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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 OCTOBER 23, 2024, HEARING
BEFORE HONORABLE D. BROOKS SMITH, SPECIAL MASTER, UNITED
STATES CIRCUIT JUDGE, at 901 19th STREET, DENVER,
COLORADO 80294, beginning at 10:00 a.m.

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

2 JUDGE SMITH: Good morning. Welcome. I'm
3 not sure there were this many people with the Sermon on
4 the Mount. This is a very impressive showing this
5 morning. Welcome. I'd say welcome to Denver, but I'm
6 not from here so I'm not the person to extend that kind
7 of welcome, but I am glad to get an opportunity to meet
8 with all of you and to use this occasion to familiarize
9 myself, through your considerable assistance, with the
10 substantial background of this matter and what has
11 transpired so far, and very importantly, where we go
12 from here.

13 I have just a couple of introductory
14 remarks to make. I'll try to be as brief as possible
15 because I don't want to cut into the time that, very
16 importantly, has been reserved for all of you, and that
17 is important to me because you are in the role today
18 certainly as advocates implicitly. I am more interested
19 in your role, as I have characterized it previously, as
20 providing a tutorial. Today, you are, not only kind of
21 side of that advocates providing less advocacy than you
22 are tutelage to me. I've spent as much time as I could
23 in familiarizing me, myself, with the significant
24 history, procedural history of this case. Some time
25 substantively, as I will speak to in a little bit

1 because I am, I'll confess, a bit baffled on some of the
2 substantive side of this case. As I presume all of you
3 know, my name is Brooks Smith. I'm a senior judge of
4 the United States Court of Appeals for the 3rd Circuit.
5 I assume that you've done some checking to my background
6 because this is an important case for all of you and so
7 I'll say no more on that subject, but I will also
8 introduce my -- my law clerk, Max Giuliano, who has
9 accompanied me from the east to here and who is lead
10 among the team of law clerks I have working with me, and
11 it must be a team, as you can imagine, given the history
12 of this case, the issues of the law, procedural and
13 substantive, as well.

14 Also, Ms. Heather Garza, who is the court
15 reporter, who has a history with this case. I'm
16 delighted that she was able to join us.

17 Judge Arthur Boylan is -- is here, as well,
18 at my request. He was acting as a mediator previously,
19 as you know, and I want to express my thanks to Chief
20 Judge Brimmer, the Chief Judge of the District of
21 Colorado. We don't know each other well, but we both
22 participated as a team of five federal judges during
23 COVID on a COVID task force during the difficulties of
24 that period of time so he, along with his clerk of
25 court, Jeffrey Colwell, has made us feel welcome, and

1 are responsible certainly for the availability of the
2 courtroom, as well as the electronic aids that we have
3 here.

4 I return to a role that I had many years
5 ago as a trial judge, 18 years working as a trial judge.
6 I often refer to the years back when I was a real judge,
7 so this is a return to -- to that role in ways that I
8 did have before, but I must say in a case like this,
9 I've never had before. I've never been a special
10 master, although I've appointed one or two in my years
11 as a trial judge as a district judge. I confess, I'm
12 not an optimist my nature, so I won't indulge the
13 proverbial notion that third time's a charm, but I will
14 in fact say I'm the third special master in this case.
15 What I promise to do today and at other junctions that I
16 will listen carefully and try hard to learn and keep in
17 mind the extraordinarily valuable interest that are at
18 stake here, and I'll take into account all the
19 meritorious arguments from the parties and from the
20 amici that have been proffered so far and that are in
21 the record so far. I may have suggested to you already
22 through one of the -- one of my outreaches to you in
23 suggested areas that I ask that you address that just
24 the vocabulary of this case is -- is new to me, and some
25 of the usages actually are not what one -- are not one I

1 might expect from traditional plain meaning, but in any
2 event -- oh, all right. I'm told you may not be hearing
3 me as clearly as -- as I would want so I'll move the
4 microphone closer. My first job many, many years ago
5 was radio and so -- but it was beyond the crystal set
6 age of radio. I am accustomed to a microphone but not
7 always working well with microphones in a courtroom.

8 The language. So I hope that in your
9 tutorials to me, you will explain language where you
10 think it's -- where you think it's important or unclear
11 and hope that you will indulge me in my questions where
12 I have some question. I have no experience with water
13 rights so this is a completely new area for me, as
14 you're probably aware. I'm from the east. I've grown
15 up in the east. Water is not a problem in -- in the
16 east. Water quality is not a problem. The quantity of
17 water has not been a problem. So I've not had that kind
18 of experience. I think my firm represented a Water
19 Authority at one time. Again, not a -- not a water
20 usage problem. I personally represented a municipal and
21 regional sewer authority, but I don't think that's going
22 to be of any assistance to -- to our inquiries here. So
23 the terms of art, the science, the hydro-geology is all
24 going to be a learning experience for me so my
25 expectation is as I've laid it out to all of you in how

1 -- how you can help me. I hope that the list of points
2 I previously provided may also be helpful to you in
3 indicating to you what I hope to learn from today's
4 experience. Today's experience is necessarily, and in
5 my judgment, necessarily a face-to-face work. We will
6 undoubtedly be required to -- to use distance, to use
7 various platforms that provide for distant appearances.
8 As an old trial judge, trial lawyer, there is no better
9 way to really get to know the people before you, to
10 assess witnesses and their credibility than to actually
11 see them face to face. I'm very proud of the fact that
12 during COVID, my circuit, the third circuit, was the
13 only circuit in the country to continue to hold in-court
14 oral arguments. It didn't mean that all three judges
15 were there. It didn't mean we required counsel who were
16 uncomfortable with the circumstances to be there, but we
17 were there in one form or another, and we were there
18 because of the importance we attach to this kind of
19 contact with counsel.

20 I -- I want you-all to know certainly I'm
21 aware of why we're here and what the Supreme Court ruled
22 in June. I have -- what I want you to know is not only
23 what I don't know but also what I've not done. I've not
24 read the settlement -- settlement agreement, the prior
25 settlement agreement, which was not agreed to by the

1 United States. Invariably certain references to it have
2 come to my attention in my research, and it may be that
3 none of you have a problem with that. Again, as an old
4 trial judge who will hear as closely as possible, even
5 though I'm not required to Rules of Civil Procedure as
6 well as the FREs here. I did not want, in deference to
7 Rule 408 of the FREs to be -- to be looking at something
8 that simply all of you didn't agree to. So that -- that
9 is the background, to the extent that you feel that it's
10 relevant and no one has an objection to it, I can
11 certainly hear about it.

12 This is not a Rule 16 conference. It
13 certainly has -- it has the feel in some respects of a
14 Rule 16 conference. I hope we accomplish more than
15 that. We're not going to be, today, ruling on the
16 discovery schedule. I realize it may come to that. I
17 can't -- I'm not asking for your sympathy, but I can't
18 state it more emphatically how daunting it is, not only
19 that I feel woefully out numbered here, but besides
20 that, my chambers currently has 46 banker boxes of
21 transcripts and exhibits, and I have long analogy on
22 judge's chambers to a small law firm, a very small law
23 firm. So if you can imagine just the -- the amount, the
24 volume of work that rests there in my chambers back
25 east. I am well aware of the task ahead of me.

1 As I've indicated to all of you, I'm
2 looking for your presentations to be descriptive, to
3 make reference to what's already in the record, not
4 necessarily to inferences that the special master should
5 draw. I'm interested more in the whats and the wheres
6 than I am in the whys if that doesn't sound too at-need
7 an expression, and I do want all of you to know that I
8 will be, at the conclusion of today's -- today's
9 presentations, be directing a -- a return to discussions
10 in mediation in this matter. I'm not going to allow us
11 to proceed any further with what remains to be done
12 relative to trial until there has been another attempt
13 at mediation of the claims that are here and will make
14 claim to me as we proceed today what those claims are.

15 Finally, let me just say that the prior
16 master, Judge Melloy, is an old friend of mine, federal
17 judiciary is actually a relatively small institution.
18 We served together on the special facilities committee
19 in the district conference of the United States so I
20 know him well, but we -- I want to assure you that we
21 have not discussed the case in any sense other than the
22 logistics of all of this. That in and of itself is an
23 area of significant challenge, but I do commend my
24 friend and colleague, Judge Melloy, for -- for his
25 efforts in this case in the past years. He has since

1 assumed inactive status as a federal judge and
2 appreciate the advice he's rendered me, again, just the
3 fact that we're in Denver because he had indicated that
4 at one point, Denver was a location for at least one
5 stage of these proceedings.

6 So without any more ado from me, let's turn
7 to the purpose of today, and that is the presentations
8 of not only the Compacting parties and the United
9 States, but also the presentations that will be offered
10 by a number of our amici. The order in which we will
11 proceed will be to hear from the State of Texas, and I
12 believe anyone and everyone -- correct me if I don't
13 pronounce your name correctly, Mr. Somach.

14 MR. SOMACH: Somach.

15 JUDGE SMITH: That's like Sumac, the tree.

16 MR. SOMACH: Well, or stomach without a T.
17 There's lots of ways that --

18 JUDGE SMITH: There's actually ways of
19 remembering it is without a T. So if I do say stomach,
20 you'll forgive me.

21 MR. SOMACH: Not a problem.

22 JUDGE SMITH: All right. Please, it's your
23 turn.

24 MR. SOMACH: If I might, Your Honor,
25 perhaps I can introduce some folks on the Texas team

1 that we've got here. My name is Stuart Somach, without
2 the T, and I am lead counsel -- in fact, I've been lead
3 counsel for the State since we filed the Complaint back
4 in -- well, the petition with the Court back in 2013.
5 With me at counsel table are Kellie Billings-Ray. Ms.
6 Ray -- Billings-Ray is the Chief of the Environmental
7 Protection Division of the State Attorney General's
8 Office. Next to her is Mr. Carl Meyer, who is her
9 deputy chief. Back in the -- the jury box is -- is
10 Wesley Williams, who's with and in -- in Ms.
11 Billings-Ray's office. From my firm -- my firm is
12 Somach, Simmons & Dunn. We have offices in Sacramento,
13 and here actually in Bolder, Colorado, is Theresa
14 Barfield and Sarah Klahn. I also want to introduce
15 Mr. Bobby Skov who is in the gallery. Mr. Skov is the
16 Texas Rio Grande Commissioner, and you asked a -- one of
17 your questions that you posed to us was whom we report
18 to or what that relationship was. The way it works --
19 first of all, I have a great deal of authority myself
20 under Texas law and my contracts with the State of
21 Texas, but I obviously interact very closely with the
22 Attorney General's Office. In various times, we've had
23 people all the way up to the assistant to the attorney
24 general involved in -- in the negotiations, particularly
25 in terms of mediation. So the Attorney General's Office

1 is one of the areas that we have constant contact with
2 and been involved in all the discussions and mediation
3 discussions and so forth. Mr. Skov is the Rio Grande
4 Commissioner for Texas. In some respects, he is the
5 direct client. He has been appointed by the governor in
6 that position, and he -- he serves pursuant to -- to
7 Texas state law. Mr. Skov and I also report to the
8 Texas Commission on Environmental Quality, the Texas
9 Water Development Board, which are the two agencies that
10 address water issues within Texas, and then Mr. Skov and
11 I have also been in contact at various times with the
12 governor's office. So every time we have made
13 commitments to this -- this case, we have gotten
14 clearances in all of those places that I'm talking
15 about, and that's the way we'll proceed now. The good
16 news is -- is we have easy access to those places, and
17 this case is of significance to the State of California
18 -- State of Texas, also. With your permission, the
19 states, the Compacting states, Texas, New Mexico, and
20 Colorado, have combined a presentation for you, and
21 we'll go back and forth a little bit. I have been
22 tasked with introducing that, and what we'll do is, in
23 fact, provide you with a tutorial that -- that you asked
24 for, and that's the way we looked at it. I also was
25 interested in your statements because invariably, some

1 advocacy will creep into our tutorial. That's almost
2 impossible to not do that.

3 JUDGE SMITH: It would be impossible, yes.

4 MR. SOMACH: We'll try to keep it at this
5 level (indicating), though, as opposed to grinding at
6 it. What we're going to do, though -- you -- you've
7 alluded to the broad amount of materials that are out
8 there in terms of getting ready for that, and all we can
9 ever do here is provide you with an overview of what is
10 a complex case that spans -- you know, I was retained
11 and drafted the complaint in 2012, so it spans over a
12 decade of -- of intensive litigation, and what we have
13 here is motions and other legal briefings that have
14 occurred. We've had orders of the prior special
15 masters, which are very informative, not just on the
16 legal issues, but also in terms of some significant
17 background materials and -- and those are obviously
18 available for review. We'll try to talk about some of
19 those things as we move forward. The -- the -- the
20 completion -- you mentioned discovery. That'll be one
21 of the issues that we'll want to talk to you a little
22 bit about as we proceed with this. We are of the
23 opinion, as we expressed in our status report, that
24 discovery is closed, that all the expert disclosures
25 have been made, and we really were at the ready for

1 trial when the states came together after mediation and
2 came up with -- with what we submitted to -- to the
3 Supreme Court, which was denied because the United
4 States had -- had not -- not agreed to it, and that they
5 should have their day in court -- in court. And we'll
6 talk more about that. We want to talk a little bit more
7 about the status of -- of this case at that point that
8 we filed the motion.

9 There was, of course, a Phase 1 evidentiary
10 trial. We'll talk a little bit about the phasing, how
11 that came -- came about, how the bifurcation of remedy
12 and -- and liability came about. And in response to one
13 of your specific questions that you asked, the
14 Compacting States agree that that factual record that
15 was made in the -- in that Phase 1 trial, as well as,
16 quite frankly, some of the prior legal decisions,
17 particularly on summary judgment, are available to you
18 in terms of making findings. There's, in our view, no
19 limit on your ability to rely upon that and make
20 determinations based upon that.

21 In addition to everything that's come
22 before, we have two Supreme Court opinions, which dealt
23 with more procedural issues, but certainly they dabbled
24 in the discussion of other things. There is, also, the
25 briefing on the motions with respect to what was the

1 consent decree. And I'll just say now that -- that
2 we're no longer calling it a consent decree because it
3 can't be that, but it is the proposed remedy that --
4 that we will be presenting to you. So I'll a bit later
5 talk a little bit about it. It's complex itself and so
6 I'm only going to give you a -- and will be subject to
7 expert testimony, and I'll just give you an overview
8 just so you get a feeling for what's involved there.

9 And then, of course, you've got what will
10 come -- not only do you have everything I just talked
11 about, which happened. You've got everything that's
12 going to happen. You know, you're going to have a trial
13 on liability, remedies, and the materials that will
14 present there. We'll attempt to cover all of this
15 stuff, and notwithstanding our combined presentation,
16 there's probably no question you could pose that I can't
17 answer since I've been involved in everything from the
18 beginning, and the same is true with New Mexico's lead
19 counsel, Mr. Wechsler, and Colorado's lead counsel,
20 Mr. Wallace. And so you shouldn't -- just because one
21 of us is up and a question, you know, arises, just don't
22 worry. One of us can answer it without any question. I
23 just -- you know, we do -- by combining it, we do
24 present a little bit of a problem, make sure you're
25 asking the right person. In a sense, we're all the

1 right person.

2 JUDGE SMITH: I certainly assume that there
3 is actually an institutional memory among you, and, in
4 fact, all of you who have worked on this case since its
5 filing. In fact, I've read, just over the weekend, just
6 to get a flavor, among other things, the opening
7 statements when trial began, and you began by
8 apologizing, in effect -- in advance if you repeated
9 anything and said I've been at this since 2012 so I
10 can't tell sometimes when I'm repeating something.

11 MR. SOMACH: I will tell you, you know, I
12 will be candid and say I had no intention of being here.
13 Judge Melloy and I, I think, are about the same age, and
14 I -- and when he decided that enough was enough, I
15 thought, I'm right with you, and my wife was well ahead
16 of him. But here I am.

17 JUDGE SMITH: Your situation is different.
18 I'm just a few years younger, and my wife doesn't want
19 me to leave and doesn't want me back in the house.

20 MR. SOMACH: Well, I didn't necessarily say
21 that my wife wanted me in the house. There are a lot of
22 tasks that I could be doing now as opposed to doing
23 this.

24 We do have a PowerPoint presentation, and I
25 -- I assume it pops up there.

1 JUDGE SMITH: I have a binder, and I have a
2 screen.

3 MR. SOMACH: Okay. I can't see anything
4 here so I'm going to stick to the binder for a while
5 here. What -- what I want to do is just kind of
6 indicate to you and provide an overview of -- of what
7 we're going to be talking about and basically who will
8 be doing the -- the talking. First, we're going to
9 provide -- or Mr. Wechsler, actually, will provide and
10 address background, including geography, how the various
11 facilities are, where they're located, how things
12 operate, as well as -- and you may have read this in
13 some of the materials -- the 2008 Operating Agreement,
14 which -- which will be discussed at -- at great length,
15 I'm sure, by the United States and the amici, but -- but
16 it is an issue -- an essential issue in the case.

17 Mr. Wallace will then provide an overview
18 of the 1938 Compact.

19 Are you following me, if I --

20 MR. WECHSLER: I'm following you.

21 MR. SOMACH: Okay. And he will provide an
22 overview of -- of the '38 Compact, which, of course, is
23 at the heart of the litigation. That's what the
24 litigation is all about is that Compact.

25 JUDGE SMITH: I realize that's where things

1 emanate from. It's probably worth saying at this
2 juncture so everyone involved hears me on this, maybe I
3 will have some kind of epiphany along the way and be
4 able to see more in the Compact than I see so far, but I
5 read it numerous times and I can't say that it has been
6 terribly helpful to me in terms of going forward,
7 especially in a menial sense but also in terms of
8 establishing liability. It's a pretty spare document
9 from my --

10 MR. SOMACH: It is. And, of course, that's
11 the reason for the litigation, you know, is its lack of
12 clarity, particularly about what happens once water is
13 -- is put into Elephant Butte Reservoir.

14 JUDGE SMITH: It's not forward-looking. I
15 mean, as a judge used to basically contractual
16 litigation, we're not looking at -- at a contract in the
17 usual sense here, not only because it required approval
18 of Congress and, therefore, takes on the status of the
19 statute, but it just is devoid of much help
20 substantively to me and I hope that some of you can
21 provide me with some direction. But trying to figure
22 out what that ancient document means has been an
23 obstacle so far.

24 MR. SOMACH: I will say this that I -- in
25 passing because I'm -- I'm -- Mr. Wallace will go into

1 more detail in this, as will Mr. Wechsler, but -- but
2 obviously it's that -- that ambiguity that's left about
3 what happens in -- in the situation that is postulated
4 here that's the subject of the litigation. The only
5 thing I wanted to say was the first special master's
6 report grappled with a lot of that, as did Judge Melloy
7 in both his summary judgment order as well as his
8 report. So at -- at -- and they were well written, you
9 know, and they -- they reached some conclusions on these
10 issues. And going back to that question, we think you
11 can, if you desire to rely upon those -- those
12 assistance in terms of helping to clarify what -- what
13 they've both found were ambiguous, also.

14 After the -- Mr. Wallace talks about the
15 '38 Compact, I will address the background of -- of the
16 litigation, then Mr. Wechsler will address principles
17 that we believe have been established in the litigation
18 to help, you know, create a foundation or anchor,
19 perhaps, based upon everything that's come before, then
20 I'll provide an overview of -- of our proposed remedy,
21 you know, of what we would like to present at trial,
22 then Mr. Wechsler will describe the Compacting States'
23 procedural proposal, and that's important, that's really
24 fundamental to moving forward, and then I will summarize
25 issues that are remaining to be decided, and then I --

1 we've prepared a comparison, a little bit of what was in
2 the United States' status report and ours, and I'd just
3 like to go back and just kind of clarify anything that's
4 there.

5 Also, at that point in time, we'll talk a
6 little bit about mediation. We're all in favor of
7 mediation. We believe that -- that -- that mediation
8 with Judge Boylan, as opposed to on our own, is -- is
9 essential, and that responds to a question that you
10 posed, and it was Judge Boylan in that mediation,
11 actually, that allowed us to get to where we did because
12 when we started that, Texas was sitting, you know, on
13 that side of the table, and, now, we are linked with the
14 other Compacting States, which -- which we think is a
15 good thing, that that's exactly where we should be in --
16 in concert with the other states who have entered into
17 the Compact.

18 JUDGE SMITH: Well, I am directing
19 mediation.

20 MR. SOMACH: But, I think, you know, the
21 issue that we'll want to talk a little bit about is we
22 would like to also proceed with the preparation of -- of
23 this litigation for trial. So we'll talk more about it,
24 but I did want to highlight that now because we have no
25 problem and we will bring -- Mr. Skov will be there, the

1 folks from the attorney general will be there, I will be
2 there. We will work hard to try to provide a
3 resolution, but -- but we are concerned that -- that we
4 not have the repeat of stay, after stay, after stay that
5 was urged by the United States, and quite frankly,
6 opposed strenuously by Texas, that led us to the fact
7 that we're now so far down the road in terms of years of
8 litigation.

9 JUDGE SMITH: Well, let me -- let me be
10 very clear, and I should have said this in my
11 preliminary comments. I am very much a believer in the
12 role of managerial judge, as that term has come to be
13 their own back in the 1980s, early 1980s, both in
14 scholarship and in practice, and while we are not bound
15 by it, we will be -- I say, "We," I mean all of us will
16 be bound very much by the language and policy behind
17 Rule 1 of the Rules of Civil Procedure, which is to move
18 forward efficiently, effectively with a view toward
19 accomplishing the end of this -- of this proceeding. So
20 I will not be countenancing any delays, which I think
21 are -- are unnecessary. Let's put it that way.

22 MR. SOMACH: You also asked Mr. -- the
23 State of Colorado explain their position so at the end,
24 Mr. Wallace will articulate that position for you.

25 I'd like to kind of summarize using another

1 slide. What we believe the remaining issues are, and
2 we're going to come back and talk about those
3 specifically, but in a way of not hiding the ball,
4 because the presentation will go on for a while, these
5 are the issues that are up front in terms of the
6 questions you've posed. As between the states,
7 liability under the Compact based upon what we'll
8 describe to you as a D2 baseline, we believe it's been
9 established, that there are no liability issues among
10 the states, that the State of New Mexico has conceded
11 liability. We will -- we will tell you here and commit
12 on the record that Texas and New Mexico are dismissing
13 their damage claims, and we will also file a document
14 with you to -- to confirm that. Once that happens, that
15 takes care of the liability, and I'll talk a little bit
16 about questions later that you asked about whether duty
17 has been established and whether there's been a breach
18 of that duty by -- by New Mexico.

