

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 SEPTEMBER 2, 2021, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
11:00 a.m.

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1 **JUDGE MELLOY:** All right. This is Judge
2 Melloy. This is an Original No. 141 State of Texas
3 versus State of New Mexico and State of Colorado. Let
4 me ask the parties to enter their appearance. For
5 State of Texas, who do we have on?

6 **MR. SOMACH:** Yes, your Honor. This is
7 Stuart Somach. Along with me from my firm is Theresa
8 Barfield, Sarah Klahn, Francis Goldsberry, Richard
9 Deitchman, Robert Hoffman, and from the Texas Attorney
10 General's Office on the phone is Grant Dorfman, who is
11 the deputy first attorney general assistant attorney
12 general, and Priscilla Hubenak, who is the chief
13 environmental -- chief of the environmental protection
14 division. Also, Commissioner Bobby Skov and the
15 engineer advisor to the commissioner, Suzy Valentine.

16 **JUDGE MELLOY:** All right. I'm getting a
17 little feedback here. All right. Then for New
18 Mexico, who do we have?

19 **MR. WECHSLER:** Good morning, Your Honor.
20 Jeff Wechsler from Montgomery & Andrews. Let me first
21 apologize for not wearing a tie this morning. I got
22 stranded near JFK from the flooding in the New York
23 area, so I'm in a hotel room, wasn't expecting to be
24 here this morning. We also have -- or will have
25 Cholla Khoury, Zachary Ogaz from the New Mexico

1 Attorney General's Office; Lisa Thompson, Michael Kopp
2 from Trout Raley; Luis Robles and Susan Barela from
3 Robles, Rael & Anaya; Corinne Atton from Draper &
4 Draper; the state engineer and Compact commissioner
5 John D'Antonio; Greg Ridgley, the general counsel of
6 the Office of the State Engineer; Arianne Singer, the
7 general counsel of the ISC; and Shelly Dalrymple from
8 the ISC. And if for some reason my audio doesn't
9 cooperate, Ms. Thompson will take over and be speaking
10 on behalf of New Mexico. Thank you.

11 **JUDGE MELLOY:** Thank you. Mr. Wallace?
12 I saw your face on before. You're here for Colorado?

13 **MR. WALLACE:** Yes, I am. Good morning,
14 Your Honor. Again, Chad Wallace from Colorado. Also
15 from my officer on the call today are Preston Hartman,
16 Scott Steinbrecher, and Dan Rheiner.

17 **JUDGE MELLOY:** Okay. And then for the
18 United States, Mr. Dubois?

19 **MR. DUBOIS:** Good morning, Your Honor.
20 James Dubois for the United States. Also on from
21 Department of Justice are Lee Leininger, Judy Coleman,
22 and Jennifer Najjar; from the Solicitor's Office,
23 Chris Rich and Shelly Randel; and I believe from
24 Reclamation, Ian Ferguson.

25 **JUDGE MELLOY:** Albuquerque Water Utility

1 Authority? Anyone?

2 **MR. BROCKMANN:** Yes, Your Honor. This
3 is Jim Brockmann with Stein & Brockmann on behalf of
4 the Water Authority, and I will -- Mr. Stein is -- is
5 -- had some other commitments today so I'll also be
6 filling in on behalf of Mr. Stein for the City of Las
7 Cruces. And -- and with me for Las Cruces, I believe,
8 are Adrienne Widmer and Delilah Walsh, the director.

9 **JUDGE MELLOY:** Okay. Anyone here for
10 the City of El Paso?

11 **MR. CAROOM:** Doug Caroom for the City of
12 El Paso, Your Honor, and Susan Maxwell is with me.

13 **JUDGE MELLOY:** El Paso County Water
14 Improvement District No. 1? Ms. O'Brien?

15 **MS. O'BRIEN:** Good morning, Your Honor.
16 Maria O'Brien for El Paso County Water Improvement
17 District No. 1. Renea Hicks is also on. The general
18 manager Jesus Reyes is on, as well as Dr. Al Blair,
19 the district engineer.

