

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 JUNE 12, 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:** This is in Original No.
2 141 Texas versus State of New Mexico, State of
3 Colorado with United States as intervenor. For the
4 benefit of the record, the court reporter, let me ask
5 the parties to enter their appearance. We'll start
6 with State of Texas.

7 **MR. SOMACH:** Yes, Your Honor. This is
8 Stuart Somach. With me are Francis Goldsberry,
9 Theresa Barfield, Robert Hoffman, Sarah Klahn, and
10 then from the Texas Attorney General's office,
11 Priscilla Hubenak.

12 **JUDGE MELLOY:** Okay. Then for the State
13 of New Mexico?

14 **MR. WECHSLER:** Good morning, Your Honor.
15 Jeff Wechsler from Montgomery & Andrews. We also have
16 Cholla Khoury from the New Mexico Attorney General's
17 Office. Marcus Rael and Luis Robles from the Robles
18 Rael and Anaya firm, Lisa Thompson and Michael Kopp
19 from Trout Raley, John Draper from Draper and Draper,
20 and also joining us this morning is Greg Ridgley, the
21 general counsel for the New Mexico Office of the State
22 Engineer.

23 **MR. SOMACH:** If I could add, Brittany
24 Johnson is also appearing on behalf of the State of
25 Texas. I'm sorry. I missed her.

1 **JUDGE MELLOY:** For State of Colorado?

2 **MR. WALLACE:** Yes, Your Honor. This is
3 Chad Wallace along with Preston Hartman for the State
4 of Colorado.

5 **JUDGE MELLOY:** And then for the United
6 States?

7 **MR. DUBOIS:** Good morning, Your Honor.
8 James Dubois from the United States. Also on the line
9 are Lee Leininger from my office and Chris Rich and
10 Shelly Randel from the solicitor's office.

11 **JUDGE MELLOY:** I understand we're going
12 to get a new solicitor pretty quick or maybe we
13 already have one. I'm not sure. In any event, all
14 right. Then Albuquerque Water Utility Authority?

15 **MR. BROCKMANN:** Yes, Your Honor, good
16 morning. It's Jim Brockmann on behalf of the
17 Albuquerque Bernalillo County Water Utility Authority.

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

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

21 **JUDGE MELLOY:** City of Las Cruces?
22 Anybody on for the City of Las Cruces?

23 (No response.)

24 **JUDGE MELLOY:** All right. Elephant
25 Butte Irrigation District?

1 **MR. BROCKMANN:** Your Honor, I think
2 Mr. Stein is on, but his microphone is muted right
3 now.

4 **JUDGE MELLOY:** All right.

5 **MR. STEIN:** Sorry, Your Honor. This is
6 Jay Stein for the City of Las Cruces.

7 **JUDGE MELLOY:** How about Elephant Butte
8 Irrigation District?

9 **MS. BARNCastle:** Good morning, Your
10 Honor. Samantha Barncastle for EBID.

11 **JUDGE MELLOY:** Okay. El Paso County
12 Water and Improvement District?

13 **MS. O'BRIEN:** Yes, good morning, Your
14 Honor. Maria O'Brien counsel for EP No. 1 is on as
15 well as counsel Renea Hicks and, also, general manager
16 Chuy Reyes, Jesus Reyes, has joined by phone, and the
17 district engineer Al Blair is also on this morning.

18 **JUDGE MELLOY:** Okay. Hudspeth County
19 Conservation and Reclamation District. Anybody on?

20 **MR. MILLER:** Yes, good morning, Your
21 Honor. This is Drew Miller here on behalf of the
22 Hudspeth district.

23 **JUDGE MELLOY:** All right. I assume
24 nobody is on for the State of Kansas. How about the
25 New Mexico pecan growers?

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

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

5 **MR. UTTON:** Good morning, Your Honor.
6 We haven't moved yet. This is John Utton representing
7 New Mexico State University.

8 **JUDGE MELLOY:** All right. Did I miss
9 anybody?

10 **MR. DUBOIS:** Your Honor, this is Jim
11 Dubois. Also, I noticed, I didn't scroll down fast
12 enough to keep up with everybody who joined. David
13 Gehlert from my office and Judith Coleman from Justice
14 are also on.

15 **MR. WECHSLER:** Sorry to interrupt. We
16 have Arianne Singer from the general counsel from the
17 Interstate Stream Commission.

18 **JUDGE MELLOY:** Thank you, everyone.
19 Well, I didn't send out an agenda because quite
20 frankly I don't have a lot to talk about today.
21 There's really two things I want to discuss with
22 counsel, but you're certainly free to bring up
23 anything that you think we need to address. The first
24 issue I want to visit about is the mediation,
25 mediator. I appreciate the fact that you have been

1 able to come to an agreement as to the name of two
2 potential mediators, Judge Wanger and Judge Boylan.
3 Let me ask you -- and as I understand it, this is the
4 order of preference you would prefer, Wanger versus
5 Boylan, if available, is that my understanding?

6 **MR. SOMACH:** That's correct, your Honor.

7 **JUDGE MELLOY:** Okay. Has anybody worked
8 with Judge Wanger before -- Wanger before?

9 **MR. WECHSLER:** Your Honor, I believe
10 it's pronounced Wanger as in "danger."

11 **JUDGE MELLOY:** Wanger?

12 **MR. WECHSLER:** Yes, Your Honor.

13 **JUDGE MELLOY:** As in danger. All right.

