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NO. 141 Original

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In The  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF FEBRUARY 27, 2025, HEARING  
BEFORE HONORABLE D. BROOKS SMITH, SPECIAL MASTER, UNITED  
STATES CIRCUIT JUDGE, at JOSEPH F. WEIS JR. COURTHOUSE,  
700 GRANT STREET, PITTSBURGH, PENNSYLVANIA 15219,  
beginning at 9:00 a.m.

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1 P R O C E E D I N G S

2 JUDGE SMITH: Good morning, everyone. We  
3 meet again here in -- this time, here in the city of  
4 three birds, I would point out to everyone, in case you  
5 hadn't noticed. I was -- among the many factoids I came  
6 away with, as well as more basic general knowledge from  
7 our conference in October was a comparison that was  
8 provided by counsel for one of the amici, I believe.  
9 I'm not recalling the name, but she mentioned the volume  
10 of water pouring through the Ohio River as compared to  
11 what goes through the Rio Grande, and I learned  
12 immediately that there was no comparison. I hope you've  
13 had a chance to see a little bit of Pittsburgh, if only  
14 from your hotel rooms, but we convene for the purposes  
15 of a status conference. The last time we met, I asked  
16 that you treat our gathering as a tutorial for me, which  
17 it was and for which I thank all of you. And so, now,  
18 we meet after a passage of time that is somewhat more in  
19 length than would have been my preference as a trial  
20 judge, but this is not an ordinary case or an ordinary  
21 trial that has taken place thus far, and the delay, so  
22 to speak, was eventuated by the mediation process that  
23 resumed and in which you-all participated back in  
24 December and, again, this week. I realize that the  
25 accommodations here in this courtroom are not quite what

1 they were in Denver. This is smaller, not as capacious  
2 as what we had in that ceremonial courtroom, but it's  
3 the best that we western Pennsylvanians could do under  
4 the circumstances, and if we are to meet on other  
5 occasions, which will probably be the case, we may be  
6 meeting in Philadelphia, give you a chance to see  
7 another river, the Delaware, and perhaps make further  
8 progress in this case. Progress and a path forward are  
9 really what I want to be talking about. I came and set  
10 up the status conference with the intention of doing  
11 just that and made a few determinations that will later  
12 be placed in a formal order. Notwithstanding, whatever  
13 has taken place or whatever has come about as a result  
14 of the mediation process. So with that in mind, I want  
15 to just mention to everyone that as you have probably  
16 noticed, not everyone at the tables actually has a  
17 microphone in front of them, which means that I'm going  
18 to ask when any individual presentation is being made,  
19 that the speaker come forward and use the podium and  
20 that microphone, so we are making sure that everything  
21 is not only of record, but that everything is recorded  
22 for audio purposes. We are, of course, not live  
23 streaming, consistent with what is U.S. Judicial  
24 Conference policy, consistent with how the Supreme Court  
25 does things, as well. This will be available after the

1 conference today has been completed to -- to members of  
2 the public. So we'll hope that all of the electronics  
3 work correctly.

4                   With that said, I want to begin by asking  
5 Judge Boylan, our mediator, to come forward. One of the  
6 items on the agenda I had intended, irrespective of  
7 anything that took place this week during mediation, was  
8 to ask Judge Boylan to address the matter of the  
9 processing of his bills/vouchers for his services. I  
10 think we did take one step in that regard a number of  
11 months ago, but I want to ask for his input/suggestions  
12 as to how we should go forward with those.

13                   Judge Boylan.

14                   JUDGE BOYLAN: Good morning, Judge.  
15 Previously, you had described to me the historic nature  
16 of this courtroom that we would be meeting in and the  
17 beauty, and to say that I think you understated the  
18 case, it's fantastic, and I would hope that on my behalf  
19 as well as everyone else's thank the chief judge for  
20 this district for allowing us to use his courtroom.

21                   JUDGE SMITH: Thank you very much. I do  
22 want to express my thanks, to, and will and have, to  
23 Chief Judge Hornak who essentially vacated the premises  
24 this week so that we could use this historic courtroom.  
25 They don't -- as someone who served as the chair of



1 judicial conference spacing facilities committees years  
2 back, I can assure you, they don't build them like this  
3 anymore.

4 JUDGE BOYLAN: Well, I mentioned somewhat  
5 this morning when I walked in that I was waiting for  
6 Perry Mason this morning to show up, but I didn't see  
7 his name on the roster this morning.

8 JUDGE SMITH: Well, don't sell any of these  
9 folks short. We'll see what we have coming.

10 JUDGE BOYLAN: Sure. Judge, in reference  
11 to the -- concerning the mediator's costs, I would  
12 prefer if it's agreeable to you to place that perhaps at  
13 the end of the agenda. I don't like the tail-wagging  
14 dog, so to speak. I would like to address the Court at  
15 least in reference to our efforts over the last couple  
16 days.

17 JUDGE SMITH: That was to be my next  
18 inquiry, yes.

19 JUDGE BOYLAN: With your permission, I'll  
20 do that then, Judge. We started meeting again here in  
21 Pittsburgh at 9:00 a.m. on Tuesday morning. That  
22 spilled into tomorrow -- yesterday, and then you were  
23 kind enough to move up today's status conference to 9:00  
24 this morning because I had alerted the Court that, in my  
25 view, everyone had been working very hard and in good

1 faith, and as a result of that, I believe the parties  
2 have identified a path by which resolution may be  
3 possible. I'm not an optimist by nature, but I'm very  
4 optimistic that with continued good work that the entire  
5 matter could be resolved, although a lot of work still  
6 remains to be done if that result is to be achieved.  
7 That's a long way of saying that settlement has not been  
8 reached and that the parties, I'm sure, will be talking  
9 to you about scheduling and other issues that may arise  
10 in reference to the trial, but I still am hopeful that  
11 efforts between today's date and a future date may be  
12 conducted so that we can report to you eventually that  
13 settlement has been achieved in a broad sense so that  
14 trial can -- can be resolved, absent any more effort by  
15 -- by yourself or your staff. I'm sure that the -- the  
16 parties will be weighing in on that, but I do know that  
17 one of the things that we talked about was the schedule  
18 of additional efforts, and many of those efforts are  
19 going to be focusing on the issues that the technical  
20 folks are busy discussing, and they have scheduled  
21 weekly meetings remote and in person, every three weeks  
22 in person. I believe that the in-person meetings are  
23 going to be scheduled for Albuquerque, and it's all with  
24 an effort to see whether or not final resolution can be  
25 arrived at so that settlement can be achieved. Not

1 anything more to that unless you have some questions,  
2 but I think each of the parties will likely have more  
3 meat to put on those bones.

4 JUDGE SMITH: I appreciate that and thank  
5 you. Again, thank you for your efforts, Judge Boylan.  
6 What I intend to do at this time is to go kind of  
7 through counsel for the parties and allow each of them  
8 to indicate where they see matters standing right now  
9 and what might remain to be done, and I will see what  
10 they can tell me, and before I do turn to that, advise  
11 everybody right now that the scheduling of trial is not  
12 something that a court of appeals judge is called upon  
13 to do with any frequency. I once knew back in my days  
14 as a district judge but not any more, and what that  
15 means is it presents some scheduling challenges that  
16 would I narrowly have. So I'll mention that to them at  
17 the outset and mention to them, but thank you very much,  
18 Judge Boylan.

19 JUDGE BOYLAN: Judge, do I have the  
20 permission to await at the conclusion today to present  
21 the issue about mediation fees.