20 **JUDGE MELLOY:** Okay. Elephant Butte
21 Irrigation District?

22 **MS. BARNCASTLE:** Good morning, Your
23 Honor. Samantha Barncastle for the Elephant Butte
24 Irrigation District, and with me today is the manager
25 of the District, Gary Esslinger, and our hydrology

1 consultant, Dr. Phil King.

2 **JUDGE MELLOY:** All right. Hudspeth
3 County Conservation and Reclamation District No. 1?
4 Anyone? Is Mr. Miller on?

5 (No response.)

6 **JUDGE MELLOY:** All right. New Mexico
7 pecan growers?

8 **MR. OLSEN:** Good morning, Your Honor.
9 This is -- this is A.J. Olsen appearing on behalf of
10 the pecan growers, and also appearing on behalf of the
11 Southern Rio Grande Diverse Crop Farmers Association.

12 **JUDGE MELLOY:** Okay. And New Mexico
13 State University?

14 **MR. UTTON:** Good morning, Judge Melloy.
15 This is John Utton on behalf of the University.

16 **JUDGE MELLOY:** Did I miss anyone?

17 (No response.)

18 **JUDGE MELLOY:** Okay. Let me start by
19 just asking -- and I guess anybody can answer this.
20 Maybe Mr. Somach, I'll let you address it. Did you
21 get my e-mail about contacting Mr. -- or Judge Boylan?

22 **MR. SOMACH:** Yes, Your Honor, we did.
23 We did contact him, and he's -- his availability is a
24 little spotty, and he's not actually available to pick
25 this up until December at the earliest. And so while

1 we're still exploring that, we were curious as to
2 whether or not you had any other suggestions of
3 mediators of comparable effectiveness and capability
4 that you might be able to suggest to us. There have
5 been discussions between the Attorney General's Office
6 of both New Mexico and Texas and the United States.
7 Everyone is serious about moving forward with -- with
8 an effective mediation, and -- but at this point in
9 time, because Judge Boylan isn't available until
10 December, we thought perhaps we would explore some
11 other options if you had some for us to consider.

12 **JUDGE MELLOY:** Well, let me think about
13 that. I -- not off the top of my head, but let me
14 give that some thought. Did you happen -- did you
15 discuss alternative mediators with -- with Judge
16 Boylan?

17 **MR. SOMACH:** No. You know, that was one
18 of the things that came up in the conversation I had
19 with the Attorney General's Office of Texas yesterday.
20 We wanted to kind of wait to see if you had had any
21 ideas. We -- we were in this quandary of -- of not
22 wanting to tell him we didn't want to use him because
23 of his availability because at the end of the day, we
24 may end up there, and so we -- we thought we'd have
25 this conversation with you first, but that's certainly

1 something that we can do and will do, but -- but we
2 have not done that yet.

3 **JUDGE MELLOY:** Okay. All right. Well,
4 let me give that some thought. You know, as an
5 appellate judge, I don't get involved in mediations
6 much, but I'll ask around here and see if -- if there
7 are some very good people and -- and I'll get back to
8 you on that.

9 All right. Let's turn to the -- the
10 trial. Have the parties had an opportunity to go over
11 their witness lists and -- and hopefully identify some
12 witnesses who we could take by -- by remote testimony?
13 Mr. Somach?

14 **MR. SOMACH:** Yes, Your Honor, we have.
15 Texas and the United States provided, on Tuesday of
16 this week, a few days ago, New Mexico and Colorado a
17 draft of two things. First was a -- a remote trial
18 protocol that we had put together, and we'd used
19 protocols that we had pulled together from a lot of
20 different federal and state sources, and that,
21 assuming we reach agreement on it, could be turned
22 into an order for how the remote trial would proceed,
23 and the second thing we did was provide a list of --
24 of witnesses that Texas and the United States thought
25 were appropriate for this with -- with this first part

