MELLOY:** And Southern Rio Grand
25 Diversified Crop Farmers Association.

1 **MR. OLSEN:** Good afternoon, Your Honor.
2 A.J. Olsen on behalf of the Southern Rio Grand
3 Diversified Crop Farmers.

4 **JUDGE MELLOY:** Anyone I've missed?

5 (No response.)

6 **JUDGE MELLOY:** All right. Then if not,
7 got a few things we want to take up this afternoon.
8 Let's talk about -- first of all, talk about the site
9 visit for next week. I sent out an e-mail last week
10 with some preliminary thoughts, and I'll tell you what
11 I'm thinking, and then you can react accordingly.
12 Point No. 1 is should it be cancelled. My -- my view
13 at this point is no. Is there anybody who feels that
14 we should cancel the whole -- the whole visit or
15 anyone feel uncomfortable with be -- doing the visit?

16 **MR. SOMACH:** Your Honor -- excuse me --
17 I might suggest that we look at the -- the flight
18 arrangements and are wondering whether or not we
19 should cancel that, and in its place, we're looking at
20 some things like -- we do think an aerial view is
21 important, but we were thinking that it might -- an
22 actual flight where everybody piles into the same
23 airplane might be replaced by some drone aerials that
24 could then be actually introduced as evidence so that
25 the record itself would reflect what would be seen in

1 those aerial photos. So that's the -- the first
2 reaction.

3 The second is, you know, we're not --
4 we've never thought that it was absolutely essential
5 to have an on-the-ground visit and so we would have no
6 problem with a cancellation of the on-ground visit,
7 but we'll obviously defer to you with respect to that.

8 **JUDGE MELLOY:** Well, let me just run
9 down the points. And, actually, you anticipated
10 exactly what I was going to suggest, Mr. Somach, which
11 is as to the -- as to the flyover portion of the tour,
12 that we cancel that, and that in place of it, we do a
13 video, either by plane or drone, and so -- unless
14 anybody wants to be heard on that point, I'm just
15 going to move along. I'll tell you what -- I'll just
16 tell you what my thoughts are on all the points and
17 then you can react.

18 On Point 3, I do think we should take
19 our own vehicles. I plan to do that. I'll leave it
20 up to the rest of you whether you want to go by your
21 own vehicle or whether you want to have several people
22 in a van.

23 I'm going to skip over No. 4 for a
24 minute. 5, I believe we -- we should have a masking
25 requirement for any time we're inside a building or

1 vehicle with any other person; and, finally, my view
2 is that we would -- I'm strongly leaning towards
3 canceling the in-person final pre-trial conference for
4 a couple reasons. The main one, just being that --
5 that it's a very uncontrolled environment. I know
6 that there are people who would like to see what's
7 going on, but that's also the thing that I think
8 introduces the biggest risks. We could have a very
9 crowded courtroom with number of spectators, of whom
10 we don't know their vaccination status is. We could
11 require masks, but that's also difficult to enforce,
12 but we could require it. And it didn't -- doesn't
13 seem to me to make a lot of sense to have the final
14 pretrial in El Paso if we're not going to allow
15 spectators. Finally, I think we can probably do it
16 just as efficiently by Zoom, so I'm leaning strongly
17 towards canceling the final pre-trial conference in El
18 Paso and scheduling it later next week or first part
19 of the week after for a Zoom hearing.

20 As far as the testing is concerned, I --
21 I did not really look into testing before I wrote this
22 memo, and based upon some further investigation, I've
23 found it's not as easy as it sounds. At least in our
24 area, there aren't a lot of sites that are doing the
25 rapid tests. It's easy to get, I think it's called

1 the PCR test where you have to wait three to five
2 days, but I thought there would be many more sites
3 that would give the rapid tests, and I'm finding out
4 that there are some, but they're difficult to get
5 appointments. What I'm personally planning to do and
6 would maybe encourage others to do this, although I'm
7 not going to require it, they -- they do have
8 take-home tests now where you can get the results
9 within a half an hour. They're obviously not as
10 accurate as a PCR test, but they have an 85-plus
11 percent accuracy. I'm planning to do one of those at
12 the end of this week and maybe even bring a second one
13 with me and retest on Sunday or Monday, but that's my
14 plan. So anyway, anyone want to react to any of the
15 points I've just outlined?

16 **MR. SOMACH:** I -- I think all of that is
17 a good idea. We have no objection to canceling the
18 pretrial in-person and moving it. Your Honor, I -- I
19 -- the Attorney General's Office, Ms. Hubenak,
20 actually wanted to address you, and I think it would
21 be appropriate to do it before we got deeper into the
22 status conference, and I'm wondering whether or not
23 that would be appropriate? I realize that it's not
24 perhaps directly relevant to -- to -- to the site
25 visit and the pretrial, but it is relevant to a lot of

1 the issues that you're raising so --

2 **JUDGE MELLOY:** Can I just make one other
3 point before -- and I'd be happy to hear Ms. Hubenak.
4 One of the reasons I decided that we should go -- that
5 I think we should go forward with the site visit is
6 besides the fact I think it's obviously very useful,
7 in talking to the senior judge in -- in El Paso who --
8 who assures me that the numbers are quite low actually
9 in South Texas and that Texas is a big state and not
10 every place has the same problems that they have in
11 Dallas and Austin and more northerly Texas, but I
12 actually looked at the numbers, and the number of
13 cases per one hundred thousand in Hudspeth County is
14 12; El Paso, 14; and then New Mexico runs about 19 per
15 hundred thousand in the areas we're going to be going
16 in, which are -- low may not be the right number, but
17 they're certainly in line with most other areas where
18 they're seeing a serious outbreak. So I did want to
19 throw that in. But go ahead. Ms. Hubenak, go ahead.

20 **MS. HUBENAK:** May it please the Court,
21 Your Honor, I asked Mr. Somach to give me a few
22 minutes of time so I could alert the Court that Texas
23 finds itself in a position of needing to move for a
24 motion for continuance of the trial, and I wanted you
25 to know that as soon as possible. My executive

1 leadership made this decision this morning, and it's
2 coming from an evolving situation. As you are aware,
3 Mr. Somach has a personal family emergency that will
4 prevent him from being in the courtroom in Cedar
5 Rapids and he's been the lead counsel for Texas for
6 the past eight years and the parties over time have
7 shown a preference for an in-person hearing before
8 Your Honor, which I think is important. Therefore,
9 Texas would like its lead counsel to be physically
10 present at the time of the trial when this very
11 important case for all the parties goes to trial after
12 this extended period of time, and given the long
13 standing nature of the litigation, we think that a
14 six-month continuance would not alter the litigation.
15 It's not sought for delay. You've heard many times
16 Mr. Somach tell the Court that Texas is ready to go to
17 trial. I believe all the parties are ready to go to
18 trial, but Texas believes it would be at a
19 disadvantage without its lead counsel physically
20 present in the courtroom, and for that reason, we'll
21 be filing a motion. We had -- my executive leadership
22 in my officer had an occasion to broach the subject
23 with New Mexico Attorney General's Office. New Mexico
24 Attorney General's Office had reached out to my
25 executive leadership, and based on that conversation,

1 Texas has agreed to respond to the most recent
2 settlement proposal from New Mexico, but when the idea
3 of an agreed continuance was broached, there really
4 was not an interest from the State of New Mexico to an
5 agreed continuance. So for that reason, Texas itself
6 will be moving for a continuance. I wanted Your Honor
7 to know that as soon as possible. I'm sorry that it
8 has come at this time, but it is important for us at
9 this time of the trial to have our -- our lead counsel
10 present and in the courtroom, and I just wanted you to
11 know that. The decision was just made this morning.
12 So thank you for your time, and that motion should
13 come in the next couple of days.

14 **JUDGE MELLOY:** Well, of course, that
15 comes as a surprise, I assume, to everybody but maybe
16 New Mexico, so I'm not going to ask anybody to respond
17 at this point. I would ask that you get that on file
18 by Thursday, and we'll take that up as the first item
19 of business at the same time we would otherwise
20 schedule the final pretrial conference. Mr. Wechsler,
21 do you need more than five or six days to respond?

22 **MR. WECHSLER:** No, Your Honor. That
23 should be sufficient.

