

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF MAY 15, 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 2:00 p.m.

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1 **JUDGE MELLOY:** All right. Well, let's
2 get started. We have our court reporter present, and
3 I'll start with this is an Original No. 141 in the
4 Supreme Court, Texas versus New Mexico and Colorado,
5 United States as intervenor. Let's start by taking a
6 roll of the parties that are on the -- on the hearing.

7 Heather, do you have a list of all the
8 participants available to you?

9 **THE REPORTER:** I do.

10 **JUDGE MELLOY:** You do. Okay. So we'll
11 go through this. We'll start with Texas. Mr. Somach?

12 **MR. SOMACH:** Yes, Your Honor. This is
13 Stuart Somach on behalf of the State of Texas and with
14 me are -- from my office are Theresa Barfield, Francis
15 Goldsberry, Sarah Klahn, Robert Hoffman, Richard
16 Deitchman, and then from the Texas attorney general's
17 office, Priscilla Hubenak. And, also, I have my
18 paralegal, Christina Garro, on the phone. She's
19 assisted in putting together the demonstration of the
20 deposition so I asked her to also participate in case
21 we needed some assistance from the lawyers' side of
22 this thing, although I think Michael and Heather are
23 perfectly capable of handling all the technical issues.

24 **JUDGE MELLOY:** All right. Thank you.
25 New Mexico?

1 **MR. WECHSLER:** Good afternoon, Your
2 Honor. Jeff Wechsler from Montgomery & Andrews. We
3 also have, on behalf of New Mexico, Cholla Khoury, who
4 is the deputy attorney general; Marcus Rael and Luis
5 Robles from Robles Rael & Anaya; Lisa Thompson and
6 Michael Kopp from Trout Raley; and John Draper from
7 Draper & Draper. Also attending are the state
8 engineer, John D'Antonio; Rolf Schmidt-Petersen, who is
9 the Interstate Stream Commission director; Greg
10 Ridgley, who is the general counsel for the state
11 engineer's office; and Arianne Singer, who is the
12 general counsel for the New Mexico Interstate Stream
13 Commission.

14 **JUDGE MELLOY:** And for Colorado?

15 **MR. WALLACE:** Good morning -- or good
16 afternoon, Your Honor. This is Chad Wallace for
17 Colorado.

18 **JUDGE MELLOY:** And for the United States?

19 **MR. DUBOIS:** Good afternoon, Your Honor.
20 James Dubois for the United States. Also on are Lee
21 Leininger and David Gehlert from my office and Chris
22 Rich and Shelly Randel from the solicitor's office.

23 **JUDGE MELLOY:** All right. And
24 Albuquerque Bernalillo County Water Utility Authority?

25 Mr. Stein, I saw you were on.

1 **MR. BROCKMANN:** It's Jim Brockmann. Jim
2 Brockmann for the Albuquerque Bernalillo County Water
3 Utility Authority.

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

5 **MR. CAROOM:** Doug Caroom and Susan
6 Maxwell for the City of El Paso, Your Honor.

7 **JUDGE MELLOY:** Okay. City of Las Cruces?

8 **MR. STEIN:** Good afternoon, Your Honor.
9 This is Jay Stein, counsel of record for the City of
10 Las Cruces.

11 **JUDGE MELLOY:** El Paso County Water
12 Improvement District No. 1?

13 **MS. O'BRIEN:** Yes, good afternoon, Your
14 Honor. Maria O'Brien for El Paso County Water
15 Improvement District No. 1, and also as counsel for the
16 district is Renea Hicks, and also attending today is
17 the district's engineer, Dr. Al Blair.

18 **JUDGE MELLOY:** Elephant Butte Irrigation
19 District?

20 **MS. BARNCASTLE:** Good afternoon, Your
21 Honor. Samantha Barncastle for the Elephant Butte
22 Irrigation District.

23 **JUDGE MELLOY:** Okay. Hudspeth County
24 Conservation Reclamation District No. 1?

25 **MR. MILLER:** Yes, good afternoon. This

1 is Drew Miller on behalf of the Hudspeth County
2 Conservation Reclamation District.

3 **JUDGE MELLOY:** New Mexico Pecan Growers?

4 **MS. DAVIDSON:** Yes, Your Honor, Tessa
5 Davidson on behalf of Pecan Growers.

6 **JUDGE MELLOY:** Anyone on for New Mexico
7 State University?

8 **MR. UTTON:** Your Honor, good afternoon.
9 This is John Utton representing NMSU.

10 **JUDGE MELLOY:** And I assume nobody is on
11 for Kansas, State of Kansas.

12 All right. We have a number of things to
13 talk about today. Let me start with just a couple
14 preliminary questions and matters I wanted to bring up
15 with counsel. First of all, I just want to advise
16 everyone that my judicial assistant re -- took a call
17 earlier this week from Mr. James Scott Boyd, who was
18 calling to express his displeasure with my report to
19 the Supreme Court concerning the intervening --
20 petition intervened by the Boyd Estate. He didn't ask
21 to do anything, other than I think he -- according to
22 my -- my assistant, wanted to vent. He obviously
23 disagreed with the analysis and most everything that
24 was in the report but felt it was very unfair.
25 Apparently I didn't -- this is secondhand, but he

1 wanted just to -- everybody to know that he didn't --
2 he didn't agree with the outcome.

3 Just a mechanical issue, on prior
4 hearings, we have furnished the court reporter and
5 handled the billing. How -- how is the billing going
6 to be handled for Heather today? Is there any
7 discussion of that?