1 of the trial and provided those to New Mexico and
2 Colorado, also. Those were witnesses of the United
3 States, Texas, New Mexico, and Colorado, and what we
4 did -- and I'll just tell you what we did, was took
5 essentially all of the percipient witnesses, the
6 non-expert witnesses, and pulled them together and
7 thought we could do that in -- in this first remote
8 part of the trial. Our -- our expectations take us
9 about seven to ten days of direct testimony for our
10 witnesses, and that's -- that actually includes the
11 historian if -- if there's time when we put all this
12 stuff together to do that. New Mexico -- and they
13 were hampered certainly by the fact that Mr. Wechsler
14 was -- was traveling and -- and so forth, but they
15 indicated that they would take a look at what we had
16 provided. They indicated they didn't have any general
17 problems with that, but that they would get us
18 suggestions back on Tuesday and then we've got a call
19 scheduled on Wednesday, and our thought is that one
20 way or another, we would provide you with either a
21 joint recommendation on those two things or we
22 certainly would provide you with Texas and the United
23 States views and -- and we presume if there was
24 disagreement, New Mexico would also provide their
25 views. But it might be good -- I mean, the way we've

1 approached the witness list, and I went over the
2 transcript pretty carefully with the United States,
3 and our understanding was your suggestion -- I realize
4 you didn't order anything, but your suggestion was to
5 try to pull all the non-expert testimony into -- into
6 that earlier phase, that way we could get that done.
7 You suggested that we might want to put the historians
8 in there, and we're certainly okay with that, and then
9 preserve for the spring the -- the expert more complex
10 testimony. That's basically what we did with what we
11 put together. But right now, they're taking a look at
12 that, and -- and we expect to -- to get something from
13 them on Tuesday, and then we'll have a discussion
14 again with them on Wednesday. But that's -- that's at
15 least, I think, where we're at. I don't know because
16 it was a joint with the United States to New Mexico
17 and Colorado, I don't know if Mr. Dubois wants to add
18 anything to what I just indicated.

19 **MR. DUBOIS:** Actually, I do, Your Honor.
20 I think that it is -- the list is not purely and
21 strictly expert versus non-expert, but it's also
22 subject matter. We -- our understanding, looking at
23 your suggestions, was what you want is the -- the
24 percipient witnesses and the witnesses that can
25 explain how the project works, and -- and -- and

1 possibly the historians. But that one of the things
2 that you're interested in is sort of the -- how -- how
3 the project works and how water moves through the
4 project as part of the fall presentation of evidence.
5 So that's sort of in a -- some of that is going to be
6 at least in -- in sort of the -- the borderline
7 between expert and non-expert. It's experiential, but
8 some of it is going to come potentially from people
9 who are also listed as experts or at least for the
10 United States, rebuttal experts. So with that sort of
11 caveat and perhaps requests for clarification of are
12 we understanding correctly what it is you want in the
13 fall?

14 **JUDGE MELLOY:** Well, yes, generally
15 speaking. I -- I guess I wasn't necessarily intending
16 to establish bright lines, but those are the types of
17 witnesses who I thought we could most easily do
18 remotely, and as Mr. Somach said, leave the more
19 difficult or expert witnesses for the live testimony
20 in the spring. And -- and to some extent, I have to
21 rely upon your expertise as to which witnesses fall
22 into which category and maybe there are even some, I
23 don't want to call them simple experts, maybe there's
24 some expert testimony we could get out of the way in
25 the fall that would -- that would lend itself to -- to

1 remote testimony. But that's generally what I'm --
2 I'm talking about. It just seemed to me that those
3 were sort of the two rough categories, the fact
4 witnesses, the witnesses in operation, and I also was
5 cognizant of the fact that if I understood Ms.
6 Barncastle's letter correctly -- and I'll let her
7 speak to it if she wants to -- her witnesses who would
8 be witnesses on project operations, I presume, really
9 didn't want to travel and testify live, that they were
10 asking for the right to testify remotely. So -- so
11 that's also one of the reasons I kind of included all
12 those witnesses in that group, but -- but I think
13 generally we're on the same page.