24 **JUDGE MELLOY:** Okay. Well, let's talk
25 about a day then for both at motion and the final

1 pretrial conference. As I said, I'm inclined to -- to
2 move it to an online Zoom final pretrial. I would --
3 my suggestion is we either do it a week from Friday.
4 I think it's going to be difficult for most of us to
5 get out of El Paso before Wednesday, even if we -- I
6 mean, I'm planning to stay over until Wednesday. I'm
7 assuming that Tuesday is going to be a full day of
8 site visits and so Wednesday will be a travel day.
9 Could do it Thursday, but I -- I think Friday would be
10 better or I'm basically open the following week,
11 Monday or Tuesday. I don't think we want to wait too
12 long if the trial does go forward. Obviously, if the
13 case gets continued, there's not the same sense of
14 urgency. But how do -- do parties have a preference
15 as to a week from Friday or the following Monday or
16 Tuesday? I know this kind of ties a little bit into
17 what you had indicated in your letter, Mr. Wechsler,
18 that you're still working on some stipulations and
19 other things. That gives you a couple more days. How
20 about if we do it -- I'll just throw it out. How
21 about a week from Monday? Does -- let me look at the
22 -- I don't have a calendar right in front of me, but
23 whatever that date is.

24 **MR. SOMACH:** I think it's August 30th,
25 Your Honor.

1 **JUDGE MELLOY:** August 30th. Any problem
2 with that?

3 **MR. SOMACH:** No.

4 **JUDGE MELLOY:** All right. Then let's
5 plan on doing it at -- we'll do it 11:00 Iowa time,
6 which will be 9:00 San Francisco time, and hopefully
7 it won't take all day, but, you know, if we have
8 motion -- we're going to be talking motions in limine,
9 we're going to be talking final pretrial, now a motion
10 to continue. I suspect that it won't be an hour, so
11 we'll -- but hopefully it won't be eight either so --
12 but we'll -- we'll just take whatever time we need.
13 So let's plan on that.

14 Anything else we need to talk about
15 concerning the scheduling at this point or -- or the
16 site visit? And, by the way, I still don't have a
17 final itinerary. If someone would send that to me, I
18 would appreciate it.

19 **MR. WECHSLER:** Your Honor, may I return
20 to the timing of the final pretrial conference? I
21 apologize for not saying something earlier. I will be
22 in New York City taking my daughter out to college on
23 that day. It's likely I can find a place to handle
24 the conference from, but if it's possible for you and
25 everyone to do it on Friday the 27th, that certainly

1 would be preferable for me. But I'll -- I'll make
2 arrangements, if necessary.

3 **JUDGE MELLOY:** I don't have a problem
4 with the 27th if everybody -- anybody have a problem
5 with that?

6 (No response.)

7 **JUDGE MELLOY:** All right. We'll do it
8 on the 27th, same time, 11:00 Central, 10:00 Mountain,
9 9:00 California time zone.

10 All right. A couple things about the
11 trial itself. I got a call from the U.S. Attorney
12 here, and I understand that -- Mr. Dubois, that your
13 folks are working directly with the U.S. attorney and
14 that we don't need to worry about space for you in the
15 courthouse; is that your understanding?

16 **MR. DUBOIS:** That is correct, Your
17 Honor. We, I believe, have got that all lined up.

18 **JUDGE MELLOY:** Okay. But it's just you?

19 **MR. DUBOIS:** Yes. It's just the United
20 States.

21 **JUDGE MELLOY:** Okay. Because we had at
22 one time talked about maybe you and Texas co-locating.

23 **MR. DUBOIS:** That's just not really
24 possible because access issues are such that they can
25 allow Department of Justice folks in, but, I mean, if

1 we were, say, going to have Texas come in and meet
2 with us in a conference room, that would be something
3 that's doable but sort of independent access is not
4 available.

5 **JUDGE MELLOY:** Well, we have -- we have
6 space for everybody and so now that we know who needs
7 space where, we'll start to divvy it up. We actually
8 have set up the courtroom for the way it will appear
9 during the trial in terms of counsel table and so on.
10 We could send you some pictures of that if anybody
11 would like to see it. The -- I know Texas and New
12 Mexico had their technical experts here and last time,
13 and I think they know pretty well what the courtroom
14 is going to look like, but if anybody wants pictures,
15 we can certainly send them.

16 One of the questions I do have is, going
17 back to the COVID situation, is -- and -- and, also,
18 the -- the issue of in-person versus remote trial. I
19 mean, nobody wants to do this trial remotely, but on
20 the other hand, if the numbers keep going up, it's
21 going to get increasingly more dicey. You know, I've
22 not personally been exposed to COVID, but we have
23 friends who have friends who have been exposed to
24 COVID. You know, we're getting down to two and three
25 degrees of separation, so to speak, and it seems to be

1 getting closer, hitting closer to home. How many
2 people do we think we'll have in the courtroom? How
3 many people are you bringing -- or would -- would your
4 team be, Mr. Somach?

5 **MR. SOMACH:** We would probably be about
6 four to five in the courtroom. It might vary from
7 week to week, but that is -- that's our current
8 estimation.

9 **JUDGE MELLOY:** Does that include the
10 person who will be -- as I understand the -- I can't
11 remember the gentleman's name who was here.
12 Mr. Tiedemann. Will he be there?

13 **MR. SOMACH:** I hadn't included him in
14 the four to five so that would be an extra person, and
15 we would have him in the courtroom.

16 **JUDGE MELLOY:** And he would have to be
17 at counsel table because I understand he's going to be
18 running the technology and pulling the exhibits up and
19 doing all that type of thing; is that correct?

20 **MR. SOMACH:** Yes.

21 **JUDGE MELLOY:** Okay. So that would be
22 five to six. What about New Mexico, Mr. Wechsler?

23 **MR. WECHSLER:** Our plan, Your Honor, is
24 to have four at counsel table at any given time. It's
25 possible, depending on the witness, that we'll also

1 ask to have one of our experts present in the
2 courtroom to be able to help us with cross-examination
3 in particular, so we're also looking at four to five
4 at any given time. We will also have, in Cedar
5 Rapids, another two to four at any given time, again,
6 depending on the witness and what's happening in the
7 trial.

8 **JUDGE MELLOY:** Does your four to five
9 include Ms. Ferguson?

10 **MR. WECHSLER:** It does, Your Honor.

11 **JUDGE MELLOY:** Okay. And what about the
12 U.S., Mr. Dubois?

13 **MR. DUBOIS:** Your Honor, I expect four
14 to five folks.

15 **JUDGE MELLOY:** And Colorado? I think
16 you had told me at one point probably just one but
17 maybe two, Mr. Wallace?

18 **MR. HARTMAN:** Mr. Hartman here, Your
19 Honor.

20 **JUDGE MELLOY:** I'm sorry. Excuse me.

21 **MR. HARTMAN:** That's okay. You're not
22 used to me yet. We will have two at counsel table
23 initially. I believe we'll be able to have one from
24 time to time depending on how things go, and then one
25 of our client experts, at times, as New Mexico

1 mentioned, we have the same plan. We may need a
2 client expert, depending on who's testifying. So I'd
3 say really three maximum at any given time.

4 **JUDGE MELLOY:** So we could have
5 realistically 15 people in the well, assuming we have
6 room for that many people. We could accommodate that
7 many people. It's going to get a little crowded
8 around counsel table. They're set up right now for
9 Colorado for two, New Mexico and Texas each for four,
10 although we could -- we can certainly get another
11 chair in, and U.S. for four. So we could squeeze one
12 or more -- one or two more at counsel table, but it's
13 going to be -- it's going to be a pretty close
14 environment. I think we're going to have to probably
15 impose a mask mandate unless things change
16 dramatically, but I -- let me -- I want people to
17 think about that before the final pretrial as to how
18 we're going to -- what precautions they think we
19 should take, if any, but I -- my -- my current
20 thinking is we'll probably have to put -- put a mask
21 mandate in unless you're -- unless you're the person
22 actually examining the witness, but -- but I don't
23 know. Any thoughts about that? You know, right now,
24 just by way of -- just to go back a second, I
25 mentioned that the numbers in New Mexico are, like, 19

1 per a hundred thousand, in the Hudspeth El Paso County
2 area, 12 in 14. In our area, it's about 24, which is
3 still not a huge number, but it's -- you know,
4 unfortunately, they're going up.