19 So as between the Compacting States, our
20 view is there -- there's nothing left -- left to try
21 with respect to liability, and that is why we have urged
22 a combination of liability with remedy because our view
23 is having established liability, what we need to talk
24 about next is so what are we going to do to ensure that
25 that is fixed, so that -- so that the -- the breach of

1 Compact doesn't occur prospectively into the future. So
2 the question there is, number one, what is that remedy,
3 and we'll put on expert testimony to explain that to
4 you; and number two, the fundamental question is whether
5 that's consistent with Compact. You've alluded to the
6 fact that that'll be an interesting explanation, but --
7 but we believe that we can explain to you why it is.
8 And I'll -- when I do the overview later on, I'll give
9 you some idea of what we're talking about. That, of
10 course, at trial is what the Supreme Court said needed
11 to come back for trial, and I don't want to begin to
12 explain what the United States' issues are distinct from
13 what the Texas issues were, but there's an argument
14 about the '38 condition. There is an argument about the
15 treaty. Those are at least the arguments that were made
16 to the Supreme Court. That was in all their briefs.
17 That's what the Supreme Court talked about. And then,
18 of course, the United States proposed a remedy, whatever
19 that may be. I'm going to state this, you know, in all
20 candor, outside of what the Supreme Court said, it would
21 be helpful to get more clarity on what the United
22 States' position is about the issues that need to be
23 litigated in a liability phase. We know that it's the
24 '38 condition, what the baseline is, and we know somehow
25 it has something to do with the treaty, but because

1 there have been no expert disclosures by the United
2 States addressing either of those issues, it's difficult
3 for us, after all of the discovery that was done, all of
4 the disclosures made, to know exactly what they're
5 talking about in terms of -- of those issues.

6 Secondly, and this is the last line I'll
7 talk about, and then I'll turn this over to
8 Mr. Wechsler, are procedural issues. The trial actually
9 was scheduled without the notion of any pre-trial work
10 that was necessary for January 17th, 2003 -- '23, and as
11 I indicated to you, we had been mediating at that point
12 for about a year and we had had a March trial date, then
13 an October trial date, and we didn't believe, State of
14 Texas, that agreement would be reached and so we kept
15 arguing to establish trial dates as we moved forward
16 that we were ready for trial, there was no -- no delay,
17 that was -- was -- was necessary, and the United States
18 and New Mexico and Colorado kept urging continued stay,
19 continuation of -- of the trial date, which -- which
20 occurred, right up until December when -- I think it was
21 December, but I'll let you know in a minute here, but --
22 but it was -- it was the trial date right before or
23 right at that point in time before we reached the
24 Compacting States' agreement, and, again, I urged the --
25 the -- the Court, Judge Melloy, to issue a trial date,

1 which was January 17th, 2023, and if you look at the
2 transcript -- and we'll talk about this -- there was a
3 great deal of discussion about how we were all ready for
4 trial, how many witnesses, no further disclosures, all
5 -- all of that. So our -- our view is what the Supreme
6 Court did was deny the Compacting States' motion.
7 That's what -- that's the final words, and, you know,
8 because there was no trial, you know, firemen case says
9 you can't have an agreement without the party,
10 therefore, the motion of the States is denied. That
11 means we're just back now to where we were. We were
12 ready to go to trial. Our procedural view is that we
13 should go to trial as early -- as early as possible.
14 We'll talk about the two proposals we have, one which we
15 believe to be the right proposals where you combine
16 remedy and liability and just get done with -- with the
17 case, at least the -- the trial part of the case, or if
18 we go liability only, and if it's liability only --
19 only, as we will indicate, we think we could -- we're
20 ready to do that by the end of the year to get it all
21 done, and then we can look forward to remedy.

22 As I said, Mr. Wechsler will talk in more
23 detail about how we arrived at that and -- and all of
24 those things. So I'm done. Jeff, if you're ready.

25 JUDGE SMITH: Thank you, Mr. Somach.

1 MR. SOMACH: You're welcome.

2 MR. WECHSLER: Good morning, Your Honor.
3 Jeff Wechsler for the State of New Mexico. I'll also
4 introduce some of our counsel. At counsel table, we
5 have Lisa Thompson from Trout Raley. We also have here
6 John Draper from Draper & Draper. You asked who I
7 report to. I report to the New Mexico Attorney General,
8 as well as the -- the State Engineer, the Office of the
9 State Engineer. So we have here the chief deputy
10 attorney general, Mr. James Grayson, and the general
11 counsel for the office of the state engineer, Nat
12 Chakeres. We also have the state engineer herself here,
13 Liz Anderson, who is also the Rio Grande Compact
14 commissioner as well as the director of what we call the
15 interstate stream commission.

16 JUDGE SMITH: And I also read over the
17 weekend that the attorney general himself shared a time
18 opening at the beginning of trial.

19 MR. WECHSLER: Yes, that's absolutely
20 correct, Your Honor. So it's very important to the
21 State of New Mexico. So hopefully you have the slides
22 there. I'm going to try and rely on those slides
23 relatively heavily. And first thing is just an
24 introduction of what this basin looks like. Here, what
25 you're seeing is an outline of the Rio Grande Compact

1 area. So the Compact apportions water amongst the three
2 states. First, it apportions water to Colorado.
3 There's a gauge near the state line, and depending -- as
4 well as up the basin, and depending how much water
5 passes those gauges, Colorado must allow a certain
6 amount of water to pass into New Mexico. There's been a
7 gauge in New Mexico a little bit north of Albuquerque
8 that's called the Otowi gauge. A certain amount of
9 water passes that gauge, and based on the amount of
10 water that passes that gauge, New Mexico has to deliver
11 water into, now, Elephant Butte Reservoir, which you see
12 down at the bottom. If you could one below it,
13 hopefully you're seeing a closer-up view what's
14 happening below Elephant Butte Reservoir. As Your Honor
15 indicates, there's not a lot in the Compact describing
16 what does happen below Elephant Butte Reservoir. I'll
17 point out a few things. Mr. Wallace will, as well.
18 What I do think it's important in your discussion about
19 that is to understand that early on in the case, New
20 Mexico filed a motion to dismiss on exactly that
21 grounds. Our point was what the Compact requires us to
22 do is to deliver water into Elephant Butte Reservoir,
23 and from there, the normal background way that water is
24 divided under the Compact -- under reclamation
25 principles, that's what takes hold, and that's what was

1 intended. But that theory was rejected. Our motion to
2 dismiss was denied. What the then special master
3 Grimsal and the Court ultimately confirmed is that the
4 water -- the Compact itself does apportion the water as
5 among the three states and -- and, therefore, the -- the
6 Compact tells us Texas must receive water and exactly
7 how much water that is. Now, as to those provisions
8 that I would point to, I'd point to the Compact tells
9 you that there must be a normal release of 790,000
10 acre-feet, and we know that that normal release is then
11 intended to provide water to all of the irrigated
12 acreage because the Compact in Provision 1L tells us
13 that releases are for irrigation demands, and then we
14 learn throughout history that what has happened is we
15 know that a normal release of 790 can provide a full
16 supply, that is fulfill the objective of the -- of the
17 project, provide all the lands with a full irrigation
18 supply with a baseline of D2. So that's how we arrive
19 at our baseline.

20 Turning then to the next slide, this is
21 just a picture of Elephant Butte. A couple points that
22 we would make here, and that is water is stored in the
23 reservoir there where it's divided by reclamation
24 according to their sort of principles. It's undisputed
25 that reclamation must follow the Compact and apportion

1 the water in the way that the Compact -- or divide the
2 water, I should say, in the way that the Compact
3 intended. It's also important to understand that really
4 all orders, when -- when downstream users are ordering
5 water, the evidence at trial showed that all of those
6 orders are always met. There's never a time that
7 they're not met. So really what we're talking about is
8 how much water, how big is the pool in the reservoir
9 that must be divided. And then --

10 JUDGE SMITH: The baseline?

11 MR. WECHSLER: The baseline has to do with
12 that level of groundwater pumping that can occur that
13 can still allow the project to complete its -- its
14 intended purpose of providing a full supply.

15 JUDGE SMITH: That remains the kind of
16 elusive holy grail here, isn't it?

17 MR. WECHSLER: Well --

18 JUDGE SMITH: Whatever the baseline is,
19 what's it mean?

20 MR. WECHSLER: That's correct. That's the
21 primary issue that remains in the case. As Special
22 Master Melloy indicated, he said there's certainly an
23 indication that the states were allowed to use water
24 subsequent to 1938 in terms of groundwater pumping and
25 that it remained to be seen exactly what level of

1 groundwater pumping was allowed that caused material
2 interference to the delivery of Texas' apportionment,
3 and what we say, what the Compacting States all say is,
4 well, that's a D2 level. The D2 amount that was
5 actually grandfathered in by the -- by Reclamation and
6 all of their actions that I'll explain in a moment, and
7 that that allows this normal release that the Compact
8 contemplates and allows a full supply to be provided.
9 And, again, these are all -- originally, all of those
10 determinations, those calculations were done by
11 Reclamation, by the United States.

12 You had asked in your -- your questions
13 about when is the best time to take a basin tour. There
14 is some flexibility --

15 JUDGE SMITH: And I do very much want to do
16 that subject, of course, to everyone to schedule and
17 weather. But I do very much want to see, again, on the
18 spot, just what is there and understand better how it
19 works on the ground.

20 MR. WECHSLER: There's flexibility. I'm
21 sure everybody can accommodate your schedule. The best
22 time to be there is when water is flowing obviously.
23 What I'll give you is -- is some indication as to when
24 water flowed this last year in 2024. So I understand
25 that water began flowing in -- in April, but wasn't

1 fully on in the New Mexico district until June and so
2 that gives you some idea about when it might be best to
3 visit.

4 JUDGE SMITH: Right. And there has been a
5 suggestion that the springtime would be the best time to
6 go.

7 MR. WECHSLER: Yes, Your Honor. That's
8 correct.

9 Turning then to the next -- the next slide,
10 and this is just under -- important to understand sort
11 of the relative rights, and that is that the -- the
12 project water rights are defined by the state law.
13 These are long standing principles that are in a number
14 of Supreme Court cases, and there's nothing, as you have
15 read in the Compact that alters or changes any of these
16 principles. This is how Reclamation obtains its water
17 rights is through the states, through the state
18 adjudications. That's Section 8. That's the McCarran
19 Amendment. Those principles are not at issue here. And
20 pursuant to that, those provisions, the United States
21 has actually had parts of its project rights defined
22 already. So in New Mexico, there's an ongoing
23 adjudication, and that adjudication has made a few
24 important things that I'll just point out. The first
25 one is Reclamation originally in the 1950s determined

1 that a full supply on a per-acre basis was 3.024
2 acre-feet per acre. That's the maximum amount that any
3 acre is allowed to take. And in the New Mexico
4 adjudication, as it was looking at a project right, it
5 confirmed that in -- in the provision proceeding called
6 Stream System 101. It said, yes, the maximum amount of
7 surface water is that amount that Reclamation determined
8 at 3.0241, but it also said that there is conjunctive
9 use allowed and that is that groundwater is also allowed
10 on acres in New Mexico above the surface water. The
11 important thing about that is the United States
12 participated, was a litigant in that -- in that case,
13 and there was a settlement there that the United States
14 did not oppose.

15 The other important thing that was decided
16 in that -- in that adjudication pursuant to Reclamation
17 Act Section 8 is that the United States does not have a
18 groundwater right and so that was litigated before the
19 adjudication court and there -- there's a decision,
20 subject to state appeal still, but the decision
21 currently standing is that the project is only entitled
22 to surface water and not groundwater.

23 JUDGE SMITH: So that litigation is still
24 pending in a sense that there's an appellate process.

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

1 yes.

2 MR. SNODGRASS: Your Honor, if I might
3 object, we're getting into lower Rio Grande adjudication
4 issues and not Compact issues. This is far outside the
5 matters of this proceeding.

6 JUDGE SMITH: For my purposes, I don't
7 think so. I'm only hearing -- that's why I just
8 inquired about the pendency of other litigation. So if
9 -- if we do get into that, certainly I would caution
10 against it, but so far I don't see that. I'm not
11 hearing that.

12 MR. WECHSLER: We'll try very hard to keep
13 it focused on the Compact. The second thing to
14 understand is that the project water right actually was
15 also litigated in Texas. There's an adjudication that's
16 complete in Texas. It was agreed to by the United
17 States. And the one important thing I'll point out
18 there is that the amount that was adjudicated in Texas
19 that is a maximum of 376,000 acre-feet. Now, I'll --
20 I'll point it out to you again later, but I'll ask you
21 to remember that amount because that's the maximum
22 amount that can be -- that's divided under what we call
23 this D2 method that the United States originally
24 developed and so we think that that adjudication is also
25 very consistent with the Compact.

1 JUDGE SMITH: Let me be clear. Again, what
2 I'm hearing is a recitation of historically what has
3 occurred. If at any point there's a departure from
4 historic recitation, then we may be in an area that is
5 inappropriate for me to hear. Certainly because of the
6 United States will speak in a while, they can also
7 counter anything they've heard that they think --

8 MR. WECHSLER: Understood.

9 JUDGE SMITH: -- is either inappropriate or
10 inaccurately represented.

11 MR. WECHSLER: Understood, Your Honor.

12 I'm going to turn then to the next slide,
13 which really starts to talk about -- we're going to talk
14 about the operations of the project over four years, as
15 it's very important, and Judge Melloy indicated that
16 understanding that and -- and what occurred, both
17 before, during, and after the time the Compact was
18 entered is very important to understand how the Compact
19 is to be interpreted, and, in fact, that's a number of
20 United States Supreme Court precedents that say exactly
21 that.

22 So the first period we want to talk briefly
23 about is this period 1903 to 1950. So this is during
24 the time that the project first came into operation.
25 You can see there that water first was released in 1915,

1 and -- and there were some important things that were
2 determined back then that helped explain what the
3 Compact apportionment is. The first one is that there
4 was an understanding that the maximum number of acres --
5 and this was determined pre Compact -- was 88,00 acres
6 in New Mexico and 67,000 acres in Texas, so that gives
7 you a total of 155. We've done the math. That ends up
8 being 57:43. That's where we get that division. The --
9 the expect -- and the division is further helped to
10 understand that the way that those -- the project was
11 operated is that every acre was entitled to the same
12 amount of water, so that is when you get the -- the
13 water divided below Elephant Butte, now you can say,
14 okay, it's 57:43.

15 The -- also, during this time period, New
16 Mexico and Texas created the irrigation districts.
17 Those are by statute. I'll point out that it was
18 conceded at one of the very first arguments in this case
19 before Judge Grimsal that those districts are a creature
20 of statute that could be changed by Texas or New Mexico
21 going forward.

22 I'll turn to the next slide, which is
23 talking here really about the project authorized
24 acreage. But there's a broader principle here, and that
25 is that in 1938 when the Compact was entered, what the

1 states knew that they wanted to do was to protect the
2 project and ensure that there was a full supply and that
3 the project could fulfill its -- its purpose of
4 providing a full supply to all of its lands. But
5 exactly how much water was necessary to do that simply
6 wasn't known. There were a lot of things that were not
7 known, but the illustration on this slide just shows you
8 that, in fact, the -- the lands within the project
9 weren't even fully built out until some time in the
10 1940s, and there was this 3 percent extra that didn't
11 get reached until closer to the 1950s, which is to say,
12 you know, while the -- the states knew that they were
13 intending to protect the operation of the project, they
14 didn't know the exact details of how much water could
15 reach Texas or as important to this proceeding, how much
16 groundwater could be pumped and still allow the project
17 to accomplish that purpose with that normal release that
18 the Compact identifies of 790,000 acre-feet.

19 There were a lot of other things that were
20 also sort of unknown and that were considered to be
21 flexible and changing at the time. So, for example, the
22 -- in the discovery, the United States has conceded that
23 things like the crops could change or the -- the
24 cropping methods could change, and that all of those
25 sorts of things change the amount of water that's

1 actually available, but all of those things were allowed
2 and contemplated in 1938 to be -- to be changeable.

3 Turning then to the next slide, this is the
4 one that says the 1938 Downstream Contract. Again, this
5 -- this further helps you understand where that 57:43
6 split came from. So at the time, you had some -- these
7 contracts -- downstream contracts, one with the district
8 of New Mexico, one with the district of Texas, and it
9 entitled them to a certain amount of water. Now, the
10 Supreme Court indicated in its 2018 decision that what
11 the States partly intended to do was to evaluate and
12 think about those contracts as they were intending to
13 allow the project to continue to operate. Obviously,
14 you know, you can look at those contracts. Those are in
15 the record. Obviously, not all of that -- those
16 languages, the detailed provisions are -- are sort of
17 incorporated or were referenced with regard to the
18 Compact, but the important provision we've sort of
19 highlighted here, and that is that during times of
20 shortage, what's going to happen is that water is going
21 to be split 57:43. In times of full supply, because
22 each acre was entitled to a certain amount of water, you
23 also got to the same result, 57:43.

24 Turning then to the next slide, one last
25 important thing that we'll point out about this time

1 period, which is sort of that period right up to the
2 Compact and then immediately after, and what you're
3 looking at here are Compact rules that were originally
4 adopted in 1939 with exactly this language, and we --
5 we're actually showing the 2018 one, which is to say
6 that language has been in place for, you know, all these
7 many years, and you can say here -- see here that it's
8 telling the -- the states that they're free to develop
9 their water resources at will. That is, subject to
10 ensuring that what they intended with the project --
11 with the -- with the Compact, that is delivering Texas'
12 -- I'm sorry -- Colorado's delivery, New Mexico's
13 delivery to Elephant Butte, and then subject to the
14 project fulfilling its purpose, otherwise, the idea was
15 you'd be allowed to develop those groundwater resources.
16 And I'm going to show you a number of slides that also
17 sort of illustrate that, as well.

18 JUDGE SMITH: This is probably another
19 point where I interject a question that is related to
20 the language, so frequently I have encountered the word
21 "deliver" and "delivery." What does that mean in the
22 context of water? Is it from Colorado down into Texas,
23 delivery merely is a matter of flow? I mean, what --

24 MR. WECHSLER: I think it's --

25 JUDGE SMITH: And in other instances where

1 there has been a delivery of water to actually
2 historically to the farmers or users themselves, how is
3 that effectuated because the term seems a very broad
4 one, and -- and it, in fact, suggests various forms and
5 means of delivery.

6 MR. WECHSLER: Understood. And I think
7 it's a little bit broader than or has a broader meaning
8 than just the physical transport of water from one place
9 to another. This has been the subject of significant
10 briefing. I know that this was an issue that New
11 Mexico, in our summary judgment, raised. I apologize.
12 I don't have the document number or the page. Special
13 Master Melloy did address this. Part of it is obviously
14 the water has to be physically transported from one
15 place to another. Also, what I think Judge Melloy said
16 --

17 JUDGE SMITH: But does it? Does Colorado
18 deliver water to New Mexico?

19 MR. WECHSLER: It does, Your Honor, yes.

20 JUDGE SMITH: Is that not just the natural
21 flow of the Rio Grande?

22 MR. WECHSLER: Fair. It is the natural
23 flow.

24 JUDGE SMITH: So, again, that demonstrates
25 -- I don't want to use the word ambiguity, but that

1 demonstrates the breadth semantically of the term.

2 MR. WECHSLER: Understood. All of that is
3 true. It is a natural flow. Although, obviously, if
4 Colorado put in a reservoir or allowed additional uses
5 within Colorado, that water would never, even through
6 the natural flow, arrive in New Mexico. In that sense,
7 the obligation is to allow a certain amount of water to
8 arrive in New Mexico and for New Mexico arrive at
9 Elephant Butte Reservoir. But we also accept, and I
10 think Judge Melloy had indicated that there's a broader
11 term there, as well, and that is as it relates, for
12 example, to Elephant Butte Reservoir, once that water is
13 put into Elephant Butte Reservoir, it's intended to be
14 apportioned as between Texas and New Mexico, and New
15 Mexico excepts, and we have throughout this proceeding,
16 that we cannot allow groundwater pumping or any
17 additional uses that interfere with the delivery of
18 Texas' apportionment. They are entitled to that, and
19 certainly it's sort of implied in the idea of deliver
20 and delivery that Texas is entitled to receive their --
21 their benefits under the Compact, as well.

22 JUDGE SMITH: That is going more to the
23 merits here than --

24 MR. SNODGRASS: Your Honor, I was just
25 going to lodge an objection that we're getting far into

1 advocacy here.

2 JUDGE SMITH: I think that does.

3 MR. WECHSLER: Understood. I was only
4 trying to attempt to answer your question.

5 Turning then to then the next period, which
6 is 1951 to 1978, so during this period, this is shortly
7 after the Compact, during the -- the trial, the
8 historians pointed out that that's a very important
9 period because you -- you can help understand what the
10 States were intending by a Compact by looking at the way
11 they behaved. So what happened important in the 1950s
12 is then you had a very significant drought, a drought
13 that really hadn't been experienced --

14 JUDGE SMITH: Do you have some problem with
15 that? That's historical fact.

16 MR. SNODGRASS: Your Honor, just looking at
17 the materials here from this 1951 through 1978, we just
18 got these materials today. They're full of
19 characterizations of facts rather than undisputed facts
20 and to present them as undisputed facts is advocacy.

21 JUDGE SMITH: Counsel, I don't mean this to
22 sound pretentious, but in December, I will have been a
23 judge for 40 years, and I think I can pretty much
24 determine what is historical fact, what's advocacy, and
25 what is not. So, I mean, in this respect, I don't agree

1 with you, I don't think.

2 MR. SNODGRASS: Respectfully, Your Honor,
3 just looking at the -- the statement that the
4 Reclamation encouraged groundwater development. That's
5 a disputed fact. That should be reserved for the actual
6 argument phase.

7 JUDGE SMITH: All right.

8 MR. WECHSLER: One thing I will point out,
9 Your Honor, all of the things that we've put in there,
10 as you suggested in one of your orders, are all part of
11 the trial -- the first phase of trial that has already
12 occurred.

13 JUDGE SMITH: Well, of course, again, we
14 discussed the difficulty in separating advocacy from
15 just mere recitation of history here. What -- what may
16 appear in the record may also be subject to various
17 inferences, so Counsel need to keep that in mind, too,
18 as we move along.

19 MR. WECHSLER: I'll do my best.

20 JUDGE SMITH: If that's the case, then we
21 do get into argument itself.

22 MR. WECHSLER: Understood. As I said,
23 there was a drought period during this -- a significant
24 drought shortly after the Compact. And during that
25 time -- and we'll -- what we'll look at is project

1 history, and you can draw your own conclusions from
2 those, but there was a recognition from Reclamation
3 certainly that there was groundwater during that time.
4 We'll look at the exact language that the project was
5 asking water users within each state to actually use
6 their supplemental wells in order to provide water, not
7 just for themselves but to -- to others. It's during
8 this same time, too, that, you know -- well, let me back
9 up. The United States at this time was delivering water
10 all the way from the reservoir all the way to the land
11 so down the river, up the various gates, and then to the
12 actual lands where the water was going to be used by the
13 farmers. And, again, that water was -- was -- was used
14 on an equal basis, an equal amount to each irrigated
15 acre, and it was during this time period that the --
16 that Reclamation determined that a full supply was that
17 3.0241.

18 And if you look at the next slide here,
19 this is the one -- this comes from the United States
20 30(b)(6) witness, who actually confirmed much of -- much
21 of what I just told you. So I don't belabor that
22 particular slide.

23 Turning to the next slide then, this is
24 from one of the project histories, and this -- here you
25 can say -- you can see this is 1955. You can see

1 Reclamation recommending -- recognizing, and this is
2 coming from the Reclamation document, that supplemental
3 water was provided by privately owned wells, of which
4 there were at the time 1,650 of those wells. Each one
5 of those wells goes through a permitting process. The
6 United States, the evidence from below, shows the United
7 States did not object to any of those. That's actually
8 part of our request for admission that they did admit.

9 If you turn to the next slide, we can see
10 very much the same thing here. This is another year,
11 this one from 1954, and here the United States is saying
12 farmers with good irrigation wells are requested to use
13 them to the greatest extent possible, et cetera, to make
14 a supply available. There's also a number of studies in
15 the record that show that at this time, the States and
16 Reclamation certainly understood what all of this
17 groundwater pumping meant in terms of the Rio Grande
18 River.