14 **MR. DUBOIS:** With regard to one of
15 Ms. Barncastle's witnesses, Phil King, Dr. Phil King,
16 he is sort of someone who straddles both worlds. He
17 has more technical things that are, in fact, sort of
18 the pre-buttal to New Mexico's case and seems more --
19 at least that portion of his testimony seems more
20 appropriate for the spring when it's more proximate to
21 also what he will be rebutting, so that -- there may
22 be that kind of a thing, but he -- but he is one of
23 the people who wanted to, at least certainly for this
24 fall, he needed to be testifying remotely. So that is
25 consistent with the operational part.

1 **JUDGE MELLOY:** All right. Well, let me
2 ask -- I'll ask New Mexico. Mr. Wechsler, do you have
3 anything you want to add to this? I know you've been
4 out of touch, to a large extent, the last several
5 days. You know, I'm content at this point just to
6 wait until next week. Do you have anything you want
7 to add?

8 **MR. DUBOIS:** Jeff, you're on mute.

9 **MR. WECHSLER:** My apologies. Only, Your
10 Honor, that we did review the proposed stipulation
11 that Texas, and I don't know to what extent the United
12 States was involved, and found it quite helpful. I'm
13 hopeful that we'll be able to reach resolution on all
14 of the issues. I agree with Mr. Somach that we'll be
15 in a position to provide something hopefully for a
16 stipulated order to you next week. If there are any
17 lingering issues, we can identify those separately. I
18 believe that we have somewhere in the magnitude of 16
19 percipient witnesses. We anticipate those will take
20 roughly 31 hours. Our historian, we anticipate will
21 take three to four hours. Again, this is all for
22 direct, so I think you're looking at a trial in the
23 range of two to three weeks. We do have a preference
24 -- I know you're likely to get to this in a moment,
25 but we do have a preference for starting later rather

1 than earlier, and -- and part of that has to do with
2 the mediation. We -- we believe that to give
3 ourselves the best possible chance to succeed at
4 mediation, we should get that process started as early
5 as possible, which is, of course, difficult to be
6 juggling those multitasks of trial preparation and
7 mediation.

8 **JUDGE MELLODY:** Well, I -- I -- I don't
9 have a big problem with that. The only concern I
10 have, Mr. Wechsler, is to get a -- to get a really
11 good mediator on board, you're very likely to run into
12 the same problem you ran into with Judge Boylan, that
13 they're not just able to necessarily pick up and
14 conduct a mediation in the next couple weeks. I mean,
15 do you think you can move forward with meaningful
16 discussions without a mediator?

17 **MR. WECHSLER:** I know that the parties
18 have been in discussion on a regular basis, at least
19 the Attorney General's Office of New Mexico and the
20 Attorney General's Office of Texas. I don't believe
21 that those conversations have been substantive yet,
22 but those are certainly encouraging. I agree with you
23 that getting a mediator on board often takes time,
24 especially one of the quality that we're talking
25 about, so we're looking. We're hoping that that might

1 be possible, and we're hoping it might be possible to
2 have discussions absent a mediator, but I think all
3 the parties have expressed to you that we believe that
4 a skilled mediator is necessary if this case is to be
5 successfully settle.

6 **JUDGE MELLOY:** All right. Well, let me
7 do, like I say, some investigation. I assume you'll
8 be talking to folks that you know, as well, who have
9 mediators.

10 **MR. DUBOIS:** Your Honor, if I may, I'm
11 sorry. I will point out that what we had scheduled
12 between October 4th and essentially November 19th for
13 the week of -- excluding the week of 24th, which we
14 had the conference on, we did have basically a -- a
15 six-week block available if the parties officially get
16 on with it as far as what you're proposing for the
17 following week. We could have this segment locked up
18 by mid November to November 19th at kind of the
19 outside, and that would actually leave a block of
20 December, January, February before shooting started
21 again.