14 **MR. SOMACH:** Yes, Your Honor. I have
15 appeared before him when he was still on the bench. I
16 didn't do the main part of that work. There was a lot
17 of trial work. It was a -- it was a case down in the
18 San Joaquin Valley dealing with water. It involved a
19 lot of -- the issues were endangered species act
20 issues associated with the operation of the project,
21 so it was a bit different than -- than this because
22 the focus was on endangered species as opposed to the
23 kind of dispute -- water rights dispute we have here.
24 He conducted a trial in that case, which lasted for a
25 very long time. He issued an opinion in that case.

1 It was subject to the -- oddly enough, the -- the
2 hearings were all focused on summary judgment issues,
3 so it was -- it was a summary judgment issue and then
4 there was a very long trial that he assisted on. I
5 ended up arguing the motion. The motion went up to
6 the Ninth Circuit. In fact, it went up to the Ninth
7 Circuit a couple of times because it was argued first
8 with the three-judge panel and then with an en banc
9 panel. But during that period of time, of course, I
10 was able to observe him and -- and noted his -- his
11 command, so to speak, of a disparate -- numerous
12 disparate parties in a fairly contentious matter and
13 was impressed by that. In the Eastern District of
14 California, he has a fairly good reputation, both in
15 terms of as a trial judge and, also, in the context of
16 settlement and mediation. I've had no contact with
17 him since he left the bench. He started a law firm,
18 and he does focus on ADR-related matters in addition
19 to a general litigation practice, but we did do a
20 fairly good job in terms of vetting him around the
21 legal community around here, in terms of trying to
22 figure out if he -- he would -- would make an
23 appropriate mediator in this matter and the -- the
24 feedback was that he would. But that -- that's how
25 we -- we came about it. I had that contact with him.

1 I -- I know a number of others in this community who
2 have obviously tried cases before and -- and had him
3 as a settlement judge and just got a universal
4 recommendation in that regard.

5 **JUDGE MELLOY:** Oh, good. Well, I'll be
6 happy to contact him and see what his availability is.
7 Let me ask you this -- well, I'll contact both of
8 these individuals, but with the understanding that --
9 that Wanger is your first choice. Does -- does fees
10 make a difference, if one is cheaper than the other?

11 **MR. SOMACH:** It might.

12 **JUDGE MELLOY:** Always like to save
13 money.

14 **MR. SOMACH:** I'll let the other party,
15 you know, kind of chime in there. We were comfortable
16 with -- with both, I think. We did prioritize it that
17 way. I'll let the others speak -- speak to that. We
18 had vetted a number of additional folks, and for one
19 reason or another, those two names came out in terms
20 of consensus. I think that that's important, and I --
21 as I -- as we put into the letter, if you -- if it
22 ends up neither of those folks could -- could act,
23 we'll go back to the drawing board, but we did look at
24 a lot of other names, also, and it ended up that those
25 are the two that we were comfortable with. We would

1 be comfortable, I believe, with either one of them,
2 but Judge Wanger, just simply based upon our
3 discussions, seemed to be our preference. But -- but,
4 again, we would be comfortable. I'll let the others
5 speak, obviously, with either of them.

6 **JUDGE MELLOY:** Mr. Wechsler, anything
7 you want to say?

8 **MR. WECHSLER:** Your Honor, cost is
9 always a consideration. We did due diligence on a
10 number of folks, and I -- I will say that I
11 appreciated the parties' professionalism in the
12 discussions. I thought they were very productive.
13 Our preference, even cost taken into consideration, is
14 for Judge Wanger. We had expressed to you a -- a
15 preference to have somebody who had very strong
16 mediation skills, which we believe that Judge Wanger
17 fills that requirement. We also expressed a hope that
18 we could find somebody who had experience with prior
19 larger-scale water cases, and in our due diligence,
20 Judge Wanger has presided over a number of very
21 complex water cases involving -- as Mr. Somach
22 indicated -- a number of water users, which gives us a
23 lot of confidence that he has the experience that we
24 were hoping to get. But I also agree with Mr. Somach
25 that we have confidence in -- in both of the mediators

1 and -- and if neither is available, I'm quite
2 confident that we'll be able to find somebody else
3 that would be agreeable to the parties.

4 **JUDGE MELLOY:** Do you have any
5 preference as to the technical advisor or the other
6 thought I had is should we wait until we pick the
7 mediator and let that mediator have some input as to
8 the technical advisor?

9 **MR. WECHSLER:** Your Honor, I -- I think
10 that that latter suggestion of yours is a good idea.
11 I will tell you, we also considered a large number
12 of -- of potential technical advisors, and the parties
13 all, again, have, I thought, very good ideas. These
14 were the two that -- that ultimately we were able to
15 agree on, and I'll tell you a little bit of background
16 on -- on each so that you understand and you might
17 pass along to the -- the mediator. Mr. Facet, as you
18 can see from his old resume, has a background in water
19 administration. He was a former state engineer for
20 the State of Wyoming. He then went on in 2015, which
21 is not reflected in that older resume, to be the --
22 the equivalent of the state engineer of the State of
23 Nebraska, which I think speaks quite highly of
24 Mr. Facet because those two parties, Wyoming and
25 Nebraska, were in litigation that Mr. Facet was

1 involved in. And so he has -- he has sort of a broad
2 experience, basin-wide experience, in dealing with
3 large water issues, and he has that advantage.

4 Dr. Anderson does not have the same water
5 administration experience. She does, however, have a
6 stellar reputation in the academic and -- and water
7 community, particularly for her expertise in -- in
8 groundwater and groundwater modeling. So they have
9 slightly different backgrounds. I'm quite certain
10 that both have experience. You know, for example,
11 Mr. Facet, I'm sure, has experience with groundwater
12 modeling and -- and conversely, I'm sure, Dr. Anderson
13 has understanding of water administration. So, again,
14 we're comfortable with both.