8 Well, Mr. Somach, any thought?

9 **MR. SOMACH:** I think the parties are good
10 to split the cost. I mean, the court reporting service
11 is one we've all used, and Heather has taken the bulk
12 of the depositions and so at least from the State of
13 Texas' perspective, we see no problem of just splitting
14 the cost the way we have split all the other court
15 reporting and deposition-related costs.

16 **JUDGE MELLOY:** Okay. Do you want her to
17 go ahead and prepare a transcript right away or do you
18 want to wait and order one when you decide you need it?

19 **MR. SOMACH:** I think we will want one so
20 at least from Texas' perspective, we'd like to go ahead
21 and order it now and then any other party, of course,
22 that would like a -- a transcript can -- can do -- do
23 likewise.

24 **JUDGE MELLOY:** Okay. Heather, if you
25 would do that, and also would you file the original

1 with my office then when you get it prepared?

2 **THE REPORTER:** Sure. Absolutely.

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

4 I should just mention, I have used Zoom
5 at home personally, but from a federal judiciary
6 standpoint, we have been discouraged from using Zoom.
7 There's still some concerns about security glitches,
8 but I think certainly for today's proceeding, there's
9 nothing that we're going to be talking about that we
10 can't have everybody in the world hear, I think.
11 There's nothing confidential, and hopefully we'll not
12 be Zoom bombed by some third party. So I'm not too
13 concerned about today, but I do just want to alert you
14 that if we were to try to go forward with hearings
15 using Zoom in the future, I may need to get -- we may
16 need to make some adjustments. And our technical
17 people in Washington are testing it and -- and at some
18 point, they may -- they may become comfortable with the
19 security issues, but at least as of right now, they're
20 not. They don't feel that way. But I think we're fine
21 for today's hearing.

22 All right. Do we want to do the
23 deposition -- I mean, the demonstration on the
24 deposition at this point?

25 **MR. SOMACH:** I think that would be

1 probably the way we should proceed because I think it's
2 important that -- that you take a look at what we're
3 doing. Ms. Barfield in my office has, along with
4 Ms. Garro, have -- have done the -- the lion's share,
5 if not everything, that's been done from our
6 perspective in terms of arranging it, so perhaps I
7 could ask Ms. Barfield to introduce what
8 they've arranged and then we can just turn it over to
9 Worldwide at that point in time.

10 So, Theresa, do you want to do anything
11 in the way of introduction?

12 **MS. BARFIELD:** Sure. Just brief
13 introduction. Your Honor, and most of the parties and
14 amici, of course, know our court reporter who is here
15 with us today, Heather Garza. Also with us with
16 Worldwide Court Reporters is Mike Flores. Now, he is
17 our technical specialist. He has done a Zoom
18 presentation for the parties and for EBID and EP1
19 already. He will be here today to do a short
20 presentation/demonstration for you-all so that you can
21 see the information that we have garnered and the --
22 the benefits of the platform and why we've chosen
23 Worldwide to go forward with. Mike is going to do a
24 short demonstration far more tailored than what the
25 parties participated in last week. I understand that

1 he will ask you at certain points if you want to see
2 more detail or less detail, Your Honor, so that we can
3 keep it -- keep it short, yet informational.

4 So I'm going to turn that over to you,
5 Mike, and thank you very much.

6 **JUDGE MELLOY:** Let me just interject.
7 Unless someone requests, I would just let Heather know,
8 I don't think we need to report the contents of the
9 demonstration. You can just note in the record the
10 demonstration was held.

11 **THE REPORTER:** Okay. Perfect.

12 (The demonstration was held.)

13 **JUDGE MELLOY:** All right. Well, we're
14 back on the record. We had our demonstration. Does
15 anybody have anything they want to add on the record
16 concerning the demonstration or the service of
17 Worldwide and the video conference?

18 All right. If not, then let's turn to
19 this issue that's come up in the last couple days, and
20 that relates to the letter that was sent by the State
21 of New Mexico and by -- by a group of the amici
22 concerning the supplemental reports that were filed by
23 the United States and Texas, and as I understand the
24 gist of the issue is that the New Mexico and the amici
25 feel that these aren't true supplemental reports, that

1 what in essence Texas and United States did was file
2 new rebuttal reports, that these did not supplement the
3 reports that were filed within the deadline of December
4 30th but have now filed new rebuttal reports and that
5 New Mexico's asking for some additional time as a
6 result to file its rebuttal report.

7 And so I think what I'll do first is just
8 let New Mexico speak first. You raised the issue. Are
9 you going to talk, Mr. Wechsler, or who's going to
10 speak to this?

11 **MR. WECHSLER:** I am, Your Honor. So,
12 yeah, it -- you're exactly right about our view. From
13 our perspective, Texas and the United States have used
14 the supplemental opinion rule and put New Mexico into a
15 difficult place with the new expert reports. We're
16 frustrated by that, but we're trying to find a workable
17 solution that doesn't prejudice New Mexico or
18 jeopardize the schedule. The Rule 26(e) requires a
19 party to update existing report or expert opinions to
20 prevent unfair surprise at trial. It's really
21 protective for the other side, and consistent with the
22 rule, the case law is clear that -- and this is a quote
23 from the DC Circuit that, quote, the narrow purpose of
24 Rule 26(e) is to correct inaccuracies or add
25 information that was not available at the time of the

1 initial report. But the new reports of these two
2 experts, whose names are Coors and Moran, are neither
3 supplement --

4 **JUDGE MELLOY:** Let me ask you a question
5 just real quick.

6 **MR. WECHSLER:** Of course.

7 **JUDGE MELLOY:** Are these experts who
8 previously filed reports or are these new experts?