22 **JUDGE MELLOY:** Okay.

23 **MR. DUBOIS:** It's a thought.

24 **JUDGE MELLOY:** When you say that block,
25 you're talking about for mediation?

1 **MR. DUBOIS:** Correct. Correct. And I
2 really -- I -- I've been spectacularly unsuccessful
3 with connecting with folks from the -- I -- I managed
4 to talk to Ms. Hubenak, but Ms. Khoury and I just kind
5 of keep trading voice messages and never been able to
6 connect so I really haven't had a chance to even
7 suggest that to the states, but I'm just -- as you
8 said, it takes a while to get a mediator on board.
9 It's possible that we can take this chunk of trial
10 time on, get it done, and then leave ourselves a solid
11 block where it might be easier for the parties to
12 commit the kind of resources that, if serious
13 negotiation is going to go on, it -- it's going to
14 take a serious effort. Just -- I -- I throw that out
15 there as -- as something for the Court and the parties
16 to think about. I have not had a chance to really
17 pursue that with the states.

18 **MR. SOMACH:** It would be helpful, Your
19 Honor, I just -- we'll -- we will have conversations
20 with New Mexico. I wanted to underscore the fact that
21 -- that these without-mediator discussions have
22 occurred, and I -- I am told by the Attorney General's
23 Office of Texas that they intend to -- to continue to
24 have those conversations. So I -- I wanted to let you
25 know, they will continue to talk. One thing that

1 would be helpful, though, is to get at least a target
2 date for starting, simply because with the remote
3 nature, we do have a little bit of technical leave
4 time that we've got to consider. We want to make sure
5 that the witnesses all have appropriate equipment,
6 particularly since a lot of these witnesses are -- are
7 very percipient witnesses and -- and so there is --
8 our technical people say we need at least two weeks
9 lead time in order to get everything in order and make
10 sure that we don't -- we minimize glitches as far as
11 the remote part of this so some idea of when you would
12 like to start would be helpful.

13 **JUDGE MELLOY:** Well, I was thinking
14 either the last Monday in September or October 4th as
15 -- and I'm not wedded to either of those dates. It
16 sounds like from what you're saying, October 4th would
17 be better for the necessary lead time, but what --
18 what -- Mr. Wechsler, you said you wanted some later
19 rather than sooner. Is that -- is that -- how does
20 that fit into what -- what your thoughts are?

21 **MR. WECHSLER:** Our rationale for
22 starting later has to do with the mediation and giving
23 that a chance of success. I do recognize that it
24 seems rather rushed in order to get a mediator in
25 place by that time and so either of those dates would

1 be fine with New Mexico.

2 **JUDGE MELLOY:** Does Texas or United
3 States have a preference as to either of those two
4 dates?

5 **MR. SOMACH:** I think at least from
6 Texas' perspective, we could work with either date. I
7 think October 4th would ensure we got everything in
8 place, but -- but we'll -- we could be ready the week
9 earlier. I don't know about -- I haven't talked to --
10 we had talked -- I think when Jim and I talked, we had
11 talked October 4th, but I don't know. So I'll -- I'll
12 defer to the United States in that regard.

13 **MR. DUBOIS:** For -- for -- for purposes
14 of getting everything lined up, I think October 4th
15 makes the most sense.

16 **JUDGE MELLOY:** All right. Well, let's
17 -- let's plan on October 4th. I do want to bring up
18 one issue, though, that I know was alluded to the last
19 time, or at least some parties did, and is -- is what
20 exactly the role of Colorado is going to be in this
21 whole trial. You have identified, I think it's 1,400
22 exhibits, Mr. Wallace. What -- what exactly do you
23 plan to do?