22 JUDGE SMITH: Certainly. Certainly.  
23 Whenever you are ready to do so.

24 JUDGE BOYLAN: Thank you, Judge.

25 JUDGE SMITH: Thank you. Let me indicate

1 at the start before I call upon the parties, really in  
2 order -- in the order in which they appear on the  
3 caption, which is a rather mechanical way of going  
4 forward, but it's consistent with how we proceeded last  
5 time. What I am envisioning without a lot of  
6 information in doing so is the possible length of a  
7 continuing trial in this matter. I realize that that is  
8 dependent, in part, probably in large part, on how I  
9 will rule, and I intend to in short order, on the  
10 request by the state parties concerning bifurcation and  
11 what was to be modification of what was originally seen  
12 as the bifurcation plan, but I have to schedule based  
13 upon what I know my own schedule makes possible. I am  
14 prepared to set out -- set aside a month, and it will be  
15 the month of June, for continuing trial in this matter,  
16 and that's something we can discuss later. I, at this  
17 point, make no determination as to where that trial will  
18 take place, but the likelihood would be that it is  
19 either here or Philadelphia, but, again, that is detail  
20 to await a more formal order from me. So I'll let you  
21 know that at the outset so you know what we're looking  
22 at schedule-wise, and you can fashion, to the extent it  
23 may be necessary, any comments that you have to make or  
24 will make as I invite you to come to the -- to the  
25 podium. And let me begin with counsel for the State of

1 Texas, Mr. Somach, which is how we began the order of  
2 events when we were in Denver. Mr. Somach.

3 MR. SOMACH: Good morning, Your Honor.  
4 Stuart Somach, lead attorney for the State of Texas. In  
5 reference to Judge Boylan's representation, we would  
6 agree that we certainly have identified a path forward  
7 in the mediation. From Texas' perspective, most of the  
8 work that has to be done to see if there is a  
9 possibility is work that'll have to be done by New  
10 Mexico and the United States and so we're -- we have no  
11 idea whether they'll be successful. We don't have any  
12 role in that. This is very similar to where we were --  
13 Texas was in St. Louis way back in 2020 or 2021 where I  
14 said the same thing to Judge Melloy. Hopeful that  
15 they'll -- because Texas has absolutely no control over  
16 any of that, we're hopeful that -- that they're  
17 successful, but we really do need a trial set. We can't  
18 keep going on. As you know, I wrote the complaint in  
19 this case in 2012. We filed it with the court in 2013.  
20 We've been at this for a very long time, and Texas' goal  
21 is one way or another, get this trial-level work done  
22 and completed by 2025 so that in 2026, the matter can be  
23 dealt with by -- by the Supreme Court in whatever way it  
24 seems appropriate. With that in mind, there are  
25 obviously two paths forward. One is to do two separate

1 trials between now and the end of -- of 2025 or to do  
2 one. The United States has voiced its preference to do  
3 one. The Compacting states are fine if that's the way  
4 it has to be, we're willing to move forward with the --  
5 with the single trial on we'll call it liability, but we  
6 believe it's just baseline. It's just what is the  
7 measure, what is the baseline, since as I indicated to  
8 you last time, from our perspective, New Mexico has  
9 conceded liability, and, now, the next step will be  
10 damages. The question that the United States --

11 JUDGE SMITH: Damages --

12 MR. SOMACH: Not damages.

13 JUDGE SMITH: A remedy.

14 MR. SOMACH: I misspoke. A remedy. In  
15 fact, one of the things that New Mexico and Texas will  
16 do will be to submit, prior to trial, a stipulation with  
17 you that would waive damages and -- and also indicate  
18 that what I did say about liability so that we would  
19 have that off the table. It would be agreed to. It  
20 would be submitted to you as an agreement to take those  
21 issues off the table. So as we understand the issues  
22 primarily are is that the 1938 baseline, isn't a D2  
23 baseline? With that in mind, what we believe that trial  
24 is about ten days. It's not long. It's just simply not  
25 -- not long. In keeping with the desire to get this all

1 done in 2025, you know, we think we'd be ready to go  
2 easily by mid or late June or as soon thereafter as --  
3 and I understand -- we understand your schedule issues,  
4 but as soon thereafter as you could find time for -- for  
5 a ten-day trial. Then the thought was a decision on  
6 baseline and then toward fall/winter, a trial in remedy,  
7 which we don't think will be more than five days or so.  
8 Together, 10 to 15 days, separate, five days. That's  
9 what we're looking for in terms of the schedule. If  
10 there's some breakthrough, you know, where we have a  
11 firm commitment for settlement, we can always let you  
12 know about that. It's not that we don't think that's a  
13 better way to go. It's just that just like back in St.  
14 Louis in 2020 or 2021, we have no assurance of that  
15 whatsoever, and we really need to get this case  
16 resolved. It's been out there way too long. As I said  
17 before, I -- you know, I took this case. I thought it  
18 might finish my professional career, but I never  
19 intended it to actually be the last thing I do in my  
20 actual life so I'd like --

21 JUDGE SMITH: I'm going to do my best to  
22 make sure that's not the case.

23 MR. SOMACH: I'd like to have a little  
24 daylight there between one and the other. Anyway, that  
25 is what -- in terms of -- of what we had provided to you

1 before -- the States had provided to you before in terms  
2 of procedures, we don't think there's any need for  
3 motions or anything before trial. As we said last time,  
4 we -- all of the disclosures have been made. All of the  
5 depositions have been made with respect to -- to  
6 everything through remedies, up until remedies, I should  
7 say, and so we don't think there should be any further  
8 discovery done. It's all been done. We're ready. We  
9 were ready to go to trial when we filed our motion with  
10 the court, as I said, last time. We think all that  
11 happened with the court was a denial of our motion  
12 because we didn't have everybody on board.

13                   In terms of a -- we do think a pre-trial  
14 motion would be good, and the other thing we thought  
15 about is it might be helpful for us to take a little bit  
16 more time than a normal opening, so that we could move  
17 backwards a little bit with you and -- and bring you up  
18 to speed with the evidence that was in that first phase  
19 trial that brings us to the -- the second phase trial  
20 because not only has there been a passage of time, but  
21 obviously you've taken over this job since that first  
22 phase trial and -- and that would be an aid to your  
23 being able to kind of, you know -- rather than picking  
24 up absolutely in the middle, we could bring you up to  
25 speed. All we're talking about is a little bit longer



1 opening statement than might be normal for a short,  
2 ten-day -- ten-day trial.

3 JUDGE SMITH: I'd already thought about  
4 that because it's not the ordinary course, but it's also  
5 not unheard of in very lengthy trial proceedings that  
6 aren't interrupted, as this one has been, so that there  
7 can be a kind of summarization, but that they are almost  
8 viewed as more in the nature of a closing argument based  
9 on what has been presented so far as opposed to an  
10 opening statement. I can't remember whether I've ever  
11 done that in the past because it's been so long since I  
12 was a district judge, but I think it's a good suggestion  
13 and one that I would expect to use whatever we'll call  
14 it, whether we call it a quasi opening or a quasi  
15 closing or just an up-to-date recital of what's taken  
16 place so far. I've -- I would expect to incorporate  
17 that into our procedure. I should have said at the  
18 outset to just let counsel know -- all of you know that  
19 notwithstanding the gap in time since we last met, I --  
20 I have read most of the trial record. My -- my team of  
21 law clerks have read all of it. I've just not had the  
22 time, and I'm neither as smart as they are nor as quick  
23 as they are. But anyway, the record that had been made  
24 so far has -- has certainly been one that I've given a  
25 lot of attention to. But I think what you have proposed

1 here would be a good way of -- of having my recollection  
2 reflected -- recollection refreshed, rather, when we  
3 resume.