9 **MR. WECHSLER:** So the expert for Texas is
10 a gentleman named Coors. Mr. Coors did not file a
11 report -- an initial report in May of 2019. He filed a
12 rebuttal report on December 30th for the State of
13 Texas. Ms. Moran, on behalf of the United States,
14 filed an original expert report in May of 2019 but did
15 not -- was not disclosed as a rebuttal witness. So
16 from our perspective, these reports are neither
17 supplemental nor based on new information. And let me
18 talk just a little bit about each of them. So New
19 Mexico disclosed its expert reports on October 31st of
20 2019, and as part of that disclosure, we produced what
21 is called the Integrated Lower Rio Grande model, and
22 it's the only model in the case that fully integrates
23 the impacts of surface water and groundwater and
24 reoperates the system, which has been found to be
25 important in -- in other cases.

1 As I said, the rebuttal reports of Texas
2 and the United States were disclosed on December 30th
3 of 2019. So as I said, Mr. Coors was disclosed by
4 Texas only as a rebuttal witness. He did submit a
5 report. That report was a total of seven substantive
6 pages. So in that seven-page report and in his
7 deposition, he did indicate that he planned to
8 supplement -- supplement his opinion, and he
9 particular -- he was asked, of course, in what areas,
10 and particularly, he highlighted the sensitivity
11 analysis. And so New Mexico prepared to address that
12 and was prepared to deal with that issue on the
13 schedule that you had -- had outlined.

14 However, on May 6th, four months after
15 the Texas expert disclosure deadline, Texas provided
16 this new Coors report. It is 91 substantive pages,
17 over ten times longer than Mr. Coors' original
18 disclosure. It purports to answer five new questions.
19 Those new questions were not posed in the December
20 disclosure, and they were not raised during the
21 deposition of Mr. Coors. So far from correcting the
22 opinions expressed in the first Coors report to reflect
23 new information or this second report contains entirely
24 new opinions that were not contemplated or disclosed in
25 the original report.

1 And then the Moran situation is
2 similar --

3 **JUDGE MELLOY:** Excuse me. What are the
4 five questions? Do you have them?

5 **MR. WECHSLER:** I don't, Your Honor, at my
6 fingertips. My apologies. I can find them during the
7 course of the argument.

8 The U.S. did not produce a model in this
9 case. Instead, Ms. Moran was disclosed in May of 2019,
10 and her direct report offered the -- generally, the
11 opinion that the Texas model was appropriate to assess
12 groundwater impacts in the lower Rio Grande in New
13 Mexico. Later in the fall of 2019, she submitted a
14 supplemental report. New Mexico did not complain about
15 that supplemental report. It did tie back to her
16 May -- original May report. She was not -- as I said,
17 not disclosed as a rebuttal witness for any subject.
18 The United States did not mention their intent to
19 submit a supplemental report to us at any time, and, in
20 fact, last -- two weeks ago, we were before you talking
21 about the schedule, and, again, the United States did
22 not mention that there might be a supplemental report,
23 which, of course, goes to the schedule. In some ways,
24 New Mexico feels ambushed by this report. It's -- it's
25 23 pages long, and Ms. Moran is now offering opinions

1 directly about the New Mexico integrated model.
2 Remember that she had never offered any opinions on
3 that at all, so whereas before, she was simply saying
4 the Texas model is appropriate, now, she's saying the
5 New Mexico model is inappropriate.

6 So the actions of Texas and the United
7 States abuse the rules in two ways. I mean, first of
8 all, it's not based on new information. The
9 information that is contained in these reports were
10 available since October of 2019. There is no reason
11 that Ms. Coors -- Mr. Coors and Ms. Moran could not
12 have produced their opinions on time, which brings me
13 really to the second way in which this violates the
14 rules. If these reports had been disclosed on time,
15 New Mexico would have had a full four months to review
16 and respond to them, and by producing these new reports
17 out of time without leave of Your Honor, Texas and the
18 United States have essentially shortened the amount of
19 time that New Mexico has to respond, a little over a
20 month, and -- and we see that as the worst kind of
21 gamesmanship, and we see it as unfair to New Mexico.

22 So as I said, this puts New Mexico in a
23 very uncomfortable position. Now, we understand that
24 you've set June 15th as the expert deadline, and as we
25 committed at the last hearing, we are prepared to do

1 whatever it takes to get this case to trial in May or
2 June of 2021; but we don't think that New Mexico should
3 be prejudiced by these unilateral actions of Texas and
4 the United States or their violation of the rules. We
5 conferred with our modeling experts because both
6 Ms. Moran and Mr. Coors are -- are modelers, and while
7 they're comfortable they'll be able to address the
8 Coors and Moran reports, it will take time to fully
9 evaluate and -- and produce a responsive analysis. So
10 what we're proposing to do is -- what we think is the
11 least disruptive change that allows New Mexico to
12 address the new reports, New Mexico has a total of, I
13 believe it's 11 rebuttal reports that we'll be
14 intending to submit. Of those, four are modeling
15 reports. So our proposal is that seven of the reports,
16 the ones that are unrelated to modeling, unrelated to
17 Mr. Coors or Ms. Moran, they be disclosed, as you
18 scheduled, on June 15th. The remainder of the experts,
19 the four modelers, the ones who are potentially
20 directly impacted by Coors and Moran and, again, we
21 need more time to fully evaluate that, those would be
22 disclosed on July 15th. So we think that way there's
23 no -- there's very little disruption to the schedule.
24 Texas can begin deposing New Mexico experts in late
25 June and July and, in fact, they would have the

1 opportunity to talk to the majority of -- of New
2 Mexico's experts and -- and so that's what we would
3 submit is the fairest way to resolve this issue.