19 The next slide, very briefly, this is --
20 this comes from the Rio Grande Compact Commission, that
21 is where the three states are making the decisions about
22 the administration of the Compact, and this is -- this
23 comes from a time in 1982 when New Mexico chose to --
24 was shutting down its new groundwater permits and not
25 allowing any new groundwater, and what you see here

1 reflected is a -- is the commissioner from Texas
2 actually saying we think that that's a mistake, that
3 those water users in New Mexico need to continue to rely
4 on their groundwater. The purpose of that is just to
5 show that this was sort of a broad understanding.
6 Again, that's an exhibit from the well. So if we look
7 at the next slide, what we can see here is what's
8 developed over these years is a very significant number
9 of groundwater wells, again, all subject to permit, all
10 un-objected to, both irrigation in New Mexico as well as
11 municipal so the cities rely very heavily on those
12 wells. The same as in Texas.

13 JUDGE SMITH: All right. This says present
14 day. Present day being when?

15 MR. WECHSLER: I believe this takes us up
16 to 2018, I believe the date on this.

17 JUDGE SMITH: Thank you.

18 MR. WECHSLER: To continue that thought,
19 this pattern is also true in Texas, as well, where they
20 rely on groundwater for irrigation as well as the City
21 of El Paso where it relies heavily on groundwater.

22 The next slide really just shows sort of
23 the concept. You had asked generally about the concept
24 of, you know, why does this matter, and what we're
25 showing here is a cone of depression. What you get is

1 that below the river, the groundwater and the surface
2 water are connected. Now, the river is actually the top
3 of the aquifer there, as it's exposed to the surface.
4 When you drill a well, you're essentially tapping into
5 that same source, and so pumping causes this sort of
6 cone of depression that's sort of the physical
7 phenomenon that occurs because of the characteristics of
8 water, and enough pumping draws down the -- the aquifer
9 levels, enough so that at some point, it can actually
10 disconnect from the river. But at any rate, it has an
11 impact on the river and reduces the overall surface.

12 Okay. So turning to the next period, which
13 here is 1979 to 2005. And so beginning in this period
14 was really marked by what we sometimes call title
15 transfer, and so what happened was there were loans
16 between the districts and Reclamation for all of the
17 facilities for the project, and during this time period,
18 they -- at the end of -- at the beginning of this time
19 period, they paid that off. So the -- the loans were
20 paid off, and the -- the facilities were being
21 transferred from -- or many of the facilities, not all,
22 were being transferred from Reclamation to the
23 districts, and what that necessitated was sort of a new
24 way of going about things. So whereas I indicated,
25 Reclamation was previously delivering water all the way

1 to the lands, now they no longer owned all of those
2 facilities, so all they were doing is delivering water
3 down the river to certain delivery points called head
4 gates of which there's three in -- in New Mexico, to
5 give you an example. And so Reclamation was looking for
6 a new method to try and figure out, okay, how much water
7 do we have to deliver to each of those head gates? And
8 what they worked on, and they figured out, was what we
9 called the so-called D2 method. Really what that is is,
10 is it takes all the data from that D2 period, which was
11 1951 to 1978, and it averaged all of that stuff, and it
12 looked at when we release a certain amount, how much can
13 we deliver to those head gates, right. So you see along
14 the X axis releases, and on the Y axis, you see
15 deliveries. There's a lot of expert testimony about
16 this, so I -- I won't go into more details than that.
17 But the important thing is when you build in that
18 period, 1951 to 1981, you're also building in all of the
19 various things that happened during that time period,
20 and one of which is you're basically building in all of
21 that groundwater pumping into the data and so this is
22 how they were figuring out exactly how much water was
23 entitled to go to each of the districts. The red is --
24 is New Mexico. That's EBID. The green is Texas.
25 That's EP No. 1. And you can see the maximum amounts

1 that they were indicating was basically 494,000-ish to
2 EBID and 376,000 to EP No. 1. Now, if you'll remember,
3 that's that same number from the adjudication that we
4 talked about.

5 And then you -- the other thing that's
6 important here to see is, okay, so that's what we know a
7 full supply is, that amount, and you can also see even
8 with that D2 level of groundwater pumping, the release
9 is less than 790. So the maximum release you get under
10 that is the Compact contemplated 790 and then you get
11 what is considered to be a full supply to -- to all of
12 the districts.

13 All right. So we can turn then to the next
14 slide. We're still talking about this period, 1979 to
15 2005, and an important thing to understand is there was
16 a number of wet years here. It was a fortunate time in
17 this basin, and so we had full supply, meaning there was
18 enough reservoir -- water in the reservoir to satisfy
19 all of the lands and satisfy this 494 and 376 all the
20 way up until 2002. And so, you know, during that time
21 period, Reclamation was using this D2 curve. It was
22 delivering water, and those were the maximum amounts
23 that they were entitled to. And during this time, you
24 also have the same amount of pumping in both states.
25 You have this sort of D2 level of pumping in both

1 states. But you still received a full supply. Well,
2 that changed in 2003 and 2004. Those were significant
3 water years. I'll explain a little bit later because I
4 think there's maybe a couple slides that will help that,
5 but this is the basis for New Mexico's concession that,
6 yes, in fact, in 2003 and in 2004, during those water
7 short years when they were still using D2 as the method
8 for allocation, New Mexico interfered with the delivery
9 of water to Texas, and we did that because what happened
10 was we had this groundwater pumping that was going on,
11 and our groundwater pumping actually exceeded the D2
12 level by somewhere between 17,000 and 22,000 acre-feet,
13 and that then reduced in those water-short years, 2003
14 and 2004, the overall pot, the amount of water that was
15 available in the reservoir, and, therefore, Texas got
16 less than what they would have but for our additional
17 pumping above D2. We therefore accept that during those
18 years we violated the Compact by not allowing that
19 additional amount to go to Texas.

20 All right. If we turn to the next period,
21 this is 2006 to the present. I mention those very low
22 supply years. So, actually, in 2005, we had another
23 full supply year. What happened in 2006 is Reclamation
24 changed the way that they divided the waters as between
25 the lands in New Mexico and the lands in Texas, and they

1 -- what I'll call this method is sort of the operating
2 agreement method, although it wasn't formalized until
3 2008 in the operating agreement. That -- that method is
4 based on D2, again, so we're about to look at some
5 testimony about that grandfathering in the level of
6 groundwater pumping. But it also -- well, it -- the way
7 it's based on D2, explain that first, is first, Mexico
8 gets its water and then the amount of water that goes to
9 Texas is based on D2 level of pumping. Whatever is left
10 goes to New Mexico, and as I'll explain here in a
11 second, that was a big concern for New Mexico because we
12 argue that a number of those depletions, a lot of that
13 reduced amount is not caused by New Mexico pumpers, and
14 we accept we're responsible for them, but it might be
15 caused by Texas pumpers. It might be caused by other
16 sources. It might be caused by Mexico, for example, and
17 we shouldn't be held responsible for that. And so that
18 was sort of the basis that New Mexico was getting
19 so-called what's left over.

20 So if we look at the next slide, that's the
21 operating agreement, the front of it. This is a
22 reclamation, it's a federal contract. It enshrines that
23 methodology I was just talking about. Now, one thing to
24 know about this operating agreement, even though what
25 it's doing is dividing the water that goes to the lands

1 in Texas and New Mexico, Texas and New Mexico were not
2 part of the negotiations, and, actually, what you got as
3 part of this case, and even before that case, is both
4 states, for very different reasons, argue that the
5 operating agreement did not provide the state with their
6 entitled apportionment.

7 JUDGE SMITH: And that was litigated?

8 MR. WECHSLER: There was a litigation,
9 that's correct, in the New Mexico district court. It's
10 stayed. It's pending before Judge Brown.

11 You can see here on this slide, one of the
12 provisions --

13 MR. SNODGRASS: Your Honor, I might object
14 to this discussion of the operating agreement. Project
15 operations are not what's at issue in this case. New
16 Mexico's Compact compliance is what's at issue.
17 There's.

18 MR. SOMACH: Challenge to Reclamation's
19 project operations. Those challenges that New Mexico
20 attempted were for lack of --

21 JUDGE SMITH: I was concerned about the
22 merits of that or even resolution. I have not at this
23 point in my stated preparation even read the 2008
24 Operating Agreement, and I'm very interested in it,
25 especially because of my concerns that I've already

1 expressed about the ambiguity provided by the turn of
2 the Compact. So I don't care to hear any argument about
3 the operating agreement, but I am interested in how it
4 fits in here. That's my interest. I'm here to learn,
5 as I've tried to emphasize.

6 MR. SNODGRASS: Understood, Your Honor. We
7 just wanted to lodge that objection as going outside the
8 scope of what this case --

9 JUDGE SMITH: Well, this is not an
10 evidentiary proceeding, as we all know. I can assure
11 you, again, based upon many years of experience and my
12 simple desire to learn history here and just what
13 certain things are, I'll figure out the meaning later of
14 what those are. I think unless you feel that I am being
15 misled, Counsel, then I certainly encourage you to -- to
16 object if you think that that's being the case. I
17 really think that objections are -- are really -- not to
18 no avail, not really apt here in this kind of a
19 proceeding.

20 MR. SNODGRASS: Thank you, Your Honor.

21 MR. WECHSLER: I will point out, also, Your
22 Honor, this same objection was raised a number of times
23 both during trial and in motion practice before Judge
24 Melloy, and he overruled that objection each time and
25 indicated that, in fact, because the operating agreement

1 controls --

2 JUDGE SMITH: But that was in the context
3 of what kind of proceeding?

4 MR. WECHSLER: Both motions to dismiss,
5 motions for summary judgment, as well as in the evidence
6 presentation.

7 JUDGE SMITH: I understand again. Big
8 difference between that and the status conference here.

9 MR. WECHSLER: Fair enough. Just so that
10 you were -- you were aware.

11 Again, the important thing here about the
12 -- this Provision 6.12, the Rio Grande Compact, here
13 it's indicating that the United States actually
14 considered this, which used a D2 baseline to be not in
15 conflict with the provisions of the Rio Grande Compact.

16 The next slide shows, as I've indicated,
17 this is just testimony from in the many, many boxes it
18 sounds like that are in your office for which I
19 apologize for our part. The -- some of the testimony
20 from U.S. witnesses that are essentially stating that
21 it's grandfathered -- grandfathering in the -- the
22 groundwater pumping.

23 All right. So if you turn to the next
24 slide, here this is sort of showing the basis for New
25 Mexico's claim that it made in this case, and it did, as

1 Your Honor pointed out, also made in a federal district
2 court case, and that is that you have the D2 baseline
3 there, which is showing the -- the line, and the problem
4 with that method is it gives New Mexico only these
5 so-called leftovers. That is it's charging New Mexico
6 for all of the depletions, whether those depletions are
7 coming from New Mexico, Texas, or elsewhere. And so
8 what New Mexico claimed was that it actually overcharged
9 the -- you know, took too much water from -- from New
10 Mexico so that we weren't getting our 57 percent of
11 project supply, and our claim was that that amount is
12 over a million acre-feet and probably saw that in the
13 opening statement that we gave. That's the basis for
14 our counterclaim. You can see that for -- in the next
15 slide, you can see that a little bit highlighted there
16 where the dotted line is basically 57:43, and you can
17 see all those years up until essentially that new
18 methodology is adopted. New Mexico was getting 57
19 percent of project supply, and after that, we stopped
20 getting 57 percent. Another graphic representation can
21 be seen in the next slide, and this is just on an
22 acre-by-acre basis where the red is the amount that
23 Texas was receiving, and blue is the amount that -- that
24 New Mexico was receiving. Again, that was the basis for
25 our claim. We believe that that claim is fully resolved

1 by the proposed index decree that the States intend to
2 pursue.

3 One last slide before I sit down, and that
4 is we also -- New Mexico also had another claim, and
5 this was again -- I think this very slide was presented
6 to Judge Melloy -- and that is, our groundwater levels
7 are dropping to levels that we're concerned will cause
8 long-term damage. And so what you're seeing here
9 basically is the -- the level -- the aquifer levels, as
10 well as the releases from project. And what you can
11 take away from that is as there's more surface water,
12 New Mexico did less groundwater pumping, and so then
13 during those years where project releases drop, New
14 Mexico is also doing more groundwater pumping to satisfy
15 those same crops. But what this shows you is basically
16 our aquifer was in equilibrium for many, many years
17 because in those years where the surface water came up,
18 the groundwater levels also paralleled that and also
19 came up. But then you can see the line there at the
20 time where we have this drop in surface water as a
21 result of this -- this new method for dividing the
22 water, now what we're seeing is those two things aren't
23 matching up. So the levels of -- where New Mexico was
24 forced to do additional groundwater pumping in order to
25 satisfy those same crops, but because of the levels,

1 what happens is the aquifer drops, but in those years
2 where the supply comes back up, our levels haven't been
3 going back up. Now, I think I can speak for Texas here
4 in saying this is also a big concern for Texas because
5 the health of that aquifer matters because that's where
6 the Rio Grande sort of passes through. And so it's in
7 both of our best interests, Texas and New Mexico, that
8 that aquifer continue to be (unintelligible).

9 With that, I'll turn it over to
10 Mr. Wallace. Thank you.

11 JUDGE SMITH: Thank you.

12 MR. WALLACE: Good morning, Your Honor.

13 JUDGE SMITH: Good morning.

14 MR. WALLACE: I am Chad Wallace with the
15 Colorado Attorney General's Office representing our
16 state in this matter. I'd like also to introduce --
17 since we're doing introductions as we approach,
18 Mr. Preston Hartman also from the Attorney General's
19 Office assisting in this case. Also in the courtroom is
20 Jason Ullmann, who is Colorado's Rio Grande Compact
21 Commissioner. Again, to answer your questions, to whom
22 do I report, I essentially work hand in glove with
23 Mr. Ullmann, who is also the Director of the Colorado
24 Division of Water Resources to advance our interests in
25 representing the State of Colorado. I also report

1 directly to our attorney general, who is very concerned
2 about the outcome of this case.

3 JUDGE SMITH: Thank you.

4 MR. WALLACE: I'm going to be talking about
5 the Rio Grande Compact, really just highlighting a few
6 of the terms you can read in the Compact and also have
7 already yourself. I'll try to hit a few of the key
8 revisions with the aim of highlighting some of the
9 questions you proposed, primarily where did we get 57
10 percent/43 percent, where is there ambiguity, and what
11 are we looking at in this Compact to try to resolve this
12 dispute.

13 JUDGE SMITH: Okay.

14 MR. WALLACE: So with that, I think we're
15 on Slide 29 of the presentation. This is the preamble
16 to the Compact. It's not a term, but I think it really
17 sets the stage for what the states were trying to do,
18 and it really just starts out at the beginning. The
19 State of Colorado, the State of New Mexico, and the
20 State of Texas are the ones who entered into the Compact
21 to equitably apportion all of the waters from the head
22 waters in Colorado down to Fort Quitman among the three
23 of them. That is the full extent as what the Compact
24 does. It's dispute about what that allocation is that
25 has now been resolved by the states, and that's what we

1 aim to implement the remedy here, to have Your Honor
2 find what the apportionments are to agree they're
3 ambiguous and to hold us to task on making sure that we
4 can make those apportionments going forward.

5 JUDGE SMITH: Very frankly, it may simply
6 reflect my own inability to understand some of the more
7 technical provisions within the Compact, but the
8 preamble, to me, said a lot maybe at the very basic
9 level, but it's straightforward statement regarding the
10 purpose being equitable apportionment is what the entire
11 -- what the litigation is all about. I assume that all
12 counsel agreed that this is, by nature, an equitable
13 proceeding that we're in, and that, in fact, that relief
14 that has been sought and that remains, based on what
15 I've been informed about the damages aspect, is also
16 equitable in nature, the history of declaratory
17 judgment, declaratory judgment is a little mixed in
18 terms of whether it is pure equity, it does have equity
19 and clearly is equity. So I'm proceeding, and anyone
20 can correct me if I'm wrong as we go forward, that in --
21 in many respects, the Supreme Court is, and I as the
22 special master, am a chancellor here for all intents and
23 purposes.

24 MR. WALLACE: Your Honor, Mr. Somach will
25 get into that later in the states' joint presentation

1 about going forward in how we want to educate you on our
2 proposal to achieve that equitable remedy in this case.

3 To get back to some of the more difficult,
4 technical questions of the Compact itself, I want to
5 turn to Article 1 of the definitions. I'm taking them
6 out of order, not to try and change the meaning of the
7 Compact at all, but I think reordering some of these
8 things helps to understand what -- how the Compact is
9 dividing this water and get specifically to your
10 question regarding ambiguities.

11 So Article 1 Section K is project storage.
12 This is simply the amount of water stored in the
13 combined Elephant Butte and not yet here identified
14 Caballo Reservoir. So it gives us a total volume to be
15 stored here. The important part in Definition K is it's
16 not talking about any operations thus far. It's simply
17 identifying the storage reservoirs, where they are, and
18 what the total amount of water to be stored in them is.

19 The next is O, actual release. That's
20 simply the release from these identified reservoirs.
21 All right. Within a calendar year, the water that
22 happens to keep going downstream. Now, in a point that
23 your Honor may find, either through other evidence or as
24 we take a tour, it's -- it's the -- this storage really
25 controls the amount of water going downstream from it.

1 It's very different, I am imagining, from any of the
2 rivers in your area of the country, where there is
3 simply not enough water to fill the riverbed all year
4 long. So when we start storing water, it has tremendous
5 effects on what it looks like downstream.

6 Definition L, usable water. This is the
7 water exclusive of credit water, and credit water is an
8 accounting term specific in the Compact. I haven't
9 included the definition here. But you'll see I've
10 highlighted terms, and it's not bolded in the Compact.
11 This is simply used as a demonstrative here. It's the
12 water that is released available -- in accordance with
13 irrigation demands. And this builds back to
14 Mr. Wechsler's explanation of water being released on a
15 programmatic basis, on an equal volume of water per-acre
16 basis. So if we look at our -- our downstream
17 contracts, which the Court has cited before, the 1938
18 contracts setting out the maximum irrigated acreage,
19 155,000 acres give or take the 3 percent. That let the
20 states know what is the total volume -- what is the
21 total acreage in play, and if we're making water
22 available to be released for those irrigation demands
23 and those demands are an equal volume of water per-acre
24 basis, we've simply set up our math problem. We release
25 water. Here's the number -- total number of acres.

1 That's where we get 57:43. It's just the amount of
2 lands in each of the respective states that math problem
3 ends up to be 57 percent to New Mexico, 43 percent to
4 Texas. So those percentages aren't in the Compact, but
5 putting these definitions together, stored water,
6 released water in accordance with irrigation demands,
7 that's how you end up with that percentage.

8 So Article II in the Compact sets out a
9 number of definitions. The -- the one that I want to
10 point out here is Article II establishes a number of
11 gauges. These are all gauges along rivers, either in
12 the Rio Grande called the main stem. That's the actual
13 main set of the river called the Rio Grande. There are
14 also a number of tributaries, waterways from smaller
15 streams and rivers that feed into the Rio Grande that
16 have gauges. These gauges measure the flow of the water
17 passing by, so that water administrators in the states
18 and the Rio Grande Compact Commission can identify the
19 flow of water, and over the course of time, a total of
20 volume of water passing. And through that, I've set up,
21 as I'll get to later, the apportionments to each of the
22 states. That's how we know where the water has been and
23 where the water is going. The important part here is
24 the we've got a number of gauges identified, including
25 above and below the federal government's Rio Grande

1 project facilities, the storage facilities at Elephant
2 Butte Reservoir and Caballo Reservoir.

3 If I could have you turn back to Slide 6,
4 please, for just a moment. If Your Honor could flip
5 back to that. You'll notice something that's otherwise
6 missing in the identified gauges, and that's a gauge
7 near Texas. If you could hit the last tab, this is the
8 tab labeled, "New Mexico - Texas State Line." If you
9 could look at that -- I don't have a paper copy. I'm
10 assuming people can see it on their screens. Let me
11 know if you cannot. In layman's terms, I'll just say
12 it's a mess. All those lines represent --

13 JUDGE SMITH: It's not a term of art.

14 MR. WALLACE: No, trying to keep it simple,
15 Your Honor.

16 There are a number of canals. You'll see
17 there's the river. There's the state line. They are
18 not coextensive. And then there are a number of canals
19 that cross the state line. That is the situation we're
20 presented with today. That's the situation the -- the
21 Compact negotiators were presented with. That's why, in
22 part, you don't see a list of gauges at the Texas state
23 line. But if we could skip back to Slide 32. The
24 Compact provides a solution for that. This is, again, a
25 continuation of a part of Article II. It allows the

1 Compacting states to establish additional gauges beyond
2 those that were already named, and when they establish
3 those gauges, they can be equipped, maintained, and
4 operated by the Commission directly or in cooperation
5 with any appropriate federal or state agency.

6 So I'll try and avoid argument, but just
7 say that this is a -- a provision in the Compact that
8 allows the states to establish additional gauges as they
9 feel necessary to measure the Compact apportionments to
10 the state consistent with the preamble and the entire
11 purpose of this document.

12 Articles III and IV on the next slide,
13 those are fairly clear. I won't spend a lot of time on
14 them, but essentially what they do is establish the
15 apportionments to Colorado through Article III. It's an
16 inflow/outflow. Again, we're using gauges. This is a
17 very technical Compact to figure out where the water is
18 going. A certain amount of water is measured coming in
19 to the major rivers within Colorado and the Rio Grande
20 Basin, and there's a corresponding outflow volume
21 measured at the Lobatos gauge fairly close to the
22 Colorado/New Mexico state line. That ends up being
23 pretty clean, because these gauges all take care of
24 water coming into Colorado and used within Colorado.
25 Essentially what we're not obligated to deliver to New

1 Mexico becomes water available for Colorado water users.
2 Article IV establishes part of New Mexico's Compact
3 apportionment. It actually does not start at the state
4 line, but as Mr. Wechsler mentioned the Otowi gauge,
5 which is some ways downstream, above the middle Rio
6 Grande project, which is a major irrigation project
7 within New Mexico measures water coming into that area
8 and then has a corresponding outflow requirement at what
9 was San Marcial gauge. I won't go into a lot of detail
10 there, but the rough locations still exist in that
11 proportionment. What we don't have in Article IV is an
12 explanation of what happens next. Your Honor asked
13 about delivery. There are several proceedings the prior
14 special master already engaged in to consider that term
15 and how it implicates the rest of the Compact. I'll
16 just leave it at the Court has already determined there
17 is a Compact apportionment to the lower portion of New
18 Mexico below this point and a Compact apportionment to
19 Texas below this point. It's consistent with the
20 definitions about providing releases in accordance with
21 the irrigation demands in the 57:43 allocation of the
22 irrigable acres within both of those states.