4 MR. SOMACH: The last -- the last  
5 suggestion that we have is a basin tour sometime prior  
6 to trial in May/June depending on making sure there's  
7 water in the canals. This has been an extraordinary dry  
8 year unfortunately, but that's -- that's part of the  
9 tension in any water litigation. If there was plenty of  
10 water, as you've articulated -- I've done a lot of work  
11 on the Delaware River, and issues I deal with there are  
12 quite different than the issues I deal with out in the  
13 west. But a basin tour. The -- the other thing I would  
14 note, and this might be helpful just between now and  
15 when we ever do it, we have a -- there's an exhibit -- I  
16 don't know the exhibit number offhand, but we can give  
17 it to you. You may be aware of it. We did a flyover of  
18 the entire area from Elephant Butte Reservoir down to  
19 Fort Quitman. It was introduced, and it's an exhibit in  
20 evidence in the case. And that -- that was a pretty  
21 good way of attempting to give Judge Melloy at that time  
22 -- and he did do a basin tour, but nonetheless, it was a  
23 good way of having him see everything, and I believe one  
24 of the United States witnesses actually narrated that so  
25 that that's also in the -- in the trial testimony. So

1 between now and then, it's something that could be done.  
2 I just wanted to note that it was in -- in the -- it was  
3 in evidence.

4 I don't have -- unless you have any  
5 questions, I think, you know, just underscoring our  
6 state of Texas', and I think -- I'll let them speak for  
7 themselves, but I think the other states are right here,  
8 getting this thing tried this year is -- is our -- our  
9 prime directive, our prime goal in order to -- there's  
10 still work to be done after that, so it's not like we'll  
11 be done, but at least we'll be moving on. That's all I  
12 have.

13 JUDGE SMITH: I appreciate that very much,  
14 and I'm eager to hear from other counsel as to what  
15 ought to be done. I have, for some time, intended that  
16 we would move forward with a -- with a conditional  
17 bifurcation here, which if your suggestion and  
18 prediction is accurate, would not require a lengthy  
19 proceeding when I do schedule something for June so we  
20 could wrap up the liabilities side of this and so I  
21 could close the record on the liability side and go to  
22 work on that.

23 MR. SOMACH: That is -- we don't -- as I  
24 said, around ten days is what we estimate.

25 JUDGE SMITH: I think you had said you

1 don't envision the need for any further discovery with  
2 respect to that part of the case?

3 MR. SOMACH: We don't think any additional  
4 discovery would be appropriate.

5 JUDGE SMITH: Right. Understood.  
6 Understood.

7 MR. SOMACH: Thank you, Your Honor.

8 JUDGE SMITH: Thank you very much.

9 Who is presenting for the State of New  
10 Mexico?

11 MR. WECHSLER: I am, Your Honor, Jeff  
12 Wechsler.

13 JUDGE SMITH: Good to see you again.

14 MR. WECHSLER: Likewise. Good morning,  
15 Your Honor. Jeff Wechsler from Spencer Fane for the  
16 State of New Mexico. And I -- this is a very beautiful  
17 courtroom so we do appreciate that. You had mentioned  
18 the Ohio River. When part of our team first got here,  
19 we looked at the gage for the Ohio River and noticed  
20 that it was flowing at approximately 30,000 CFS, but in  
21 the last -- that's cubic feet per second, but in the  
22 last week or so, it had peaked at 100,000 CFS. So to  
23 give you some perspective --

24 JUDGE SMITH: We've had a little snow melt  
25 thankfully. Not enough, but we've had some.

1 MR. WECHSLER: If you could send some of  
2 that to New Mexico, we'd appreciate it. But the -- the  
3 flow below Elephant Butte reservoir, I suspect, is  
4 nothing or next to nothing. Going into the reservoir,  
5 which, of course, is important for storage purposes, we  
6 just looked, and it's at 245 CFS. So if we could borrow  
7 the flow of the Ohio River for, say, a week, we could  
8 solve this case.

9 JUDGE SMITH: If we could borrow some of  
10 your weather during the winter, I think we should -- I  
11 think we could settle that.

12 MR. WECHSLER: Perhaps I can work with your  
13 clerk to work on the details. Be happy to make that go.

14 I'll start with the mediation. We agree  
15 with the description that both Judge Boylan who, again,  
16 very much appreciate his efforts, which have been  
17 invaluable, as well as my colleague, Mr. Somach have  
18 described. We do see a path forward. The parties have  
19 worked very hard to identify that path forward. I think  
20 we're hopeful, cautiously optimistic. We're not there  
21 yet. There's much to be done from New Mexico's  
22 perspective to evaluate it and make sure that it works  
23 for us in a way that we think we're entitled to. The  
24 parties have set forth an aggressive schedule to -- to  
25 be evaluating that and working on that in the next

1 month/month and a half and beyond that, as necessary,  
2 and we're committed to doing that. We think we can do  
3 that in parallel with a trial schedule. So turning to  
4 the trial schedule, we agree with Mr. Somach. We think  
5 that the -- the case is prepared for trial. In fact,  
6 it's halfway through trial. We've completed our  
7 discovery. We've completed disclosures. There's really  
8 not much more to do other than to begin. We also agree  
9 that having those what I'll call extended opening  
10 statements is -- will be very valuable for both us, and  
11 we hope for you. We think that ten days for that  
12 baseline trial is the right amount of time. You know,  
13 we've gone back and looked at the witnesses that were  
14 identified previously. Given the agreement now among  
15 the states as to the path forward, a number of those  
16 witnesses are no longer necessary, so it eliminates a  
17 lot of what we originally thought would be a much  
18 lengthier trial so we think ten days would be an  
19 appropriate amount of time.

20 JUDGE SMITH: And on that point, I should  
21 have said this when Mr. Somach was at the microphone and  
22 even before. My intention would be to indicate to all  
23 of the participants, certainly to the parties, that I  
24 will -- I don't want to use the word impose. I will  
25 utilize some time limitations on the respective

1 presentations. I'll do so only after having received  
2 the input from all of counsel as to how long you think  
3 things should take. But it -- otherwise, I don't think  
4 I'd be able to predict, for a number of scheduling  
5 reasons, how we'll proceed and how I might handle some  
6 of the other business that I have for the Court of  
7 Appeals. So just to give everybody a heads-up on that.

8 MR. WECHSLER: I appreciate that, Your  
9 Honor. We are comfortable with a time clock. We had  
10 one in the first part of this trial. We think it's  
11 helpful to keeping the parties efficient and certainly  
12 gives more than enough time to do what we think is  
13 necessary.

14 We think that setting the trial date is  
15 actually -- will be helpful for the additional work we  
16 have to do in mediation. You know, I think Your Honor  
17 is certainly aware that deadlines help negotiations  
18 rather than hinder them, and we also agree that it's a  
19 very good idea maybe to build in a deadline by which we  
20 have to inform the Court either that, you know, yes,  
21 we're intending to continue to go forward with  
22 negotiations and, therefore, asking to vacate the trial  
23 setting or we simply haven't reached a deal and -- and  
24 the trial date that you set should be held and made  
25 firm.

1 I have nothing further unless you have  
2 additional questions.

3 JUDGE SMITH: You see no need for  
4 additional discovery from your standpoint, New Mexico's  
5 standpoint?

6 MR. WECHSLER: No, Your Honor. We  
7 conducted years worth of discovery, hundreds of  
8 depositions, at least three sets of expert disclosures,  
9 so everything is ready for trial.

10 JUDGE SMITH: I'm not suggesting to anyone  
11 that I'm open to reopening a discovery schedule. I can  
12 only envision a situation where we would allow  
13 additional discovery if something is -- would be if  
14 something completely unanticipated had arisen.  
15 Otherwise, that's not a situation where you say it ain't  
16 over until it's over. It is over, as far as I'm  
17 concerned.