15 **JUDGE MELLODY:** In terms of -- of getting
16 a time commitment out of either of these individuals,
17 do we still think it's -- are we still thinking that
18 no sooner than early to mid fall would be an actual
19 mediation after discovery is over? And I know there's
20 a little dispute about whether it might start while
21 the dispositive motion period is -- is running, but --
22 but at least not before the end of discovery? Does
23 everybody still agree on that?

24 **MR. SOMACH:** Let me say from the State
25 of Texas' perspective, we'd be willing to start at any

1 point in time. We think that certainly -- and I think
2 we've expressed this, there's no need to wait until
3 dispositive motions are resolved, and in terms of
4 being involved in -- in a mediation, it's -- it --
5 it's almost, from our perspective, simply a manpower
6 perspective or woman power perspective, because we've
7 got a lot of depositions going. Having said that,
8 we -- we do have the ability to -- to do both the
9 depositions and proceed with -- with mediation. We'd
10 like to get it started at the earliest possible time.
11 We think it will take time. There are a lot of
12 parties involved. There are a lot of amici involved,
13 and it's just simply going to take a lot of time to
14 move through that mediation process. So without
15 getting to, of course, what anybody else does, I will
16 simply say we don't think it is necessary to wait
17 until after dispositive motions, so certainly once
18 discovery is over, we -- we think it would be
19 appropriate to start mediation, and if -- if a
20 mediator is engaged and has time, certainly beginning
21 that process sooner than later from our perspective is
22 not a bad thing, and we'll make sure that the right
23 people with the right authority are involved in that
24 mediation process.

25 **JUDGE MELLOY:** From your per -- from

1 Texas and New Mexico's perspective in particular, who
2 are those people? Who's going to have to make the
3 ultimate decision? Is it your attorney general, your
4 governor, state engineer? Who's the person who can
5 make the call?

6 **MR. SOMACH:** It will be the Texas Rio
7 Grande Commissioner, Mr. Pat Gordon, in conjunction
8 with the attorney general's office and those folks are
9 ready to go and they have the appropriate authority to
10 resolve the -- to resolve the case if we're successful
11 in mediation.

12 **JUDGE MELLOY:** What about your -- what
13 about New Mexico, Mr. Wechsler?

14 **MR. WECHSLER:** From the State of New
15 Mexico, the ultimate settlement authority rests with
16 the attorney general. He will also work very closely
17 with the New Mexico State Engineer, and both agencies
18 are already involved in the litigation and will be
19 involved in the mediation.

20 **JUDGE MELLOY:** Okay. And I haven't
21 given you a chance to speak yet, Mr. Dubois, but what
22 are your thoughts on all of this and who -- who from
23 the United States' perspective is going to be the --
24 make the -- be able to say yes or no on an agreement?

25 You're muted.

1 **MR. DUBOIS:** My apologies, Your Honor.
2 As you may recall, Your Honor, the -- the ultimate
3 call on resolution of litigation is with the assistant
4 attorney general based on the recommendations from the
5 trial attorneys and the agency. But the --

6 **JUDGE MELLOY:** That's the attorney
7 general for civil? I always get confused.

8 **MR. DUBOIS:** Yes. It's assistant --
9 yeah, it's assistant attorney general, Jeff Clark, is
10 currently in that position. So -- but as -- I'm
11 somewhat skeptical about our ability to get sufficient
12 focus of all the parties before the end of discovery.
13 We're willing to -- we're willing to try it, but, you
14 know, there's -- there's just simply there's, I think,
15 a bandwidth problem with all of the parties because
16 we've got a very busy schedule through August. I
17 agree that it does not need to wait until briefs are
18 filed or any of -- of that stuff, but I -- I see
19 people really having the bandwidth to focus starting
20 in September.

21 **MR. WECHSLER:** Your Honor, may I be
22 heard on that subject?

23 **JUDGE MELLOY:** Sure.

24 **MR. WECHSLER:** I -- I agree that there
25 is a lot going on; however, I -- I also agree with

1 Mr. Somach in this regard, and that is I think there
2 is probably ground work that mediator ultimately can
3 do during this period. In other words, I think the
4 parties mutually anticipate that the mediator would
5 intend to have one, maybe more, discussions with each
6 of the parties separately to understand the lay of the
7 land and try and set up a -- a procedure for the
8 mediation. I expect that that work probably could
9 very meaningfully be done during this period of
10 discovery; however, I also agree with Mr. Dubois that
11 we -- we do have a very aggressive discovery schedule
12 and so to the extent that he's wanting to conduct what
13 we would think of as the actual mediation, having
14 parties in the same vicinity or whether it's in a Zoom
15 sense, that may be more productive after discovery
16 closes.

17 **JUDGE MELLOY:** Does Colorado have
18 anything they want to say about this?

19 **MR. WALLACE:** Your Honor, not much of
20 substance to add. Colorado generally agrees with all
21 the comments previously made. We do think that
22 mediation may take some time. It's a very large and
23 complex case, and we want to be able to give it enough
24 time for the parties to find a workable remedy. We
25 have the same bandwidth problems that the other

1 parties do, but certainly appreciate we might be able
2 to take preliminary steps in this mediation process.
3 And, finally, we also would like to concur in -- in
4 the -- the method in which all the parties work
5 together to get that letter to you and in picking
6 mediators and possible technical consultants.