4 **JUDGE MELLOY:** Well, before I give Texas
5 and United States a chance to respond, I know you
6 weighed in with a letter, Mr. Stein. Do you want to be
7 heard?

8 **MR. STEIN:** Yes, Your Honor. This is Jay
9 Stein. I'm counsel of record for the City of Las
10 Cruces. As Your Honor knows, the New Mexico amici
11 filed a letter yesterday in support of the -- of the
12 State's letter. What we tried to do was to put a human
13 face on the issue. Your Honor, the New Mexico amici
14 are the City of Las Cruces, the New Mexico Pecan
15 Growers, New Mexico State University, and the
16 Albuquerque Bernalillo County Water Utility Authority,
17 which is always interested in how these principles
18 might lead into the middle valley.

19 We had four concerns that echo
20 Mr. Wechsler. These reports presented extensive new
21 evidence; secondly, that they presented new theories,
22 new data, and new information that had not been
23 accounted for previously; thirdly, that they were
24 untimely; and fourthly, that they potentially presented
25 new restrictions and new limitations on the economy in

1 the lower Rio Grande that is represented by Las Cruces
2 and by the Pecan Growers and by NMSU, who are the water
3 users, who are potentially affected by the outcome of
4 this case and will be affected by the outcome of this
5 case.

6 In that respect, Your Honor, I cited for
7 you the case of Colorado versus New Mexico. That case
8 was not a Compact enforcement case. That was a
9 equitable apportionment in the first instance. But
10 what we had tried so hard to do in that case, what the
11 Interstate Stream Commission had tried so hard to do in
12 that case for New Mexico was to create the principle
13 that an existing economy in an Interstate lawsuit had
14 to be respected and had to be considered with respect
15 to any decree that the Court were to enter in
16 interstate water disputes. And for that reason, Your
17 Honor, we stand in support of the goals that were
18 enunciated by Mr. Wechsler.

19 **JUDGE MELLODY:** Thank you.

20 What's Texas' response, Mr. Somach?

21 **MR. SOMACH:** Yes, Your Honor. First of
22 all, in -- in response to what Mr. Stein just said, I
23 just want to point out again that that equitable
24 apportionment cases are quite different than Compact
25 cases and that the law is -- is different in terms of

1 those. But substantively, let -- let me say this.
2 The -- the New Mexico expert report that the Coors
3 report responds to was 7 terabytes -- the material, the
4 data, was 7 terabytes of information with a model that
5 took from 24 to 36 hours to run just one run.
6 Mr. Coors did the best he could do within the time
7 period that was allowed. He issued a report where he
8 criticized the model. He indicated that because of the
9 7 terabytes of work or data that was involved and the
10 length of time it took to -- to operate just in one run
11 of the model, that he was going to have to continue to
12 do work and that he would supplement his -- his
13 opinions as soon as he was able to get it done. His
14 deposition was taken in February. He repeated that
15 very -- very same thing. He said he was working on it,
16 but there was so much data there, I mean, 10 terabytes
17 of data. It was an incredibly large data file that it
18 was just taking time to do that.

19 We indicated to New Mexico that we were
20 going to supplement because of that. Ultimately, his
21 report -- and -- and I dispute the fact that it's 90
22 pages long. The narrative in the dispute -- in the
23 report is 38 pages long. It does have figures that are
24 referred to in the report, and the total amount of
25 data -- and -- and that's in their letter -- is about

1 200 megabytes or 1 percent of the data that was in
2 the -- the -- the report that was issued by -- by the
3 New Mexico experts.

4 Now, in terms of attempting through meet
5 and confer to resolve this, we said that while we
6 didn't think all that time was necessary, that we
7 agreed that they could file surrebuttal reports to
8 Mr. Coors' report on July 15th. That's the day that
9 they've requested. What we did say, however, was there
10 were a universe of modeler rebuttal reports that we had
11 filed that had nothing to do with what Mr. Coors was
12 doing and that we thought those reports by those
13 modelers, whatever that was, should be filed on June
14 15th on time. After all, nothing new has happened with
15 respect to those reports. They've been there since the
16 beginning. They've been deposed on their rebuttal
17 reports, and that -- that we -- we're entitled to have
18 those reports on June 15th so we could move forward
19 with depositions, but that certainly they thought they
20 needed more time with Mr. Coors 'report, we were fine
21 with that. Okay? Now, of course, they want all of the
22 model reports to be delayed notwithstanding the fact
23 that presumably, part of what they've been doing to
24 date has been rebutting our other modelers' reports and
25 we'd like to see that and we'd like to move forward

1 with those depositions.

2 Now, there's real substance behind
3 that -- that request, and that is, you know, on May
4 1st, New Mexico said they needed to take 22 more
5 depositions. I said something along the lines of that
6 sounds like a do-over to me. Now, as of today, they
7 want to take 32 depositions. They've added ten between
8 May 1st and -- and May 15th. I don't -- if we can't
9 start taking their expert depositions, including their
10 modelers, subject only to what they're going to do in a
11 surrebuttal report with Mr. Coors, then I'm not sure
12 how we're going to fit it all in because there's only a
13 month and a half between July 15th and the end of
14 depositions. And so the dispute, I think, is narrower
15 than Mr. Wechsler would -- would have -- have one
16 believe. We're okay with them rebutting Mr. Coors'
17 report on July 15th. What we're saying, though, is all
18 the rest of the reports, including modeler reports,
19 that address reports that we filed seven or eight
20 months ago, that those reports ought to be filed on
21 June 15th, and -- and essentially that's -- that's our
22 position. I don't know why that's not fair, why it
23 doesn't address the concerns that were raised by -- by
24 Mr. Wechsler and -- and New Mexico, but that is our
25 proposal. That's what we indicated to them, and that's

1 what we're willing to live with now.