18 MR. WECHSLER: We agree.

19 JUDGE SMITH: Okay. Thank you very much,  
20 Mr. Wechsler.

21 Mr. Wallace is here for Colorado.

22 MR. WALLACE: Good morning, Your Honor.  
23 Chad Wallace for the State of Colorado. I'd like to  
24 open by also thanking you for bringing us to the  
25 courtroom and for having your staff actually provide a



1 chair to the State of Colorado. That's not always  
2 happened during the course of this proceeding.

3 JUDGE SMITH: You are not probably familiar  
4 with the federal judiciary share of the federal budget,  
5 and it shows up in those sorts of accommodations.  
6 Chairs are luxuries as far as the federal -- we have  
7 slightly less than two tenths of one percent of the  
8 federal budget, so I realize budgets are very much in  
9 the news these days, but I'm sorry we couldn't provide a  
10 cushion along with it, but that's -- that's an expensive  
11 extra.

12 MR. WALLACE: It's got four legs, Your  
13 Honor.

14 I'll start just by saying the State of  
15 Colorado concurs with the procedure laid out by Texas  
16 and by New Mexico. We think that we can proceed with a  
17 liability phase trial, you know, so that is to say we  
18 are in agreement now with the United States to proceed  
19 with the bifurcated system, it sounds like. That may be  
20 Your Honor's inclination, as well. In doing so, we  
21 think the liability trial will be focused as Judge  
22 Melloy had -- had set up previously for a -- what is the  
23 baseline condition. The baseline condition to figure  
24 out the apportionments. It seems that that question is  
25 is it a 1938 or a D2 condition. Because of that, we

1 agreed to do this within the ten-day framework laid out  
2 initially by Texas. Also, we believe that discovery has  
3 been complete and thorough with regard to that question  
4 so no more discovery is needed for that liability phase  
5 of the trial. We also certainly agree that some sort of  
6 extended opening statement or presentation would be  
7 useful. I believe Mr. Somach talked about initial  
8 motions. I took that to mean initial trial briefs or --  
9 or documenting basically the same thing that we would be  
10 doing through opening statements.

11 JUDGE SMITH: I -- I would expect, in fact,  
12 I intend to require a supplemental pre-trial statement  
13 from everyone just to bring me up to date as to what I  
14 can anticipate each party would be presenting. I  
15 haven't thought through that to the extent that I know  
16 everything that I would be requesting, but you can  
17 anticipate I would want that as providing what will be  
18 individual paths forward in terms of producing proof at  
19 the first stage of trial.

20 MR. WALLACE: And we also agree that if --  
21 if Your Honor can fit it into his schedule, an  
22 interlocutory order following that liability trial would  
23 be preferable. The reason is that would allow us to  
24 proceed to a remedy phase without filing exceptions to  
25 the Supreme Court in between and delaying things perhaps

1 for years before we get everything wrapped up. We've  
2 already done something very similar. When Judge Melloy  
3 issued an order on summary judgment, he did so without  
4 drafting a report to the Supreme Court. That allowed us  
5 to continue moving toward trial without that exceptions  
6 and argument break that might have occurred.

7 JUDGE SMITH: I had not -- thank you. I  
8 had not thought of that, but you make a good point that  
9 certainly we will take a look at. That certainly sounds  
10 like it would contribute to some economics in this whole  
11 process -- long process.

12 MR. WALLACE: If you're able to do that,  
13 Your Honor, that would allow us to -- to conclude with a  
14 much shorter remedy phase trial. We're in agreement  
15 that something in the order of five days might be  
16 sufficient to do that, and we have an interlocutory  
17 order in a timely fashion, we might be able to do that  
18 within the calendar year. A basin tour, also, I think  
19 would be very useful in addition to seeing the aerial  
20 footage. Just getting boots on the ground really helps  
21 you to orient yourself to what's going on and how the  
22 system works.

23 JUDGE SMITH: If it's possible before we  
24 all depart today, if someone could provide us with the  
25 exhibit number of the video and whatever it is that

1 provides the -- the flyover that will be good to have so  
2 that my chambers team and I can -- can do it.

3 MR. WALLACE: That's fantastic. And -- and  
4 with mediation, my colleague, Mr. Wechsler, had  
5 mentioned sort of a date which to inform the Court about  
6 the status of this, and I think you estimate, and they  
7 may discuss this, as well, when their turn comes. The  
8 idea behind that would be to let the Court know, because  
9 there is so much technical detail that the parties are  
10 working with, we may be coming right up to the deadline  
11 in -- in being able to finish that up to the  
12 satisfaction of everyone so that we're confident that  
13 the deal we have sticks. So that -- that would be a  
14 request if we're to the point to then perhaps stay that  
15 trial date if we're right about to settle this. That  
16 said, I do agree that -- that having that trial date in  
17 place -- Your Honor had mentioned sometime this summer,  
18 June, I believe, I think that that would be very helpful  
19 in pressing the parties.

20 JUDGE SMITH: You will all receive an order  
21 -- I don't know how extensive it will be. I don't know  
22 how many matters I might want to include in the  
23 declarative portions of the order. At the very least,  
24 you will receive an order setting a date for trial  
25 within -- what is today, Thursday, be returning later to

1 -- to chambers later today, I guess, more in central  
2 Pennsylvania, but you can count on receiving in the  
3 coming days a -- an order that sets a specific date for  
4 resumption of trial.

5 MR. WALLACE: With that, I don't want to  
6 get into the scope of mediation at all, but just to let  
7 Your Honor know that there are a lot of pieces dealing  
8 with a lot of pending cases. You're aware that there  
9 are a number of lawsuits pending in addition to this  
10 one. We're trying to do the whole enchilada all at once  
11 to make sure that we get, as I said before, an agreement  
12 that we know can stick and will work for all the parties  
13 moving forward.

14 JUDGE SMITH: Very good. Thank you very  
15 much, Mr. Wallace.

16 MR. WALLACE: Thank you.

17 JUDGE SMITH: It does occur to me that  
18 among the provisions we have done our best to make for  
19 the number of counsel we have, it's not just the number  
20 of chairs. Depending upon who intends to present for  
21 the United States, I should have possibly a microphone  
22 that is about 5 feet higher than it is here. I realize  
23 that the microphone we had in Denver did not stretch far  
24 enough for counsel, but if you're presenting, I'll get  
25 down and hold it for you, in fact.

1 MR. SNODGRASS: Thank you, Your Honor. Tom  
2 Snodgrass with the United States. Is that microphone  
3 picking that up?

4 JUDGE SMITH: Yeah. And if we have any  
5 difficulty, that way, we do have some --

6 MR. SNODGRASS: I do have an auxiliary  
7 microphone that I can use.

8 JUDGE SMITH: I think your voice is  
9 projecting well enough so as long as you're speaking  
10 into it. Don't worry about looking at me.

11 MR. SNODGRASS: Well, thank you, Your  
12 Honor. Thanks for the welcome to Pittsburgh. It's a  
13 beautiful city. It's my first time here, and I'm  
14 favorably impressed. Beautiful courtroom. Thank you  
15 for welcoming us. As you -- as you're aware, as you've  
16 heard, we've just completed several days of mediation,  
17 and after that mediation, as you've heard, I think the  
18 parties agree that we've made substantial progress and  
19 that there is a potential settlement path here; however,  
20 there are many technical details that still need to be  
21 worked out, particularly between United States and New  
22 Mexico, and the technical people for the United States  
23 who are going to be integral to working through those  
24 technical -- technical issues are the same technical  
25 people who would be integral to our trial preparation.