23 The next major point or term I want to
24 point out are a series of Compact articles that describe
25 the authorities of the Compacting states in operation of

1 the Compact, and here what the Compacting states are
2 doing is controlling where water goes, and it provides
3 them that authority. Article VI sets out the abilities
4 of Colorado and New Mexico being upstream and having
5 these obligations to send water down, as you can
6 imagine. It's a very imprecise science. We don't
7 always hit that exact target, so the Compact allows for
8 what are called debits and credits, going over or under
9 your target amount, and that -- that results in New
10 Mexico and Colorado perhaps owing more water or having
11 delivered too much water. Article VI deals with that
12 issue. An important part within that is that if water
13 is stored upstream, the Compact Commission can authorize
14 release of that storage water as being held upstream in
15 those two states. Importantly, that storage water -- a
16 significant part of that storage water is being released
17 from federally owned reservoirs. In New Mexico, one of
18 them would be El Vado reservoir. In Colorado, one of
19 them would be Platoro reservoir. Nonetheless, the
20 Compact Commission can authorize release from those
21 reservoirs under the terms of the Compact.

22 In Article VII, we skip a slide. Trying to
23 save everyone some time here unless Your Honor has
24 questions. There is an obligation to not store water in
25 the upstream portions of these states, depending on what

1 the amount of storage in project facilities is. Again,
2 this has the states essentially what we call curtailing
3 or not allowing reservoirs in the upper portions of the
4 river to store water and forcing that water to go
5 downstream. So it's, again, giving the Compacting
6 states authority on managing all the facilities within
7 their -- their boundaries in order to comply with these
8 Compact terms.

9 Article VIII is an article that came out in
10 some briefing earlier in this matter, and it gives Texas
11 and New Mexico the right to demand releases again of
12 previously stored water, this to offset debits, that is
13 under deliveries. One of the -- one of the -- one of
14 the ideas here is that under deliveries can occur if
15 instead of having water flow down the stream, the states
16 are instead putting it into storage. This goes, again,
17 to the point I was making where -- where dealing with a
18 finite volume of water so much so that once you start
19 storing it in one place, you can't -- the river no
20 longer delivers what -- what the states expect. So if
21 that happens to a certain extent -- extent, they develop
22 debits. Texas can demand New Mexico and Colorado, and
23 New Mexico can demand of Colorado release of that stored
24 water in order to come back into balance with -- with
25 the Compact. And, again, this includes requiring the

1 release of water from federally owned storage
2 facilities.

3 And I mentioned these Articles VI, VII and
4 VIII, really sort of the operative water-moving
5 provisions within the Compact. One question Your Honor
6 may have is, well, what role does the United States
7 have? There are some provisions in here that speak
8 specifically to roles of the United States in the river.
9 Those are Articles IX and X. I will say I don't believe
10 they're relevant to solving this dispute, but I wanted
11 to point them out because they're there in the Compact.
12 Article IX has to do with the San Juan-Chama project.
13 The San Juan River is within the Colorado river basin,
14 not the Rio Grande basin. One of the projects that they
15 were looking at was basically diverting water, drilling
16 a tunnel from the Colorado River basin into the Rio
17 Grande basin and divert that water into the Rio Grande.
18 This, again, goes to the point we don't have enough
19 water, so anywhere that we can get it and make use of it
20 leads to these -- these -- we call them trans-basin
21 water projects, moving water from one river system to
22 another.

23 Water so moved in Article X is not counted
24 against the accounting within the Rio Grande Compact.
25 We're -- we're adding water to the system. That water

1 doesn't count. So essentially it doesn't become part of
2 the inflow obligation of New Mexico to then deliver
3 additional water. It's taken off the books.

4 Article XII describes some duties of the
5 Rio Grande Compact Commission. The important part here
6 I talked about in Articles VI, VII, and VIII, operative
7 provisions the State have, how do they implement those?
8 That's to the Rio Grande Compact Commission. Article
9 XII sets that up. Importantly it's composed of a member
10 from each of the Compacting states who have the ability
11 to vote. The United States was requested to have a
12 non-voting member. The President of the United States
13 is requested to appoint one of those. We do have a
14 non-voting federal representative at the current time.
15 Article XVI also provides rights of the United States
16 under the Compact. They are not the same as the
17 Provisions VI, VII, and VIII. What this provision does
18 is basically it's a savings-type clause where it says
19 nothing in this Compact shall affect the rights of the
20 United States under existing treaties or to the Indian
21 tribes. So the Compact does not affect those rights.

22 With no other questions, Your Honor, we're
23 ready to proceed with the next part of our presentation.

24 JUDGE SMITH: Thank you very much.

25 MR. SOMACH: If we can look at Slide 41.

1 What that slide does is provide a very high-level
2 elevation view of tenures of litigation. I don't intend
3 to go through and describe everything in that slide, but
4 it does kind of give you a graphic illustration of the
5 fact that a lot has occurred over a period of time.
6 Here, I'm just going to mention a few points. The first
7 part is of if I divide the litigation history, the first
8 part of that litigation history was Texas' filing of the
9 petition and its subsequent filing of its complaint. I
10 will say, there was a year of briefing that took place
11 before the court directly. There was no special master
12 appointed at that point in time. Everything was done to
13 the court itself. At that point in time, the court
14 granted our petition over New Mexico's objection, and we
15 filed our complaint. United States was granted
16 intervention status, but when the petition was granted,
17 the Court, at the United States' suggestion, solicitor
18 general's selection said, Well, you know, New Mexico can
19 always file a motion to dismiss. And so that's what
20 happened next, and we spent -- I haven't counted up the
21 number of years we spent briefing that, and we had oral
22 argument in New Orleans before Special Master Grimsal on
23 that point. At the same time, the two districts
24 intervened, and the way that occurred was the Elephant
25 Butte Irrigation District in New Mexico first filed a

1 motion to intervene. That motion was argued in New
2 Orleans over two days of arguments, one dealing with the
3 motions to dismiss, the second dealing with the
4 intervention motion of the Elephant Butte Irrigation
5 District. There was extensive argument there.
6 Subsequent to that hearing, the Texas district filed a
7 motion to intervene. That was briefed, and it was
8 agreed to submit based upon papers, as well as the prior
9 oral argument by the Elephant Butte Irrigation District
10 because the issues were the same, the issues that were
11 being covered were the same. The special master's
12 recommendation led to the 2018 Supreme Court decision,
13 and the special master recommended that the motions to
14 intervene be denied, and there was extensive -- he -- he
15 -- in his report --

16 JUDGE SMITH: And I've read that opinion.

17 MR. SOMACH: Okay. And he also recommended
18 that the motion to dismiss the Texas complaint be
19 denied. He did indicate that it should be granted
20 against the United States and so the -- even though the
21 United States Supreme Court itself denied those motions,
22 that the hearing before the Supreme Court was on his
23 recommendation to grant the motion to dismiss the United
24 States complaint. And, of course, in the 2018 Supreme
25 Court decision, the Court indicated that the United

1 States had Compact claims that -- and it gets a little
2 fuzzy. They were either distinct from Texas or they
3 were parallel to Texas and so that led to some
4 subsequent issues that the 2024 opinion of the Court
5 clarified without any question as to the fact that the
6 United States had distinct federal interest in the
7 Compact that they could litigate. As you've kind of
8 asked, there ought to be a little clarity about what
9 that is, and as I said earlier, we know it's at least
10 the 1938 Condition and the Treaty. After that decision,
11 we went back, and that was when Judge Melloy was
12 appointed as the second master. We -- there were
13 briefing on motion -- on -- on the question of what
14 issues had previously been decided, essentially what was
15 law in the case, what was not, what was he involved
16 with. He issued an order on that, which clarified
17 exactly what had been decided and what had not been
18 decided. He ordered that answers be filed. They were
19 filed. There were motions to dismiss those claims, and
20 ultimately, we ended up with -- with clarity on issues
21 to be decided, what were the operative issues after the
22 motions to dismiss were decided, and then the parties
23 filed cross motions for partial summary judgment. I
24 won't go into those rulings.

25 JUDGE SMITH: I've read.

1 MR. SOMACH: But, again, as I indicated in
2 the introductory comments, they all go to form how we
3 got here and the foundation of what we got here, and we
4 believe those were all --

5 JUDGE SMITH: And what remains.

6 MR. SOMACH: Yeah. Exactly. The next
7 slide -- not yet. We then went through extensive
8 discovery. I'm still on this, but this is the --
9 essentially where we're at now and how we got to this.
10 We had extensive discovery on the complaints and the
11 answers, as well as the counter complaints that were
12 filed by -- by New Mexico. As Mr. Wechsler will go into
13 a little bit later, there was finality on procedures,
14 finality on disclosure, all discovery have ended. There
15 was nothing left to do except for trial, and a trial
16 date was set for the case. We then went into -- and I'm
17 going to talk a little bit about how we got to the
18 phasing in a moment, because I think that -- that's
19 relevant to where we go in the future, but it was about
20 that time that we entered into mediation that we had two
21 official mediations, the first with retired District
22 Judge Ollie Wanger. That took an extensive period of
23 time. That was before the Phase 1 trial. Then after
24 the Phase 1 trial, Judge Boylan was appointed as the
25 mediator, and we proceeded to mediation and spent a

1 great deal of time, over a year, on that, and that
2 resulted in the consent decree that was the subject of
3 the 2024 --

4 JUDGE SMITH: There was no ultimate decree.

5 MR. SOMACH: That's right. No -- there was
6 agreement but not total agreement, and, of course,
7 that's what caused the problem that resulted in the
8 Supreme Court opinion.

9 There was -- contextually, the states'
10 motion came at the eve of trial. So we were ready for
11 trial. We asked the Court if we could file the motion.
12 The Court said if you file it by -- and I remember, I
13 think it was November 8th, we will proceed with that, I
14 will take a look at it. That's what precipitated what
15 went up to the Supreme Court, and the third interim
16 report of the special master recommending the entry of
17 that. We know that that motion was denied. We went
18 back to trial. As I indicated earlier, what the Court
19 said was because the consent decree disposed of the
20 United States' claims without its consent, the United
21 States' exception is sustained, and the States' motion
22 to enter the consent decree is denied. So the question
23 becomes, well, that just means we're back to the eve of
24 trial again. We're comfortable with that. We -- you
25 know, we -- we lost the argument to the Supreme Court.

1 We understand that. And so what we believe we are, are
2 back on the -- the eve of trial. So then the question
3 becomes what are Texas' claims because we believe that
4 in this response to one of your questions, we believe
5 the Texas complaint is still the operative complaint in
6 this litigation. And in your questions, you essentially
7 answer the question of what -- what the Texas complaint
8 does. It -- it -- it is -- it is a complaint that says
9 New Mexico, by intercepting and impeding -- I can see a
10 question, Your Honor.

11 JUDGE SMITH: No, go ahead.

12 MR. SOMACH: Okay.

13 JUDGE SMITH: I was talking to myself, I
14 think.

15 MR. SOMACH: Okay. Well, if I can help you
16 with that, just let me know.

17 By intercepting and impeding water -- this
18 goes to that question of delivery that you asked before.

19 JUDGE SMITH: Yes.

20 MR. SOMACH: In our complaint, we didn't
21 talk about delivery because that's the language of the
22 Compact.

23 JUDGE SMITH: Was there a point in the
24 proceedings in the history where you either sought or
25 suggested that you were going to file an amended

1 complaint?

2 MR. SOMACH: No, no. We -- yes. I
3 remember. And that's what you're referring to.

4 JUDGE SMITH: But did not do so.

5 MR. SOMACH: That was another issue.

6 JUDGE SMITH: All right.

7 MR. SOMACH: It was, to us, a significant
8 issue, and what we informed Judge Melloy is that we
9 might amend our complaint. No. Everybody was very
10 upset about that. It ended up that it wasn't necessary
11 to do that, but -- but we did make that representation.
12 It did not have to do with these issues. It had to do
13 with issues further upstream, and we thought it would
14 just complicate this case because this case is focused
15 below Elephant Butte Reservoir. I'd actually forgotten
16 that. There's a lot to remember and a lot to forget.
17 But our simple complaint boiled down as you did in your
18 questions was New Mexico breached the Compact and
19 continues to breach its obligation of the Compact --

20 JUDGE SMITH: So the claim, the single
21 claim that produced additional pleading set out counts
22 generally, but you have one general complaint that seems
23 to sound inequity but also is characterized as a breach,
24 which simply goes to the manner in which there has been
25 some kind of equitable apportionment, in its basic

1 sense?

2 MR. SOMACH: You know, addressing the
3 question of whether your -- this is a court of equity or
4 -- the Compact -- compacts are contracts and so you've
5 got to interpret the Compact like a contract. That's a
6 legal interpretation.

7 JUDGE SMITH: Right.

8 MR. SOMACH: But the court says it's equity
9 so the remedies are all equitable. And Judge Melloy and
10 I had a considerable exchange on that very issue, which
11 in part led to the bifurcation of the liability from
12 remedy, and we saw damages. And -- and there were
13 affirmative defenses in laches, estoppel, and we said
14 you can't apply those against the State of Texas. Texas
15 is sovereign, those don't apply to us. Judge Melloy
16 said that may be the case, but I'm going to leave them
17 in there because when I fashioned the remedy, those will
18 be issues; as the court of equity, I can consider in
19 terms of the extent and scope of -- of damages. And I
20 said I think you're right, you know, that that's exactly
21 right, that those, which are themselves equitable
22 principles, could be applied in terms of measuring the
23 damages that would be awarded to -- to Texas. So the
24 remedy is clearly equitable, but interpretation of the
25 contract -- Compact sounds more as a court of law

1 interpreting those provisions.

2 But, again, I -- I do believe that -- that
3 your question summarized exactly the Texas complaint.
4 We believe it is operative. We believe that you -- it
5 -- it describes the breach by New Mexico. Now, one of
6 the things I'll just insert here is New Mexico's
7 admitted liability and so, therefore, you've got not
8 only established the duty, but now you've established
9 the breach, and that's why we believe that you now go to
10 -- to -- to remedy. Now, damages -- I'll just explain
11 this. You know, whether Texas agrees that there's only
12 been two years of breach or whether there have been more
13 extensive --

14 JUDGE SMITH: Well, the admission has been
15 to only two years.

16 MR. SOMACH: It's been two years. And if
17 we sought damages, that wouldn't have been enough. But
18 because we don't seek damages, once there's been an
19 admission of breach, then we move to -- it really
20 doesn't matter how many years they breached. The
21 admission of breach says how do we prevent that in the
22 future, and that's what the remedy goes to.

23 JUDGE SMITH: Let me just, at this point,
24 suggest to you that we will hear from your side only up
25 until noon, which is about eight minutes from now, which

1 we will take a midday recess. I think the suggested
2 time allotments that I had set out earlier had indicated
3 we're not inflexible, have not been inflexible, and I
4 appreciate the way that you have presented, but I just
5 wanted to let you know that we'll -- we'll --

6 MR. SOMACH: So we'll be done at noon is --
7 is what you're saying?

8 JUDGE SMITH: Yeah. That puts it very
9 succinctly.

10 MR. SOMACH: Well, with -- with leave of
11 counsel, let me zoom through the remainder of what we
12 wanted to talk about. And I think I can do that
13 particular by because I was going to summarize anyway.
14 I'll move to that and that ought to help. I wanted to
15 touch on this question of deliver just very quickly. We
16 interpreted that not as a physical delivery but rather a
17 -- a -- an injunction against impeding water from
18 flowing, so that New Mexico had --

19 JUDGE SMITH: Well, that really is a
20 semantic stretch.

21 MR. SOMACH: Well, but -- but it is --

22 JUDGE SMITH: Not saying it's wrong in the
23 context of --

24 MR. SOMACH: That's right.

25 JUDGE SMITH: -- what we're talking about

1 here in a term of art, but it's not generally what one
2 was texture in that word.

3 MR. SOMACH: But think of it this way, if
4 water went into a pipeline, you could turn off and turn
5 on the pipeline and the water would go to where it was
6 intended to be delivered. In this case, water was
7 intended to be delivered. A remedy might be construct a
8 pipeline, and ensure that that water is, in fact,
9 delivered. But in the west, rivers, streams are often
10 used as the conveyance mechanism to get water from one
11 place to another. So think of the Rio Grande as a -- as
12 a mechanism to deliver, as you're thinking about it,
13 water, and you're using the river --

14 JUDGE SMITH: But I thought you said also
15 to not impede.

16 MR. SOMACH: Well, that's --

17 JUDGE SMITH: That's where I saw the
18 stretch.

19 MR. SOMACH: Well, let me -- let me add to
20 this. So if you have a pipeline, there's no way that
21 water is delivered without interference, but in this
22 case, you have roughly a hundred miles of New Mexico
23 that that water has to get through. So the question is
24 how do you prevent New Mexico from taking water that
25 should have reached Texas, and that's -- that's the --

1 the nature of delivery. And it's been briefed in
2 detail. The first special master addressed the question
3 of delivery in his opinion, in his recommendation, and
4 Judge Melloy addressed it in the motions for partial
5 summary judgment. And so there was extensive discovery
6 on the term "delivered" and what it -- what it means.
7 But I -- I offer that, and, you know, as -- as a way of
8 addressing that.

9 We've already discussed the claims of the
10 liability. I will mention this because this comes to
11 what we have left. On this 1938 condition, and whether
12 it's a baseline, there's -- there's a note -- there is a
13 notation that -- and this is the 2024 opinion says,
14 well, United States never mentioned 1938, but with
15 respect to their distinctly federal interest, they never
16 mentioned it, but Texas did, and because the U.S.
17 complaint is parallel to Texas' complaint, that's good
18 enough. It -- it's -- it's mentioned there, which is
19 interesting, but it -- moving forward, the question is
20 from our perspective whether or not the United States
21 has ever actually made that case on a '38 baseline or on
22 a -- on the treaty. We don't believe they've ever --
23 you can't find any place where they've actually
24 articulated those things except in their trial brief.
25 In their trial brief is -- is all over that, and what

1 they promised to do is make a presentation in the Phase
2 2 trial, the -- the expert witness trial, on that point,
3 yet they disclosed no witnesses to -- at all that talk
4 about the 1938 condition and no witnesses that talk
5 about the treaty. This goes to this question of do-over
6 that was mentioned in the status conference report. We
7 are ready to go to trial. We will go to trial on
8 liability. We'd like to go before the end of the year.
9 If you combine liability and remedy together, we could
10 go as early as February, depending upon whether or not
11 there needs to be any additional work on our proposed
12 remedy. Now, as we indicated to you, there were -- I
13 think it was 23 declarations filed in support, eight by
14 the United States, the remaining ones by -- by the
15 Compacting states. So there's -- there's no surprise.
16 Those are the witnesses that we're going to bring to you
17 to explain the proposed remedy. And so we're really
18 concerned about the fact that the United States, number
19 one, wants a do-over, and that they want to delay the
20 trial well into 2025 and into 2026, and -- and that's
21 what they've indicated. That's what it looks like
22 they've provided for, and that just is simply, from our
23 perspective, something that -- that we oppose
24 strenuously.

25 JUDGE SMITH: Well, I'm sure that

1 Mr. Snodgrass will speak to that when -- when we
2 reconvene. I -- certainly there's no advantage, no
3 benefit to anyone to turn what is already an 11-plus
4 years case in a Jarndyce versus Jarndyce. No desire to
5 do that. So -- and I will be interested to hear what
6 the United States has to say beyond what they've already
7 indicated. You've put forth -- and I don't mean this as
8 a pejorative, but an aggressive schedule going forward
9 given the schedule, you know, that I have. Let me just
10 say this by way of information to all of you, too, that
11 I'm going to be looking to a place not simply for my own
12 personal convenience for resumption of trial, but
13 convenience that also involves the availability of
14 technical support, which I'm familiar with, which is to
15 say that we may be looking for the resumption of trial
16 in either Pittsburgh or Philadelphia. Nothing's cut in
17 -- nothing is yet written in stone, but I just say that
18 for everyone's benefit. I've made no -- no decision
19 certainly nor do I at this point even have inclination
20 of when that would be. You have referred maybe twice to
21 eve of trial and that kind of set me back a bit because
22 I figured I really hadn't packed adequately.

23 MR. SOMACH: It was a metaphoric --

24 JUDGE SMITH: All right.

25 MR. SOMACH: If I could turn to just two

1 final slides, I'll wrap up.

2 JUDGE SMITH: All right. Sure.

3 MR. SOMACH: Slide 60. All I've done in
4 these slides is put side by side what the United States
5 and what the Compacting states have proposed in their --
6 in their status conference briefs. I won't speak for
7 the United States. They listed four points, basically
8 what is the baseline and sub points, but I took that
9 right out of their -- their filing. From our
10 perspective, liability has been -- as to among the
11 states has been decided, and we believe we should
12 litigate what the proper baseline is in the context of
13 the proposed remedy. The -- the next steps is exactly
14 what I've just been talking about. I've articulated
15 what our view is. We did offer a July date, and that
16 was predicated upon this notion, and as a courtesy to
17 the United States, to be able to, if they wanted to --
18 to depose those declarants, they could do that, and that
19 would be time period to do it. What we need, what we're
20 willing to forego that, all we need is enough time to
21 line up our -- our expert witnesses, get them ready for
22 trial, so we could do that as early as February. We
23 actually had proposed maybe April for that, but that's
24 considerably -- you know, that's six months down -- down
25 the line, you know, so that's a lot of time in and of

1 itself.

2 The last point you already covered, we've
3 already covered, and that was settlement. I want to,
4 again, say that I appreciate the fact that you've
5 appointed Judge Boylan. He hasn't always agreed with
6 how we wanted to -- to proceed, but we've always thought
7 that Judge Boylan was fair and balanced. We know that
8 we won't get anywhere if we just sit in a room alone
9 with the United States. I -- I can tell you, we've had
10 ten years of that kind of experience, and it's not going
11 to -- going to work. The other point I already made
12 before, and that was we really don't want to have a
13 stay. We think a hard point where we have a trial date
14 is essential to our getting this resolved, and I don't
15 know that I can drag Mr. Skov to -- to many more
16 mediation sessions if they're just kind of endless with
17 -- with -- with no end.

18 JUDGE SMITH: Well, I'm -- as a former and
19 old trial judge, I'm well familiar with the old song
20 that there is nothing like a firm trial date to get a
21 case settled, and I believe that, whether this case
22 settles or not, but we'll look seriously at the
23 schedule. Something that I didn't get into in my
24 preliminary comments, but, you know, I -- I am a senior
25 judge now, but I continue to carry a significant case

1 load, I am a member of two committees of the judicial
2 conference of the United States so I maintain a pretty
3 busy schedule for an old guy as it is. So scheduling
4 will -- will be -- be difficult, I'm sure, for all of us
5 to get witnesses, as well as a long enough period of
6 time to actually conduct the trial, too, because we
7 don't want to get started and have to interrupt.

8 MR. SOMACH: Yeah. I will respond just at
9 the end to the location comment you made. We -- we've
10 taken this show all over the country already.

11 JUDGE SMITH: Sure.

12 MR. SOMACH: From New Orleans to --

13 JUDGE SMITH: Sounds like a grand tour.

14 MR. SOMACH: We've been everywhere. Quite
15 frankly, either Pittsburgh or Philadelphia, I guess,
16 would be a lot easier to get to than Cedar Rapids was so
17 --

18 JUDGE SMITH: I thought of that when I --
19 when I knew you had talked about Cedar Rapids, and I
20 know where my friend, Judge Melloy, where his duty
21 station is. Philadelphia is a hub airport for one
22 thing, that's an advantage. Pittsburgh unfortunately is
23 not, but it's -- you know, it's not the end of the earth
24 either, so we will take all of that into account. Thank
25 you.