2 **JUDGE MELLOY:** What's the United States'
3 position on all of this?

4 **MR. DUBOIS:** Your Honor, I'm sorry. I
5 forgot to unmute there. We've -- we're largely aligned
6 with Texas on this. On -- as Mr. Somach told you, the
7 size of the New Mexico modeling effort was terabytes of
8 data. We had only two months. We did the best we
9 could with the time we had; but in contrast to
10 Mr. Coors, New Mexico never even sought a deposition of
11 Ms. Moran, who did disclose a year ago and then
12 supplemented in September. So it never came up whether
13 or not she was doing some additional work because there
14 was never a deposition. There was never any attempt to
15 have a deposition. It did not come up two weeks ago
16 because the discussion was all about the Coors
17 deposition -- or the Coors report.

18 **JUDGE MELLOY:** But is it true --

19 **MR. DUBOIS:** Nobody has approached us --
20 pardon me?

21 **JUDGE MELLOY:** But is it true that she
22 did not come up with her own model until two weeks ago?

23 **MR. DUBOIS:** Oh, no. She didn't come up
24 with her own model at all, Your Honor. The report --
25 and this is why I also -- my next point, Your Honor,

1 was that this is -- really, this is a supplemental
2 report. Her initial report had to do with a review of
3 the Texas model from Mr. Hutchison. The -- the latest
4 report compares and contrasts that and also Hutchison's
5 model with a -- an analysis of the output of New
6 Mexico's own model. What they don't necessarily like
7 is the conclusion she came to. But this is just a
8 compare and con -- contrast. It's an analysis of New
9 Mexico's model. That's true. But Mr. Wechsler has
10 misstated her conclusions about the model. I don't
11 know if it's appropriate to -- to get very far into
12 that, into those weeds. But this is simply, Your
13 Honor, a report that takes New Mexico's model, uses New
14 Mexico's methodologies and practice of running it, and
15 compares outputs to both historical data and to
16 Mr. Hutchison's model. So, therefore, we do see it as
17 supplemental in that sense.

18 In that respect, I think that Mr. Somach
19 has expressed that what we proposed to New Mexico was
20 make the -- make the -- all of the model -- all of the
21 sup -- surrebuttal reports available on June 15th but
22 acknowledging that they may need to supplement to
23 address Coors and -- and Moran to the extent that they
24 need to supplement those much more narrow issues, have
25 that due in -- in July, which at least allows a greater

1 percentage of the -- of the expert depositions to
2 continue going forward during July. This can be very,
3 very difficult depending on what they suddenly come up
4 with in multiple reports that are covering far more
5 ground with essentially having a couple of weeks to
6 review whatever they come with in middle of July and
7 then doing depositions.

8 They're talking about being prejudiced by
9 only having basically ten weeks to look at the -- the
10 Moran and the Coors reports. I will point out that
11 having gotten 7 terabytes, we only had eight weeks to
12 put out rebuttal reports in the first place. So as far
13 as fairness, I agree, they -- they do need to have an
14 opportunity to review this. They do need to have an
15 opportunity -- some reasonable opportunity if they need
16 to supplement to respond to Moran and Coors, but we
17 need to have reasonable lemon switch. Do not prejudice
18 the United States and Texas to suddenly have large
19 reports and a total of six weeks to digest it and then
20 do depositions on it.

21 **JUDGE MELLOY:** Well, it doesn't seem to
22 me that it's going to be very reasonable that you're
23 going to want to take depositions of these rebuttal
24 experts in June and July if you know they're going to
25 be supplementing by July 15th. Why not just wait for

1 the report? That seems to be very inefficient. You
2 want a report and then you want to wait for
3 supplementation. That seems like a very inefficient
4 way to do something.

5 **MR. SOMACH:** Well, you know, here --
6 these reports are -- are -- the modeling that's been
7 done -- let me put aside the Shane Coors report for a
8 moment. The modeling that was done by Texas, which
9 presumably triggered the need for more time to June
10 15th to -- to respond to that -- those original reports
11 are a broad array of materials. The -- the Coors
12 report is relatively narrow. I'm not even certain
13 whether or not we would need to depose those model
14 surrebuttal reports, if there are any, on -- on the
15 Coors report; but if so, they would be very narrowly
16 focused, and they could be very efficiently done in a
17 very short period of time. What we --

18 **JUDGE MELLOY:** But why do a surrebuttal
19 report and then a supplementation 30 days later? That
20 doesn't make any sense to me.

21 **MR. SOMACH:** Well, because the
22 supplementation would be focused on only one thing,
23 presumably the -- the Moran and the -- the Coors
24 report, with -- with all the rest of the critique of
25 modeling, which I'm going to have to give to our

1 modeling experts and have them have an opportunity to
2 take a look at it just somehow sitting there and
3 waiting for what is a relatively narrow area of -- of
4 materials that the Coors report dealt with.

5 **JUDGE MELLOY:** I'll give Mr. Wechsler a
6 chance to respond, but before he does, does anybody
7 else want to weigh in on this issue that hasn't been
8 heard up to this point?