5 **MR. SOMACH:** I -- if I were going to be
6 there, you know, I'm 73. It's not -- I would not be
7 enthusiastic about being in a crowded courtroom,
8 certainly if folks weren't masked. I'm not
9 enthusiastic about -- I mean, I'm isolated in my
10 office here and I know all the folks that are in this
11 office and I do care about the people that will be
12 there, and I think a mask mandate is not asking too
13 much under the current situation, and as you
14 indicated, it may even be worse at the time of trial
15 so I think from a Texas perspective, we -- we
16 certainly would have no objection to -- to a mask
17 mandate at all.

18 **MR. WECHSLER:** Your Honor, for New
19 Mexico, everyone on our team is vaccinated, and we are
20 comfortable with a mask mandate, as well.

21 **JUDGE MELLOY:** And I -- I don't want to
22 put the cart before the horse, but, you know, it may
23 get to a point where the -- the district court may
24 impose some restrictions for the whole courthouse. I
25 -- I'd hate to see the trial go remote, but, I mean,

1 that's certainly a possibility that could happen at
2 some point if -- if -- if the numbers keep rising the
3 way they are. Does anybody -- does -- would anyone
4 object to certifying that they've been vaccinated? Do
5 you think anyone has any objection to disclosing their
6 vaccination status on any of the teams?

7 **MR. SOMACH:** I don't think any of the
8 lawyers will object. I do know, and I've talked --
9 I've got a couple of percipient witnesses that I know
10 are not vaccinated and will not be vaccinated. I
11 don't -- I don't know what to do about them. And I'm
12 not sure -- you hadn't mentioned amici. You know,
13 originally, you had indicated that -- that you would
14 have them in the jury box and -- and other places.
15 We've talked about that. You know, we're not overly
16 enthusiastic about loading the courtroom with
17 additional people, and that's another consideration.
18 But in terms of our -- our -- our lawyer team, we have
19 no problem with certifying vaccinations. With
20 witnesses, I don't know, because other than these
21 conversations I just relayed to you, I don't know what
22 their status is or their inclination.

23 **MR. WECHSLER:** Your Honor, we have no
24 objection to vaccination mandate, and I would say for
25 those witnesses -- I'm not aware of any for the State

1 of New Mexico -- but for any witness who is not
2 vaccinated or doesn't wish to disclose, they could
3 testify remotely.

4 **JUDGE MELLOY:** Mr. Somach does bring up
5 a good point. I forgot to ask. How many of the amici
6 think they may be here for the trial for any
7 significant portion of it?

8 **MR. BROCKMANN:** Your Honor, this is Jim
9 Brockmann for the Water Authority. We had kind of
10 planned on having counsel and one client
11 representative for the opening for a day or two and
12 then we thought we would attend primarily remotely,
13 and as necessary, if there was a particular witness of
14 concern or -- or a water authority witness, we would
15 attend that personally, but I think our attendance
16 would primarily be remotely with some occasional time
17 in the courtroom, primarily for -- for the opening and
18 then, also, for a witness of the Water Authority.

19 **JUDGE MELLOY:** Well, that was kind of my
20 understanding of all the amici with maybe the possible
21 exception of -- I know Ms. Barncastle indicates she
22 may be here for a significant portion. Is Ms.
23 Barncastle on? I know she wasn't earlier.

24 **MS. O'BRIEN:** Your Honor, this is Maria
25 O'Brien. I don't think Samantha is on. I think --

1 and I don't know what her current plans are except
2 that I do -- I think it is consistent with what you
3 articulated. For EP1, we had planned on being there
4 for, not necessarily the entirety of the trial, but
5 certainly the bulk of the Texas/United States case.
6 We have four witnesses at least from EP1, and much of
7 their testimony is also interrelated with some other
8 witness testimony so depending on the order, it just
9 -- we need to be there in person for certain aspects,
10 and depending on the order, it just might not make
11 sense to come -- certainly to travel in and out, might
12 not need to be there in person, but we would
13 anticipate just one to two district counsel and then
14 perhaps one district representative there in -- in
15 person.

16 **JUDGE MELLOY:** I guess I would just
17 request of Mr. Somach's team and Mr. Dubois's team and
18 then, of course, when New Mexico takes over, to do the
19 same thing. But if you could coordinate with Ms.
20 O'Brien or Ms. Barncastle or whoever is involved to
21 try to -- to group their witnesses to the extent you
22 can without impacting the flow of the case too much,
23 it might make -- it might make things much more
24 efficient in terms of their having to be here and the
25 amount of time that we have additional people in the

1 -- in the courtroom. But if we have a lot of people,
2 other than the parties, the jury box could start to
3 get a little crowded. It's -- it's a very big jury
4 box. If we have, say, half a dozen people in the jury
5 box or in -- in -- in the gallery, we can spread those
6 people out pretty easily. If it starts to be 12 or
7 15, then it's another story. But we can -- I think we
8 can spread the people out pretty -- pretty well if
9 it's only, say, 10 or 12, but -- between the jury box
10 and the -- and the gallery, but much more than that,
11 we're going to start getting crowded and, you know --
12 but anyway...

13 **MS. O'BRIEN:** Your Honor, I would just
14 also add that anybody from the District that we plan
15 to have in person in the courtroom, we don't have a
16 problem disclosing vaccination status, and those that
17 will be in person are fully vaccinated.

18 **JUDGE MELLOY:** All right.

19 **MR. STEIN:** Your Honor, this is Jay
20 Stein. There will be four attending from the City of
21 Las Cruces for the opening two days and then perhaps
22 -- in addition to myself, and then perhaps the same
23 for attending when the two Las Cruces witnesses are
24 presented by the state attorneys.

25 **JUDGE MELLOY:** Looks like it's going to

1 be a pretty big -- pretty full house the first two
2 days. I'm not sure what you think is going to happen
3 the first two days that's going to be so exciting, but
4 maybe -- maybe Mr. Somach has something planned that's
5 going to be a real blockbuster.

6 **MR. SOMACH:** They should hold their
7 breath and wait.

8 **MR. UTTON:** Your Honor, could I mention
9 one thing? This is John Utton for NMSU. So we're not
10 planning to attend the first few days but will attend
11 when, I think there are three witnesses that are
12 scheduled to testify, and then I think unless there
13 are COVID issues, also attend in person when the trial
14 is in Las Cruces. One thing I want to mention and was
15 going to raise this anyway. It would, I think, make
16 it more helpful and would encourage people to attend
17 not in person if the live feed were a little less
18 restrictive. I'm wondering if rather than limiting
19 the live feed to attorneys, we could perhaps submit a
20 list including client representatives. I think in
21 some cases, it's going to be difficult for client
22 representatives to go to their attorneys' office. I
23 think, also, if COVID is worsening, it's going to
24 cause people to gather when maybe they don't need to.
25 So I think it would encourage folks not to attend in

1 person if there were -- if -- if the ability to
2 observe the live feed were a little less restrictive
3 and so I would propose, Your Honor, that rather than
4 limiting it to just two experts and attorneys, that
5 perhaps each party could submit a list of -- of
6 parties, representatives who would be authorized to
7 view the live feed from their own offices rather than
8 having to congregate. Thank you.

9 **JUDGE MELLOY:** Well, why don't you
10 submit that? I want to think about it, but I'm not
11 closing the door on it. So if you want to -- I want
12 to see how many people we'd be talking about. So if
13 each -- if each party and amici want to submit
14 something indicating who they would want to have
15 access to the live feed, if you get that to me before
16 the final pretrial, we can talk about that then.

17 **MS. DAVIDSON:** Your Honor, this is Tessa
18 Davidson. I just want to support John Utton's
19 request, and also let you know that we had similar
20 plans to attend first day of trial, the first few
21 days, with up to three people, and I will be in and
22 out of Iowa in person depending on the witness order
23 and some other matters with the New Mexico team.

24 **JUDGE MELLOY:** Well, I -- I hope we
25 don't get back to what sort of started the evolution

1 of the -- of my thinking about the live feed, which
2 was that at one point, I was thinking if we had so
3 many people here, we would have to use an overflow
4 courtroom and do -- do a live feed into an overflow
5 courtroom, but that sort of went -- my thought evolved
6 from that point of, well, if we're going to do a
7 courtroom, why not just do it back to their offices in
8 New Mexico or Colorado or Texas or wherever? But -- I
9 mean, but if we have too many people, that's the only
10 alternative is that we'll be putting some of them in a
11 separate courtroom, and you're still going to be
12 looking at it on -- on a video feed. But -- but --
13 but, again, to follow up on Mr. Utton, send me the
14 list, let me think about it and see how many we're
15 talking about, and we'll go from there.