1 MR. SOMACH: Well, unless you have any
2 further questions --

3 JUDGE SMITH: Not for now.

4 MR. SOMACH: Okay. Thank you.

5 JUDGE SMITH: Thank you, Mr. Somach.

6 MR. WALLACE: Your Honor, if I may, I just
7 want to inquire whether you wanted still a brief word
8 from Colorado --

9 JUDGE SMITH: I'm sorry? If you would move
10 to the podium, please.

11 MR. WALLACE: Thank you for indulging me,
12 Your Honor. I just wanted to inquire whether you wanted
13 Colorado to answer the question about its anticipated
14 role in the case either before or after the break.

15 JUDGE SMITH: Why don't we -- why don't we
16 address that after the break, which I'm assuming just
17 about everybody would like at this point. We've been
18 going just a little bit over two hours. And I'm
19 assuming you won't need much time to do just that, after
20 which it's my expectation the United States will go to
21 the podium. Is that the order of events, as I recall.
22 So that's what we'll do. We will then reconvene at
23 1:15, which hopefully gives everyone adequate time. I
24 thank everyone so far that gave their presentations. I
25 look forward to the presentation of the United States.

1 We will be in recess then until 1:15.

2 (Break.)

3 JUDGE SMITH: We will resume by
4 Mr. Wallace, I believe, albeit briefly since I had
5 indicated that how much time approximately each side
6 would have. Proceed.

7 MR. WALLACE: Thank you, Your Honor. I
8 certainly have shortened my remarks to accommodate that.
9 So I believe your -- your question of Colorado is what
10 role, if any, will Colorado play in this litigation
11 moving forward, and the answer is the same role that it
12 has played before. Colorado's primary interest is
13 making sure that the Rio Grande Compact is accurately
14 interpreted, so that no additional or incorrect
15 obligations are imposed on the states. Colorado
16 anticipates cooperating moving forward in this
17 litigation playing an active trial presentation role
18 with the other two Compacting states, and its interest
19 remains the same. In that regard, making sure this
20 litigation remains focused on the singular question as
21 laid out in the preamble, which is what is the equitable
22 apportionment to the three Compacting states made by the
23 Rio Grande Compact. That's the single question this
24 Court needs to answer, what is that apportionment, and,
25 thereafter, how did the states among themselves

1 guarantee that apportionment is made. Colorado
2 additionally wants to defend against any attempt to
3 expand the Rio Grande Compact to, one, either give it a
4 role to the United States that is not presented in the
5 terms of the Rio Grande Compact itself; or, two, to
6 impose additional obligations on the states regarding
7 their delivery of Compact water to one another that is
8 not already found in the Compact.

9 JUDGE SMITH: Thank you very much.

10 MR. WALLACE: Thank you.

11 JUDGE SMITH: That was indeed succinct.
12 Thank you very much.

13 Before we move on, if I could just indicate
14 -- actually, reiterate but also underscore one thing
15 before the United States goes forward. I've at least
16 alluded to future mediation, and I don't want to leave
17 any questions that I have directly to mediation take
18 place before anything else does. Will determine exactly
19 when that takes place in consultation with Judge Boylan,
20 which, again, brings to the point that I do intend that
21 Judge Boylan will conduct the mediation, and I am
22 directing -- I want to be clear in this regard that I've
23 asked Judge Boylan not simply because he has experience
24 with this matter, which I think adds to the economy and
25 efficiency that I seek to attain in any civil matter or

1 did when I was a trial judge, but beyond that, I have
2 done my -- my own research, if you will, and Judge
3 Boylan was appointed as a magistrate judge by a court,
4 which at that time was headed by a chief judge who
5 happens to be a very close friend of mine, then Chief
6 Judge Paul Magnuson, and he continues as a senior judge
7 in the district of Minnesota. So I had the assurance of
8 my good friend, Judge Magnuson of the quality and
9 character of Judge Boylan and his service as a
10 magistrate judge and the extent to which Judge Magnuson
11 knew him, has known him both professionally and
12 personally. So I just wanted everyone to know that I
13 have done my due diligence on Judge Boylan and certainly
14 was pleased that he agreed to undertake this. And I am
15 also inclined, make no order at this time and indicated
16 to all of you that I would not be entering any orders
17 today, but I would certainly be inclined to -- to grant
18 a limited stay period for purposes of conducting --
19 undertaking, I should say, mediation and seeing how that
20 goes. Other than that, I'll give no other indication
21 because I don't really know at this point what kind of
22 schedule we are going to be looking toward going
23 forward. I have suggested to you where I would be
24 inclined to schedule further trial if it becomes
25 necessary, but I have not etched that in stone either.

1 So having indicated that, I want to say one
2 other thing, and it may be that -- and I say it at this
3 juncture because the United States may well want to say
4 something in this regard, but it's a great concern I
5 have, not only as a judge but as a citizen, but -- and I
6 don't want to overstate the matter, but we all know that
7 there's an election coming up, a major election, and we
8 know that in the debate, if you will, that has gone on,
9 there are certainly suggestions of major change. We all
10 know that in the ordinary course of any election, there
11 will be changes made, and I -- I do have a concern about
12 this litigation, old as it is, going forward and how any
13 change in administration might affect structure and
14 personnel within the Justice Department, and more
15 importantly, the United States' position in this case.
16 I don't claim to know anything, foresee anything, being
17 able to predict anything. I've always preferred to do
18 my predicting after the fact. It's a lot more reliable
19 that way. But with -- fully with respect, I having many
20 a friend, a former law clerk who has gone on to work in
21 the Justice Department and continues to do so, and not
22 being pretentious, but General Garland happens to be a
23 personal friend of mine with whom I served as a chief
24 circuit judge some years back, so I -- I look to
25 whatever the future may be for justice and for the

1 country for that matter in what comes out of the
2 upcoming election. So I've done nothing but to express
3 uncertainty in that regard to the extent it affects
4 anything justice is doing. It's certainly up to them,
5 and I'm not trying to influence it. But that said,
6 appreciative of everybody being on time and apologies
7 for my being about five minutes late taking the bench.
8 It wasn't a long lunch. It was just a lengthy wait for
9 lunch, no fault contributed. Anyway, thanks.

10 If we could hear then from Mr. Snodgrass.

11 MR. SNODGRASS: Thank you, Your Honor. I'm
12 a little bit vertically challenged, so I often struggle
13 with microphones and lower podiums.

14 JUDGE SMITH: You have no idea how I have
15 yearned over the years to have had some kind of
16 challenge of that kind. At 5-8, it has never been --

17 MR. SNODGRASS: I'll be hunched over, but
18 hopefully not giving the optics of shying from the
19 incoming barrage.

20 JUDGE SMITH: This explains why I didn't
21 play basketball.

22 MR. SNODGRASS: Doesn't explain why I
23 didn't play basketball in the NBA. So Tom Snodgrass for
24 the United States. I'm joined here by Judy Coleman, my
25 co-counsel. We're with the Department of Justice

1 Department of Natural Resources Division. We handle --
2 we're part of the team that handles water rights
3 litigation throughout the west. We also handle
4 litigation involving Reclamation project operations, and
5 we report to our division leadership with the
6 Environment of Natural Resources Division. We also work
7 directly with the Office of the Solicitor General. We
8 have two solicitor general attorneys who are on the
9 pleadings, Ed Kneedler and Fred Liu. It's normal for us
10 to share the workload with them in these original action
11 original jurisdiction cases where we will often handle a
12 lot of the trial work, but they're -- they're directly
13 part of the team, and we're regularly conferring with
14 them.

15 Our client agencies in this litigation are
16 the Department of Interior and the Bureau of
17 Reclamation, which is an agency within the Department of
18 Interior. We also represent the Department of State,
19 which has interests along the border, and the
20 International Boundary and Water Commission, who also
21 does work down there.

22 So for the Department of Interior, I have
23 Christopher Rich -- Chris Rich and Shelly Randel, who
24 are with the Solicitor's Office Attorney advisors with
25 the Department of Interior.

1 So I want to start just giving an overview.
2 We believe our claims in this case are straightforward.
3 The Compact imposes a duty on New Mexico not to
4 interfere with the project's delivery of water below
5 Elephant Butte. New Mexico has breached that duty by
6 allowing --

7 JUDGE SMITH: That's a Compact-level
8 obligation, I assume, even if it's simply implicit?

9 MR. SNODGRASS: That is a Compact-level
10 obligation. You are correct. We believe New Mexico has
11 -- we assert New Mexico has breached that duty by
12 allowing interference with project deliveries from
13 groundwater pumping far beyond what took place when the
14 states signed the Compact in 1938 and Congress approved
15 the Compact in 1939 and the United States asserts it's
16 entitled to injunctive relief prohibiting that
17 interference.

18 JUDGE SMITH: How much of an issue is it in
19 this case for trial purposes as to what and how much New
20 Mexico knew about hydrogeology, that is the connection
21 between pumping and water -- to surface water to the Rio
22 Grande? How much of that figures into -- or would
23 figure into trial in this case?

24 MR. SNODGRASS: Well, there's been
25 extensive evidence testimony concerning what was before

1 the Compact negotiators negotiated the Compact.
2 Critical piece of that evidence is this joint
3 investigation report issued in 1937 to help inform
4 Compact negotiators, and I'll get into it a little bit
5 later, that report does touch on groundwater and
6 identifies the amount of groundwater pumping that was
7 then present in the Rio Grande basin below Elephant
8 Butte, which was minimal at that time. It is an
9 important piece in terms of what the -- the Compact
10 negotiators intended and understood, but ultimately, we
11 think this case is a case about Compact interpretation
12 as a matter of law, and as I'll get into in a little
13 bit, we don't think equitable principles, equitable
14 defenses, to the extent that's what Your Honor is
15 suggesting, can alter the meaning of the contract. I
16 think we're going to -- you know, the question of what
17 the Compact requires, it's our view that that's a
18 question of law that can be determined as part of the
19 liability phase.

20 JUDGE SMITH: I have a question to that. I
21 mean, I continue to have difficulty in finding plain
22 meaning in the Compact. In fact, I will go so far as to
23 say I speculated to my law clerk of having a hard time
24 believing that the lawyers even drafted this. It looks
25 like something drafted by engineers. It is not a

1 forward-looking document to provide answers for me, and
2 that does not suggest any preference to one side or the
3 other. It's just it doesn't help a judge trying to
4 decide this case very much.

5 MR. SNODGRASS: Well, our position -- and
6 I'll touch on that a little bit later, as well -- is
7 that the Compact is not ambiguous. It plainly required
8 delivery from New Mexico into Elephant Butte Reservoir.

9 JUDGE SMITH: Don't you think there's a
10 difference between ambiguity and simply not saying
11 anything at all?

12 MR. SNODGRASS: Well --

13 JUDGE SMITH: This is not an issue of
14 ambiguity arising out of what a provision or a
15 particular word or set of words means. This is simply
16 not speaking to certain -- a certain area of performance
17 under the Compact in any way.

18 MR. SNODGRASS: Well, we think, again, the
19 Compact is clear. New Mexico has to deliver water into
20 Elephant Butte. Once it's delivered that water, that
21 water is turned over to the project for distribution of
22 -- of that water for irrigation uses within the -- the
23 two districts. I think that's clearly the -- the scheme
24 that was approved by the contract, and, you know, as to
25 the --

1 JUDGE SMITH: Does that tell you what --
2 does that help in determining what's equitable, which is
3 quite clear in the preamble?

4 MR. SNODGRASS: Well, the Compact specifies
5 that it's directing an equitable apportionment of water
6 between the states. We also think it's clear and the
7 Supreme Court has affirmed that that equitable
8 apportionment is effected through Reclamation's
9 operation of the project. Reclamation -- the water goes
10 into Elephant Butte. Reclamation then determines how
11 that water is distributed for irrigation -- irrigation
12 uses. That's what's specified in the contract. It's to
13 be for irrigation uses between the two districts
14 pursuant to the contracts with the districts. So it
15 didn't spell out how Reclamation does that, but it gives
16 Reclamation discretion to determine how to allocate that
17 water between the districts in accordance with water
18 demands, seasonal changes in -- in stream flows, and the
19 requirements of Reclamation law.

20 JUDGE SMITH: I didn't mean to interrupt
21 your flow. These are nagging questions for me.

22 MR. SNODGRASS: These are the heart of the
23 case, so fair questions very much so.

24 So the particular question that we're
25 asking -- or we're trying to answer today, figure out

1 today, help you figure out today is how the case should
2 move forward including the next steps for resolving the
3 United States Compact claim, and as you've heard from
4 the states, they proposed a combined trial on liability
5 and remedy that would largely focus on their proposed
6 decree. They also propose a period for discovery that
7 would be limited to their proposed decree.

8 JUDGE SMITH: Before we get into discovery,
9 what do you think about their -- I think I know what
10 your position is generally, but what about specifically
11 their proposal of moving forward both with liability and
12 remedy with this -- I forget the term. Hold on. I'm
13 having a memory lapse. In any event, you know what they
14 have agreed and seek to proceed upon.

15 MR. SNODGRASS: Yeah. Proceeding in order
16 what I think you're asking, so the United States
17 believes that the parties should instead finish the
18 liability phase before proceeding to remedy. That would
19 conform to where these proceedings last left off when
20 the proceedings were bifurcated between liability and
21 remedy, and we were partially through the liability
22 trial.

23 JUDGE SMITH: Which was the understanding
24 everybody had until the Supreme Court decision, right?
25 I mean, even though at one stage, Judge Melloy decided

1 to break the liability stage into two stages itself, but
2 everyone has anticipated that this would be a
3 traditional bifurcation, am I right?

4 MR. SNODGRASS: That's my understanding. I
5 wasn't around during that time.

6 JUDGE SMITH: Yeah, I understand. We're
7 both -- we're both relative newcomers --

8 MR. SNODGRASS: Yes.

9 JUDGE SMITH: -- but you know a lot more
10 than I do.

11 MR. SNODGRASS: So another critical point I
12 want to make here is that our proposal to finish
13 liability before remedy, it reflects that an appropriate
14 remedy may only be crafted once the threshold issue of
15 liability and the appropriate measure of liability is
16 determined. Critically, the United States' proposal
17 conforms to two prior Supreme Court rulings, which ruled
18 that the United States is entitled to assert its own
19 Compact claims, and it is entitled to an adjudication of
20 those claims on the merits. The States' proposal would
21 short circuit that process by focusing the next phase on
22 their proposed decree, which is unduly complicated and
23 proposes terms that are nowhere found in the Compact,
24 and it's not responsive to the United States' claim.

25 Now, that said, the United States, as

1 always, remains open to settling this Compact dispute on
2 appropriate terms that are agreeable to all parties, but
3 short of a breakthrough in settlement, which I
4 understand you're going to direct the parties to
5 mediation, but short of that type of breakthrough, a
6 ruling on liabilities the next appropriate step and may,
7 in fact, help pave the way to settlement down the road.

8 So to help the special master decide the
9 next steps in this case, I'm going to take a little bit
10 different approach than you heard this morning. I'm
11 going to largely structure my presentation around the
12 questions you've pitched to all the parties and the
13 questions you've pitched specifically to the United
14 States. I'll do my best to move as quickly as I can. I
15 have a lot of questions to address, so I may be pressed
16 to finish in 30 minutes, but I'll -- I'll do my best to
17 keep moving along quickly.

18 So at the outset, as we just touched on,
19 unlike Mr. Somach, I'm, as you know, a newcomer to this
20 case. I'm working hard to get up to speed on the
21 issues, and I'm -- I understand and am sympathetic to
22 the challenge in doing that. If we get too deep into
23 the weeds today with your questions, I may need to turn
24 to my co-counsel, Judy Coleman, who's been involved in
25 the case a lot longer than I am and may be more equipped

1 to deal with specifics.

2 JUDGE SMITH: I doubt that my questions
3 will reach that depth given my limited time.

4 MR. SNODGRASS: Okay. So just starting
5 with the -- the global questions for all the parties,
6 your first question talks about the degree to which
7 equitable principles apply here. So we don't agree that
8 equitable principles have applicability to a
9 determination of liability with the Compact's meaning.
10 The Compact is a federal statute. The party's conduct
11 cannot alter its meaning.

12 JUDGE SMITH: But when -- when the preamble
13 to the very document upon which you are relying talks
14 about equitable allocation, how -- how can you not
15 somehow be looking at an action that sounds in equitable
16 principles?

17 MR. SNODGRASS: I would -- the term
18 "equitable apportionment" is a term of art in our world
19 that refers to dividing water of the states whether by
20 Compact or by original action proceeding before the
21 Supreme Court, so I don't think the use of that term,
22 "Equitable apportionment," necessarily means or does
23 mean that we're going to import all the considerations
24 of equity into the interpretation of this federal
25 Compact. Now, that said --

1 JUDGE SMITH: Let's go beyond that and not
2 only focus on that term, but also on the fact that with
3 removal of damages being sought, the remedies also are
4 traditionally equitable declaratory relief and an
5 injunction.

6 MR. SNODGRASS: I was getting to that. So
7 I'm focused on the bifurcation between liability and
8 remedy. So in the liability phase, the interpretation
9 of the Compact phase I view that phase as largely legal.
10 When we get to remedy, I think that's when equitable
11 considerations do come into play. Not the least of
12 those reasons, that in order to get an injunction, we
13 need to demonstrate a likelihood of the success on the
14 merits and there's a balance of the equities as
15 consideration in drafting that injunctive relief. So
16 when we get to remedy, I think equitable considerations
17 do have a potential role to play, and I -- I think
18 Mr. Somach may have largely agreed with that earlier
19 when he said that interpretation of the Compact is a
20 question of law, but equitable principles may come into
21 play when we get to remedy.

22 JUDGE SMITH: Well, I would much prefer
23 having if not black letter, straightforward legal
24 principles rather than a chancellor's foot to be
25 determining issues in a case of this kind or any case

1 for that matter.

2 MR. SNODGRASS: So turning now to your --
3 your second question. It deals with ambiguities in the
4 Compact. As I touched on a little bit earlier, we don't
5 agree that the Compact is ambiguous. Article IV of the
6 Compact unambiguously requires New Mexico to deliver
7 into Elephant Butte specified quantity of water each
8 year and the plain meaning of that term suggests that
9 New Mexico surrenders control over that water and may
10 not take it back by allowing groundwater pumping
11 downstream of the reservoir that depletes project supply
12 and that diminishes deliveries to the districts.

13 Getting to terminology, I want to make
14 clear that apportionment and allocation are two
15 different terms.

16 JUDGE SMITH: Thank you. That interests
17 me.

18 MR. SNODGRASS: Okay. Allocation where the
19 Compact equitably apportions water to the state. That's
20 in the preamble of the Compact. It relies upon
21 Reclamation to effect that equitable apportionment
22 through its allocation and deliveries to the districts
23 for irrigation uses. As the Supreme Court has found,
24 the Compact relied on Reclamation to apportion water
25 through its contractual obligations to EBID and EP1. So

1 those contracts are the method through which Reclamation
2 effects that equitable apportionment agreed to by the
3 states. There's nothing ambiguous about this.

4 So moving onto your third question, you
5 talk about a redo of the trial phase, whether any party
6 is seeking that. No, I think we're on bard with all the
7 other parties. We don't want to redo where -- where
8 we've already been. We just think the case should pick
9 up where it left off and complete the liability phase
10 before moving to remedy as ordered by Special Master
11 Melloy previously.

12 So the next question talks about
13 determining the applicable baseline, whether 1938 and D2
14 are the only potential ones and what the parties'
15 positions are on that baseline. I think you've heard
16 already earlier the two baselines argued by the parties
17 are either 1938 or D2. United States asserts, Texas
18 previously asserted that a 1938 baseline is the
19 appropriate one, whereas New Mexico argues for a D2
20 condition. But there are differences in -- in what
21 these terms, I think, mean to the parties. For
22 instance, Texas previously argued, if I'm accurately
23 understanding its position, that the 1938 baseline
24 requires the downstream delivery of a fixed quantity of
25 water based on what was available in 1938. United

1 States position recognizes that the 1938 baseline is
2 programmatic rather than quantitative and allows for
3 things like improvements in irrigation efficiency that
4 don't interfere with project operations. What the
5 United States instead challenges is increased
6 groundwater pumping above 1938 levels, which depletes
7 project supply and interferes with deliveries to the
8 districts.

9 So your next question asks about the 57:43
10 split and where that came from. You're correct that the
11 Compact does not mention this 57:43 split of water nor
12 do the project contracts direct a 57:43 split in all
13 years. Rather, the 57:43 split appears to have
14 originated in the 1938 contract, the counsel for the
15 states previously discussed, which was a contract
16 between the districts to which Reclamation was not a
17 party. That contract provided that the districts would
18 divide project costs 57:43 based on their project
19 acreage, 88,000 acres in New Mexico and 67,000 acres in
20 Texas, and that contract also included a shortage
21 provision that provided for a 57:43 split of available
22 supply, but only in water short years and only so long
23 as practicable. Neither the 1938 contract nor the
24 Compact provides for such a split in non-shortage years.
25 And so far practicable language reflects that

1 Reclamation has discretion over the actual allocation of
2 water even in water-short years. In practice, water has
3 rarely been divided in a precise 57:43 split. In fact,
4 as the project was originally operated, there was no
5 specific allocation to the different districts or the
6 specific -- or the different states. Instead,
7 individual farmers within the project, with project
8 contracts, replaced water orders with Reclamation, which
9 released water from the project reservoirs and diverted
10 water at project diversion dams to make the ordered
11 deliveries to each farm regardless of which districts
12 they were located in or regardless of which state they
13 were located in, and as the states touched on earlier
14 this morning, the first allocation of water among
15 eligible project lands did not even occur until 1951
16 when Reclamation placed a limit of 3.0241 acre-feet per
17 acre on all project lands. This reflects that a 57:43
18 split is not a Compact requirement and that the Compact
19 relies upon Reclamation to determine the appropriate
20 annual allocations to the districts based on a variety
21 of factors, including different watering demands --
22 different water demands, different operating conditions
23 from year to year and requirements for Reclamation law.
24 Critically, only project contractors, not the states at
25 large, are entitled to the delivery of project water for

1 irrigation. This is why the Supreme Court found that
2 the project -- that the Compact was inextricably
3 intertwined with the Rio Grande project and downstream
4 contracts.

5 Your next question talks about law of the
6 case and whether we're bound by the prior rulings of the
7 prior special masters. So the prior rulings of the
8 Supreme Court are law of the case and may not now be
9 revisited. United States also believes the other
10 rulings of the prior special masters that have not yet
11 been reviewed and adopted by the Supreme Court should
12 not be reargued even if they're not technically binding.
13 To be clear, the United States disagrees with aspects of
14 those reports and reserves the right to take exceptions
15 to those reports when and to the extent they're
16 incorporated in future reports and recommendations that
17 you may issue, and you will ultimately exercise your own
18 independent judgment in determining the portions of
19 those orders to incorporate into those reports, but the
20 United States does not seek to have those prior rulings
21 reconsidered or reargued at this point.

22 Moving onto Question 7, you referred to
23 your transcripts from 19 days of trial and the boxes of
24 trial exhibits and what you're to do with them. As with
25 the earlier orders in this case, the United States is

1 not seeking to have you retry that portion of the case
2 and rehear testimony from those fact witnesses and those
3 historical -- expert historical witnesses. Rather, I
4 think it'd be most efficient for you to use that prior
5 testimony together with whatever additional testimony
6 and evidence you receive when you make your ultimate
7 findings of fact and conclusions of law and incorporate
8 those into reports and recommendations for the Supreme
9 Court's review, presumably preceded by a briefing from
10 the parties to help you craft those rulings.