24 **MR. WALLACE:** Yeah, thank you, Your
25 Honor. We do not plan on introducing 1,400 exhibits,

1 if -- if that's where your question is going. As far
2 as the exhibits go, our plan is to submit an amended
3 final exhibit list paring down those exhibits. Right
4 now, I'm looking in the range of around 200 or so,
5 just to cover our bases. Our disclosed witness list
6 are fact witnesses that have today primarily with
7 Compact accounting and Compact administration by
8 people that do those jobs. We've identified -- all of
9 our witnesses have been past or current engineer
10 advisors to the Rio Grande Compact for Colorado, and
11 we would use them to present testimony and documentary
12 evidence regarding accounting and administration of
13 the Compact.

14 **JUDGE MELLOY:** How much testimony do you
15 envision that being?

16 **MR. WALLACE:** As I said before, we
17 envision that taking no more than two days. We, of
18 course, had planned on going last, but with -- and the
19 plan with that is if we had gone last, there could
20 have been a number of items already covered by the
21 other parties. Now, we do not have that advantage
22 since we are presenting evidence remotely in the
23 middle of trial as it were. So maybe some additional
24 direction from Your Honor to help us to pare down that
25 even further so that we don't end up presenting

1 testimony that's not needed. For example, one of the
2 things we are wondering is testimony regarding how
3 accounting works with regard to the project in the
4 Compact once liability or the scope of the Compact
5 needs and obligations of those states are established
6 may be better suited to the next phase, that's the
7 liability -- or the -- the next phase, the
8 remedy/damages phase, and if testimony regarding
9 needed Compact administration that may or may not be
10 taking place now with regard to project water supply
11 distributions under the Compact, if Your Honor
12 believes that is better in the remedy/damages phase,
13 that's fine with us, and knowing that, we can pare
14 down our testimony and really just stick to what do we
15 do now under the Compact, how is this accounted for,
16 how do the states, in particular Colorado, administer
17 it today, and that will take less time.

18 **JUDGE MELLOY:** I guess the question I --
19 this is the more fundamental question I have is, is
20 that even relevant to what we're talking about here?
21 There's never been a claim made against Colorado. You
22 never filed an answer. As far as I know, subject to
23 the amendment that Texas is talking about may be
24 raising some issues. I just -- what's the point of
25 Colorado's accounting? I mean, if nobody -- if

1 nobody's disputing that you're delivering the water
2 that you're required to deliver, what -- what's the
3 point?

4 **MR. WALLACE:** The point for the
5 testimony regarding how Compact accounting is done
6 today is just to make sure the Court has a clear
7 record before it on what the Compact does, so there
8 are not any inadvertent mistakes or presumptions on
9 how the Compact accounts for water. Just so Your
10 Honor will know, in fact, here's how we do it. And
11 that's really the limit of it. If we limit the
12 testimony to that issue, certainly direct on that
13 would be a few hours.

14 **JUDGE MELLOY:** Okay. Well, why don't we
15 leave it this way, leave the witness who you feel
16 needs to present that testimony on your witness list.
17 As the trial progresses, after we start on October
18 4th, it may become more or less clear as to whether we
19 actually need that person, and it doesn't have to be a
20 decision we necessarily make today on that issue. And
21 in the meantime, I'm going to be talking with -- well,
22 I think I'll wait until I see what your stipulation
23 looks like, but I do want to talk to Mr. Brown at
24 Worldwide Reporting and just make sure I understand
25 how their -- the technology will work from their --

1 from their end, but I'll wait until I get your,
2 hopefully, stipulation or if it's not a stipulation,
3 your thoughts on -- on trial protocol, and we'll go
4 from there.

5 Let me talk about the trial itself. I
6 -- I'm assuming that the folks in California would
7 just as soon not have the trial start at 9:00 a.m.
8 Iowa time, and -- and nor would New Mexico necessarily
9 like that, but what I -- what I'm thinking about doing
10 is a common practice around here for jury trials is --
11 is to run them from 8:30 to 2:30 without a lunch break
12 and do two 15 or 20-minute breaks. I thought I would
13 do something similar, but we would run from 11:00 Iowa
14 time until 5:00 or 5:15 Iowa time, which would be 9:00
15 to 3:00, of course, in California, without a lunch
16 break. We'll take a couple 15, 20-minute breaks
17 during the trial, that way we can get in, I think,
18 pretty much the same amount of testimony we would as
19 if we went for a sort of more normal trial day with a
20 lunch break, and still not be starting at some
21 unreasonable hour or ending at some unreasonable hour
22 here. Does anybody have any problem with that? I
23 don't know if you've ever used that type of schedule,
24 but it's not -- it's actually fairly common around
25 here anymore.