16 **MR. OLSEN:** Your Honor, A.J. Olsen on
17 behalf of the crop farmers. I do not intend to attend
18 any of the proceedings with the exception I would
19 anticipate during New Mexico's case in chief, at least
20 one witness from the farmers is identified as a
21 witness, and I may -- I may attend that if it's done
22 live. There's also some discussion maybe done
23 remotely, but that would be the only case. So there
24 will be an extra chair there.

25 **JUDGE MELLOY:** In the jury box. All

1 right. Unless there's anything further on that, let's
2 talk about the letters that were sent within the last
3 two days. I'm going to save for the last discussion,
4 the issue that you raise, Mr. Dubois, and
5 Mr. Wechsler's response, and go first to the items
6 that Mr. Wechsler has identified in his e-mail from
7 this morning, which I think we can maybe tick off
8 pretty quickly. Status of the decision on Texas'
9 motion for leave to file a supplemental complaint. I
10 do owe you something on that. I want to talk to the
11 clerk at the Supreme Court, but my current thinking is
12 that I will plan to forward that on to the Supreme
13 Court. My guess is they'll send it back, but that's
14 my current thinking. We'll get something out on that
15 within the next week or two, and I do owe you
16 something on that.

17 As far as the joint exhibit list and
18 stipulation of facts, I don't have any problem
19 extending that deadline to the 20 -- actually, if you
20 want to make it the 24th now since we're going to be
21 doing the final pretrial on Friday -- or, actually, I
22 could even -- even do it the 25th. I don't have any
23 objection if that -- if that works better for
24 everybody. I assume there's no objection to that.

25 Weeks of the trial will be held in Las

1 Cruces and El Paso. I -- it's a little hard to answer
2 that because it's my understanding from the
3 discussions we had previously that the parties wanted
4 the Las Cruces and El Paso weeks be the last two
5 weeks, and until we know how long the trial is going
6 to go, I don't know what -- I don't know when the last
7 two weeks will be. Now, if you want to pick two weeks
8 but with the understanding that may not be the end of
9 the trial, we could do that. I don't know what --
10 what are your thoughts on that, Mr. Wechsler?

11 **MR. WECHSLER:** Well, my concern, Your
12 Honor, is there's a large number of exhibits. I think
13 collectively the parties have disclosed 7,000 plus.
14 We will have physical exhibits, you know, present at
15 the courthouse in our various spaces. Logistically
16 moving from one courthouse to another just ends up
17 being difficult. If we do know the weeks in advance,
18 it makes it a little bit easier, and -- and I am also
19 somewhat warming to the idea of -- of you selecting
20 either Las Cruces or El Paso and not having to move
21 three times. And just to give you an example, I think
22 Thanksgiving is the last full week of November. You
23 then have three weeks before the final day of December
24 17th, which -- which we anticipate would be the very
25 last possible day if it goes that long. So it would

1 mean that we went home for Thanksgiving, we came back
2 to Cedar Rapids the week afterwards, did a week of
3 trial there, packed up all of our stuff, moved to Las
4 Cruces for the next week, and then the week following
5 that, also moved to El Paso, and it just becomes a
6 very difficult challenge logistically for -- for our
7 teams. And so that -- that's what we're thinking. I
8 guess if I were -- if you were asking what days would
9 we choose, we would choose the last two weeks, the
10 week that ends the 17th and the week immediately
11 before that. If it turns out we don't need all of
12 that extra time, then maybe we can just have a pause
13 there that would allow us to switch the trial, the
14 time to take care of those logistics, and the -- and
15 the travel. But knowing that in advance would be
16 helpful.

17 **JUDGE MELLOY:** All right. Well, let's
18 -- I think that's an issue that we don't have to
19 resolve today. Let's see how things kind of evolve.
20 We should be able to give you plenty of notice as to
21 when those two weeks will be. I also need to
22 coordinate it with -- I need to give notice to the
23 courts in those locations so that they have facilities
24 available, although they're both relatively new
25 courthouses with nice courtrooms, so I don't

1 anticipate that being an issue, but we'll talk about
2 that once the trial gets going.

3 Trial subpoenas. I -- I guess I don't
4 have a problem with your suggestion. I really don't
5 know how it's been done in other cases. Again, that's
6 probably something I'll clear with the clerk at the
7 Supreme Court, but I think your suggestion is probably
8 a workable one. Anybody else want to be heard on that
9 issue?

10 (No response.)

11 **JUDGE MELLOY:** And whoever issues the
12 subpoena will be responsible for the service and the
13 service costs and the witness fees and all that type
14 of thing, I assume, and so --

15 **MR. WECHSLER:** Yes, Your Honor. That's
16 our understanding.

17 **JUDGE MELLOY:** Yeah. Okay. All right.
18 No, I don't have a problem with that.

19 And then, finally, you're going to take
20 the deposition of Mr. -- how do you spell it, Skov?

21 **MR. WECHSLER:** I believe it's
22 Commissioner Skov, Your Honor. We just wanted to make
23 you aware that that was being scheduled.

24 **MR. SOMACH:** I can add something. I
25 talked to Mr. Skov this morning, and we're not going

1 to -- regardless of the question of deposition, we'll
2 certainly make him available, but we're going to not
3 put him on our -- our witness list either as a
4 will-call or may-call. He's only been the
5 commissioner for a few months and the prior Rio Grande
6 commissioner will testify and his deposition has been
7 taken. But I'm -- I'll let you know, Your Honor, and,
8 also, Mr. Wechsler, that we're going to not put him on
9 our witness list so you can decide how you want to
10 proceed. But that's not a problem.

11 **MR. WECHSLER:** Well, I appreciate that,
12 Mr. Somach. Yeah, if that happens, there's no need
13 for us to take his deposition obviously so...

14 **MR. SOMACH:** That's why I raised it, and
15 I only confirmed that with him this morning. I wanted
16 to make sure he was comfortable with that since he is
17 the Rio Grande commissioner.

18 I have an off agenda before you get to
19 Mr. Dubois' letter, which obviously we're interested
20 in, but there have been over a period of time some
21 discussion of expert reports and their admission and
22 hearsay and so forth, and I know that we took a pretty
23 aggressive position against their admission and so I
24 think it's appropriate for me to just kind of fall on
25 my sword here and say we have no objection at all to

1 expert reports of witnesses that are going to testify
2 being admitted, subject to our ability to
3 cross-examine those witnesses, you know, and address
4 the relevance and other objections, other than
5 hearsay, that we will agree that we won't make hearsay
6 objections to those reports. I -- I think that the
7 New Mexico suggestion earlier that they be admitted
8 upon some reflection is -- is probably an appropriate
9 and a good idea, allow you to take a look at those. I
10 would say we assume that those would be reports for
11 which witnesses would also be put on the stand so that
12 they could be cross-examined, but we had had a lot of
13 discussion about it in previous status conferences. I
14 just wanted to let you know that we've really thought
15 a great deal about it, and in spite of our vigorous
16 opposition, I am going to just simply say we were --
17 we thought about it and decided that we will -- we
18 will lift any -- any objections to that and would like
19 to go along with the original New Mexico suggestion.

20 **JUDGE MELLOY:** And what was that
21 suggestion? Mr. Wechsler?

22 **MR. WECHSLER:** Your Honor, I think, as
23 Mr. Somach indicated, our suggestion is that the
24 expert reports are considered admissible in the same
25 way that any other exhibit would be. We would

1 anticipate, for example, if we're putting on
2 Dr. Barroll, we'll attempt to qualify her as an
3 expert, and then we would offer her -- her expert
4 report at some point. Texas and the United States
5 would have the opportunity to obviously voir dire or
6 do anything related to her qualifications, as well as
7 particular portions of the exhibit that they object
8 to, but ultimately, those exhibits are not
9 inadmissible simply because they're -- they're
10 hearsay.

11 **JUDGE MELLOY:** What about hearsay within
12 the report? I mean, experts are -- you know, experts
13 can rely on hearsay to some extent, but -- this is an
14 example. In one of the pleadings that I read today,
15 somebody had had attached an excerpt from a transcript
16 of a prior proceeding where a historian said the
17 commissioners meant this when they -- when they
18 entered into the Compact, and the reason I know that
19 is because I talked to those commissioners and they
20 told me that that's what they meant. Now, that
21 wouldn't be admissible, I don't think, as an expert
22 report.