11 The next question asked about next steps in
12 this case. So as discussed in our status report as I've
13 touched on today, we believe that the next step in this
14 case is that the case should resume where it left off,
15 completion of the liability phase. It makes sense, and
16 it's most efficient to determine liability before
17 proceeding to remedy and the complications presented by
18 the states proposed decree. As the United States has
19 proposed, we think the next immediate steps should be a
20 period to negotiate stipulations of fact and followed
21 potentially by a manner of summary judgment briefing
22 based upon those stipulations and the record evidence
23 that's already been developed. We think that the
24 threshold issue of the applicable baseline, which is a
25 critical question here -- I think everyone agrees on

1 that -- is one that can likely be resolved on the
2 existing record, and depending upon the extent of
3 stipulations or whatever stipulations the state may
4 file, we may not even need a trial on breach, but
5 that'll largely depend upon what those stipulations
6 touch on and whether the United States views them as
7 satisfactory to close out the liability phase.
8 Therefore, as we proposed in our report, we propose a
9 period to negotiate those stipulations on liability and
10 potential summary judgment briefing schedule, both of
11 which could simplify the liability trial or altogether
12 eliminate its need. By comparison, the United States
13 believes the states proposal to have a combined
14 liability and remedy trial would make things
15 significantly more complicated. It'd be inefficient and
16 contrary to the prior bifurcation order and its
17 underlying principle that proper remedy can only be
18 determined after liability and the appropriate baseline
19 have been established and evaluating technical aspects
20 of the state's proposed decree may get into complex
21 questions involving competing modeling runs and
22 technical metrics for measuring New Mexico's compliance.
23 It may also involve, as the states have proposed,
24 supplemental expert reports and additional discovery.
25 If a remedy is grafted on the wrong baseline, this all

1 may have to be redone. The better and more efficient
2 approach is to complete the liability phase, and once
3 the applicable baseline is established, the parties may
4 then find the basis for renewed settlement discussions
5 that could -- that could craft an appropriate remedy.

6 The next question talks about -- asks about
7 who we report to. I covered that at the top of my
8 presentation. So, now, we're moving into the questions
9 for the United States. Your first question says, "Can
10 you explain to me succinctly what your interest in this
11 litigation is as of now?" The United States interests
12 have not changed. They're the same now as when we
13 intervened in this case. At a broad level, we have an
14 interest in the proper interpretation of the federal
15 statute, particularly one such as the Compact that puts
16 a federal reclamation project at its center. The United
17 States' specific interest under the Compact include
18 projecting the project's supply of water and the annual
19 and long-term delivery of the project, fulfilling our
20 contractual and statutory obligations to both districts,
21 and the delivery of water to those districts and
22 satisfying our treaty obligations to Mexico. The
23 Supreme Court has twice recognized that in light of our
24 distinctively federal interests, we're entitled to
25 pursue the Compact claims we have pled. The Court

1 should, therefore, now decide the merits of those
2 claims. We're beyond the threshold question of the
3 United States interest.

4 The next question asks is our complaint
5 essentially a one-count complaint? New Mexico's
6 diversion of surface water and pumping of groundwater
7 violates the Compact. I think that's more or less
8 correct. We're essentially bringing one count, which
9 alleges violation of the Compact by New Mexico through
10 its failure to regulate groundwater pumping and surface
11 diversions below Elephant Butte, contrary to the
12 Compact.

13 Next question asks for an explanation
14 factually of what our theory of New Mexico's alleged
15 Compact breach is. So as I touched on earlier, United
16 States basic theory of the case is that New Mexico may
17 not take back the water it delivers to Elephant Butte
18 under Article IV of the Compact. The factual bases for
19 this alleged breach includes New Mexico's failure to
20 regulate groundwater pumping below Elephant Butte, which
21 diminishes project supply and accepts deliveries to the
22 districts and results in New Mexico water users
23 exceeding EBID's annual allocation. Groundwater pumping
24 does this by reducing surface flows and project return
25 flows. Project return flows is basically water that's

1 diverted and delivered to project lands which runs off
2 the irrigated fields into project drains or percolates
3 through the soil instead of being consumptively used by
4 the irrigated crops. When that water flows back through
5 the project drains and returns to percolation to
6 recharge the Rio Grande, it can be diverted for the
7 irrigation use further downstream.

8 JUDGE SMITH: The references in your
9 references here to project drains, is there a drainage
10 system?

11 MR. SNODGRASS: Yes. There is an extensive
12 network of drains that were specifically designed to
13 capture these return flows and allow their use and reuse
14 of those return flows as part of project supply.

15 So groundwater pumping that intercepts
16 these return flows causes project drains to run dry
17 earlier and more often than they otherwise would and
18 reduces groundwater recharge to the Rio Grande. As a
19 result, Reclamation must release more water from storage
20 to make up for these deficiencies, which draws down
21 project storage further and diminishes project supply
22 that's available for delivery to the districts both on
23 an annual and long-term basis.

24 Question 4, Your complaint states that New
25 Mexico has allowed the diversion of surface water and

1 pumping of groundwater that's hydrologically connected
2 to the Rio Grande. What does hydrologically connected
3 mean when referring to the Rio Grande? So our answer to
4 this question is where I'm going to get more into the
5 tutorial part of my presentation. In practical terms,
6 hydrologically connected means that pumping of
7 groundwater reduces surface flows in the Rio Grande and
8 project drains. It's undisputed that there is such a
9 hydrological connection. As the Supreme Court found in
10 its 2024 opinion in this case, the more groundwater
11 pumping between the Elephant Butte reservoir and Texas,
12 the more water Reclamation has to release from the
13 reservoir to comply with its delivery obligations. In
14 fact, New Mexico has conceded that its groundwater
15 pumping has interfered with project deliveries in 2003
16 and 2004. This shows that hydrological connection.
17 Negotiators of the Compact were aware of that
18 hydrological connection. The Compacting states
19 commissioned that 1937 Joint Investigation Report that I
20 referred to, to inform negotiators and engineers as to
21 the existing resources and water uses within the Compact
22 area. I'm going to first direct you -- I don't have
23 nearly as many exhibits as the states had today, but I
24 do have four that I'll direct you to now. So our first
25 exhibit is an excerpt from that 1937 report, and that

1 report referring to the Rincon, Mesilla, and El Paso
2 valleys downstream of Elephant Butte included that. In
3 none of these areas has groundwater been utilized to any
4 appreciable extent as a primary or basic source of
5 supply for irrigation, and extensive development of
6 groundwater for irrigation would add no new water to the
7 upper Rio Grande basin. In other words, the report
8 concluded there had been no significant groundwater
9 pumping at the time of the Compact for irrigation and
10 that groundwater development would not be a new source
11 of supply due to the connection between surface and
12 groundwater.

13 Now, our second exhibit, this is redundant
14 with Mr. Wallace's presentation earlier, but this is an
15 exhibit that shows the effects of groundwater pumping on
16 an aquifer that discharges to a stream under natural
17 conditions.

18 MR. SANDERS: Excuse me. Are these
19 exhibits in your report? Are the exhibits in your
20 report? I'm just asking if they were.

21 MR. SNODGRASS: Yeah. I'm just pulling it
22 up for you.

23 MR. SANDERS: Thank you. All right. I got
24 it. Appreciate it.

25 MR. SNODGRASS: Prior to pumping --

1 JUDGE SMITH: Excuse me. Where are you
2 right now?

3 MR. SNODGRASS: I'm in the second exhibit,
4 which if you flip down, should be a panel -- four-panel
5 exhibit showing the -- the effects of groundwater
6 pumping and cone of depression. So prior to pumping the
7 groundwater level at or above surface stream levels
8 resulting in discharges to the stream from the aquifer
9 that support surface flows. That's what you're seeing
10 in Panel A. But after pumping begins, the cone of
11 depression forms around the well and drops the water
12 table, as shown in Panel B. As pumping continues, the
13 cone of depression expands outward from the well, and
14 when groundwater levels drop below surface levels, the
15 pumping begins to capture water that would otherwise
16 discharge to the stream as shown in Panels C and D. In
17 this way, groundwater pumping draws water away from the
18 Rio Grande facing seepage losses and reducing surface
19 flows. By this same mechanism, groundwater pumping
20 intercepts project return flows that would otherwise
21 flow into the extensive network of drains that were
22 constructed for the project.

23 So these return flows, again, were
24 historically an important part of project supply, and
25 their reuse allowed the project to actually deliver more

1 water to project irrigators than is released from
2 storage.

3 The next exhibit in our materials, Exhibit
4 3, is Table 45 from the Joint Investigation Report.
5 This table shows these return flows averaged
6 approximately 50 percent of total diversions from 1930
7 to 1936, which amounts were available for reuse by the
8 project contractors as part of project supply. The
9 prior special master found in his ruling on summary
10 judgment that the Compact negotiators specifically
11 relied upon the use of project return flows in
12 determining that the normal annual release of 790,000
13 acre-feet set forth in Article VIII would be sufficient
14 to meet the project's irrigation demands. As the United
15 States explained in its exceptions brief filed to the
16 proposed consent decree with the Supreme Court, 1931
17 Reclamation released around 751,000 acre-feet from
18 Elephant Butte. That release resulted in a delivery of
19 over 1 million acre-feet of water at downstream
20 diversion points. This means the project delivered over
21 1.3 times more water for irrigation than it released
22 from storage due to this use and reuse. Fast-forward to
23 the present and the situation has markedly changed.
24 Starting in 1950, as you heard earlier, groundwater
25 pumping below Elephant Butte in New Mexico has

1 dramatically increased. To help you understand this
2 problem, I'll refer you to our next and final exhibit,
3 Exhibit 4, which is a table taken from a New Mexico
4 expert report. This exhibit shows the dramatic increase
5 in groundwater pumping that started in the 1950s. The
6 majority of this pumping is in New Mexico. There have
7 been various peaks and valleys in this pumping since it
8 began. There's never been anything resembling the
9 period of minimal groundwater pumping that existed at
10 the time of the Compact's signing in 1938. In some
11 years, this groundwater pumping in New Mexico exceeds
12 200,000 or even 300,000 acre-feet. The cumulative
13 effects of this pumping have dramatically reduced
14 project return flows so that the project now usually
15 delivers less water than is released from storage. This
16 is a complete flip from 1931 when 751,000 acre-foot
17 release yielded over 1 million acre-feet at downstream
18 diversion points.

19 So this is the crux of the case, and our
20 position is that New Mexico's failure to curtail this
21 dramatic increase in groundwater pumping has
22 significantly increased seepage losses and reduced
23 project supply given this hydrologic connection between
24 groundwater and surface water.

25 So moving to your next question, Question

1 5, you ask, "What am I to make of the language you use
2 in your complaint New Mexico's use of water could reduce
3 project deficiency to a point where 43 percent of the
4 available water could not be delivered to EP1 and 60,000
5 acre-feet per year could not be delivered to Mexico?"

6 So this question relates to the point I just made.

7 Groundwater pumping in --

8 JUDGE SMITH: Actually, my concern actually
9 was for lack of a more precise term, that the
10 conjectural nature of the statement, use of the word
11 should or could rather.

12 MR. SNODGRASS: Well, I -- I think it's
13 more than conjectural. I mean, as we've seen in 2003
14 and 2004, New Mexico has conceded that it deprived Texas
15 of water that it would have otherwise been entitled to.

16 JUDGE SMITH: Well, then would it be
17 incorrect to say that it will as opposed to should? I
18 don't mean to be a stickler, but words matter.

19 MR. SNODGRASS: Yes. I wasn't around for
20 the drafting of the complaint, but I take your point.
21 So, yeah, it's the basic same point about the --

22 JUDGE SMITH: From a remedy standpoint,
23 that can have profound -- profound implications where
24 something either will or is highly likely as opposed to
25 something that just should, especially when you're

1 asking for injunctive relief.

2 MR. SNODGRASS: Yeah. As I say, we have
3 seen these effects visibly in 2003 and 2004, but those
4 visible effects are -- are not the only problem. This
5 cumulative draw down in storage that reduces project
6 storage available for distribution to the districts so
7 that from year to year, there's simply less available
8 supply distributed to the districts. I think simply
9 put, groundwater pumping at D2 levels is not
10 sustainable. I think we could -- you know, if seepage
11 losses are heightened even over current levels, we could
12 reach the point at which the United States wouldn't be
13 able to -- to deliver 60,000 acre-feet to Mexico. That
14 is the could. We haven't reached that point yet, but if
15 those seepage losses continue, that's a potential
16 outcome here.

17 Your next question asks about whether it's
18 -- you have a sense that it's important for us to obtain
19 a declaration that New Mexico breached the Compact and
20 has breached its duty of noninterference. Yes, we seek
21 a determination of breach, but that's not an end itself
22 whether stated in terms of a declaration or findings of
23 fact and conclusions of law, we request a duty on -- a
24 ruling on New Mexico's duties under the Compact that it
25 has breached these duties and that it has an obligation

1 to remedy these breaches. One of the elements of our
2 requests for permanent injunction is a likelihood of
3 irreparable harm which relates back to the question of
4 breach. So we think that all fits together as why we
5 need a determination of breach.

6 Beyond this, skipping over to termination
7 of New Mexico's liability, it would also beg the
8 question of what needs to be remedied and heighten the
9 potential need for future court involvement to spell out
10 what New Mexico can and cannot do under the Compact.
11 United States finally believes the Supreme Court will
12 want a complete record on liability that includes
13 findings of fact and conclusions of law rather than
14 jumping right to remedy. Such a ruling could also set
15 the stage for future settlement discussions. Again, I
16 think the principal issue that needs to be resolved next
17 is this issue of baseline condition, whether it be 1938
18 or D2.

19 Your next question asks, "If I were to
20 agree with United States' wish list, would United States
21 still want a declaration?" I'm not sure if I fully
22 understand this question, but if you're asking why we
23 need a determination of breach, that, again, will help
24 demonstrate entitlement to injunctive relief and an
25 appropriate remedy. I don't know if that's responsive

1 to your question.

2 JUDGE SMITH: Well, it really goes back to
3 the starting point of whether or not this is an
4 equitable proceeding or whether the proceeding at law
5 are principles that would therefore apply.

6 MR. SNODGRASS: I do think a determination
7 of breach will then lead to remedy, where as I've
8 discussed earlier, equitable consideration can come into
9 play.

10 Question 8 is a question about trial
11 schedule proposed by the Compacting states. So we have
12 multiple objections. Repeated here today, the states
13 propose to combine liability and remedy phase.
14 Liability should proceed first, both because remedy can
15 only be determined after liability and the appropriate
16 baseline have been established. Beyond this, a remedy
17 crafted on the wrong baseline may mean that we have to
18 do all this over again.

19 We also have concerns, as stated in our
20 report, that the states' schedule is far too short. The
21 United States and Texas were previously aligned and
22 designated joint witnesses as part of an integrated
23 case. The United States did not designate additional
24 overlapping witnesses on harm to the project or seek to
25 introduce new modeling in order to avoid duplication of

1 testimony and the unnecessary introduction of yet a
2 third model, but that alignment between the United
3 States and Texas now appears to have fundamentally
4 changed, and the United States needs more time to
5 develop its case in chief, particularly its case on
6 remedy. The states should not be allowed to jam the
7 United States with a December trial date or even a July
8 trial date under these entirely changed circumstances as
9 are further compounded by my new role as lead counsel in
10 this case.

11 The stipulations of fact may take care of
12 part of this and allow for trial on liability to resume
13 later in 2025, to the extent liability isn't resolved by
14 summary judgment, but if those stipulations prove
15 insufficient or the special master combines liability
16 and remedy phases, the United States would need
17 additional time. The states are not the only ones who
18 should be given the opportunity to present affirmative
19 case on their proposed remedy.

20 Next question gets into our position on the
21 states' discovery proposal. So we don't believe any
22 discovery should take place at this time. Again, as I
23 repeated ad nauseam, we think liability should be
24 determined before remedy, including the applicable
25 baseline, which means discovery on remedy should be

1 deferred at this time while the liability phase is
2 completed.

3 Even if the special master allows discovery
4 over the United States objection, that discovery should
5 not be limited to the states' supplemental expert
6 discovery and discovery on that should not be limited to
7 the states' supplemental expert reports and discovery on
8 those reports. The United States may need to designate
9 additional expert testimony on liability if we don't
10 negotiate that with stipulations, and the United States
11 should also not be limited to presenting supplemental
12 expert witness disclosures that respond only to the
13 states' proposed remedy. In fact, the states' proposed
14 remedy is not responsive to the United States claims and
15 should not be the focus of remedy phase. Rather, the
16 United States should have a chance to determine whether
17 it needs supplemental expert disclosures as part of its
18 case in chief, and the schedule for these disclosures
19 should be substantially expanded beyond what the states
20 have proposed. Any remedy proposed by the United States
21 may ultimately be -- end up being much simpler than the
22 index decree, but the United States needs time to
23 develop that case.

24 Question 10 asked about -- asked if Texas
25 is getting the amount of water required by the Compact,

1 why is that objectionable. The index decree is
2 objectionable for multiple reasons, as discussed in our
3 Supreme Court briefing, our exceptions briefing. I
4 won't get into all of that today, but I will give some
5 examples. For instance, by converting New Mexico's
6 delivery obligation into a state line delivery
7 requirement, the proposed decree would essentially
8 rewrite Article IV to excuse New Mexico's depletion of
9 water below the reservoirs in ways the downstream
10 contracts do not anticipate. It would do this by
11 allowing New Mexico water users to take all the water
12 they wanted from EBID project beneficiary, so long as
13 Texas gets its delivery. That's not the regime Congress
14 approved. Congress wasn't indifferent to how water
15 reached Texas. Rather, Congress approved a Compact that
16 protected the project's deliveries of water from
17 Elephant Butte to the districts, not a Compact that
18 protected deliveries to the Texas state line. State
19 line delivery would also interfere with Reclamation's
20 ability to get water to the districts when they need it.
21 By requiring deliveries to Elephant Butte, the Compact
22 preserved Reclamation control over the timing and amount
23 of deliveries to the districts consistent with
24 irrigation demands, seasonal climate conditions, and
25 long-term operation of the project. Shifting delivery

1 to the Texas state line would change that. Even if
2 Texas may agree to deliveries that do not meet EP1's
3 needs, that's not consistent with the Compact, which
4 incorporates the operation of the project and its
5 allocations to the districts to affect the equitable
6 apportionment to which the states and Congress agreed.

7 Your next question asks about United States
8 sovereign immunity, how would the index decree violate
9 sovereign immunity? Are the United States current
10 obligations those carried out by Reclamation? Yes, the
11 United States current obligations under the contract are
12 carried out under the Compact and the project contracts
13 are carried out by Reclamation, but Reclamation, as an
14 agency of the United States, is protected by sovereign
15 immunity. There's no waiver of sovereign immunity that
16 would allow any party to seek specific performance
17 against the United States much less specific performance
18 of the Compact to which the United States is not a
19 party, and there's no -- certainly no waiver that would
20 allow Texas and New Mexico to seek an injunction to
21 compel Reclamation to perform duties that are nowhere
22 found in the Compact and that are far outside the scope
23 of the United States claims, including by requiring
24 Reclamation to reallocate water between the districts
25 and police state line delivery compliance. As Special

1 Master Melloy previously affirmed, New Mexico's
2 counterclaims, the injunctive relief against the United
3 States should be dismissed, among other reasons, based
4 on New Mexico's failure to identify applicable waiver of
5 sovereign immunity. Now, United States will ultimately
6 abide by whatever the Court says the law is, but that's
7 true whether we were an intervenor in this case as we
8 follow the Court's rulings in cases all the time in
9 which we're not even a party. It's quite another thing
10 to hold the United States may be enjoined into
11 performing specific obligations that are nowhere found
12 in the Compact and for which there is no waiver of
13 sovereign immunity.

14 Question 12 asks about alignment between
15 EP1, EBID, and the United States. It's United States'
16 current understanding that we're still aligned. My own
17 caveat is that EBID now has new counsel. We've only had
18 an introductory call with the new counsel, but we're
19 hopefully able to remain the case.

20 Question 13 talks about filing stipulations
21 and list of undisputed facts. Is that something we'd
22 agree to or view as beneficial? Yes, for all the
23 reasons we previously discussed, the United States
24 agrees its stipulations would be beneficial.

25 Question 14 asks about additional summary

1 judgment motions. Yes, we think that would be very
2 beneficial and could potentially resolve the threshold
3 baseline issue based on -- on the existing record.

4 Question 15 talks about how the parties
5 required the assistance of a mediator to draft the
6 consent decree, and prior to the consent decree, the
7 parties were unable to work a solution on their own.
8 Given the lengthy history of this case plus the
9 appointment of a new special master so late in the game,
10 how can the United States believe a mediator is
11 unnecessary? So there's been some discussion on
12 mediation on this point this morning.

13 JUDGE SMITH: You can understand why I'm
14 not exactly sanguine over the prospects of the parties
15 being able to resolve anything without the assistance of
16 a mediator.

17 MR. SNODGRASS: Understood. But we also --
18 we don't agree with the consent decree or that a
19 mediator was necessary to broker the settlement between
20 the parties. In fact, we view the prior mediation as
21 unsuccessful due to our objections to that proposed
22 decree.

23 JUDGE SMITH: Well, I understand that
24 that's your view. That doesn't mean that the entire
25 agreement was -- or any part of the proposed agreement

1 was incorrect and not based upon evidence. It means we
2 know the more narrow grounds upon which the Supreme
3 Court refused to accept the decree, and that had to do
4 with the United States interest and the fact that it did
5 not join that proposal. So I -- I can't accept the fact
6 that that fact alone renders nullity -- renders as a
7 nullity anything that the special -- anything that the
8 mediator were to effectuate between the parties.

9 MR. SNODGRASS: Understood. We do not
10 object to reinitiating --

11 JUDGE SMITH: And this -- let's all face
12 it. This is an 11-plus-year-old controversy within the
13 court. The controversy itself is longer than that, but
14 the public has an interest here whether they're citizens
15 of the states, the Compacting states, or whether they're
16 citizens of the United States, and everybody involved
17 both, we all have an obligation to try to resolve this.
18 Certainly it hasn't been resolved in a timely basis, and
19 I don't ascribe fault to anybody or any entity to that,
20 but it 's just a fact.

21 MR. SNODGRASS: Yeah. Ten years is --

22 JUDGE SMITH: I spent 18 years of my life
23 as a trial court trying to move matters along. This is
24 not something that --

25 MR. SNODGRASS: Ten years is a long time.

1 Ten years is --

2 JUDGE SMITH: So is 11.

3 MR. SNODGRASS: 11 years is a long time.

4 Not necessarily a long time in terms of these large
5 water disputes. We're involved in lots of large water
6 disputes as part of our work with Environment of Natural
7 Resources Division, and these cases often take a long
8 time to resolve. But we recognize that. You know,
9 we're not trying to hold up the progress of the case.
10 We want to get to an end point in this case. So we
11 don't object to initiating new settlement discussions if
12 the other parties are willing to take seriously our --
13 our federal interests in this case. We just think --

14 JUDGE SMITH: There's no question that --
15 certainly no question in my mind and there can't be
16 because we know what the Supreme Court said, but
17 frankly, even if the Supreme Court had not ruled as it
18 did in its most recent decision, it appears to me that
19 there are obvious federal interests involved and federal
20 interests on an ongoing basis with respect to the
21 project and the treaty interests and so forth, so I
22 don't question that. Can't question that.