9 **MR. DUBOIS:** Your Honor, if I might, just
10 one additional consideration is that as Mr. Somach
11 says, any supplementation seems like it would be very
12 narrow because both the -- the Moran and the -- and the
13 Coors reports focus on narrower issues. We do not know
14 what the rest of their modeling surrebuttal is going to
15 be, and there is a preparation time frame. I don't
16 think that much of it will go to be all that relevant
17 to Jean Moran's report, but I don't know how it's going
18 to affect other aspects of the case. I -- I -- as I
19 said, Moran's report is primarily a -- an operation of
20 New Mexico's own model. That will be a narrow thing,
21 but I don't know whether or not they're going to have
22 some other kinds of reports that are going in new
23 directions on, say, their groundwater models, and that
24 does take time to analyze, and waiting until
25 depositions are almost completed may -- probably is

1 less of a disadvantage for the United States because we
2 do not have a separate model, but it seems like it is
3 a -- a potential problem going forward in the case.

4 **JUDGE MELLOY:** Let me ask you a question,
5 Mr. Dubois.

6 **MR. DUBOIS:** Sure.

7 **JUDGE MELLOY:** Early on in this case,
8 there was some discussion about the United States
9 already had a model from the --

10 **MR. DUBOIS:** USGS.

11 **JUDGE MELLOY:** -- USGS and that you would
12 be using that model. Is that -- is that model in play
13 at all or what happened to that model?

14 **MR. DUBOIS:** We never actually -- we
15 never said that -- others implied that we were going to
16 use it. We did not commit to using that model because
17 it was uncompleted at that point. It has a few bugs in
18 the system. It is not ready for prime time. They did
19 publish a model and issues were found with that model
20 that the -- the GS is working on fixing and curing, but
21 I do not think we are going to be in any -- well, we
22 obviously have not disclosed it so even if it -- it is
23 corrected and fixed prior to next summer, we would not
24 be in a position to try and offer that to the Court
25 without having given extensive discovery to the

1 parties. So we will not be using that model in trial.

2 **JUDGE MELLOY:** I'll give you the last
3 word, Mr. Wechsler. What -- what's your response to
4 Mr. Somach's position that why not disclose the
5 report -- the rebuttal reports on the models that
6 aren't at issue in Moran and -- who's the other one?

7 **MR. DUBOIS:** Coors.

8 **MR. WECHSLER:** Coors.

9 **JUDGE MELLOY:** -- Coors?

10 **MR. WECHSLER:** Happy to, Your Honor. Let
11 me first say, the United States nor Texas never asked
12 you for additional time to evaluate and address the New
13 Mexico model. In fact, New Mexico probably would not
14 have opposed that, provided that we were given a fair
15 opportunity to also respond. If I understand their
16 argument, they acknowledge that there has been -- what
17 they have done is essentially unfair; and let me say
18 this, and that is since this is a problem that was
19 created by Texas and the United States, it's a little
20 frustrating for us that they want a say in how to fix
21 it, and they want a say in how to fix it in a way that
22 puts New Mexico at a disadvantage. I very much
23 disagree that -- with Mr. Somach that this is a narrow
24 issue or is necessarily a narrow issue. We are in the
25 process of evaluating the Coors -- particularly the

1 Coors report, and it may be that it -- it does have a
2 very narrow -- it's easy to address. Our folks are
3 quite confident they're able to do that. However,
4 the -- the New Mexico models, because they're
5 integrated, and I -- I should say that the U.S.
6 modeling that they were unable to complete was of a
7 similar type, whereas the -- the Texas modeling is a
8 more simplistic approach. But so the New Mexico
9 modeling takes a significant effort from a team of
10 people. If it becomes necessary to make any
11 adjustments to the model due to the issues raised by
12 Coors or potentially Moran, then New Mexico is going to
13 have to rerun one, perhaps more, different model runs,
14 which to your point, makes this an incredibly
15 inefficient process because there would be model runs
16 presented in June that ultimately in July are simply --
17 have no relevance. That also takes time, and it takes
18 time away from New Mexico being able to evaluate the
19 new reports, the new material, and so when you take all
20 of that together, it makes the supplemental report for
21 the -- for -- for a supplemental approach as opposed to
22 the new full reports unfair for, I think, three
23 reasons.

24 The first would be that it's inefficient
25 for New Mexico to produce those modeling runs on June

1 15th only to have to -- to turn around and produce
2 them -- the potential new ones four weeks later. I
3 don't think that that's in any of the parties' best
4 interest. Secondly, it's -- it's costly to produce the
5 runs and the related data. As Mr. Somach correctly
6 indicated, there is a lot of data. It takes a fair
7 amount of time to marshal it and disclose it, and it
8 comes with a certain amount of costs. Which comes to
9 the third reason, which that is that maybe most
10 importantly, New Mexico should not have to bear the
11 burden and the cost, the prejudice of Texas and the
12 United States having violated the rules. As to their
13 point that there wouldn't be enough time after July
14 15th to take a deposition, we are, again -- I think
15 we've tried to emphasize to you that we think it is
16 important for all of the parties to have a full and
17 fair opportunity at discovery of producing their full
18 case. That applies to Texas and the United States, as
19 well, and what that means is if they feel like they
20 need additional time, we are willing to join with them
21 in a request to take a deposition at a later point.

22 And -- and I would simply say to -- in
23 closing there, as to Mr. Somach's point that there's
24 additional other depositions, we respect Texas' ability
25 to take the discovery that is necessary for them in

1 order for them to create their own case. We would
2 simply ask for the same courtesy from them.

3 **JUDGE MELLOY:** Well, I'm going to grant
4 New Mexico's request. It seems to me that both Texas
5 and the United States have somewhat implicitly
6 acknowledged that these are not true supplemental
7 reports, but they're basically new rebuttal reports and
8 that they got an extra four months to prepare them and
9 I think for New Mexico to ask for an extra 30 days is
10 not unreasonable, and I'll grant it. I don't -- I
11 don't understand the idea of doing a report on the 15th
12 of June and then a supplemental report on July 15th.
13 It just seems to be, in this compressed time frame, to
14 be a very inefficient way of doing it so I'll grant
15 their request. All of the other -- and that, of
16 course, relates only to the modeling reports. The
17 other reports are still due on July 15th, as set out in
18 Mr. Wechsler's request.