1 Based on discussions with our technical people, as well  
2 as technical representatives from New Mexico and the  
3 irrigation districts who are heavily involved here, we  
4 think a reasonable time period to seek to resolve those  
5 technical periods is three months. There doesn't seem  
6 to be any disagreement on that. Our folks have  
7 committed to weekly meetings to seek to make that  
8 happen, but these are complex technical issues, and we  
9 need to take the time to get it right. Our -- one of  
10 our primary objectives here is to do everything we can  
11 to make that settlement happen, give that settlement its  
12 best chance of success. Now, we've heard you loud and  
13 clear that you are inclined to set a trial in June. If  
14 that's the decision, I won't belabor the point, but I  
15 will say that we would request whatever additional time  
16 you may be able to put into that schedule to allow these  
17 settlement efforts their best prospect and success.

18 JUDGE SMITH: I'm certainly not  
19 unsympathetic to the demands of -- of the Department of  
20 Justice's time or any practicing lawyer's time. I know  
21 how hard it is to be in the trenches. The nature of  
22 time is -- it is finite. The nature of life is finite,  
23 and it's the only time I have on my schedule between now  
24 and the end of the year. I just can't -- for trial  
25 purposes. So that's why I've set out June, the entire

1 month. I may be required -- it's not that I have  
2 nothing listed during that period of time. I'm prepared  
3 to forego a meeting of the standing committee on rules  
4 of the judicial conference of the United States to try  
5 this case. I'm a member of that committee, but I will  
6 prioritize this, but it's got to be June. It's the only  
7 time that's available.

8 MR. SNODGRASS: With that understood, we  
9 would pick up on the States' suggestion that New Mexico  
10 has given us indication that they think they're going to  
11 know within about six weeks whether we're going to get  
12 there or not. If we get the green light from New  
13 Mexico, United States agrees that, yeah, looks like  
14 we're going to get there, but we still need more time to  
15 get there, we would pick up on the suggestion of the  
16 states that we file something with the Court indicating  
17 that, Hey, it looks like the trial is likely not going  
18 to be needed and continuing the trial date, vacating the  
19 trial date, what have you. So we strongly support that  
20 suggestion.

21 Another thing I want to touch on, you asked  
22 about additional discovery, and we think some additional  
23 discovery would be appropriate, because we think we  
24 should be given the opportunity to prepare and provide  
25 to the other parties a supplemental expert report on



1 liability, and -- and the reason for that is that there  
2 has been a fundamental shift in the shape of this case  
3 since 2022. The United States and Texas were previously  
4 aligned in their position. The United States and Texas  
5 previously designated a lot of the same witnesses. They  
6 previously developed an integrated case. The United  
7 States did not designate additional, duplicative  
8 witnesses. That would just repeat what Texas was doing.  
9 The United States did not submit its own modeling  
10 testimony or try to develop a third duplicative model  
11 because we didn't want to duplicate what we thought was  
12 already going to be there. That circumstance has  
13 fundamentally changed. Texas and the United States are  
14 no longer aligned. Texas is no longer intending to  
15 submit, as we understand it, a case in support of a 1938  
16 baseline condition, and we want to have the opportunity  
17 to submit a supplemental expert report concerning  
18 liability pertaining to that condition, depletive  
19 effects of groundwater pumping in New Mexico on project  
20 supply. We think the Supreme Court should have a fully  
21 developed trial record on those issues for its review  
22 ultimately.

23 JUDGE SMITH: I think you alluded to this  
24 possibility back when we were in Denver.

25 MR. SNODGRASS: That's correct, Your Honor.

1 JUDGE SMITH: And I -- I would just -- I  
2 have no predilection one way or another because you had  
3 indicated that, but I -- I would expect, and what I will  
4 include in whatever order I get out in short order, will  
5 be a date by which you should file a motion seeking to  
6 reopen discovery for a particularly -- for a narrow  
7 purpose, and I'd expect that it would be a -- a motion  
8 that robustly supports the need for additional discovery  
9 and also narrows such discovery to the purpose that you  
10 believe it is required, and I will certainly expect  
11 opposition from the parties. So I'll set a schedule for  
12 that, as well so that I can decide the matter. I would  
13 hope that I can decide the matter without the need for  
14 oral argument, that I can decide it on papers, again, so  
15 as to expedite resolution of that issue and expedite,  
16 were I to grant the motion, the additional discovery  
17 itself. So I would encourage you -- well, I'll more  
18 than encourage. I'll set forth the schedule in an order  
19 that will issue within the coming days for such a  
20 motion.

21 MR. SNODGRASS: To be clear, Your Honor, we  
22 think the discovery would largely be discovered by the  
23 states in an event we're allowed to submit supplemental  
24 expert disclosures, supplemental expert report rather  
25 than discovery sought by the United States, unless they

1 in turn want to submit a rebuttal report in response to  
2 our supplemental report. So it's only reasonable that  
3 if we're producing a supplemental report, they have the  
4 opportunity to -- to have discovery on that report so  
5 that's -- that's the gist of the --

6 JUDGE SMITH: Again, the narrower, the  
7 better. The more specific to be, the better. That will  
8 facilitate prompt resolution.

9 MR. SNODGRASS: Beyond that, I think the  
10 other parties accurately captured where we're at. We  
11 agree that pretrial -- some form of pretrial brief would  
12 be appropriate. I think that's the extent of my  
13 comments so thank you, Your Honor.

14 JUDGE SMITH: Thanks very much.

15 I heard back in October when we were in  
16 Denver not only from the parties but from  
17 representatives of the amici that chose to appear at  
18 that session, and I know we have representatives here,  
19 as well. While I don't envision the participation of  
20 amici formally in trial as would be the necessary  
21 participation of the parties in the trial, I realize  
22 that they are going to be engaged after today with input  
23 and so forth into the mediation process, and that were  
24 we to go to trial, they would continue to have such an  
25 interest. We can discuss down the road how that

1 participation may play out or we can discuss it, also,  
2 today and so what I would like to do is give the amici  
3 an opportunity to supplement, through comment, what they  
4 have heard here in open court today to the extent that  
5 there is a desire to do so since -- since you are here,  
6 not as tourists, but as participants in an important  
7 piece of ongoing litigation, I want to make sure you  
8 have an opportunity to -- to go forth on anything that  
9 you think is relevant to our purposes today. And maybe  
10 you don't have anything in that regard since this is  
11 really about case management, but to the extent that  
12 people do want to come to the microphone, I want to  
13 provide for that. We have -- let me just go in the  
14 order that I have here on the sign-in sheet before me.  
15 I know that we have counsel for the El Paso Water  
16 Improvement District. If either counsel who are present  
17 want to speak, want to come to the microphone.

18 MS. O'BRIEN: Good morning, Your Honor.  
19 Thank you for the opportunity. I have nothing further  
20 to add today. We support the comments and presentation  
21 of Mr. Snodgrass on behalf of the United States. We  
22 would simply echo that -- I think all parties have  
23 expressed this that having been involved in both the  
24 trial aspect and the settlement aspect of this case  
25 since the beginning, we believe that there is, at this

1 point, the best chance of a comprehensive final  
2 settlement of a matter that has, even before 2013 when  
3 this case was filed, was an issue for all the parties  
4 present before you in the courtroom. So we simply  
5 request that the Court and all the parties allow the  
6 full opportunity for that settlement to come to  
7 fruition. Thank you.

8 JUDGE SMITH: Thank you very much. The  
9 Elephant Butte Irrigation District is represented, as  
10 well. Mr. Domenici?

11 MR. DOMENICI: Good morning, Your Honor.

12 JUDGE SMITH: I have to ask this. Forgive  
13 me, but I'm -- I'm old enough to remember a United  
14 States senator by the name of Pete Domenici. Is there  
15 any relation?

16 MR. DOMENICI: Yes, Your Honor. That was  
17 my father. I'm Pete, Jr.

18 JUDGE SMITH: I am a Pennsylvanian, but I  
19 admired your father's service in the United States  
20 Senate.

21 MR. DOMENICI: Thank you, Your Honor. I  
22 appreciate that. He had -- his sister was married to a  
23 Pennsylvania native.