23 MR. SNODGRASS: Yeah. And to be clear, we
24 do not object to mediation per se particularly given
25 that you've indicated you intend to direct this case to

1 mediation, but we do object to mediation before Special
2 Master Boylan.

3 JUDGE SMITH: I understand. That objection
4 is overruled.

5 MR. SNODGRASS: Okay. So a final note I
6 want to make in closing, and this is -- goes beyond your
7 questions. I want to make clear that we disagree with
8 the states' position and view of this -- this case that
9 the court will ultimately adopt a method of accounting
10 and project operations to divide available water supply.
11 This case is not a case against the United States and
12 its operation of the project. New Mexico's counterclaim
13 is against the United States, including its challenges
14 to project operations and the associated requests for
15 relief have been dismissed. The case is instead about
16 New Mexico's alleged violation of the Compact. The
17 problem it seeks to remedy is too much pumping in New
18 Mexico. The Court may declare whether and how New
19 Mexico has violated the Compact and join any such
20 violations, but it may not direct Reclamation to operate
21 the project in any particular manner. That's outside
22 the scope of this case.

23 A few -- I guess a few odds and ends on --
24 on more mundane matters. As far as the scheduling and
25 when a site visit might occur, we think it might be

1 beneficial to have that site visit no earlier than June
2 of this coming year so that there's actually water in
3 the system for you to observe.

4 JUDGE SMITH: It sounds as if everybody
5 agrees that springtime is best. It's just a matter of
6 what point in the springtime. And I think I indicated
7 that I would certainly want to go at a time when it
8 would be most -- most valuable to be there, and that
9 would be a time where, you know, substantial flow of
10 water.

11 MR. SNODGRASS: I understand from
12 Reclamation that that would likely be not until June at
13 the earliest. And beyond that, in terms of future
14 proceedings in this case, we have a lot of parties -- a
15 lot of interested parties on the federal side that are
16 interested in hearing these proceedings. I'm sure the
17 Compacting states do, as well. So if it's possible, we
18 would request that there be allowance for some sort of
19 telephonic dial in to listen to future proceedings.

20 JUDGE SMITH: I'm most interested in -- in
21 what amici have to add, and if I haven't said this
22 before, I would want to certainly move forward including
23 their participation in the same manner as Judge Melloy.
24 I think he -- I think he permitted participation --
25 correct me if I'm wrong -- but there was permission to

1 participate in depositions and certainly participation
2 -- narrow participation, I believe, and also at trial.
3 So I'm interested in the input. My ears are open, and I
4 want to assure that.

5 MR. SNODGRASS: I appreciate that. My
6 comment was actually narrower than that, just that we
7 have other interested parties on the federal side who
8 are interested in listening to future proceedings.

9 JUDGE SMITH: Oh, okay. All right. More
10 than just amici. Yeah, I need to consider that. I
11 would want it to be limited to -- I don't want to open
12 up a proceeding that is in any way violative of current
13 policy with respect to what is broadcast of the
14 proceeding, so we would need to take precautions and
15 make sure that we have narrowed the availability of
16 access to -- as opposed to something that's streaming in
17 a way that everyone in the public has access to. That
18 could present problems that are violative of --
19 certainly of the Supreme Court's own view of its own
20 proceedings and the judicial conscience of policy with
21 respect to -- to public access. That said, that's a --
22 it is an area of interest that -- on the -- just in the
23 work that I'm involved in from judicial conscience is
24 something looking forward to possible changes, but we'll
25 have to deal with whatever is the policy now.

1 MR. SNODGRASS: Understood.

2 JUDGE SMITH: I very much want this to be
3 as open as possible as today was. I further understand
4 that access to a courtroom, wherever it may be, and this
5 particular case, from what everybody has described to me
6 in terms of the various venues where proceedings have
7 been held has got to be one of the more peripatetic
8 forms of action or pieces of litigation that I've ever
9 seen. So -- but we'll proceed with those conditions and
10 those concerns.

11 MR. SNODGRASS: Thank you for taking that
12 into consideration. I have no further comments.

13 MS. COLEMAN: I can speak to that really
14 quick. May I speak from this microphone?

15 JUDGE SMITH: Why don't you come forward.

16 MR. SNODGRASS: Thank you, Your Honor.

17 JUDGE SMITH: Thank you very much.

18 Ms. Coleman?

19 MS. COLEMAN: Yes, good afternoon. Judy
20 Coleman for the United States. I'm actually just up
21 here quickly to say Special Master Melloy found a way
22 for our Zoom trial to handle public access, which
23 involved a limited -- Heather would probably actually be
24 the best person to answer your questions on this, and I
25 think in terms of -- just in terms of press attendance,

1 they would have to contact chambers in advance, but
2 otherwise, it was a -- I think we all had to give
3 attendance lists and things like that. My recollection
4 is the highest number it ever got was in the eighties
5 for people watching.

6 JUDGE SMITH: Well, things I've been
7 involved in rarely proceed that broad attention and that
8 high a number of interested entities, whether that had
9 anything to do with me or just the nature of the
10 proceedings, but the technological aspect involved in
11 this is above my pay grade, which is one of the reasons
12 why I'm interested in conducting a trial in a place
13 where I am dealing with those in our -- in our IT
14 departments who can give me the greatest assistance, but
15 I am interested to hear that. I'm glad you brought it
16 up.

17 MS. COLEMAN: Thank you.

18 JUDGE SMITH: Thank you very much.

19 I think we're prepared to hear from the
20 amici who are present and who desire to make
21 presentations. Let's -- let's begin then with the
22 amici.

23 MR. SANDERS: Your Honor, not to -- I am
24 interrupting you. I apologize.

25 JUDGE SMITH: That's all right.

1 MR. SANDERS: New counsel for EBID.

2 JUDGE SMITH: I know that there's new
3 counsel.

4 MR. SANDERS: I was going to cut my brief
5 short because I will defer to her if you'd like.

6 JUDGE SMITH: I'm sorry. You'll defer to
7 who?

8 MR. SANDERS: To Maria O'Brien. We're
9 aligned on this case so I was going to --

10 JUDGE SMITH: You didn't give your name,
11 sir.

12 MR. SANDERS: I'm D.L. Sanders, sir. My
13 co-counsel is Pete Domenici, Jr. here.

14 JUDGE SMITH: You're the new kid on the
15 block?

16 MR. SANDERS: Yes, we are. And I can't
17 thank you enough for the opportunity today because it's
18 a lot of stuff.

19 JUDGE SMITH: Yeah, thank you.

20 MR. SANDERS: Okay.

21 JUDGE SMITH: All right. Thanks very much.
22 With that in mind, Ms. O'Brien, do you want to --

23 MR. SANDERS: You don't want me to go
24 first?

25 JUDGE SMITH: I'm sorry?

1 MR. SANDERS: You didn't want to allow me
2 to go first? Because then Maria can close it out.

3 JUDGE SMITH: When you said defer, I
4 thought you were ceding your time to her.

5 MR. SANDERS: I am not. I will probably
6 cede most of it. I just wanted to introduce myself.

7 JUDGE SMITH: Let's go forward with you.

8 MS. O'BRIEN: I was surprised at the
9 deference.

10 MR. SANDERS: She wants to correct
11 everything I get wrong. We all go back a long time.
12 It's like old-timers day here. Just so you know, Your
13 Honor, I had Mr. Chakeres position when this case was
14 filed ten years ago so --

15 JUDGE SMITH: Was your beard gray back
16 then?

17 MR. SANDERS: I had long here. No. This
18 has kind of gone this way, and this has gotten longer.

19 JUDGE SMITH: I know that.

20 MR. SANDERS: So a lot of great stuff
21 today. It's overwhelming. I've followed this case,
22 just my natural -- because it's my only area of
23 practice, just water. Mr. Domenici and I go back -- go
24 back to law school together taking water courses
25 together. They had a master's program that we were the

1 first two people to ever explore on behalf of law school
2 and natural resource management and water so we go back
3 way back on this stuff. I was the state engineer for 26
4 years and so I kind of know generally. Now, I know I
5 know a lot less than I thought I did after today. I
6 think we can come up to speed relatively quickly, but we
7 definitely need time. I have not been given any
8 direction whatsoever other than stay the course for the
9 moment. Pete and I have been directed to give a fresh
10 perspective from -- you know, an objective fresh
11 perspective once we get up to speed on this. And I want
12 to thank all the other counsel. Most of the counsel
13 have bothered -- have called. I haven't heard from the
14 states. And I did call to have a conversation with the
15 feds. That was stilted but welcomed. And then I have
16 -- and, of course; I have not yet spoke -- I spoke to
17 Nat, which I believe probably is a segue into the State
18 of New Mexico. I have not spoken to anybody from Texas
19 or Colorado on this issue.

20 But I think, you know -- and I think
21 basically what I've heard and what I've -- if I
22 misinterpret, please correct me. I understood you to
23 have probably suggested something about the districts
24 and their unique status because once this water is
25 delivered into Elephant Butte, you know, the only two

1 users of this district through contract with Reclamation
2 are EBID and EP No. 1. Nobody else. Also, but we're
3 real aware of any specifics. Things have happened and
4 changes and evolved. If this was a typical case, we
5 would just have already been in the process, had
6 litigation over what groundwater -- you know, that's
7 what these cases are about. Groundwater impacts surface
8 flow, and to what extent must it be offset. That's what
9 it's about. Colorado had a case like this, and I think
10 Mr. Draper, who's in our audience today, he did
11 something on that, handled that case where, you know, I
12 think Colorado maybe -- maybe not that particular case
13 but another one where 60 percent of the water impacted
14 by groundwater was offset. Groundwater pumping
15 affecting -- through an irrigation district affecting
16 surface supply deliveries across state line. Very
17 difficult to come up with putting the -- the -- you
18 know, getting the horses back in the barn. Once they're
19 out, you've got to figure out how to manage that. I
20 think that's what the states were attempting to do and
21 kudos to them because those states -- you never have
22 states settling stuff. It's usually battle to death. I
23 can't believe they got that far. Of course, our
24 concerns are they might have done it on our backs, of
25 the users' backs, of the district themselves backs

1 because we have to suffer with those consequences
2 without any input. So what we are really aspiring to be
3 is participants at least in the negotiations. We don't
4 expect you to necessarily offer us a full opportunity to
5 intervene as full parties, though we would desire that.
6 What we would prefer, though -- I mean, what we would be
7 happy with is being able to sit at the table because
8 talking to my district and talking to co-counsel and her
9 district, we feel like we have a serious ability to
10 contribute to things that might help facilitate a
11 settlement. Of course, maybe we could help the United
12 States move in that direction. I mean, I appreciate the
13 position. You know, like I said, everybody has a good
14 point here, and they're largely correct in their
15 perspective. We don't have that ability to get in
16 before the court in the same way. We would offer that
17 to but not to sit down with the parties to negotiate in
18 the same way. We feel that would be constructive
19 towards a settlement in this case. Certainly it
20 wouldn't hurt. Since you're going to direct it towards
21 mediation, we would greatly appreciate the opportunity
22 to participate as full participants in that because
23 we're like islands. You know. Ostensibly, my client,
24 EBID, is represented by --

25 JUDGE SMITH: I'm not sure what you mean by

1 full participants. You're an amici so I understand --

2 MR. SANDERS: Right. If you recall -- we
3 stepped into this position and we don't disagree with it
4 that we suggested we might be moving for further
5 intervention status, and that's because how the water is
6 going to be managed greatly affects how we do our
7 business within the district. Everybody is looking out
8 for us but nobody is listening to us in the way perhaps
9 we would like to be listened to. So, you know, the
10 district has to listen -- they're responsible for both
11 the parties. You know, I think if we could come up --
12 we could work with the United States perhaps to come up
13 with a solution acceptable to the states. Certainly I
14 know they would like to work with us to settle. And so
15 I think mediation -- I'm never -- we're never against
16 mediation. I think Mr. Domenici and I have done some
17 pretty good mediations and been successful in pretty big
18 cases for pretty small clients with big interests. So
19 that's primarily what I wanted to present that we have a
20 long practice in water. We come in this kind of cold
21 behind the 8-ball a little, but the learning curve,
22 we'll get on that learning curve, and we're on it now.
23 Like I said, I was -- we studied Texas -- El Paso V. New
24 Mexico back in 1981 when we were in law school. The
25 resolution of Texas V. New Mexico in 1985 when we were

1 still in law school and first special master report came
2 out. When I was with the state, I was still working on
3 Texas El Paso, Texas V. New Mexico on the Pecos River,
4 and we had to come up with a way of managing to get the
5 water to Texas. We have done that. Largely successful
6 on the Pecos. I think the State of Texas will agree
7 with that.

8 So to me, it's just the simple fact that we
9 are the -- in our case, whereas district of EP No. 1
10 owns -- is the bulk water owner of the right as
11 adjudicated, in New Mexico, it's bifurcated. You have
12 the United States owning the surface impoundment and the
13 right to release for delivery to the districts. We,
14 EBID, divert the water and deliver it to our members.
15 Our members are adjudicated as owners of the water right
16 and the right to put that use to water. Yet on this
17 thing it totally affects their future and their
18 livelihood. They will be unable to -- if they are
19 unable to really have a seat at the table to kind of
20 help dictate their own future, and we think that's
21 pretty important.

22 If you have any other questions, I'd be
23 happy to answer them. Otherwise, I'll defer to Maria.
24 She has the opportunity maybe to -- if there's a
25 disagreement or something or little of a point, I'd like

1 the opportunity to address that if possible.

2 JUDGE SMITH: Thank you, Mr. Sanders.

3 Now, Ms. O'Brien.

4 MS. O'BRIEN: Good afternoon, Your Honor.
5 I have the opposite problem of Mr. Snodgrass. So good
6 afternoon. Maria O'Brien. I'm counsel for El Paso
7 County Water Improvement District No. 1. That's a
8 mouthful so we call ourselves, for purposes of this
9 proceeding, EP1. Thank you for the opportunity to
10 address you today, Your Honor, and we appreciate the
11 questions that you provided to the parties, as well as
12 to the districts. I think answering those questions
13 will generally address what we had intended and hoped to
14 be able to provide to you today in terms of the
15 district's view on where things stand in this case and
16 the district's significant interest in those -- in those
17 issues. I'd like to say at the outset that we support
18 the comments and tutorial information provided by the
19 United States today through Mr. Snodgrass. I'm going to
20 provide just a few additional comments on -- on that, I
21 hope will elucidate EP1's unique interest. To reiterate
22 what Mr. Snodgrass articulated, this case is about the
23 claims that Texas and the United States brought to the
24 Supreme Court and which the Supreme Court accepted and
25 exercised its original jurisdiction over. Those claims

1 raised the singular issue of New Mexico violation of the
2 Rio Grande Compact based on a violation of its duty not
3 to interfere with the release of surface water from
4 Elephant Butte, and that interference is occurring
5 through groundwater pumping in New Mexico. That water
6 that's released from Elephant Butte is dedicated to the
7 Rio Grande project and its beneficiaries, EP1 and EBID.
8 The district's project water manifests as the Compact
9 apportionment to Texas and New Mexico, but it is first
10 and foremost, always was, always has been, always will
11 be the project water supply that's dedicated under
12 Reclamation law and the Compact to EBID and EP1.
13 Through various twists and turns in this now as Your
14 Honor has pointed out several times, this 11-year-old
15 case, what the states are bringing to you today, this
16 case has deviated, we believe impermissibly, from the
17 core claim over which the court exercised its original
18 jurisdiction. Texas has abandoned its core claim. The
19 United States has not. EP1 is the only recipient of
20 Texas' Compact apportionment, and EP1's receipt of this
21 water -- this is where it stands much different stead
22 than other amici in this case, not to downplay their
23 interests, but EP1's interest is factually and legally
24 different because EP1's receipt of that water is
25 pursuant to federal statutory congressionally --

1 congressionally authorized legislation and federal
2 contracts pursuant to Reclamation law. Those contracts
3 among the United States, EP1, and EBID for the water
4 supply from the Rio Grande project. The Compact did not
5 come in, in 1938, and supplant the project, and the
6 states are not surrogates for the districts or
7 Reclamation vis-a-vis project supply, project
8 operations, or the Reclamation contracts to which the
9 states were not parties. The Compact itself and the
10 states in drafting the Compact and approving the Compact
11 determined that the project was to govern any
12 apportionment of water below Elephant Butte.
13 Programatically, as Judge Melloy found, programatically
14 in accordance with Reclamation law and contracts, the
15 Supreme Court has agreed now twice with that
16 articulation. In 2018, it noted the incorporation of
17 the downstream contracts with regard to how the Compact
18 apportionment was to work, and, again, just now in June
19 of 2024, finding that Reclamation's operations of the
20 project and U.S. obligations to EBID and EP1 under the
21 downstream contracts, Reclamation contracts enter into
22 over a series of years, are the means by which the
23 states -- the states chose to effectuate the
24 apportionment. I know that Your Honor is struggling
25 with, I think that's what we all continue to do but

1 certainly upon first, second, even third reading with
2 the language of the Compact that the Compact did not
3 need to be specific as to how the water was to be
4 distributed below the reservoir because the project
5 existed, and Reclamation law was already clear on that
6 point, and the states were well aware of this.

7 So, Your Honor, I think that leads, I
8 think, nicely into your first question to the districts,
9 and you asked about something we said in our status
10 reports. You said that your status report states that
11 EBID and EP1 have always been the instrumentalities for
12 delivering project water, and the 1979 and 1980 title
13 transfers made the districts the recipients of project
14 water. Can you explain to me generally how this works
15 in practice? And I will try to explain to you generally
16 how this works in practice. In order --

17 JUDGE SMITH: This is really practical, I
18 understand, not a --

19 MS. O'BRIEN: I understand. And I will try
20 to do that. I think in order to understand that, I'm
21 going to go back in time a bit and give you some factual
22 and legal context if you will. So EP1 was formed under
23 state law for the exclusive purpose of fulfilling
24 federal law requirements to participate in and benefit
25 from a federal reclamation project.

1 JUDGE SMITH: In saying that, are you
2 referring to some legislative mystery or some actual
3 legislative language.

4 MS. O'BRIEN: Yes, there is. And this is
5 -- it is 1917 Texas general laws 172 and 173 to 74.
6 This is specific Texas law that came into play in 1917,
7 although the predecessors and interests to EP1 or EP1's
8 -- how it was formed in 1917, there were water
9 associations formed actually under territorial law in
10 1906. But the Texas legislature made clear in the
11 formation of EP1 that it was specifically for the
12 purpose, and I quote, "For cooperation with the United
13 States under the federal reclamation laws," and further
14 provided that the district's distribution of contracted
15 for reclamation water was to be under federal
16 reclamation law, and the reason that Texas law so stated
17 really was because federal reclamation law, commencing
18 in 1902, requires formation of water districts for the
19 purposes of a federal reclamation project to first
20 determine feasibility as to that Reclamation project.
21 These were irrigation projects. And that feasibility
22 process is necessary to determine the ability for
23 repayment of construction costs, as well as
24 determination of what's the irrigable acreage. Again,
25 these are determinations made under federal Reclamation

1 law.

2 JUDGE SMITH: Isn't there what you're
3 describing an overlap between the interest of the state
4 and the interests of the United States.

5 MS. O'BRIEN: There should be.

6 JUDGE SMITH: Well, but statutorily and
7 based on the policy behind the statute that you've
8 described, doesn't it reflect the kind of some of the
9 same interests? If -- if the state is saying in
10 legislative history or somewhere in the statute that
11 part of the interest is -- is repayment, for example,
12 that repayment went to who?

13 MS. O'BRIEN: The United States is saying
14 our interest is in providing for Reclamation of arid
15 western lands. That was what the federal government
16 said in enacting the 1902 Act. In fact, the 1902 Act
17 came about as a result of the federal government
18 recognizing --

19 JUDGE SMITH: I had a serious
20 misunderstanding because I thought you were referring to
21 the states' statute since we were talking about
22 statutory authority that enabled the irrigation
23 districts.

24 MS. O'BRIEN: The irrigation districts were
25 required under federal Reclamation law. At a point in

1 time, state law recognized the need to have -- to form
2 under state law these irrigation districts required and
3 necessitated by federal law. So there is a synergy of
4 interest, and at the beginning of this case, as you are
5 well aware and people have stated today, Texas and the
6 United States and the -- and EP1 was aligned with the
7 State of Texas, but the -- the deviation has occurred
8 because Texas has abandoned its claims with regard to
9 preventing New Mexico from interfering with project
10 supply as it makes its way down to EP1 and turned this
11 case, in our view, into a -- an attack on our federal
12 reclamation contracts and the operation of the project
13 that we believe is not the role of the state that is
14 delegated under federal law, the Compact, and
15 Reclamation law to the United States and the districts.
16 And starting in 1906 through --

17 JUDGE SMITH: How is that delegation shared
18 since -- since the irrigation districts are, as I
19 understand it, effectively municipal subdivisions of the
20 state itself, are they not?

21 MS. O'BRIEN: Yes, they are. And that is
22 why I thought it was important to have you understand
23 how the irrigation, at least EP1 kind of irrigation
24 district EP1 is under Texas state law, why it is -- why
25 it came into existence and the purpose for which the

1 Texas legislature formed it. So we are, for purposes of
2 a parens patriae situation, for purposes of our
3 Reclamation contracts and allocation of water under the
4 Reclamation statutes and our contracts, Texas cannot be
5 -- in fact, the legislature said they are not parens
6 patriae for -- for that purpose. Now, if Texas were
7 still sticking to its claims of we're protecting our
8 Compact apportionment, which is manifesting as the
9 project allocation to EP1 and we, Texas, are going to
10 protect that from interference through upstream
11 groundwater pumping, that's one matter. But if that
12 claim is abandoned and the claim instead is as was
13 presented by the states today that we are going to
14 modify project operations, we're going to complain about
15 federal reclamation contracts, and address their terms
16 and conditions, that is -- that is another matter. I
17 mean, I think Mr. Snodgrass, towards the end of his
18 presentation, noted that the United States believes and
19 we are steadfast with them on this that this case is not
20 about once the court interprets -- comes to the right
21 Compact interpretation as to New Mexico's duty not to
22 interfere and what is the baseline above which it cannot
23 interfere, the Court cannot then turn and say, oh, and,
24 okay, now, we states are going to ask the court, and
25 we're going to tell the court how project operations and

1 the water supply from a project should be accounted for
2 and divide it as between the districts. That is
3 addressed under federal reclamation law. If there --
4 once there is a decree entered, if there is something in
5 project operations that is somehow inconsistent with the
6 decree, then it's in the purview under Reclamation law
7 for the districts and the United States to bring that
8 into align with the decree. We do not believe that that
9 would be the case. We do not believe that the
10 appropriate interpretation of the Compact in this case
11 and/or any remedy would require any adjustment, but that
12 would be the situation if, in fact, that were the case.
13 But the states here have deviated again from the core
14 claim, and, in fact, New Mexico's presentation -- or New
15 Mexico's part of the presentation, several of the slides
16 articulated, you know, a -- New Mexico's claim vis-a-vis
17 the operating agreement. There is no current existing
18 claim in this case that has not been dismissed by Judge
19 Melloy challenging the operating agreement, yet the
20 states appear intent on, either through the proposed
21 consent decree or through continued litigation, appear
22 intent on litigating dismissed counterclaims and project
23 operations in other issues, which have been, we believe,
24 inappropriately inserted into this case.