7 **JUDGE MELLOY:** Thank you. Well, I'll --
8 I'll contact both of these people and -- with the idea
9 that if -- if Judge Wanger is available, that he would
10 be the first choice, and -- and I think, based on the
11 discussions here, we'll probably wait until he's
12 picked to decide on -- on the technical advisor so
13 that whoever the mediator is going to have some input
14 on that. I think, both as to timing -- what I will --
15 what I will tell the person is that they may be doing
16 some preliminary groundwork over the summer, but --
17 but that the real guts of the mediation, so to speak,
18 will probably not occur until this fall and that --
19 and that -- and it's going to be basically, I believe,
20 up to the mediator to decide at what point to bring
21 the amici into the process. I think that if I were --
22 if I were the mediator, I'd start with the four
23 parties, and I may eventually have to expand it, but I
24 think it's up to the mediator to make that call as to
25 when to involve the other parties, and I -- I saw your

1 letter, Ms. O'Brien. I think you're the one who sent
2 it yesterday. And I -- I understand the unique
3 position that Elephant Butte and El Paso Irrigation
4 Districts are in, but I think at this point, I'm not
5 going to tell the mediator how to do the mediation and
6 how -- and who he should involve at what point in the
7 process and so I understand, and I think everybody
8 does, that at some point you're going to have to be
9 involved, and at some point you're probably going to
10 have to sign off on whatever agreement is reached,
11 but -- but that -- but I'm not at the -- at a point
12 where I -- I feel comfortable telling the mediator how
13 or who he should participate or have participate and
14 what the sequencing of that participation should be.

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

16 **JUDGE MELLOY:** Does anybody else want --
17 go ahead.

18 **MS. O'BRIEN:** Yes, I appreciate your
19 comments, and -- and certainly concur. Obviously our
20 letter was directed at and raised great concern with
21 regard to the parties' determination that it would not
22 be the mediator that decided how to progress with the
23 mediation, and so we don't differ, Your Honor, in --
24 in what you articulated. We -- we certainly advocate
25 that, you know, as a mediator is chosen, we certainly

1 appreciate the parties' work in choosing a mediator,
2 and the technical -- possible technical advisors, but
3 that it -- you know, the mediator is made aware that,
4 yes, there are four parties, but there are interests
5 of great significance that's unique in this case, and
6 as Your Honor, you know, re-noted at this point, that
7 is primarily the irrigation districts, EP No. 1 and
8 EBID, as the beneficiaries of the Rio Grande project.
9 So we objected to, you know, an advance determination
10 that we should not be included at the start. We fully
11 understand that, you know, a good mediator can figure
12 out, knowing all the issues, how to structure a
13 mediation going forward, so we appreciate Your Honor's
14 comments.

15 **JUDGE MELLOY:** All right. Thank you.
16 Is there -- oh, and, also, I appreciate the fact that
17 the parties were able to come to an agreement on fees.
18 Quite frankly, it was kind of along the lines of what
19 I was thinking would be a pretty fair -- pretty
20 equitable distribution, but -- but I'm glad that the
21 parties were able to come to that agreement. So what
22 I'll do is I'll contact both of these people next
23 week, and I'll report back by e-mail as to -- as to
24 their response, and we'll go from there.

25 Is there anything else anybody wants to

1 talk -- say about the mediation or the mediators?

2 (No response.)

3 **JUDGE MELLOY:** All right. Then if not,
4 there's one other issue I wanted to visit with -- with
5 the parties about, and it certainly goes back to
6 something we talked about the last time, mainly with
7 Mr. Somach, and that is I don't want to get hung up
8 too much on this issue of what is the apportionment
9 between the states, but it does seem to me that it's
10 very difficult to decide if somebody is getting too
11 much water when we don't know how much water they're
12 entitled to. And -- and what I'm thinking about is,
13 is there any way that we can address that issue as to
14 what each state's apportionment is at some early stage
15 instead of the one subset of a motion for summary
16 judgment that may have, I don't know, 10, 20, whatever
17 number of issues. It just seems to me that's such a
18 fundamental issue in this case, that is there a way we
19 could address that issue earlier as opposed to some of
20 the other issues that we may have to resolve? I don't
21 know if anybody wants to speak to that. Mr. Somach?

22 **MR. SOMACH:** Yeah, I'll say, it's an
23 issue, obviously, that we would prepare to brief and
24 discuss at any point in time. I -- at a fundamental
25 level, we believe it to be a legal issue that could be

1 resolved by partial summary judgment so, therefore, we
2 believe it's an issue that could be resolved sooner
3 than when the dispositive motions are currently
4 scheduled to be filed, and we would be willing to do
5 that based upon the briefing schedule. It may be
6 there are factual issues associated with that, and the
7 reason I say that was in reading one of your orders,
8 you indicated there are nuances here that may require
9 some factual filling out of what's -- what's been done
10 there, but I think we're sufficiently far along in
11 terms of the development of the factual part of the
12 case, notwithstanding the fact that we're still taking
13 depositions of modelers and others to be able to
14 articulate that case and that -- that issue in a
15 motion, and if you decide you want more facts on it,
16 like I said, with respect to the other partial summary
17 judgment motions, you could just put it aside once you
18 see what is written, decide that you do want more
19 factual development, but at least it'll, again, assist
20 in focusing down on the issue. So, again, if it would
21 be helpful to you, we would be more than happy to
22 brief that issue in the nature of a partial summary
23 judgment and then have -- have you decide whether or
24 not there's some additional factual development that
25 you'd like to -- like to have. So I --

1 **JUDGE MELLOY:** Well, let me ask you
2 this: Would it be helpful to you? I mean, as you do
3 your modeling, as you do your analysis, it just seems
4 to me that you need to know what's the -- what's the
5 target you're shooting at so to speak.