24 JUDGE SMITH: Well, I hope you don't hold  
25 that against me.

1                   MR. DOMENICI: No. So there was a pretty  
2 strong connection actually. So, Your Honor, I'm here  
3 with three board members from the Elephant Butte  
4 Irrigation District, Rafael Rovirosa, PK Colquitt, Gregg  
5 Daviet. I'm here with our general manager, and I'm here  
6 with our -- our single technical expert, Dr. Phil King.  
7 We've brought all those people, and they've all been  
8 attending as a team because much of the impact of this  
9 settlement rests on the Elephant Butte Irrigation  
10 District. Much of the historic problems have been borne  
11 by the Elephant Butte Irrigation District, and we  
12 essentially have one technical expert to participate in  
13 the ongoing mediation. He's been with us a long time,  
14 but he is spread very thin, and there is a groundwater  
15 resolution that has been longstanding, and there's a  
16 surface water aspect that has been longstanding. Both  
17 of those have to be addressed in this mediation process,  
18 and he will be working on both of those on our behalf,  
19 as well as he's listed as a witness for the U.S. So we  
20 will be -- we are spread very thin. We just want to --  
21 we understand your schedule has June, and we will do the  
22 very best.

23                   JUDGE SMITH: I'm spread real thin.  
24 There's just one of me.

25                   MR. DOMENICI: I understand, Your Honor.

1 And I understand you're -- you have June available. I  
2 just wanted to emphasize how important this whole  
3 proceeding, both the mediation and the litigation, is to  
4 the -- this irrigation district, and we will do our very  
5 best to try to be in a position to come forward with  
6 those two pieces of the mediation, making progress or  
7 perhaps being completely resolved in a way to hopefully  
8 avoid the trial. Other than that, I don't think we have  
9 comments on the pretrial procedure other than what the  
10 U.S. has said. But I just wanted to let you know that  
11 we are participating very actively and will be impacting  
12 significantly however this turns out. Thank you.

13 JUDGE SMITH: Thank you very much,  
14 Mr. Domenici.

15 From the Albuquerque Bernalillo County  
16 Water Utility Authority?

17 MR. BROCKMANN: Yes, Your Honor. Jim  
18 Brockmann from the Water Authority. I don't have much  
19 to add to what the Compacting states said in terms of  
20 the proceedings today, but in terms of the trial, if  
21 this does go to trial and doesn't get resolved through  
22 settlement, we worked with the State of New Mexico and  
23 presented witnesses that we presented to work with them  
24 on cross-examination. We'd expect the same thing if we  
25 get to trial in this matter.

1 JUDGE SMITH: I'm sorry. Say that last bit  
2 again.

3 MR. BROCKMANN: We'd expect the same kind  
4 of cooperation with the State of New Mexico and the  
5 Compacting states if we go to trial in this matter.

6 JUDGE SMITH: Could you just be more  
7 specific when you say the same?

8 MR. BROCKMANN: We worked with them behind  
9 the scenes in terms of preparation of witnesses,  
10 cross-examinations, and the state attorneys put on,  
11 like, the Water Authority witness in this case.

12 JUDGE SMITH: So you're really talking  
13 about just communication between --

14 MR. BROCKMANN: Yes, Your Honor.

15 JUDGE SMITH: Okay. I didn't know whether  
16 it was a request of any -- to the Court of anything or  
17 -- that clarifies.

18 MR. BROCKMANN: No. Just telling you how  
19 it went last time.

20 JUDGE SMITH: Thank you, Mr. Brockmann.

21 MR. BROCKMANN: Thank you.

22 JUDGE SMITH: From the City of El Paso,  
23 Mr. Caroom?

24 MR. CAROOM: Doug Caroom for the City of El  
25 Paso. No comment, Your Honor.



1 JUDGE SMITH: Thank you, sir. From Las  
2 Cruces. I don't speak any Spanish. Little bit.

3 MR. STEIN: Bienvenidos, Your Honor. My  
4 name is Jay Stein. I represent the City of Las Cruces,  
5 which is the second largest city in New Mexico. We are  
6 in the lower Rio Grande Valley. We are directly  
7 implicated in this case, and we look forward to  
8 continuing to work constructively with our New Mexico  
9 attorneys, both in the mediation track as well as any  
10 potential litigation and the City has presented  
11 witnesses in the previous trial proceeding.

12 JUDGE SMITH: All right.

13 MR. STEIN: Thank you.

14 JUDGE SMITH: Very good. Thank you. From  
15 New Mexico State University? Mr. Utton is here. I know  
16 you were with us in Denver, as well.

17 MR. UTTON: Yes, I was. Thank you, Your  
18 Honor. Thank you, again, for inviting us here. John  
19 Utton. I'm representing New Mexico State University,  
20 also the regional utility authority and public service  
21 company of New Mexico. I've conferred with the other  
22 New Mexico amici and just want to express on behalf of  
23 my clients and on behalf of the counsel for the other  
24 New Mexico amici that we're very encouraged by the  
25 process over the last couple of days, and we definitely

1 also would like to express our appreciation to the Court  
2 for include -- including the amici to the extent that  
3 you have, allowing us to participate both in the  
4 mediation proceedings and in this court proceedings. I  
5 think that's been very helpful. It's been not only  
6 useful to our clients, but I think allowing us to  
7 interact and participate constructively in those  
8 proceedings. We are encouraged by the settlement  
9 discussions and are supportive of the States' position,  
10 particularly our home state, New Mexico. We do -- I  
11 think I want to emphasize one thing that, I think,  
12 Mr. Wallace also mentioned, that we're seeking a  
13 comprehensive settlement, that there are these  
14 underlying matters. I think both surface and  
15 groundwater issues, state administrative issues. There  
16 may be three or four agreements that would need to be  
17 reached, and we're hopeful that that can all be done and  
18 put into one package and that we'll have time to do it,  
19 but then again, balancing the pressure of having a court  
20 proceeding trial setting that would be the forcing  
21 mechanism to make that happen. So hopefully we could  
22 get to a point where we'll know that yes or no that can  
23 happen, and if it does, that we'll have enough time to  
24 not only do have a loaf but do the whole loaf or the  
25 whole enchilada, as our colleague described it.

1 JUDGE SMITH: Seems to be given the  
2 setting, the whole enchilada being a much better --

3 MR. UTTON: Whole enchilada is much better  
4 than half an enchilada.

5 JUDGE SMITH: That's one of the reasons I'm  
6 hoping for a site visit actually.

7 MR. UTTON: We will accommodate you.

8 JUDGE SMITH: Thank you.

9 MR. UTTON: Thank you. For the New Mexico  
10 pecan growers. Ms. Davidson?

11 MS: DAVIDSON: Your Honor, I asked John to  
12 speak on behalf of us, as well as Ms. Standish also  
13 asked John to speak for all of New Mexico amici.

14 JUDGE SMITH: All right. Thank you. Was  
15 it Ms. Standish who had the Ohio River reference to me  
16 last time?

17 MS. STANDISH: No, that was Ms. Davidson.

18 JUDGE SMITH: All right. I knew it was one  
19 or the other of you. It caused me to do a little extra  
20 homework, in fact. It was an interesting factoid. Have  
21 I gone through all of the amici who are present and  
22 given everyone who is present an opportunity to come  
23 forward? Is there anything further from counsel of  
24 record for the parties at this stage, Mr. Somach?

25 MR. SOMACH: I have just -- I do have the

1 exhibit stuff, which I can give to your clerk.