1 (No response.)

2 **JUDGE MELLOY:** All right. Hearing no
3 objection. There was a question about who's going to
4 keep track of time. I'm planning on my law clerk and
5 -- and judicial assistant to act as courtroom deputy.
6 They'll work back and forth. They'll be keeping track
7 of both exhibits and -- and the time. We'll check
8 that against the realtime transcript that I understand
9 is going to be released every evening or first thing
10 in the morning following the trial, and we'll be able
11 to report on a pretty much daily basis as to the
12 amount of time that's being used. We'll -- given the
13 way this whole thing has sort of evolved, I'm open to
14 some flexibility on that, as well. If that turns out
15 to be -- if -- if doing this by Zoom results in some
16 extra time being needed the way we're sort of -- this
17 whole thing is working out, I -- I'm certainly willing
18 to be flexible on that.

19 There was a question about opening
20 statements. I certainly would welcome opening
21 statements. I don't know that they need to be
22 particularly long. I would hope they wouldn't be too
23 long. Well, let me ask this: Do the parties want to
24 do an opening statement? Mr. Somach, do you think
25 your side will want to do one?

1 **MR. SOMACH:** Yes, Your Honor, but I had
2 thought of it as being short, and rather than arguing
3 our case in opening statement, I actually thought I
4 would focus more on how we're laying our case out so
5 that it gives you some context of what the various
6 witnesses were going to do, and because we're breaking
7 the trial, I thought I would, in the opening
8 statement, try to create a little bit of a bridge in
9 advance so you knew kind of where we were headed. But
10 it was -- it was in that nature as opposed to a more
11 traditional opening statement with argument. We're
12 aware --

13 **JUDGE MELLOY:** Opening statements aren't
14 supposed to be argument. We always tell lawyers that,
15 they're not supposed to argue to the jury in opening
16 statement. A rule that's often violated.

17 **MR. SOMACH:** Well, it is, and, of
18 course, the other thing you've got to remember is if
19 you represent something in an opening statement, you
20 better be sure you can establish it during the trial.
21 But it's merely to lay out what -- what we were going
22 to do, and I don't think it'll take very much time at
23 all, but that's it, is to provide context for you,
24 particularly since we're going to have this break, and
25 I -- I want to make sure that right up front, we -- we

1 create some continuity for you.

2 **JUDGE MELLOY:** How much time do you
3 think you need?

4 **MR. SOMACH:** You know, I'm -- I'm
5 thinking an hour, you know, something along those
6 lines. You know, I haven't sat down to actually write
7 it out. You know, obviously I wasn't planning on
8 doing much at all during the next few months except
9 sitting around the house and worrying about
10 everything, but -- but I -- but I plan on sitting down
11 and doing that. But I -- I'm thinking it's -- it's
12 like an hour, you know. If you have any questions, it
13 might go a little longer, but certainly I don't think
14 anything more than that.

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

17 **MR. WECHSLER:** We were anticipating a
18 short opening statement of approximately 30 minutes.

19 **JUDGE MELLOY:** United States, are you
20 going to want to have one?

21 **MR. DUBOIS:** Yes. Certainly no more
22 than 30 minutes, probably less.

23 **JUDGE MELLOY:** Okay. All right. Well,
24 I'll give -- let's say this: I'll give each side 45
25 minutes, but let's try to keep it less than that if

1 possible. If you can get it to 30, that's better, and
2 we'll do 45-minute openings.