23 **MR. WECHSLER:** Your Honor, I --

24 **JUDGE MELLOY:** Maybe these are just
25 issues I have to resolve as we go through them because

1 it's hard to decide them in a vacuum but --

2 **MR. WECHSLER:** Agreed. We would
3 anticipate those would be addressed at the time of
4 admission. And as to that particular rule, I think
5 that the rules of evidence address that, and just
6 because an expert has relied on something doesn't
7 necessarily mean that you can overcome the hearsay
8 exception on that. I think the classic example is
9 survey evidence, but I agree, that's something that we
10 would address at the time of an exhibit was offered.

11 **JUDGE MELLODY:** And do you anticipate
12 that, to some extent, the report would take the place
13 of the direct testimony? Certainly not all of it, but
14 that the direct testimony could be somewhat truncated
15 by having the report in evidence?

16 **MR. WECHSLER:** Yes, Your Honor. Yes, it
17 will make our presentation much more efficient. We've
18 looked at that exact issue. I wouldn't say it takes
19 the place of it. There's still some explanation in
20 walking through the -- what we consider to be the
21 important parts, but much of the excess information or
22 background information won't be necessary to walk or
23 step through in detail.

24 **MR. SOMACH:** Yes. And that -- that's
25 part of our motivation, also, is it relieves us of the

1 obligation or burden of going through every -- every
2 aspect of the report, and we can focus on what we
3 think are the most significant aspects of the report
4 and then allow you, subject to any -- any objections,
5 allow you to take a look at the -- the rest of the
6 report at your leisure.

7 **JUDGE MELLOY:** Thank you. Going back to
8 the -- the video feed, Mr. Utton. I -- I have the
9 strong suspicion that there will be a lot of people
10 watch it the first two days and realize, in spite of
11 what Mr. Somach's team is trying to do to make it
12 very, very interesting, that they'll quickly lose
13 interest and it will not be a ratings bonanza, but
14 we'll see.

15 But anyway, turning to Mr. Dubois'
16 letter and Mr. Wechsler's response, and it ties
17 obviously a little bit into the motions in limine,
18 which wasn't planning to get into too much detail on
19 today, but I guess I -- I'm -- can you explain to me
20 what you want kept out, Mr. Dubois? I'm a little --
21 I'm having a little trouble following your logic.

22 **MR. DUBOIS:** There are aspects -- I
23 mean, it's nice that Mr. Wechsler said they weren't
24 going to pursue their affirmative claims, but they
25 have given very mixed messages on that and it appears

1 that they are -- looking at the witnesses and exhibit
2 list, that they are, in fact, not merely presenting
3 defenses but are trying to establish affirmative
4 claims against the United States to defend this, and
5 in that respect, I think that, you know, those --
6 those -- the specifics of those objections are likely
7 to come up at trial as evidence is attempted to be
8 submitted by New Mexico.

9 **JUDGE MELLOY:** Well, the way I look at
10 it, and maybe I'm -- I -- I'm misunderstanding what
11 this case is all about, but New Mexico, as I
12 understand its position, and Mr. Wechsler can
13 certainly correct me if I'm wrong, has acknowledged
14 that to some extent, groundwater pumping does affect
15 return flows, which to some extent affects the amount
16 of water that Texas is receiving under its Compact
17 apportionment, but New Mexico is also taking the
18 position, as I understand it, that to the extent Texas
19 is getting shortchanged on its water, there are other
20 reasons, in addition to groundwater pumping, and that
21 they're going to be presenting evidence as to what
22 those other reasons are and it may include
23 mismanagement by the Bureau of Reclamation. And, I
24 guess, why should they not be permitted to do that,
25 Mr. Dubois?

1 **MR. DUBOIS:** Your Honor --

2 **JUDGE MELLOY:** Even though it may
3 overlap with the counterclaim.

4 **MR. DUBOIS:** And some of it does, Your
5 Honor. You know, I don't -- that's not really the
6 issue; however, they've also apparently, for instance,
7 there was a -- a dispute regarding accounting -- or
8 there's at least alleged to be a dispute regarding
9 accounting of credit water in 2011, but, in fact,
10 there -- that is -- that is not a matter that is going
11 to -- to affect either the baseline operation or -- or
12 the amount of water that went through the project in
13 that year. It is simply trying to pursue the claim
14 that they have brought in -- in federal district court
15 regarding -- regarding the -- the accounting in 2011.
16 They're -- apparently, they're still seeking, it
17 appears, to try to establish that the -- the legal
18 obligations, question mark, exist for the IBWC, not a
19 matter of simply there is -- there is this much water
20 lost against because of seepage from the river. These
21 are slightly different issues, and they are not
22 necessarily within the defenses that -- that you're
23 talking about. It is -- it appears to be trying to
24 assert and -- and prove affirmative claims against the
25 United States that are currently pending in

1 essentially an APA case in Federal District Court, and
2 I -- we do not want this to be a litigation of a case
3 that, frankly, would be under APA standards and is
4 pending in Federal District Court in New Mexico.

5 **MR. SOMACH:** Your Honor, could I add
6 something from the State of Texas' perspective on the
7 issue? And that is that the -- the claims Texas
8 brought in the Supreme Court were claims against New
9 Mexico for its permitting and authorization actions.
10 The issues that Mr. Dubois is talking about are -- are
11 not Compact actions against the State of Texas other
12 than the allegations about some groundwater pumping,
13 which I think they're free to litigate. Almost all of
14 the actions that they complain about with respect to
15 accounting, canals, you know, just the -- the
16 operating agreement itself are all claims against
17 third parties that the State of Texas, as a Compacting
18 party, in an original action has absolutely no control
19 over. Now, the -- the question I thought we were
20 litigating, and I thought you had articulated at one
21 point was you've got to know what each side is
22 entitled to get, and -- and that was your
23 determination essentially that it was 57/43 percent,
24 and that the question for trial was 57/43 percent of
25 what, and that the issues that they raise in terms of

1 that fourth cause of action, which brings most of this
2 in here in -- in their -- not the fourth cause but the
3 fourth counterclaim, you know, that they're really
4 couched in terms of remedies or that's the unjust
5 enrichment argument against the State of Texas. So
6 once you decide whether or not, you know, what 47
7 percent -- or 43 and 57 percent of what -- whatever
8 that amount is, then in that remedies phase, you would
9 determine whether or not Texas was getting that entire
10 43 percent or whether or not New Mexico was getting
11 its 57 percent and -- and -- and that would be the
12 determination. The question of doing something about
13 it, you know, enjoining some action, again, there's no
14 action by the State of Texas that, other than
15 groundwater pumping in Texas, that would -- you -- you
16 could enjoin us from accounting eight ways to Sunday,
17 and it wouldn't change the accounting. Those are
18 claims against the United States, which you have
19 indicated are outside of the scope of the original
20 action and which would have to be dealt with in the --
21 in -- in the district court case in any event. And so
22 it is really kind of the scope of what this -- this --
23 this -- what the testimony would be on those issues in
24 the liability phase when Texas hasn't -- there's no
25 actions other than groundwater pumping that have been

1 alleged against the State of Texas. So they have to
2 be allegations either against third-party districts,
3 who are not parties to the litigation, or the United
4 States, which -- which you have dismissed. So I -- it
5 does create a quandary in terms of knowing what we're
6 supposed to do to address -- at least the State of
7 Texas to address allegations for which we have no
8 control over any more than New Mexico has control
9 over.

10 **JUDGE MELLOY:** How do we account for the
11 fact that none of this is being litigated in a vacuum,
12 and you and Mr. Dubois have both indicated, well, you
13 don't want to get into the 2008 operating agreement,
14 but if -- if I looked -- if we were to just determine
15 what -- what amount of water Texas is getting today,
16 Texas, I assume, would say, hey, wait a second, that's
17 not because New Mexico isn't -- is because New Mexico
18 -- because of what New Mexico has or has not done.
19 It's because of the operating agreement. You may be
20 getting all the water you're entitled to right now,
21 but it's not because New Mexico is not doing
22 groundwater pumping. It's not because the return
23 flows aren't -- haven't dried up, it's because of the
24 operating agreement. So how do we ignore the
25 operating agreement?

1 **MR. SOMACH:** Well, we don't think that
2 we are getting -- even with the operating agreement,
3 that we're getting the amount of water that -- that we
4 should be getting because the operating agreement is
5 predicated upon operations from a period that -- that
6 is decades after the 1938 Compact. What we think of
7 the operating agreement quite frankly is it's
8 mitigating for damages that otherwise would be
9 occurring. It's not eliminating. It's just
10 mitigating for them. And that's part of the testimony
11 that we'll be -- we'll be putting on. But, you know,
12 we don't think that -- I mean, we have no control over
13 the operating agreement. What the operating agreement
14 just does is allocate the water that's left over after
15 New Mexico does its groundwater pumping.