2 JUDGE SMITH: Great.

3 MR. SOMACH: The other thing I was going to  
4 mention, in that context was that there was -- in terms  
5 of the site visit, your consideration of that, there was  
6 an itinerary that I think the parties have described the  
7 fact or agreed to the fact that that itinerary would  
8 work again. We might have to substitute a farm here or  
9 a farm there because -- but you might want to look at  
10 that as -- as a mechanism to kind of figure out if  
11 that's something you want to do, how you want to do it.

12 JUDGE SMITH: Well, if we go to trial, I  
13 view it as -- as necessary. While the Mexican food is  
14 an inducement, I admit, but I do think it's necessary to  
15 actually conduct a view. Thank you.

16 MR. SOMACH: I have nothing further.

17 JUDGE SMITH: All right. Thank you very  
18 much. And from New Mexico, Mr. Wechsler, do you have  
19 anything further?

20 MR. WECHSLER: Very briefly, Your Honor.  
21 I'll just mention that in light of thinking about  
22 demonstrative exhibits, it might help orient you. There  
23 also is New Mexico Demonstrative Exhibit 1, which is a  
24 Google Earth, which includes all the important features  
25 that are part of this case, and you might take a look at

1 that. It's similar, but a little bit different than the  
2 -- the video that Mr. Somach described. There also is,  
3 if you wanted to understand what we did on the first  
4 site visit and give you an idea of how that might go the  
5 second time, there's New Mexico Demonstrative Exhibit 2,  
6 which actually includes sort of pictures of the  
7 itinerary that we had Judge Melloy for that site visit.

8 JUDGE SMITH: Thank you very much,  
9 Mr. Wechsler. Mr. Wallace?

10 MR. WALLACE: Your Honor, nothing further  
11 to add. Thank you.

12 JUDGE SMITH: Mr. Snodgrass?

13 MR. SNODGRASS: Nothing further, Your  
14 Honor. Thank you.

15 JUDGE SMITH: All right. Let me -- my head  
16 of chambers, Ms. Svirsko, who has been with me for more  
17 years than I will tell you and has a pretty good command  
18 of the record in this case, just told me about some gaps  
19 that we have. So, Dawn, if you will go to the  
20 microphone and tell counsel what we are missing at this  
21 point and perhaps they can between them fill those gaps.

22 MS. SVIRSKO: Yes. My name is Dawn  
23 Svirsko, as you've said, and we have gotten the record  
24 from Judge Melloy's team out there. They have listed  
25 numerous exhibits that have come in. Some have been

1 joint exhibits, some have been New Mexico exhibits,  
2 Texas exhibits, but it's our understanding from reading  
3 a lot of the transcript and from what counsel has said  
4 here that there's some exhibit about a flyover. That is  
5 something we do not possess in the records. We have no  
6 thumb drives. We have no CDs, and when I spoke with the  
7 JA for Judge Melloy at one point, she had indicated that  
8 some exhibits had been presented to some server for some  
9 period of time, but we don't have anything about that.  
10 So to the extent that those are part of the record,  
11 they're part of the record that is not in our chambers.  
12 We have all the transcripts, but we do not have  
13 necessarily all those exhibits.

14 JUDGE SMITH: Thank you very much, Ms.  
15 Svirsko.

16 So it's clear, Judge Melloy, who has since  
17 gone on inactive status as a federal judge, and his  
18 chambers, his judicial assistant, have been enormously  
19 cooperative with us from the start. I think I mentioned  
20 to all of you, you know, know each other well, served  
21 together on the facilities committee, judicial  
22 conference, wives know one another, so that has been an  
23 advantage to have that level of cooperation, but it's  
24 also something that's very characteristic of the federal  
25 judiciary, let's say, please forgive me, the

1 advertising, but I'm proud of the branch. So any  
2 efforts that counsel for the parties may be able to make  
3 cooperatively or otherwise to come up with these gaps,  
4 we would appreciate. And I will say one exhibit -- and  
5 I can't even remember who proffered this exhibit that is  
6 part of the record, but it is a -- it's a map, a -- a  
7 drawn map of the -- most of the basin anyway. When I  
8 say that, it barely fits length-wise in my chambers. I  
9 tell you that only because it stands there from floor to  
10 ceiling, and there is not a day in my chambers that I  
11 don't think of all of you as a consequence of this  
12 obtrusive item that commands such a special spot there  
13 in chambers. But at least we've demonstrated to you  
14 that we've -- we have spent time -- a lot of time with  
15 the record in this case up to this point.

16           At this juncture, if I could call upon  
17 Judge Boylan just to come back to the microphone and to  
18 indicate whether or not there's -- there's anything else  
19 that we should cover, and, also, to address anything  
20 relative to the matter we took up at the very beginning.

21           JUDGE BOYLAN: I do believe, Judge, it  
22 would be appropriate to ask about my ongoing role  
23 vis-a-vis the technical people. One of the lawyers  
24 recently asked what he was doing, and somebody else  
25 replied that he was shepherding feral cats. That's the

1 role in this whole business.

2 JUDGE SMITH: That's why I'm a dog person.  
3 I would bring my dog into chambers, as my law clerks  
4 will tell you.

5 JUDGE BOYLAN: To a certain extent, that's  
6 true. The technical folks are all very knowledgeable.  
7 They're all working very hard and have far more  
8 knowledge on a technical level than I will ever have,  
9 but there may be some wisdom in reference to nailing  
10 down the exact dates that they're going to be visiting  
11 remotely, the exact dates that they'll be in  
12 Albuquerque, and perhaps if the Court is interested in  
13 having a basin tour -- I'm not sure what your schedule  
14 might be, but maybe it can be consistent with one of  
15 those sessions that there's an in-person meeting going  
16 on in Albuquerque. I'm certain about when the technical  
17 folks -- because this is all fairly new. We've been  
18 talking about this just yesterday afternoon.

19 JUDGE SMITH: Right.

20 JUDGE BOYLAN: Whether that in-person  
21 meeting that takes place in Albuquerque will be for a  
22 day, will be for two days. That is yet to be figured  
23 out. And I'm -- when I'm thinking about this, I do know  
24 that there's been some issue in reference to the  
25 abilities of one party or another or experts that may be



1 retained by one party or another to travel, and if, in  
2 fact, it's necessary in the parties' views that they  
3 have people who are not stationed in Albuquerque to  
4 travel to Albuquerque for those sessions, I would hope  
5 that perhaps you may be open, Judge, to consider issuing  
6 an order if that becomes necessary, and if that became  
7 necessary, I would advise you of the same and consider  
8 -- ask you to consider issuing an order that certain  
9 people had travel plans to attend.

10 JUDGE SMITH: Certainly, and I would be  
11 willing to do that for any witness that a party  
12 represents to me is -- is necessary to -- to this  
13 process, and I also would hope that you would have  
14 continued involvement, Judge Boylan, in what I think  
15 everyone here has suggested, if not affirmed, is an  
16 ongoing and major part of how this case is going to be  
17 resolved. It's good news certainly, even music to my  
18 ears to hear the parties themselves indicate the amount  
19 of progress that has been made through mediation in  
20 recent times, but as little as I know about the  
21 technical aspects of this matter, which is to say almost  
22 nothing, I at least can understand, based upon the  
23 repetition of those that counsel have made regarding  
24 just how many of those issues are still out there, that  
25 it constitutes a major part of getting this --

1 JUDGE BOYLAN: And I'm just counting how  
2 many in-person meetings may take place between now and a  
3 June trial date, and it's either four or five, given  
4 that they're going to be at three-week intervals. But  
5 given your comments, Your Honor, I'll make every effort  
6 to attend each of those in Albuquerque unless the  
7 parties have some other ideas concerning that issue if  
8 they'd like to address the Court with.