3 All right. On -- on exhibits, we need
4 to -- and I want to think about this some more, but at
5 this point, what I'm -- what I'm anticipating we'll do
6 is -- is get together probably in about two weeks, and
7 by then, we will have the trial protocol. We'll have
8 had the chance -- I want to visit with Mr. Brown in
9 the meantime, then we can talk a little bit more about
10 the order of witnesses and -- and how we're going to
11 do exhibits, but I assume it's going to be pretty much
12 the same way we were going to do it as if it were in
13 person, but rather than physically delivering the --
14 or hand delivering exhibits to me a few days in
15 advance, I'll probably just have to have you Federal
16 Express them overnight, the hard copies of the ones
17 you're going to be using.

18 **MR. SOMACH:** Your Honor, I just -- I'll
19 note that the protocol we're putting together does
20 address that, and it does deal with the concept of
21 Federal Expressing those exhibits to you, just like
22 you -- you indicated.

23 **JUDGE MELLOY:** All right. I'm not
24 really wanting to discuss this today, but I want to
25 just alert you that the next time we get together or

1 certainly some time before the trial, I'd like you to
2 update me with where you are on deposition
3 designations. I know there were some designations,
4 some objections, some objections, I think, have been
5 withdrawn. There was a motion by New Mexico to add
6 some designations, which have been objected to, but I
7 -- I'm not sure where we are. So what's -- I'm not
8 going to address that today, but before -- certainly
9 before the trial, I'd like you to let me know what
10 needs to be resolved in that regard so that we can get
11 that resolved prior to trial. So let's -- let me ask
12 if you would do that before our next -- our next
13 get-together.

14 Is there anything else we need to talk
15 about today?

16 **MR. SOMACH:** I just -- this is Stuart
17 Somach, Your Honor. I wanted to indicate to you that
18 in the hearing on the motions in limine, we had had a
19 discussion with respect to some of the motions, and
20 Ms. Thompson will have to remind me which New Mexico
21 motions we're talking about, but we have discussed and
22 we've agreed to resolve those through some extra
23 depositions, which we will schedule in January so --
24 but, Ms. Thompson, I don't remember exactly which
25 motions that -- that those go to so you might want to

1 help the -- the Court by clarifying that.

2 **MS. THOMPSON:** Sure. Your Honor, those
3 motions in limine were for Dr. Brandes, Dr. Hutchison,
4 and then we also have a discussion going about
5 Dr. Kimmelshue.

6 **JUDGE MELLOY:** Doctor who?

7 **MS. THOMPSON:** Kimmelshue from Land IQ.

8 **JUDGE MELLOY:** All right. Okay. Thank
9 you.

10 Well, let's get together the week of the
11 20th of September again. And if something comes up
12 and you think we need to get together sooner, my
13 schedule is pretty open so -- but let's -- let's shoot
14 for the Tuesday, the 21st. Does that work for
15 everybody? Same time. And we'll hopefully be able to
16 finalize any logistics that need to be finalized in
17 anticipation of the trial starting on the 4th.

18 **MR. SOMACH:** Could we do either the 20th
19 -- the 21st is a Tuesday -- the 20th or the 22nd? I
20 -- I have medical stuff to do on the 21st, and I'd
21 like to participate in this last trial. So I could --
22 I could do it on the 20th or the 22nd.

23 **JUDGE MELLOY:** Anybody object to the
24 22nd?

25 (No response.)

1 **JUDGE MELLOY:** All right. Let's plan
2 then, same time, 11:00. All right. Anything else?

3 **MR. SOMACH:** No, Your Honor.

4 **JUDGE MELLOY:** If not, we'll be
5 adjourned. Thank you, everyone.

6 **MR. SOMACH:** Thank you very much.

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

8 (The proceedings adjourned at 11:39
9 a.m.)

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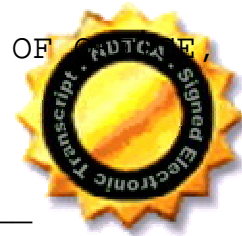
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