16 **JUDGE MELLOY:** You keep saying you don't
17 have any control over the operating agreement, you
18 don't have any control over this, you don't have any
19 control over that, which may be true, but why can't
20 New Mexico come in and say the same thing? If you're
21 getting shorted, Texas, it's not because of anything
22 we're doing, but it's because of things the United
23 States is doing, it's because of things other parties
24 are doing, over which they have no control? Why
25 aren't they allowed to do the same thing that you're

1 asking to do, which is -- which is to show that there
2 are causes totally outside their control that are
3 effecting the delivery of water to Texas?

4 **MR. SOMACH:** Well, it's because that our
5 -- our complaint focuses on New Mexico actions. It --
6 it doesn't focus on the -- as I've said, we don't
7 think the operating agreement gives us what we're
8 entitled to because it's not that 1938 condition.
9 What our complaint, the complaint we filed with the
10 Supreme Court, did was focus on the actions of New
11 Mexico, not the actions of the United States, not the
12 actions of the two districts. That's another lawsuit,
13 which I -- you know, we're not a party to the
14 operating agreement any more than New Mexico is.
15 We're focusing on the impacts of groundwater pumping
16 authorized and permitted by the State of New Mexico.
17 Now, what I've said is if they want to focus on
18 groundwater pumping that is authorized and permitted
19 by the State of Texas, which is part of what they're
20 arguing, we don't think they can prove what they're
21 alleging, but they're entitled to try to prove that.
22 We -- we haven't focused on that at all. What we're
23 saying is you can't bring into an original action, a
24 Compact action, and a complaint against Texas because
25 that's what that fourth counterclaim is, it's a claim

1 against Texas. And except for the groundwater
2 pumping, they're complaining about somehow Texas'
3 involvement with the operating agreement, with
4 accounting, with the fact that the United States lined
5 canals, that they did realignments. Those are actions
6 not of Texas. They're of the United States. It's not
7 that they don't have a -- a place or a forum, but that
8 place and forum is, as Mr. Dubois said, in a Federal
9 District Court under the APA, not an original action
10 in the United States Supreme Court because there's
11 nothing that -- that can be done by litigating against
12 the State of Texas, which is, again, what that fourth
13 counterclaim does. Those are claims against third
14 parties that Texas has no -- no control over. If they
15 want to raise those issues in the remedy phase because
16 somehow, you know, it's appropriate to consider the
17 actions of others, that's fine, but not in the
18 liability phase because we can't be liable for the
19 actions of the United States or the actions of the two
20 districts. We simply can't be liable. They're
21 strangers to those actions.

22 **JUDGE MELLOY:** Well, why can't New
23 Mexico be liable for the actions of the United States
24 or the two districts.

25 **MR. SOMACH:** We don't think they can be.

1 We're focused on --

2 **JUDGE MELLOY:** Well, then why can't they
3 prove that whatever you're being shorted is a result
4 of the action of the United States and the two
5 districts? That's what I'm having the whole trouble
6 understanding is why -- assuming you're -- assuming
7 you're getting shorted on the water, why can't New
8 Mexico come in and say, fine, but it's not our fault?
9 I don't understand why they're not allowed to prove
10 that?

11 **MR. SOMACH:** Well, I think that that --
12 that's -- they can prove it's not our fault. What I'm
13 saying is that's not what that fourth claim for relief
14 is. That's not the way the testimony is -- is set up.
15 It's set up from a liability on the part of State of
16 Texas perspective, which is totally different from an
17 affirmative defense, and -- and they are certainly
18 entitled to put up affirmative defenses, which say you
19 may be injured, but we didn't do it. That's quite
20 different from a -- a -- a counterclaim that says it's
21 your fault, State of Texas, that we, New Mexico, are
22 being injured. That's -- that's quite a different
23 thing.

24 **JUDGE MELLOY:** Mr. Wechsler, do you want
25 to --

1 **MR. WECHSLER:** Yes, Your Honor. And
2 I'll try and address these in order. I'll observe
3 first that feels like we've gone a little far afield
4 from the procedural issue that Mr. Dubois raised.
5 This isn't a time or place for dispositive motions.
6 You've already ruled on this issue. You've ruled in
7 the past. It's clear where we're going, and Texas
8 doesn't like the outcome of that and that's fine, but
9 it's going to have to litigate the issues that are --
10 are before it. I want to comment briefly on your
11 articulation of New Mexico's position, which I think
12 is the mostly accurate. I would specify in particular
13 that we can see that in low supply years, the project
14 supply has been reduced, and -- and it's only in those
15 years that any injury is -- is held, and we'll be
16 prepared to explain exactly why that is at trial. We
17 also want to be very clear that we're not just saying
18 that Texas didn't -- did receive its 43 percent. We
19 are actually saying that at least since 2006, New
20 Mexico did not receive its 57 percent of project
21 supply. I think the evidence will be uncontroverted
22 on this point, which is one of the reasons that Texas
23 and the United States are fighting so hard on this
24 particular issue, and -- and you'll learn that there's
25 a number of reasons for that. Some are accounting.

1 Some are physical. Regardless, New Mexico is getting
2 charged for actions that occur in New Mexico and
3 elsewhere.

4 On the two issues that Mr. Dubois
5 raised, credit water and -- and the IBWC maintenance
6 issues, you're exactly right. Part of what we're --
7 we intend to show is that those are particular issues
8 that show that New Mexico did not receive its
9 apportionment as a result of the -- the credit water
10 action of the United States and its failure to, say,
11 maintain the river, which causes depletions for which
12 New Mexico is getting charged, and it's not
13 responsible. On this bigger issue that Texas is
14 raising about the counterclaims, it doesn't like
15 Counterclaim 4. You've been very clear, and I think
16 correctly so, that ultimately what this case is about
17 is are the two states receiving their apportionment?
18 So as you've ruled, is New Mexico receiving 57 percent
19 of project supply? Is Texas receiving 43 percent?
20 And so we first have to identify, is that occurring,
21 and if not, what are the causes? And if either of the
22 states is not receiving its full apportionment, then
23 there has been a Compact violation. That's the
24 essence, the essential basic question that's being
25 presented here. It -- it shows up in Texas'

1 complaint. It shows up in the United States'
2 complaint, and it shows up in -- in -- in New Mexico's
3 counterclaims. And so those -- the evidence that
4 we're talking about here is relevant both in New
5 Mexico's defenses, not affirmative defenses, but to
6 the extent that Texas is saying we didn't receive 43
7 percent. It is a direct defense, not an affirmative
8 defense, to say that's not right, not only did you
9 receive 43 percent, you received more than that. So
10 all of this evidence is -- is relevant to that. Part
11 of what is going on here is when you made your summary
12 judgment ruling and confirmed that New Mexico has an
13 apportionment below Elephant Butte, that apportionment
14 is equivalent to 57 percent of project supply,
15 recognizing that you have also explained that exactly
16 what project supply is and what the baseline is are
17 yet to be determined, but still what that did is it
18 showed to Texas that the actions that it has taken,
19 the actions that the United States is responsible for,
20 that have caused a reduction in New Mexico's project
21 supply from 57 percent are suddenly relevant, and so
22 now what you see, you have this interesting divergence
23 that you see playing out in the motions in limine
24 where on the one hand, as you heard Mr. Dubois say, he
25 wants to say, well, New Mexico can't raise any claims

1 against the United States, which we have acknowledged,
2 and then you hear Texas saying, well, it's not our
3 fault. And so they're -- they're both trying to run
4 away from the fact that New Mexico, since 2006, has
5 not received 57 percent of project supply, but what we
6 view the case as is did the states receive their
7 amount of water that was Compacted? In other words,
8 did New Mexico receive its 57 percent of -- of water,
9 and if it didn't, it's Texas has benefitted, and as
10 Texas has pointed out in previous arguments, each of
11 the states is responsible for the actions of -- of its
12 water users. And so to the extent that Texas has
13 received greater than 43 percent, which we're quite
14 confident the evidence will show, then it's
15 responsible for that, and it has received more than
16 the benefit of the Compact. I think both Texas and
17 the United States are forgetting Counterclaims 1 and 4
18 you have held are directly live, and these address the
19 exact issues that we're talking about. Although as I
20 said, and as I pointed out in my letter, a lot of this
21 evidence, I think, that we're talking about, whether
22 it's accounting issues or the credit water issues, all
23 of those also go directly to defenses and not just the
24 counterclaims. I guess that addresses all the issues,
25 and I'll just leave it at ultimately the case is about