6 **MR. SOMACH:** Well, we certainly have a
7 target in mind. I mean, we're not -- the factual work
8 hasn't been done in a vacuum. It's been done
9 predicated upon our view of what Texas is entitled to,
10 to put it in a -- you know, really summarize it.
11 That's really what we're talking about from our
12 perspective is what is Texas entitled to. The flip
13 side of that, of course, is you've got to know what
14 you think New Mexico is entitled to. So spelling that
15 out for you in some way, shape, or form, briefing it
16 out and explaining it to you, whether we do it early
17 or whether we do it late, we're -- we're very prepared
18 to -- to do that should you make a ruling that is
19 different, certainly, than -- than what we're -- what
20 we're focused on. Our modeling is broad enough to be
21 able to move in it whatever direction needs to be
22 done, but -- but -- but, again, we're prepared to do
23 that if that's -- if -- if that would be helpful. The
24 reason we brought those original motions with respect
25 to what we called kind of law in the case was it

1 certainly would be better to get some of these
2 preliminary issues resolved sooner than later because
3 at the end of the day, we'd like to be as focused as
4 we can when we get to trial, and some of what we're
5 talking about when we talked about it the last status
6 conference is very foundational, and knowing the
7 foundation upon which the trial is going to proceed
8 is -- it definitely would be helpful. It certainly
9 will be necessary in terms of the dispositive motions
10 we'll bring, but if this issue is one that you'd like
11 us to brief earlier, we're -- we're more than happy to
12 do that.

13 **JUDGE MELLOY:** Well, I guess what I'm
14 concerned about is without having seen the evidence,
15 is -- is the modeling and is the analysis going to be
16 predicated upon what you believe Texas is entitled to,
17 Mr. Wechsler, United States will do their modeling and
18 their analysis that based upon what they believe each
19 state's entitled to and if that fundamental decision
20 about what the entitlement, does that totally
21 invalidate the opinions in other reports or -- or can
22 they be, as you say -- are they broad enough that they
23 can accommodate a different decision about
24 entitlement? I don't know if I'm making myself clear.

25 **MR. SOMACH:** I think -- I believe they

1 are broad enough. I mean, I'll let the others speak
2 to -- to the work. I'm aware, obviously, the modeling
3 has been done by the others and think that this is
4 broad enough. That said, as much of the stuff that we
5 can focus on and get resolved sooner than later, I
6 think is beneficial. I think it helps us move forward
7 to the trial in most sufficient way possible. But --
8 but is it absolutely necessary? No. I -- I -- you
9 know, to the extent there's a difference among the
10 three of us, we're aware of it, and -- and the expert
11 testimony we will have and bring will -- will address
12 all of it, but whether or not you want to bundle it
13 that way so that it all -- it requires at the end of
14 the day for you to make all the decisions at one time,
15 I -- I -- I don't know. Again, focusing down creating
16 a good foundation on some of these fundamental issues
17 probably does assist in -- in focusing the trial on
18 where it's got to go, even if contested issues are
19 decided one way or another against one party or for
20 another party. Those things are all preserved -- I --
21 I -- all I'm saying is I think a good foundation is --
22 is necessary. We intended to -- to set some of this
23 stuff, and as dispositive motions at the end of
24 discovery, this is, for example, one of them. Whether
25 we want to do it in advance of dispositive motions,

1 again, it's fine with Texas. We'll be more than happy
2 to do that. Is it absolutely necessary? No. Because
3 I do think everybody's modeling is broad enough to
4 encompass the different views because, of course,
5 we're dealing with the different views as we move
6 forward with the -- the preparation of the case.
7 But -- but I'll let Mr. Wechsler and Mr. Dubois -- may
8 have different views.

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

11 **MR. WECHSLER:** Certainly it's an issue
12 that is and has been on all of the parties' minds. I
13 think that it is a -- both a legal and a factual
14 question. I think, as I pointed out at the last
15 status hearing, I think there's really four things
16 that we're looking at. I mean, we do have some
17 guidance on this issue from the court, whether
18 intentionally or not, we have some guidance from Your
19 Honor in the two decisions that you've issued, which I
20 think have some -- something to say about the issue.
21 We have the pleading and the issues taken -- positions
22 taken by the parties in the case thus far, which also
23 have things to say about that issue, and then from a
24 factual perspective, I mean, I think you have the
25 history, both from a historian's perspective and,

1 also, the history of the project. You have the course
2 of dealing, which is important, and then you have
3 expert testimony, which -- which bears on this. I
4 think all of which counsels towards at least waiting
5 until the end of discovery to address this issue.

6 Now, if you were inclined to address
7 this particular issue early, we have no objection to
8 that. I do agree with Mr. Somach that the technical
9 side of the case, the expert reports, the positions of
10 the parties, the modeling, is broad enough, it is
11 flexible enough from all of the parties to be able to
12 accommodate whatever the ruling is and to make a -- a
13 relevant presentation at the trial in this matter. If
14 you're inclined to brief this on an earlier schedule,
15 my submission would be we set that some time in
16 December and to do a simultaneous briefing since all
17 of the parties are likely to have something to say on
18 this particular issue, in other words, simultaneous
19 motions or opening briefs followed by responses and
20 replies.

21 **JUDGE MELLOY:** Okay. Mr. Dubois, do you
22 have anything you want to say about this?