9 JUDGE SMITH: Well, and let me also say,  
10 while I had just essentially blocked out all of June,  
11 based on what I've heard here, if I'm understanding what  
12 would be the expected duration of a continued trial on  
13 liability alone, that I would not need to be looking at  
14 all of June being consumed and would, therefore, set a  
15 date that is not at the very beginning of June, to the  
16 extent that a matter of days or even a couple weeks  
17 matter. Maybe they do. So I'll try to find a date not  
18 at the beginning of the month for resumption of trial.

19 JUDGE BOYLAN: Sure. Perhaps what I will  
20 do then is ask each of the lead counsel after we're  
21 finished this morning to confer with me regarding the  
22 thoughts of what those in-person Albuquerque meetings  
23 will entail. They may have to consult with their --  
24 their own technical people, but I'm thinking probably  
25 each would be a day and a half. We'd arrive in

1 Albuquerque, meet that day, perhaps into the next day,  
2 and then -- and then depart with the understanding that  
3 continuing efforts to be undertaken on remote basis  
4 until the next three weeks would expire, and then  
5 another in-person meeting would be scheduled in a  
6 similar fashion. I think that's the process that I'm --  
7 that I understand the technical folks were talking  
8 about, and maybe we can make sure that that -- that, in  
9 fact, is true.

10               The last -- the last thing, Judge, is the  
11 question of mediator fees. It's really a housekeeping  
12 issue. It's not something that I believe is at issue at  
13 all, but I believe that the attorneys representing the  
14 Compacting states and the U.S. would find it more user  
15 -- would -- would find it helpful if the Court would  
16 issue an order, after looking through the invoices,  
17 directing them their payment. I think their ability  
18 then to contact their administrative support staff and  
19 say here's an order from the Court, please process it,  
20 makes it a lot smoother process than otherwise that  
21 might get out of hand.

22               JUDGE SMITH: Well, I -- as you know, I  
23 remain available to -- to -- to resolve any issues in  
24 that regard and resolve them promptly.

25               JUDGE BOYLAN: I don't believe there's any

1 issues. If I -- may I approach, Your Honor?

2 JUDGE SMITH: Yes.

3 JUDGE BOYLAN: I have two invoices. They  
4 have been previously presented to the parties. They  
5 both have had a chance to look through those. I haven't  
6 heard any complaints about any of those. My -- my  
7 intention would be that when I get home back to my home  
8 office following today's proceeding, that I will prepare  
9 a invoice -- up-to-date invoice, send it to the parties  
10 pursuant to the terms of your order and then,  
11 thereafter, present it to the Court for your review and  
12 hopefully an order that would be forthcoming from the  
13 Court directing the parties to -- to pay all of the  
14 outstanding invoices as they've been finally presented  
15 to the Court.

16 JUDGE SMITH: Should counsel agree upon an  
17 order, a formal order, submit it to the Court?

18 JUDGE BOYLAN: I would think that they  
19 would be presenting --

20 JUDGE SMITH: I would request that. It  
21 would be helpful to me because -- if for no other reason  
22 that it being submitted by all of you, I know it is in a  
23 form and addresses what you have in mind.

24 JUDGE BOYLAN: In that regard, every --  
25 every -- each party has been very helpful, but in

1 particular, the administrative support staff of Texas  
2 has been remarkable in reference to making  
3 accommodations for our mediation sessions and all of the  
4 things that might be surrounding that, and I ask that --  
5 I'd ask -- direct Texas to prepare a proposed order when  
6 appropriate.

7 JUDGE SMITH: That sounds fine with me.

8 MR. SOMACH: You're very welcome.

9 JUDGE BOYLAN: That's all I have, Your  
10 Honor.

11 JUDGE SMITH: All right. Thank you very  
12 much, Judge Boylan.

13 Forgive me if I'm drawing this out  
14 unnecessarily, but before I express a thank you to all  
15 of you for your presentations today, for your updates,  
16 and for your cooperative approach to this matter in the  
17 last few days, I can't help but reflect on not only the  
18 importance of this case, because all of you, through  
19 your experience, know that better than I do, but I've --  
20 I've learned a lot so far. I, in many ways -- you know,  
21 now, at this stage in my life, I -- I recognize that I  
22 may be something of an anachronism. I'm a bibliophile,  
23 and I'm not sure how many people actually read books  
24 that are printed anymore. I collect them. Anyway, this  
25 -- I have read *Conflict on the Rio Grande*, which I know

1 is referred to in some of the testimony of -- of the  
2 trial, and it's a not only interesting from a historical  
3 perspective, but it's actually a well-written book, so  
4 I've tried to do my homework along the way, which is  
5 part of this job and what part of this job always should  
6 be. In December, I -- I marked 40 years as a judge in  
7 three courts, and even to this point after all that  
8 period of time, I marvelled at how our process works.  
9 Now, I don't marvel at the speed of that process, and  
10 I'm not simply referring to this case. Cost and delay  
11 has always been issue for those of us who are interested  
12 in civil litigation, and I have been interested for many  
13 years and continue to be able to express that interest  
14 and participation in the rule-making process at the  
15 federal court level and did so even when I was on a  
16 committee as a state court judge many years ago. That  
17 we stand for process is something that we all take for  
18 granted, I think, from time to time unfortunately.  
19 There are a lot of things that we take for granted that  
20 we have. I have always been proud of this system of  
21 what lawyers do, of what lawyers both in private  
22 practice and lawyers who represent the federal  
23 government and the sovereigns and every other form of  
24 government that we have in this country. I was  
25 confronted this morning -- not confronted, but faced

1 this morning with a very, very sad episode as I checked  
2 out of my hotel. Again, sorry to -- sorry to elongate  
3 this, but it -- it certainly was one of those  
4 experiences that drive home to you how fortunate we are  
5 and how we should take note of how fortunate we are. I  
6 checked out of my hotel to head up here and met a young  
7 woman working at the desk, and having done a lot of work  
8 in rule of law during my latter parts of my career as a  
9 federal judge and different parts of the world, but  
10 especially in the former war-torn areas of the former  
11 Yugoslavia, as well as after the fall of the Soviet  
12 empire, I recognized, despite her excellent English, a  
13 slight Slavic accent, and I asked her where she was  
14 from, and she said, "I'm from Ukraine." And I  
15 said, "I'm sorry. I'm sorry to hear that. I'm sorry  
16 for what your country has gone through." I was there  
17 years before right before the Orange Revolution. I  
18 asked her where she was from in Ukraine. She said Kyiv,  
19 and for these of you who have followed war, you know  
20 Kyiv has had the hell kicked out of it in the last  
21 couple years. "Do you still have family there?" And  
22 she choked and said, "Yes. All my family are -- are  
23 there." It has nothing to do with water. It has  
24 nothing to do with the controversy that brings us here,  
25 but it certainly does remind us of the worst that can

1 happen when the rule of law is not supreme. Certainly  
2 didn't start my day out in the happiest way that it  
3 could have begun, but I just wanted to tell all of you  
4 that I appreciate seeing you-all again and that I  
5 appreciate your commitment to this very, very important  
6 litigation. It has taught me a great deal so far. I  
7 know very little about water. I don't even add it to my  
8 scotch, as a matter of fact, but I do appreciate water  
9 for its other purposes. Thank you for everything you've  
10 done in this litigation for quite some time. Thank you  
11 for everything you've done since I've been assigned as a  
12 special master in the matter. Thank you for all you've  
13 done today. I extend that to Judge Boylan, as well.

14                   So with that said, we'll be getting an  
15 order out to you early next week. I'll ask the clerk to  
16 adjourn the proceedings.

17                   (The proceedings adjourned at 10:27 a.m.)

18  
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CERTIFICATE

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

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

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on this, the 24th day of March, 2025.



HEATHER L. GARZA, CSR, RPR, CRR  
Certification No.: 8262  
Expiration Date: 04-30-26

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