1 did Texas and New Mexico receive its Compact share, 57
2 percent and 43 percent, and if not, then there has
3 been a violation. And what this first trial will be
4 addressing is was there a violation of that Compact?
5 In other words, did one of the states not receive its
6 -- its share of Compact water, and in what amount?
7 And then as to the remedies phase, I'm not sure I
8 follow Mr. Somach's argument on that. The remedies
9 phase will be dealing with -- you know, at that point,
10 it'll be -- we'll be saying, you know, let's say New
11 Mexico is successful, and there's a finding that there
12 was 600,000 acre-feet of water that Texas received in
13 excess of the Compact. Well, at that point, now,
14 we're talking about what's the remedy for that? How
15 do we calculate those damages if we seek damages or
16 how do you put the water back into the reservoir to
17 make New Mexico whole, is injunctive relief necessary,
18 is declaratory relief necessary? That's the -- that's
19 the import of the bifurcated case. Thank you.

20 **JUDGE MELLOY:** Let me ask Mr. Somach
21 something. And we're kind of getting into motions in
22 limine here, but just so I understand. When you, as
23 part of your case in chief, where you anticipate
24 attempting to prove that you're getting less than your
25 43 percent apportionment, are you looking at that as a

1 state line delivery obligation or are you going to be
2 trying to prove what's happening in Texas to prove
3 that or how -- how do you intend to prove that.

4 **MR. SOMACH:** There is no -- there is no
5 state line delivery obligation.

6 **JUDGE MELLOY:** I know. I know there
7 isn't. That's why I'm wondering.

8 **MR. SOMACH:** Yeah. Well -- well, you
9 know, the way we're going to address it is through a
10 simple analysis. It's a simple water budget analysis.
11 That is if you have X amount of water in the reservoir
12 and you make that release as a project release, then Y
13 amount of water ought to show up in Texas, assuming,
14 again, a 1938 hydrologic condition and utilization by
15 the Elephant Butte Irrigation District, which would
16 include consumptive use and return flows. And so it's
17 -- it's a water balance. You take so much water, put
18 it in at the top. You know what's supposed to happen
19 in the project in the middle, and you ought to get Y
20 amount of water down at the bottom. But --

21 **JUDGE MELLOY:** How do you measure that
22 Y? I mean, I guess because this is -- I think it's --
23 I think we're getting a little bit into motion in
24 limine, but if you measure that Y is based upon the
25 amount of water that's available to -- to the El Paso

1 Water District, then why wouldn't New Mexico be
2 entitled to say, well, there's other things going on
3 within Texas that's affecting that water supply? I
4 mean, how do you measure that Y?

5 **MR. SOMACH:** I'm uncertain. You measure
6 the Y, I think -- in other words, what's happening in
7 Texas, other than the argument that maybe groundwater
8 pumping is pulling water from New Mexico, what happens
9 once the water gets to -- to Texas doesn't have any
10 impact upon project operations. It doesn't have any
11 impact upon New Mexico.

12 **JUDGE MELLOY:** But how do you measure
13 what Texas is getting? How do we know -- how do we
14 know that Texas isn't getting what it's supposed to be
15 getting?

16 **MR. SOMACH:** Well, there's a gage at El
17 Paso and it's a -- it's a delivery point associated
18 with the project and you can take a look at, over
19 time, starting back before the 1938 Compact and follow
20 those numbers all the way through to today and you can
21 see the decrease in the amount of water that Texas is
22 getting and it is directly proportionate to the amount
23 of excess groundwater pumping that's occurring in New
24 Mexico. You can add these numbers together. It's a
25 accounting kind of process as much as anything else.

1 **JUDGE MELLOY:** I guess that's what I'm
2 asking. When I use state line delivery obligation,
3 you're basically saying you're going to prove it as if
4 it were a state line delivery obligation, but the
5 state line is at the El Paso gage? Is that
6 essentially what we're saying?

7 **MR. SOMACH:** Essentially that's the
8 measurement point. You know, I think it's the
9 measurement point that New Mexico model looks at in
10 terms of before-and-after types of analysis so it's --
11 but, again, it -- it's not -- it's not that New Mexico
12 isn't entitled to 57 percent of surface water. That
13 -- that's -- we're not arguing they're not. But what
14 we are arguing is that we're entitled to 43 percent,
15 that our 43 percent is made up of a smaller quantity
16 of water released from the reservoir and is made up
17 for a greater quantity of water that is return flows
18 after that water is utilized by New Mexico in EBID and
19 that the impact of groundwater pumping is to take
20 return flows, which were to go to Texas, and instead,
21 they're being used in New Mexico, thereby reducing the
22 amount of water. If you look at direct water from the
23 reservoir, plus return flows, that'll be a number, and
24 if you reduce the return flows, that'll be a lesser
25 number, and that's the accounting that we're talking

1 about.

2 **JUDGE MELLOY:** And I guess going back to
3 Mr. Dubois' letter, as I understand it, you don't want
4 to have to be required to put on any evidence in your
5 case in chief as to other potential causes of -- if we
6 use that gage in El Paso, as an example, if -- if the
7 quantity has diminished over the years and you can --
8 are you -- are you saying that you can show that
9 there's a direct one-for-one relationship between that
10 -- between that -- that loss of water?

11 **MR. SOMACH:** Absolutely. That is --
12 that is our -- that is our case, and we will show it.
13 We will prove that we have been reduced one-to-one
14 based upon the excess groundwater pumping that's
15 occurring in New Mexico. All those actions are by --
16 by New Mexico. Whether or not there are -- and we
17 don't agree, but whether there are accounting issues
18 in terms of project accounting, all that other kind of
19 stuff, all -- all I'm saying is yeah, they can put
20 those on as affirmative defenses, but -- but those --
21 those have nothing to do in contrast with groundwater
22 pumping authorized and permitted by the State of New
23 Mexico. The actions that they're complaining about in
24 that fourth counterclaim are actions that are actually
25 being taken by third parties over which the state of

1 Texas has no -- no control. Do they want to put on
2 affirmative defenses that say, well, you may be
3 shorted, but it's all these other reasons that you may
4 be shorted, therefore, New Mexico shouldn't be liable
5 for your shortages, that's fine. We don't -- unlike
6 what Mr. Wechsler is saying, we don't have any
7 problems with them putting -- putting that on. Part
8 of what we're concerned about is, I don't -- I don't
9 know what that testimony and evidence is going to be,
10 yet they're requiring us in our case in chief to not
11 only address our case in chief, not only address what
12 we know about their case in chief, but also address,
13 without any rebuttal testimony allowed, whatever
14 evidence and testimony they're going to put on in
15 their case, and we don't know what that is.

16 **JUDGE MELLOY:** Well, I guess that's --
17 you're anticipating one of the things I was going to
18 say is, it seems to me that you should be required to
19 put on testimony as to what you understand and know
20 their defenses to be. Now, for testimony that you
21 don't -- if they come up with a defense during their
22 case in chief that you've had no notice on, obviously
23 that's what rebuttal is for, but I would have thought
24 that through all the depositions, you'd have a pretty
25 good idea of what New Mexico's case is in this -- in

1 this case.

2 **MR. SOMACH:** Well, we will put on, as
3 part of our case in chief, what we've been jokingly
4 called pre-buttal. We will go ahead, and we will put
5 on a discussion, even though it -- it's difficult.
6 For example, we'll have to deal with their model
7 before they've explained to you what their model is,
8 but -- but we will do all of that. What we're saying
9 is I don't know what their actual testimony is going
10 to be. I don't know what their actual evidence is
11 going to be. We will only know once they put on that
12 evidence and testimony, and we may need to put on some
13 additional rebuttal to -- to rebut testimony and
14 evidence that we will only see after our case in
15 chief. But we --

16 **JUDGE MELLOY:** I don't think -- I don't
17 know -- I don't know that there's any problem with
18 that. I think that's what rebuttal is for, and I
19 don't -- I don't read Mr. Wechsler's letter to dispute
20 that. But I -- I read Mr. Dubois' letter to say you
21 don't -- that you don't want to put on testimony as to
22 issues you know are going to come up because you don't
23 think -- well, I'm not sure what -- maybe I should let
24 Mr. Dubois speak to that.