23 **MR. DUBOIS:** Sorry about that, Your
24 Honor. We anticipated that this issue would come up
25 in the dispositive motions. The United States'

1 perspective on this is somewhat different than two
2 states. The precise numbers don't matter as much. We
3 have claimed interference with the project, and the
4 ultimate fundamental question is, I think, whether or
5 not the impacts of groundwater pumping on the surface
6 water supply have to be accounted for and -- and dealt
7 with as far as dealing and looking at the apportion --
8 apportionments. So I think our modeling and the
9 modeling that exists already is sufficiently flexible
10 to address that issue, but the precise numbers as far
11 as whether one state or another got too much or too
12 little, that's more of an accounting issue at the end
13 of the day, once the Court makes decision of -- of how
14 the general split has been accomplished under the
15 Compact. But as I say, it is somewhat different from
16 the perspective of the United States, which is
17 actually complaining of interference with the
18 project's water supply, which ultimately is surface
19 water supply, but that's affected by groundwater
20 pumping, and that's going to be the issue from us.

21 **JUDGE MELLOY:** Well, I -- let me -- let
22 me understand. Is there a dispute that groundwater
23 pumping may potentially affect surface water
24 distribution? Is that a -- is that a concept anybody
25 disagrees with? As a factual matter, that's a

1 different issue. Whether or not -- whether or not
2 there is pumping or whether or not the pumping is to
3 the extent that it might actually affect surface
4 water, but as a -- as a legal concept, I thought that
5 was pretty much resolved, but maybe I'm wrong.

6 **MR. DUBOIS:** I think, Your Honor, that
7 that is what Texas was trying to bring up as law of
8 the case, whether that has been decided in -- in the
9 context of Special Master Grimsal's order and report.
10 Based on, I think, what we are hearing in discovery, I
11 questioned whether that is as resolved as you think.

12 **MR. WECHSLER:** Your Honor, I don't agree
13 with Mr. Dubois on that point. I certainly think that
14 as a -- as a factual or technical matter, the question
15 of whether or not groundwater can or has the potential
16 to have an impact on surface water, I think that's
17 agreed upon by all of the parties. The principles of
18 how you -- how the Compact apportions the water, what
19 is protected, the methodology by which it's protected,
20 I agree with Mr. Dubois. That is a central issue in
21 the case, and that is -- that is very important.

22 **JUDGE MELLOY:** Well, what is -- as I
23 understand it, New Mexico now acknowledges that
24 groundwater pumping can affect surface water and could
25 affect the Compact. Whether it does as a factual

1 matter is a separate issue, but you no longer applying
2 it as a legal proposition, but maybe I'm wrong.

3 **MR. WECHSLER:** Well, Your Honor, I --
4 the way in which New Mexico views the apportionment to
5 me is very similar to what the Court itself has said
6 in its decision and what was pled by the State of
7 Texas. In other words, we believe the intent of the
8 Compact was to protect the project, that the -- that
9 that was done by the intertwined nature of the Compact
10 in the project. Whether you say that the -- the
11 project was incorporated into the Compact or not, we
12 don't think makes much of a difference, that there was
13 a -- an incorporation and a recognition of the
14 downstream contracts, and that the intent was to bid
15 the apportionment around that. So what that means is
16 that the -- the district in New Mexico continued to
17 get 57 percent of project supplies, taking into
18 account the -- the -- the return flows and the normal
19 operations of the project, and that there was
20 sufficient water to irrigate 43 percent of the lands
21 in -- in Texas and so that is very consistent with
22 what the -- the -- the Court has been saying and what
23 the -- what the pleadings have been saying, and that
24 forms a basis for the -- the apportionment. And then
25 there -- there's yet to be some differences of

1 opinion. I think all of the parties recognize that
2 conjunctive management is -- has been done throughout
3 the -- the project acreage, that it was encouraged by
4 the United States in the '40s and '50s, and there's
5 some question as to whether -- difference between the
6 parties as to whether or not the Compact permits that
7 in the way that the project permits that, and it's New
8 Mexico's position that groundwater pumping was always
9 contemplated to supplement supplies to meet crop
10 demands and so there's a -- a clear limit on the total
11 amount that could potentially be used in New Mexico,
12 but that those operations, as they happened over the
13 course of history, were -- were always allowed, and as
14 you see, and I'm sure Your Honor is familiar with the
15 idea of D2, that that was an attempt basically to be
16 putting that methodology into a -- a -- a method that
17 was adopted and developed by the United States. So
18 that's New Mexico's view. So it's nuanced on the
19 issue of groundwater pumping, I think.

20 **MR. SOMACH:** It is quite a bit
21 different. I should state from the Texas position, I
22 mean, I listened to that. That was a mini argument on
23 the issues. You know, our -- our view, in a capsule,
24 is that the Article 4 Compact provision that focuses
25 on the delivery binding Mexico, certain indices

1 amounts of water into the reservoir, and the
2 interrelationship between debits and credits and the
3 Texas Rio Grande Commissioner's ability to control and
4 decide those things argues for a -- a -- and our
5 position is that that word deliver is critical.
6 That's something that -- that Special Master Grimsal
7 spent a lot of time in his -- his first report on and
8 that that delivery is a delivery to Texas and that
9 that use of the water in Elephant Butte is -- is
10 subject to two things, the treaty with Mexico and the
11 Elephant Butte Irrigation District's contract with the
12 United States, and that that contract, separate and
13 apart from any apportionment that New Mexico may have
14 been given upstream is controlled by the United States
15 in terms of -- of how we contracts for water and that
16 it's critical that the contract be consistent with
17 reclamation law with respect to the operation of the
18 project because otherwise return flows from use of
19 water in the contracted areas within New Mexico will
20 deplete the amount of water that Texas gets. In other
21 words, if return flows are interfered with, there just
22 simply isn't enough water in the project to supply
23 Texas. The argument and the position we have is that
24 groundwater pumping, not the groundwater, per se,
25 itself, but the pumping of groundwater has the effect