19 **MR. WECHSLER:** Understood.

20 **JUDGE MELLOY:** All right. In
21 Mr. Somach's letter, he had indicated a couple issues
22 that were -- presented themselves, two of which relate
23 to deposition requests they made of New Mexico and New
24 Mexico's inability to make people available until late
25 summer. What's your response to that?

1 **MR. WECHSLER:** Yes, Your Honor. We're --
2 we're -- we offered up the first dates that State
3 Engineer D'Antonio and Mr. Schmidt-Petersen had
4 available on their calendar. We're not trying to
5 withhold them at all. They are the top two water
6 officials in New Mexico. This is a time of water
7 shortage in New Mexico, and it's also a time where New
8 Mexico is about to enter into a emergency legislative
9 session related to the COVID-19 issues and, also, much
10 of New Mexico's income comes from oil and gas, and
11 there also is a drastic reduction in that amount, too.
12 That is going to occupy much of their calendar for
13 what's anticipated through June. We have gone back to
14 their schedulers a couple of times. We did offer the
15 first available dates and so we're not trying to -- to
16 prevent them from taking the deposition.

17 We also don't see why the dates that when
18 they are available causes any problem for Texas. There
19 is no additional expert reports or opportunity for
20 Texas to present additional expert reports if they take
21 these depositions in July, it's simply for purposes of
22 preparing for trial, and six weeks gives more than
23 enough -- before the close of discovery, gives more
24 than enough time for that to occur.

25 **JUDGE MELLOY:** Mr. Somach?

1 **MR. SOMACH:** Well, you know, all of our
2 depositions fall into that last category. We're not
3 filing any more reports. We don't -- I mean, subject
4 to what we're looking at what comes out of these
5 surrebuttal reports, we have no plans to file anything
6 else. So every one of the depositions that we're going
7 to take fall in that category. But we've been trying
8 to take these depositions since almost September after
9 you -- you opened discovery in this case and that the
10 exact argument that Mr. Wechsler gave, except perhaps
11 that there's a special session because of the health
12 issues that are out there, we've heard -- I've heard
13 those before. We -- we've had this discussion now for
14 as many years or as many months as discovery has been
15 open. Those depositions of those two individuals were
16 noticed and ready to go in April when the stay of
17 discovery was -- was granted. So it -- it -- it --
18 those depositions were already at that point in time
19 pushed to the last month of discovery. Now, we have an
20 extension of discovery, and rather than having those
21 folks ready and available when we need them, we're
22 pushing them back again to the last month of discovery.

23 But, now, the difference is we have
24 remote depositions so that their availability ought to
25 be easier, and we'll work with them to -- to do that,

1 plus they want to take 32 depositions between now and
2 the end of discovery, plus the depositions that we will
3 need to take, which now include four extra depositions
4 after July 15th with respect to expert witnesses, and I
5 don't know how we're going to have enough time to do
6 all of that if two depositions that easily could be
7 done in the next month before even these expert reports
8 are -- are done at all can't be taken.

9 I -- I know these are important folks,
10 but it is unfathomable to me that they can't find time
11 in the next month for a remote deposition that has now
12 been delayed for the entire scope of -- of this
13 discovery. I mean, for heaven's sakes, I've taken
14 federal cabinet-level depositions of very important
15 people and they've been easier to schedule than these
16 two depositions and I think I -- I am worried about the
17 compression of depositions in -- in that time period
18 after July 15th. That's when they're offering these,
19 the last month of July, and -- and in August, and that
20 pushes everything, everything of critical importance in
21 terms of the depositions that we want to take to that
22 last month and a half. I don't think that that is
23 equitable. I think it -- it adversely prejudices us.

24 Again, we'll work with them to -- to work
25 around this -- this impossible schedule, but to tell us

1 that they're so important we can't take their
2 deposition until the last month -- the last month of
3 discovery, I think is inexcusable and not reasonable at
4 all.

5 **JUDGE MELLOY:** Well, I think this is
6 pushing it out pretty far, and I -- I'm going to grant
7 Mr. Somach's request. I -- I want you to find a time
8 when they can be available before the end of June,
9 Mr. Wechsler, and get those scheduled by the end of
10 June so that you have July and August available for
11 these experts who are going to be filing their reports.
12 So they'll have to -- they'll have to figure out some
13 way to be available.

14 **MR. WECHSLER:** Understood. May I ask a
15 question?

16 **JUDGE MELLOY:** Yes.

17 **MR. WECHSLER:** Can we offer -- is it
18 acceptable to you if we're offering half days, in other
19 words, an afternoon and a morning?

20 **MR. SOMACH:** It's okay with me.

21 **MR. WECHSLER:** Thank you.

22 **JUDGE MELLOY:** All right. Anything --
23 anything further on depositions? I see from the
24 reports that have been filed, they've been -- you have
25 quite a few scheduled for the next few -- next couple

1 weeks.

2 All right. I'm not -- you know, I had
3 indicated on the agenda that we would talk about
4 phasing. I'm not sure that we're really ready to do
5 that yet. I think we need to talk -- think about that
6 a little bit more. I -- what I'd like to do is
7 schedule -- do you have depositions scheduled for two
8 weeks from today? Do you know? The 29th?