25 **MR. DUBOIS:** I think you've actually

1 answered my -- the -- the fundamental question that I
2 was asking, giving me your thoughts, because I think
3 that the -- the question was in terms of issues that
4 -- that during testimony, we assume that we will be
5 disputing where they are attempting to present an
6 affirmative case against the United States for which
7 they seek relief, and I understand that Mr. Wechsler
8 is saying they are not going to do that. I'm not sure
9 that that's consistent with what he has said in some
10 of his prior pleadings, but you have answered the --
11 the relatively narrower question that -- that I asked,
12 which is to the extent that they're putting on that
13 sort of thing that goes beyond their -- their
14 defenses, that we are going to be entitled to -- to
15 rebuttal. I actually don't anticipate that your --
16 your views on that are going to change particularly
17 what we're going to be putting on, but it -- these are
18 issues that are probably best resolved in context
19 because I think they're not going to be as broadly
20 framed as -- as I think that the pleadings from both
21 sides have -- have been taken.

22 **JUDGE MELLOY:** Well, and I -- and that
23 does -- and that is another good point is that it's
24 very difficult to really address these issues until we
25 start to see how the evidence comes in and give some

1 context to it. And I -- and I -- you know, and also
2 just to circle back to one point you made earlier,
3 Mr. Dubois. New Mexico cannot file a claim -- cannot
4 have its counterclaims against the United States
5 necessarily litigated in this -- in this lawsuit.
6 That doesn't mean, though, in the nature of
7 litigation, that some of the issues that -- that may
8 be resolved in this lawsuit are going to have a big
9 impact upon law -- upon a -- an APA claim in another
10 forum. Just because there may be some preclusive
11 effect or because it may have some precedential
12 effect, or whatever phrase or term we want to use,
13 doesn't mean it can't be litigated. It just -- you
14 know, they could -- they just can't get the relief of
15 a counterclaim, but they may be -- you know, we may be
16 deciding some things in this case that are going to
17 have significant impact on another lawsuit some place
18 else. But as long as they're relevant to this case,
19 you know, the chips have to fall where they may.

20 **MR. DUBOIS:** And if I may, Your Honor, I
21 think the fundamental case that what has been
22 carefully avoided, perhaps, is the question that you
23 raised in your summary judgment order is percentage of
24 what, and that's really the fundamental question.
25 There has not ever been any Compact accounting by the

1 Compact commission below Elephant Butte, and so we're
2 all sort of working a little bit in a vacuum as to
3 exactly percentage of what and how does that actually
4 work. So where the water goes is sort of the
5 secondary question to where is it supposed to be, and
6 that is, I think, the question that you asked if your
7 -- in your ruling of the summary judgments is that's
8 the first fundamental question. After that, you're
9 correct that then it will be a matter of, all right,
10 where did the water go, is that consistent with your
11 conclusions, but is the fundamental and primary
12 conclusion of what's the baseline that we're talking
13 about? New Mexico, I believe, would make it 57
14 percent of whatever they leave in the river after
15 they're done pumping and depleting it. I think Texas
16 has a very different view of what the baseline
17 condition should be, and that's, I think, the
18 fundamental question that you're going to have to
19 answer first.

20 **JUDGE MELLOY:** Well, I'll give
21 Mr. Wechsler the last word if he has anything he wants
22 to say, but I -- at this point, I don't think there's
23 anything I can say beyond what's already been
24 discussed in terms of a ruling, and -- or any further
25 direction I can give, but there's -- is there anything

1 you want to say, Mr. Wechsler?

2 **MR. WECHSLER:** No, Your Honor. For the
3 most part, I'm comfortable with the guidance that
4 you've given. I would say Mr. Dubois did not
5 correctly articulate New Mexico's view of -- of
6 project supply. We understand that your basic
7 guidance is that the -- the plaintiffs, Texas and the
8 United States, are to put on evidence on the issues
9 and defenses that they're aware of, and that rebuttal
10 will be for anything that we present that they weren't
11 aware of and -- and certainly we think that that's the
12 correct standard. I'd be very surprised if we put on
13 anything that Texas and the United States are not very
14 keenly aware of.

15 **JUDGE MELLOY:** I suspect if you try to
16 put on something that they weren't aware of, we'll
17 hear a lot of objections during the presentation of
18 that testimony.

19 **MR. WECHSLER:** I'm certain that's right.

20 **JUDGE MELLOY:** All right. Is there
21 anything further that we need to talk about? Let me
22 just close by one thing. I want to sort of circle
23 back on. As far as the tour is concerned, we won't --
24 we'll not be doing the flyover so do we still plan to
25 start in Truth or Consequences? Is Ms. Barfield in

1 charge of that? Is she on?

2 **MS. BARFIELD:** Good afternoon. I am on,
3 Your Honor. I'm not sure that I'm actually in charge,
4 but I am happy to comment on it. We are trying to
5 change the flight plan to go to and from in and out of
6 Truth or Consequences to make it easier for folks to
7 get there in their separate vehicles.

8 **JUDGE MELLOY:** You want to change -- I'm
9 sorry. You want to change what?

10 **MS. BARFIELD:** The -- you were talking
11 about the flight plan? I'm sorry.

12 **JUDGE MELLOY:** Not the flight plan.
13 Where are we going to meet to start the tour, I guess,
14 is the bottom-line question.

15 **MS. BARFIELD:** We were intending to meet
16 in Truth or Consequences. I apologize for the
17 confusion, Your Honor. So we will need to meet to
18 regroup with the parties to see what the current
19 intention is in light of the change. It could be that
20 we could do it out of El Paso, but I'm happy to
21 arrange a meeting with the parties this week, sooner
22 rather than later, and we will let you know where the
23 meeting is, along with a copy of that itinerary.

24 **JUDGE MELLOY:** And then there is one
25 other point I wanted to mention earlier, and it

1 slipped my mind. I've been reading some news reports
2 about quite a bit of flooding in El Paso and Southern
3 New Mexico. Is -- does any of that have any impact
4 upon the tour? Maybe the locals would have a better
5 view of that?

6 **MR. ESSLINGER:** Your Honor, this is Gary
7 Esslinger with EBID.

8 **JUDGE MELLOY:** Pardon me?

9 **MR. ESSLINGER:** We have -- we have the
10 -- I'm just looking ten days out, and there's supposed
11 to be pretty heavy duty storms, 30 percent chance on
12 Sunday, the day before the tour, but it looks like the
13 day of the tour is partly cloudy. So the effects of
14 what happens the day before could -- could have an
15 effect. Some has ran up in the Arrey area this last
16 weekend, and also, we've had some severe flooding on
17 roads in the southern part of the county, as well, so
18 we'll just have to play it by ear. It's monsoon
19 season, so I can't predict where the storm events will
20 fall.

21 **JUDGE MELLOY:** I'm assuming there wasn't
22 enough water that there could be a release next week.
23 Is that still the understanding that -- that the
24 releases are -- are done for the year?

25 **MR. ESSLINGER:** Yes, sir. They're done.

1 The only water that's in our canals right now is
2 floodwater that we're trying to distribute and
3 evacuate fields and roads and streets.

4 **JUDGE MELLOY:** Okay. All right. Well,
5 then I'll wait to hear from Ms. Barfield or some other
6 member of the group as to exactly where we're going to
7 meet to start the tour on -- on Monday morning.

8 All right. Anything else before we sign
9 off?

10 **MR. SOMACH:** I have one more thing. I
11 just want to clarify something. We've moved -- there
12 -- there are four items that are requested in your
13 pretrial statement. We've moved two of the four, and
14 I was curious as to whether or not you still want the
15 pretrial statement this Friday or whether we can do
16 the pretrial statement on the same date the August
17 25th date that you set for the -- for the two issues?

18 **JUDGE MELLOY:** That's fine.

19 **MR. SOMACH:** Okay. I just wanted to get
20 clarification. Thank you very much.

21 **JUDGE MELLOY:** Anything else? All
22 right. If not, we'll be adjourned. I'll see some of
23 you on Monday. Thank you, everyone.

24 (The proceedings adjourned at 2:35 p.m.)
25

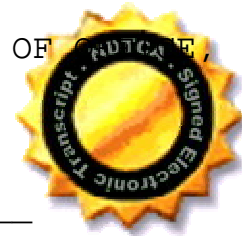
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