1 of interfering with intercepting with return flows,
2 which are intended to supply Texas. So it's a more
3 complex argument, but in nutshell, our belief is that
4 the apportionment to New Mexico is above Elephant
5 Butte, that the apportionment with Texas was to
6 Elephant Butte, and, again, it goes to -- to all the
7 things that -- that Special Master Grimsal found in
8 his report in terms of how the Compact, when you put
9 it together in terms of debits, credits, who has the
10 ability to call for that water at various times,
11 supports that -- that point of view, and that -- that
12 the contract with Elephant Butte, that downstream
13 contract, is critical and central because it not only
14 provides benefits to EBID, but it does have -- have
15 limits in terms of return flows and other types of
16 issues there. But there's my mini argument in
17 response to Mr. Wechsler's mini argument, but it
18 probably needs a great deal more development in terms
19 of --

20 **JUDGE MELLOY:** And without being overly
21 simplistic, basically Texas' position is that once New
22 Mexico makes the delivery into the Elephant Butte
23 reservoir, that that water is -- is basically an
24 entitlement for Texas, subject to the 60,000 acre-feet
25 that goes to Mexico and whatever goes to the Elephant

1 Butte Irrigation District?

2 **MR. SOMACH:** That's --

3 **JUDGE MELLOY:** Is rest is Texas' water?

4 **MR. SOMACH:** That's correct.

5 **JUDGE MELLOY:** Mr. Dubois, I know you
6 wanted to say something.

7 **MR. DUBOIS:** I hesitate to join in
8 everyone making mini arguments. I think the
9 fundamental question, Your Honor, is I disagree
10 with -- with a number of things Mr. Wechsler has said,
11 but I think the fundamental question, I think is
12 coming up, is that New Mexico takes the position that
13 the only thing the Compact looks at is surface water
14 and that they can freely permit groundwater pumping
15 that decreases the amount of surface supply and that
16 the percentage allocation then is simply based on
17 what's left after the pumping. I think that that is
18 inconsistent with the Compact. I think that as
19 Mr. Somach said, the word deliver has meaning, and
20 the -- the pumping is essentially taking back some of
21 the water that is -- has been delivered to the project
22 and, therefore, decreases the amount of water
23 available to the project beneficiaries in the two
24 districts, and that's the essence of -- of our
25 complaint. The operating agreement was an attempt to

1 deal with that. That is -- is sort of the -- the --
2 the accounting and administration question that'll
3 come up is where does the water go and who's getting
4 how much, but the -- that's the essence of the issue,
5 I think, Your Honor.

6 **JUDGE MELLOY:** Well, I don't want to cut
7 off anybody else who wants to be heard on this. Does
8 anybody else want to be -- chime in or --

9 **MS. O'BRIEN:** Your Honor, this is Maria
10 O'Brien for EP No. 1. I think the parties' various
11 arguments show that it would be extremely helpful to
12 brief sooner rather than later what the measurement of
13 the entitlements under the Compact are to New Mexico
14 and Texas from and below Elephant Butte. I think each
15 of the parties' respective arguments demonstrated that
16 there is an underlying legal issue that would, if
17 resolved sooner rather than later, would certainly
18 provide guidance to Your Honor, and we -- we believe
19 that it is a legal issue that can be resolved now, and
20 in the event that briefing order occurred, let's say,
21 in the next, you know, 30 -- 30 days, and Your Honor
22 determined there were factual issues, which, again, we
23 believe there is a legal issue that could be resolved,
24 then we could -- it could be further briefed at the
25 close of discovery in the dispositive motion, but we

1 feel there's much to be gained in the full briefing
2 now on what is -- what's the yardstick, what is the
3 measure of the entitlements to New Mexico and to Texas
4 from and below Elephant Butte. So that's -- without
5 going into our legal position on that, that's -- we
6 think it would be very helpful to -- to get -- to get
7 that out for Your Honor.

8 **MR. BROCKMANN:** Your Honor, you've --

9 **MS. BARNCASTLE:** This is Samantha
10 Barncastle for EBID. I just want to state that I
11 agree with Ms. O'Brien that this is an important issue
12 to resolve sooner rather than later, 30 days puts
13 quite a crunch on me given that I'll be adding to my
14 team on Monday morning and be out of pocket for a few,
15 hopefully weeks, recovering. But like I said, that
16 would just put me in quite a bind as EBID's only
17 attorney.

18 **JUDGE MELLOY:** Well, let me just say
19 this. I think Mr. Stein wants to say something.
20 First of all, congratulations. I hope things go well
21 on Monday for you, Ms. Barncastle. I think 30 days,
22 given the amount of discovery that's being undertaken,
23 is pretty aggressive, as someone used the term
24 earlier, bandwidth. I think there's -- you know,
25 there's a lot of lawyers involved in this case.

1 There's still a lot of things to be done over the next
2 60 days to get to the completion of discovery. So I
3 don't -- I don't want to impose upon that, but I'm --
4 I do think that -- I want to give this some more
5 thought, but I do think that towards the end of the
6 discovery period, that that may be a time to revisit
7 this issue, setting up a briefing schedule, maybe --
8 maybe as Mr. Wechsler suggested, even simultaneous
9 briefs as to -- as to this issue, but I want to think
10 about that some more, and I'll visit more with the
11 parties before I make any final decision.

12 Did you want to say something,
13 Mr. Stein? You looked like you were. Take it off
14 mute. Mr. Stein, you're on mute.