9 **MR. WECHSLER:** No, Your Honor.

10 **JUDGE MELLOY:** Well, let's -- I'd like to
11 have another status conference. We'll do it in the
12 morning of the 29th and -- just to see how things are
13 going with these depositions. I want to keep them
14 moving. Also, at that time, I would like to start to
15 get a better feel for where the critical differences
16 are in this case. Obviously, modeling is an issue. I
17 know that -- I know that it's obviously not going to be
18 a short discussion, but I'd like to get -- start to get
19 some sense of where you see the -- the major
20 differences are in -- in whether it's the models,
21 whether it's groundwater pumping, what -- what is it
22 where you think the -- the rubber is going to hit the
23 road, so to speak, on what the real issues are. I'd
24 like to take a little -- be prepared to take a little
25 time to understand what you see as those issues.

1 And in the meantime, I've got a couple
2 calls out to talk to a couple people about mediation,
3 just to get some sense of who might be a good mediator
4 in this case. Has anybody who's on the call or on the
5 video thought about -- about that further, if -- who
6 they might want -- if they know somebody who would be a
7 good mediator in a case like this? I think there seems
8 to be some consensus that if there is to be mediation,
9 there has to be a mediator, and the parties just
10 getting together on their own probably isn't going to
11 get the job done.

12 **MR. SOMACH:** We could probably, at least
13 on our side, propose a name or two. You know, the
14 discussion we've had is whether or not you want a good
15 mediator or whether or not you want someone that knows
16 about water, and I think our -- at least on the Texas
17 side, we think it better to get a good mediator, that
18 the water stuff, you know, will follow, and it's --
19 it's something that one can educate the mediator on.
20 But I think it 's someone with good mediation skills.
21 That is really what -- what we -- what we want.

22 Fast-forwarding a little bit to the
23 discussion at next status conference is, some respects,
24 much of the technical differences are -- are -- are not
25 that significant, you know, in terms of end results. I

1 mean, we can quibble about how you get there, but --
2 but at the end of the day, the results are -- are --
3 are pretty close. It's a -- it is interesting in that
4 regard. It's what you do with those results and how
5 you interpret them in the context of the Compact and --
6 and other -- some legal issues that really is where the
7 parties appear to diverge, and so I -- I think --
8 again, I just -- you know, Texas' opinion is that what
9 we need is a very good mediator as opposed to looking
10 for someone with -- with those skills plus, you know,
11 some -- some knowledge of water, interstate disputes.
12 That's all learnable as part of the mediation process,
13 but getting someone who can really push on resolution,
14 I think, is -- is the -- at least from Texas'
15 perspective where we should go.

16 We'll talk to some of the others and see
17 if we could add some names to the ones that you're --
18 you're perhaps getting on your own.

19 **JUDGE MELLOY:** What you -- what you just
20 said, Mr. Somach, is exactly what I've been thinking
21 about is do we need somebody who has strong technical
22 knowledge about water -- about water law and hydrology
23 and how these Compacts work or do we need somebody who
24 is a good mediator? I suppose, ideally, you'd get
25 somebody with both, but -- but if you have to pick one

1 over the other, which is the more important
2 characteristic to have, and -- and I appreciate your --
3 your thoughts on that and any other thoughts. We can
4 talk about that some more. If you want to talk about
5 it today, fine, but certainly we can talk about it some
6 more in -- in two weeks.

7 **MR. WECHSLER:** Your Honor, this is Jeff
8 Wechsler. I -- I -- we would prefer talking specific
9 names in two weeks. We have had the opportunity to be
10 looking at mediators, and I agree with you that,
11 ideally, you are finding somebody who has both. We'll
12 be prepared, I think, to offer some names from previous
13 interstate cases that we have experience with who do
14 have both mediation skills and technical water skills
15 because I -- I do not agree that -- that that's an
16 unimportant part of the case. And perhaps it's --
17 it's -- it would be helpful for -- for Texas and New
18 Mexico and United States and Colorado to confer on
19 possible names so that next status conference, we're in
20 a better position to discuss it with you.

21 **JUDGE MELLOY:** I think that'd be a good
22 idea. Obviously if you can come up with some ideas or
23 agreements between yourselves, all the better.

24 Do we want to do the next one using this
25 service again or do we want to do it by telephone?

1 **MR. SOMACH:** I like this process. It's
2 helpful, I think, to see -- to see, in addition to
3 hear, what folks are saying and so that would be Texas'
4 preference to do one very similar to this one. Seems
5 to have worked pretty well, I think.

6 **MR. WECHSLER:** I agree.

7 **JUDGE MELLOY:** Unless there's any
8 objection, we'll plan to do it. Again, I guess, I'll
9 rely upon your firm, Mr. Somach, to set it up, if
10 that's agreeable.

11 **MR. SOMACH:** We'll arrange it with
12 Worldwide.

13 **JUDGE MELLOY:** We'll do it at 11:00 two
14 weeks from today.

15 **MR. SOMACH:** That works.

16 **MR. DUBOIS:** That's 11:00 your time, Your
17 Honor?

18 **JUDGE MELLOY:** Yes.

19 **MR. DUBOIS:** Okay.

20 **JUDGE MELLOY:** Noon Eastern, 9:00
21 Pacific, 10:00 Mountain.

22 All right. Is there anything else we
23 need to talk about today?

24 **MR. WECHSLER:** Nothing from New Mexico.

25 **JUDGE MELLOY:** All right. Then if not,

1 we'll see you in two weeks. Thank you, everyone.

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

3 **MR. DUBOIS:** Thank you, Your Honor.

4 (The proceedings adjourned at 3:06 p.m.)

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