15 **MR. STEIN:** Thank you, Your Honor. I
16 want to thank you for raising the question of the
17 groundwater issue, which is a primary importance to
18 many New Mexico water users, including the City of Las
19 Cruces, and historically under the administration of
20 groundwater in the western states, it has been
21 regarded as lying within the province, the
22 administrative province of the western territories and
23 states. One thing that the parties who have discussed
24 this issue have not raised is that there are rights in
25 the state of New Mexico that are pre-project

1 groundwater rights, that are pre-project and
2 pre-Compact and, therefore, are vested rights with the
3 right to divert and use groundwater, and those have to
4 be considered in any disposition of this issue before
5 the Court. So we look forward to briefing it. Thank
6 you, Your Honor.

7 **JUDGE MELLOY:** Well, I think that issue
8 actually came up a little bit in the motion to
9 intervene by -- all of a sudden I'm drawing a blank --
10 the -- the estate. They were claiming pre --
11 pre-project water rights, and as I understand, those
12 are being adjudicated in the master adjudication in
13 New Mexico. Is that correct, Mr. Stein?

14 **MR. STEIN:** Yes. There are -- the
15 adjudication in New Mexico is adjudicating the
16 priority date of all groundwater users, and those
17 include pre-project and pre- -- pre-Compact rights
18 such as those as the City of Las Cruces.

19 **JUDGE MELLOY:** I don't know how that's
20 going to fit into all of this and how that has to be
21 recognized, but -- but at the end of the day, the
22 Compact supersedes those rights, doesn't it? Is there
23 any big dispute about that? I think the Supreme
24 Court -- I can't give you the name of the case, but
25 basically the Supreme Court said that when the parties

1 entered into a Compact or when the states enter into a
2 Compact that's been approved by congress, that that in
3 essence supersedes any adjudication of groundwater
4 rights by individual groundwater users, because New
5 Mexico, as I understand it, is presumed to be
6 representing interests in those Compact negotiations.
7 I think we just lost Mr. Stein so anyway.

8 **MR. UTTON:** Your Honor, this is John
9 Utton. Could I address that?

10 **JUDGE MELLOY:** Go ahead.

11 **MR. UTTON:** I think no one disagrees
12 that the inderliner principle would apply, but that
13 those rights would be included in the amount
14 apportioned to the state that's in question. So here
15 in New Mexico. So this -- this proposition advanced
16 by Texas that New Mexico does not even have an
17 apportionment below Elephant Butte makes it difficult
18 to even apply inderliner. So I think that that --
19 that issue has to be addressed, first of all, and then
20 I think no one on the New Mexico side would dispute
21 that the use of New Mexico, both surface and ground,
22 has to fall within that. I think that what Mr. Stein
23 is saying is under New Mexico law in allocating its
24 own apportionment, those adjudication priorities of
25 its own courts would apply. But that whole structure,

1 the inderliner structure, living within your own
2 apportionment, has been called in question by some
3 parties saying there is no apportionment of that
4 water, even though it's used in New Mexico, which
5 definitely we disagree with. Thank you.

6 **JUDGE MELLOY:** I think we've probably
7 exhausted this topic for today, but I do want to think
8 about this some more. Is there anything else we need
9 to talk about today or in connection with discovery or
10 any other issue that's -- that's currently out there?

11 **MR. BROCKMANN:** Master Melloy. This is
12 Jim Brockmann. My connection dropped off a second
13 ago, but I just want to make one other point with
14 respect to the dispositive motions, and that is that
15 previously, the first special master heard dispositive
16 motions on this. The parties briefed before you which
17 issues were resolved by the Court, and judging from
18 your -- from your last two orders, it was going to be
19 helpful to have some evidence on that point. I do
20 think before you order a briefing schedule, it would
21 be useful maybe to have further discussion about the
22 propriety of that and whether it's really going to get
23 us anywhere or whether we're still looking at factual
24 development of the issue at trial. Thank you.

25 **JUDGE MELLOY:** All right. Thank you.

1 Well, I -- I made no decision on it. We'll talk about
2 it more before we get to that point. Is there
3 anything else that anyone wants to discuss? Well, I
4 tell you what, I think it's been helpful to keep
5 things moving. I don't know that we need to meet
6 every two weeks. I -- I would suggest that we
7 schedule something about four weeks out. If something
8 comes up, as I said, I'm not going any place this
9 summer. I'm available any time. We can set up a
10 hearing on short notice, but I would -- I would
11 suggest that we plan to get together, and if Fridays
12 at this time works for everybody, maybe on Friday,
13 July 10th. Does that work for everyone?

14 **MR. DUBOIS:** Works for the United
15 States.

16 **JUDGE MELLOY:** I'm trying to be mindful
17 of the fact -- I'm trying to be mindful of the fact
18 that you're busy with discovery. I don't want to
19 impinge upon that time either, so unless there's a
20 need to get together sooner, let's just plan on,
21 again, same time on -- on July 10th and, again, we'll
22 use the same system that we've been using the last
23 couple meetings.

24 **MR. WALLACE:** Your Honor, this is Chad
25 Wallace.

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JUDGE MELLOY: Yes.

MR. WALLACE: If I can ask, since we're having much more frequent meetings with you, do you care to suspend a requirement to file status reports?

JUDGE MELLOY: I will for now. Yes.

MR. WALLACE: Thank you.

JUDGE MELLOY: All right. Anything else? All right. I will sign off, everyone. Thank you.

MR. SOMACH: Thank you, Your Honor.

MR. WECHSLER: Thank you, Your Honor.

MR. DUBOIS: Thank you, Your Honor.

(The proceedings adjourned at 11:57 a.m.)

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