25 So commencing in 1906 and through 1937 and

1 thereafter as necessary under Reclamation law, the
2 districts or their predecessors entered into requisite
3 repayment contracts with the United States to provide
4 for repayment of construction costs, payment of
5 operation and maintenance costs, operations, delivery,
6 accounting, and that delivery of water to qualified and
7 authorized acreage under Reclamation law. The
8 authorized acreage and in each state, in each district,
9 is decided under federal Reclamation law, not under the
10 Compact, and that authorized acreage was already in
11 existence at the time of the Compact. And as I noted,
12 other federal reclamation contracts followed after 1937,
13 as necessarily required by congressional directives
14 under federal reclamation law. Delivery of water in any
15 reclamation project -- and this is kind of giving --
16 trying to give a little more specifics to what I was,
17 you know, explaining in terms of this, that the Compact
18 versus the project, the delivery of water within any
19 Reclamation project, the Rio Grande project being no
20 exception, is subject to a plethora of federal
21 reclamation requirements, including the determination of
22 eligible lands, acreage limitations, limitations on use,
23 allocation of water, and so on, and only district
24 members within each of the required irrigation districts
25 are entitled to project water delivered through the

1 districts. So getting more to the core of your question
2 number one, prior to the -- so the districts have always
3 been, as we stated in our status report, the entity
4 through which water is delivered under the Rio Grande
5 project and after 1938, the -- the Compact an
6 acknowledgment of the project. So prior to the transfer
7 of title to project works to the districts, Reclamation
8 delivered water directly to the farm head gates of
9 district members to individual farms, individual
10 farmers. By 1977, I think you've heard some of this,
11 but I'll walk through just, again, to give the right
12 context, both districts had repaid their construction
13 obligations. In terms of your earlier question, which I
14 don't think I -- I answered, the money was to the
15 federal government for construction of the project. It
16 was not to -- not to the state.

17 JUDGE SMITH: Right.

18 MS. O'BRIEN: So both districts had repaid
19 their construction obligations pursuant to the repayment
20 contracts, 1979 and 1980, EBID and EP1 respectively, and
21 as a result of this repayment, the two districts entered
22 into, again, separate Reclamation contracts, which we
23 refer to as transfer contracts with Reclamation
24 providing for the transfer of project works within each
25 of the districts and the transfer of the O&M obligation

1 for those work within each of the districts. The O&M
2 for the project writ large, Caballo/Elephant Butte, that
3 remained a continuing annual obligation of each of the
4 districts to pay the Reclamation to continue to -- and
5 continues to this day to operate those works. This
6 title transfer was congressionally approved in 1992. So
7 significantly, Your Honor, the transfer contracts
8 required the districts and the United States to enter
9 into an operating agreement to address water delivery,
10 and that was because of the change from delivery of
11 water to farm -- individual farmer head gates to
12 delivery of water to diversion dams for the -- each of
13 the districts. So, now, Reclamation starting in 1977,
14 Reclamation delivers water to EBID at three diversion
15 dams on the Rio Grande and to two diversion dams to EBID
16 -- excuse me -- EP1 a little further down. Although
17 they share one diversion structure, Mesilla dam.

18 JUDGE SMITH: Excuse me just one moment.

19 MS. O'BRIEN: Sure. So as noted, those
20 transfer contracts, the '79 and '80, required the
21 reclamation of the districts to enter into an operating
22 agreement to address project operations, project
23 accounting, which included storage releases, delivery,
24 management of the water through the project. In 2008,
25 that agreement was consummated. You've heard reference

1 to it, I think, many times now, the 2008 operating
2 agreement. Operating agreement simplified. It
3 addressed all project operations as necessary and
4 related to storage releases, diversions, and all
5 associated accounting. Critical to the operating
6 agreement was the need to address, within the purview of
7 reclamation and the districts, New Mexico's interference
8 with project supply as it moves through the gauntlet of
9 groundwater pumping in New Mexico. To be clear, the
10 operating agreement was a compromise and addressed only
11 what was in the purview of the districts and reclamation
12 taking into account the conditions as we found them in
13 2008. The operating agreement did not and could not
14 authorize New Mexico as a Compacting state to interfere
15 with project surface supply as the state's
16 apportionment.

17 So, Your Honor, that is what I would offer
18 in terms of answer to Question 1. If you have any
19 further questions, I was going to move on to actually
20 your Question 3 in terms of the preview of any potential
21 motion to intervene. I would think I would say at the
22 outset, we're not anxious to move to intervene. So much
23 of that decision and the legal and factual basis to make
24 that motion will depend on what I see is really what
25 fork in the road this case takes going forward.

1 JUDGE SMITH: I'm not sure what you mean by
2 that. We know what the positions of the parties are at
3 this point.

4 MS. O'BRIEN: Right.

5 JUDGE SMITH: So I'm not sure --

6 MS. O'BRIEN: Well, I think --

7 JUDGE SMITH: -- what further fork you may
8 be envisioning.

9 MS. O'BRIEN: Well, to me, there is two --
10 the fork in the road has been presented pretty plainly
11 today. The fork the states would like to have you take
12 is a litigation that would involve putting the operating
13 agreement in project operations as the central focus of
14 the case, be that in continued litigation on liability
15 and/or through presentation of the state's consent
16 decree, which is an amendment to the 2008 operating
17 agreement. If that is the fork that's chosen, as I
18 think evidenced by the state's proposal in its
19 presentation today, and in the status reports, we don't
20 believe -- I think EP1 would not only need to but would
21 have a right to intervene because what would be at issue
22 are its federal statutory rights under federal law and
23 under its contracts. The other fork is as been
24 presented by the United States, which is what we believe
25 is the appropriate procedural posture, if you will, of

1 the case that what remains to be litigated are the
2 claims that the United States brought to the court and
3 the court accepted in 2018 regarding New Mexico's
4 interference with the release of project supply from the
5 reservoir, interference through groundwater pumping,
6 and, again, that is the release of project supply to be
7 allocated or is allocated to the districts. That
8 allocation does manifest as the state's Compact
9 apportionment. But the Compact, and, again, I believe
10 the Supreme Court has said that it agrees with this,
11 once that water is delivered into the reservoir, it's
12 dedicated to the project and turned over to Reclamation
13 for allocation under the Rio Grande project. So,
14 really, two issues, depending on the left fork or the
15 right fork is taken, underpin, I think, drive EP's
16 interest in the case and potential renewed request for
17 intervention. This case has fundamentally changed since
18 the filing of the Texas case in 2013 and the district's
19 2014 motion to intervene. The motion was denied at that
20 point. The states and the United States argued, and the
21 first special master found that intervention should not
22 be granted because the contracts, the federal
23 reclamation contracts and project operations were not at
24 issue in the case. Based on that, EP1 nor EBID took
25 exception to the Supreme Court. At that point in time,

1 New Mexico had not filed counterclaims or affirmative
2 defenses, and Texas had not abandoned its singular
3 Compact claim. So this is a different case and --

4 JUDGE SMITH: So the records certainly
5 speak to itself as to the twists and turns that have
6 been taken and the change in litigation position to the
7 extent it can be characterized as that.

8 MS. O'BRIEN: And for -- and for the same
9 reason as I articulated earlier, if that is the
10 procedural posture -- procedural and substantive posture
11 that the case continues along, Texas is not parens
12 patriae for purposes of EP1's reclamation contracts or
13 interests in specifically in how project supply is
14 allocated or accounted for. So those -- the fundamental
15 change in the nature of the case triggers EP1's
16 underlying legal interests and rights, and we believe
17 that, you know, under federal law is clear and applies
18 even though this is a Compact case with -- with states
19 that contractual rights cannot be adjudicated without
20 all the parties before the court. Can start with that
21 -- with that simple presence. And I would -- do not
22 think you wanted a full argument today on a motion to
23 intervene. I think your request --

24 JUDGE SMITH: Your intuitive sense of that
25 is correct.

1 MS. O'BRIEN: I think your request is,
2 again, for a preview and so that is generally the -- the
3 preview that I -- I would -- I would offer today. I
4 think that, you know, the -- the law is clear with
5 regard to really, you know, a right of intervention, if
6 -- if the case continues as the states propose or -- or
7 would like to see it continue as opposed to the United
8 States' we think more reasoned, appropriate view of the
9 case at -- at this point in time. That is the obviously
10 related to your -- I think it's actually your second and
11 fourth questions, which -- to the districts, which I
12 think are for the most part interrelated and can be
13 answered together, and those -- those questions are what
14 specific roles are EP1 and EBID seeking in this
15 litigation beyond that of active amici and then
16 relatedly, if the Special Master, if you afford active
17 participation going forward in all procedural steps of
18 this litigation, as I have today and as my predecessor
19 afforded to in the past, what would you expect you would
20 gain through intervenor status.

21 JUDGE SMITH: Which would be fully my
22 intention as of today.

23 MS. O'BRIEN: And we appreciate that. I
24 think I would say a few things in response to those
25 questions. The first and, I think, most important,

1 especially given Your Honor's articulation -- more than
2 articulation intent that you will direct the case to
3 proceed to mediation before Judge Boylan, that EP1 needs
4 an unqualified seat at the settlement table. I think
5 that it is --

6 JUDGE SMITH: Let me just, for purposes of
7 the record, rather than unqualified, without
8 qualification, I'm sure is what you mean --

9 MS. O'BRIEN: Without qualification. Yes,
10 thank you. Yeah, without qualification and the ability
11 of any of the parties to dictate when we could or could
12 not be privy to what was being discussed, being told
13 after the fact, sometimes not being told at all. The
14 reason for this is essential. We found, during the
15 course of it but certainly based on the result, the
16 prior settlement proceedings to be untenable in terms of
17 EP1's, I think, ad hoc at best ability or right to
18 participate, and it was untenable because what the
19 result was, was clear. What was being negotiated were
20 compromises and negotiations regarding EP1's contractual
21 rights in project water supply, and I know you have not
22 read the consent decree and it would take more readings,
23 frankly, than the Compact to understand what the
24 intended result there was, but it is an amendment to
25 project operations and accounting, and I think the

1 states have actually been pretty up front about that in
2 their presentation today and otherwise. So whether
3 intervention to be recognized as a party is necessary to
4 have that, we think, required seat at the settlement
5 table, I -- it's really a question perhaps I pose back
6 to you. I don't -- I think that it could be shaped
7 through direction from you, Your Honor, that we would be
8 secured that -- that seat. Some of the opposition in
9 the past, which I think has -- has not been legitimate,
10 is has been concerned about managing space and parties.
11 We've all been involved, I think you've heard several
12 people today, in pretty complex large settlements. I
13 know Judge Boylan has, himself, handled very complex
14 negotiations and mediations with a vast number of
15 parties, and where there's a will and an interest, it --
16 it can -- it can be done. I do not see it unmanageable,
17 and, frankly, I don't see how negotiations could
18 continue or go on without the proper participation of
19 the districts in -- in a way to -- to work, to figure
20 out a resolution, not as, you know, an obstacle to
21 resolution, but to -- to work through the issues, to see
22 what the -- the resolution could be here, given the
23 complexity and the -- the different views and concerns
24 regarding the proper relationship of the project and the
25 Compact.

1 JUDGE SMITH: All right. Ms. O'Brien,
2 you've exceeded your allotment, but you have gone beyond
3 the time that I have set.

4 MS. O'BRIEN: We appreciate the time. I
5 think the only last questions was our alignment with the
6 United States. We are -- we remain aligned with the
7 United States, but we also are independent contracting
8 parties with the United States, and for that reason, you
9 know, potentially at times need the opportunity to
10 express our views to ensure protection of the district's
11 unique interest. Thank you.

12 JUDGE SMITH: All right. Thank you, Ms.
13 O'Brien.

14 MR. SANDERS: Your Honor, if I might be
15 able to address a couple things that were omitted that
16 are directly specific to EBID.

17 JUDGE SMITH: I'm sorry. We have other
18 amici to hear from now.

19 MR. SANDERS: Okay.

20 JUDGE SMITH: They have half an hour
21 allotted to them. In fact, we don't even have an entry
22 of appearance from you as of the end of the day
23 yesterday.

24 MR. SANDERS: I filed it on Sunday.

25 JUDGE SMITH: Max, I think -- it never got

1 with us as far as --

2 LAW CLERK: I haven't seen yet, but that
3 could be a clerk.

4 MR. SANDERS: It did. I was admitted to
5 the bar, as well.

6 JUDGE SMITH: We are not doing any rebuttal
7 here.

8 MR. SANDERS: I'm not rebutting her. It's
9 just an omission that doesn't apply to EBID.

10 JUDGE SMITH: Submit it to me in writing.

11 MR. SANDERS: Okay. That's great.

12 JUDGE SMITH: I've been as generous as I
13 can be with respect to time.

14 MR. SANDERS: I understand. I'm happy to
15 do it in writing. Appreciate it.

16 JUDGE SMITH: Who is taking the -- the
17 first -- the initial --

18 MS. DAVIDSON: I am, Your Honor.

19 JUDGE SMITH: All right. Please come
20 forward.

21 MS. DAVIDSON: Good afternoon, Your Honor.
22 I'm Tessa Davidson, and I represent the New Mexico Pecan
23 Growers. You just heard from Ms. O'Brien. Her
24 irrigation district is in Texas, and my farmers are
25 actually in EBID and the irrigation district in New

1 Mexico. Our organization has 300 members who farm about
2 30,000 acres of pecan orchards in EBID, and the
3 interests of our members and the members actually of our
4 fellow amici, the diverse crop growers association,
5 who's represented by Ms. Standish, have been aligned
6 with the state of New Mexico since the very initiation
7 of this case. One reason is because the farmers not
8 only use surface water to irrigate from the project, the
9 water that's delivered from the project, but they also
10 rely on irrigation wells to meet their irrigation
11 demands, and these wells mostly have been drilled --
12 most of the farmers' wells were drilled in the '50s, and
13 they have been used without interference from the United
14 States for around 70 years. I very much appreciate your
15 comments this morning about your limited experience in
16 western water law matters. For lunch, I looked to see
17 what rivers you live with and I saw the Ohio River and
18 to give you some --

19 JUDGE SMITH: Well, it's not close. What's
20 close is the Juniata River and Spruce Creek, which is a
21 great Trout stream, according to some.

22 MS. DAVIDSON: Okay. I didn't research
23 them. I'm sorry. Well, I did look at the Ohio River,
24 which is near Pittsburgh; is that correct?

25 JUDGE SMITH: Yes.

1 MS. DAVIDSON: And I saw that on average,
2 its average discharge flow is 236,000 cubic feet per
3 second, and to give you some context for comparison,
4 what we live with on the Rio Grande, just four days of
5 average flow of the Ohio River exceeds the total flow in
6 the Rio Grande for an entire year, and this is the
7 reality for farmers in the west. Their crops don't grow
8 without irrigation, and they struggle daily to stretch
9 the limited water supplies just to farm. The farmer's
10 role in this matter is two prong. We do align with the
11 states. We do believe that the states' position in this
12 case best protects our interests. We seek to
13 reestablish the Compact's equitable provision of the Rio
14 Grande to New Mexico, that -- that 57 percent share of
15 project water supply, and second, we seek protection of
16 our groundwater uses that have been established during
17 the D2 period. As you heard this morning, the Compact's
18 57:43 pro rata division of water below Elephant Butte
19 was first established by a Reclamation contract in
20 effect in 1938, and as Mr. Wechsler showed you, the 2008
21 operating agreement altered the 57:43 division of water
22 below Elephant Butte. Since then, New Mexico's farmers
23 no longer receive 57 percent share of surface water, and
24 as a result, it had to replace that reduced surface
25 water with groundwater pumping. So I found it

1 incredibly ironic that the United States actually
2 pointed out Exhibit 4 that shows really clearly the
3 effects of having less surface water in New Mexico and
4 the increased groundwater pumping that's resulted since
5 2008. And you will see spikes of groundwater pumping
6 increased through time in New Mexico, but those are
7 usually the result of a drought and surface water
8 limited supply, but the increased sustained pumping in
9 New Mexico is a result, at least in part, by the 2008
10 operating agreement.

11 JUDGE SMITH: You just said New Mexico.

12 MS. DAVIDSON: New Mexico.

13 JUDGE SMITH: Okay. I thought you said...

14 MS. DAVIDSON: Before I continue, I think
15 it's very important to distinguish EBID's interest from
16 the farmer's interest. Why EBID is sitting at this
17 table and not that table and we're on opposite sides of
18 the table has really confounded Judge Melloy, so I'll
19 take just a few moments to explain. EBID, as explained
20 by D.L. is the entity that distributes surface water to
21 our farmers. It does not use water. It does not
22 distribute groundwater. It has no control over
23 groundwater. The farmers are the users of water in New
24 Mexico, and they're the ones that pay their pro rata
25 share for project construction, as explained by Ms.

1 O'Brien, and they continue to pay for its operation and
2 maintenance. No matter how little surface water they
3 receive now under the operating agreement, they are
4 still paid for operation and maintenance of the
5 facilities that really today benefit mostly EP No. 1.
6 EBID's position has thus far been to defend the
7 operating agreement, however the farmers believe the
8 operating agreement results in inequitable treatment of
9 New Mexico's project beneficiaries over Texas' project
10 beneficiaries, and your question regarding the overlap
11 of the state law that created the irrigation districts
12 and Reclamation law, you're absolutely right. They are
13 consistent. New Mexico's irrigation statute that
14 created EBID and Reclamation law both provide and
15 require protection of project beneficiaries water rights
16 and equitable treatment of all project beneficiaries,
17 and that just hasn't been occurring under the operating
18 agreement. When you review the trial transcripts, you
19 will see that several New Mexico farmers testified about
20 the disparate impacts of the operating agreement on
21 their operations. Since it was implemented. It was
22 only a fraction of your pro rata share of water and
23 they're forced to pump more groundwater to meet the
24 demands of their crops and while they may only receive a
25 few inches of surface water per year for the project,

1 their downstream neighbors in Texas receive more than
2 full supply. For example, evidence at trial showed that
3 farmers in Texas received four acre-feet or 48 inches of
4 water per acre in 2018 through 2020, while farmers in
5 New Mexico received less than 10 inches in 2018 and just
6 about 13 inches in 2019 and 2020. In years in which the
7 projects had a full supply of surface water, the
8 operating agreement has reduced Mexico's allocation by
9 more than one-third. Farmers also testified that having
10 to pump more groundwater has significant -- it
11 significantly increases their operating costs. They're
12 spending double the amount for the additional
13 electricity of fuel needed to pump the amount of water
14 that used to be supplied by EBID, and for the little
15 amount of surface water they've received, they've paid
16 an exorbitant amount for that water compared to Texas
17 farmers. For example, in 2021, farmers in New Mexico
18 paid \$270 per acre-foot of water while farmers in Texas
19 paid only \$12.50 per acre-foot. That amounts to New
20 Mexico farmers paying 22 times the amount Texas farmers
21 paid for the same project water. However, those most
22 impacted by the operating agreement are the farmers who
23 do not have irrigation wells and cannot replace reduced
24 surface water with groundwater to irrigate. They've
25 simply lost the ability to farm. As you heard today,

1 United States continues to take the position that it and
2 the irrigation districts have complete authority to
3 alter the division of water below Elephant Butte over
4 the objection of the Compacting states, and it also
5 desires to pursue 1938 baseline condition in New Mexico
6 under the Compact. Notably, your Honor, the United
7 States does not seek a 1938 condition in Texas, and you
8 would think that that condition would equally apply to
9 their ability to get water down to Mexico, but for some
10 reason, it's only a '38 condition in New Mexico. We
11 believe what the United States seeks would result in
12 continued disparate treatment of project water users in
13 New Mexico if it were to be successful, project
14 operations under the operating agreement would continue
15 to provide New Mexico farmers only a small fraction of
16 their share of project water, while a 1938 baseline
17 would prevent them from pumping their irrigation models
18 above 1938 levels which you heard Mr. Snodgrass say
19 today. This is absolutely irreparable. In short, New
20 Mexico farmers are aligned with the states. They seek
21 to reestablish the Compacts of equitable 57:43 division
22 of water below Elephant Butte under a D2 baseline in New
23 Mexico, and we very much appreciate the opportunity,
24 Your Honor, to apprise you in this matter, and with
25 that, I'll turn to Ms. Standish.

1 JUDGE SMITH: Thank you very much. Ms.
2 Standish.

3 MS. STANDISH: Good afternoon, Your Honor.
4 I also am new to the case and so I'm going to keep my
5 presentation very short. I represent the Southern Rio
6 Grande Diversified Crop Farmers Association which is
7 made up of landowners and farmers in the southern Rio
8 Grande Valley. They are slightly different in that they
9 grow everything from green chile to onions, cotton to
10 corn, and since it's seasonally appropriate, pumpkins.
11 I represent more than 500 members that farm more than
12 30,000 acres so between Ms. Davidson and my clients,
13 they farm 60,000 irrigated acres in New Mexico and as
14 the Court heard earlier, they're 88,000 irrigated acres
15 in New Mexico that are served by the project. My client
16 specifically has the mission to advocate for surface and
17 groundwater rights of its members in accordance with
18 Compact and state law. To echo what Ms. Davidson has
19 previously said, my client has the position that the
20 57:43 split between the states is not only equitable,
21 but it is appropriate. Something that the U.S. has
22 raised regarding groundwater, New Mexico has the
23 administrative ability and capabilities to administer
24 its own groundwater. This is a state and not a federal
25 issue. My client remains aligned with the state, even

1 though it is a -- many of its members are members of
2 EBID and so, again, as Ms. Davidson stated, we are
3 seated on this side and will remain to be seated on this
4 side through those proceedings. Thank you.

5 JUDGE SMITH: Thank you very much.

6 MR. STEIN: Good afternoon, Your Honor.

7 JUDGE SMITH: Good afternoon.

8 MR. STEIN: My name is Jay Stein. I'm
9 counsel of record for the --

10 JUDGE SMITH: Speak a little closer to the
11 microphone, please.

12 MR. STEIN: Is this better?

13 JUDGE SMITH: That's better.

14 MR. STEIN: Jay Stein. I'm counsel of
15 record for the City of Las Cruces. Your Honor, the --
16 Your Honor has been briefed extensively on irrigation
17 issues from the United States, from the Compacting
18 states, from representatives of the two irrigation
19 districts, from constituent members of the irrigation
20 districts, but you haven't heard much from the cities
21 yet. You haven't heard anything about a million people
22 -- close to a million people in the state of New Mexico
23 whose water rights and water use would be adversely
24 impacted by the importation of the 1938 condition or the
25 rollback of a 19 -- of so many years to a 1938 condition

1 and its effect on the essential public welfare services
2 that the municipalities supply and those include, of
3 course, a domestic use. They include supply to regional
4 medical centers. Las Cruces has three of those. They
5 apply to, of course, school districts. Las Cruces has
6 six of those. They apply to commercial and industrial
7 users. The city is constantly being asked for new
8 hookups for those. They apply to parks and recreation.
9 The city's water rights are based on permits that have
10 been -- Las Cruces' water rights are based on permits
11 that have been issued by the New Mexico state engineer.
12 Those are obtained on application by the city to the
13 state engineer. That is a process that's required to be
14 noticed so that there can be protests, and it's an
15 adversarial process occasionally. In any event, any
16 permit that is issued by the New Mexico state engineer
17 in the Rio Grande corridor to a municipality always
18 contains conditions of approval, and those are
19 constraints or requirements that the permittee is
20 required to observe to continue exercising water right
21 in the permit. In the Rio Grande corridor, the first
22 consideration is Compact compliance. The state engineer
23 will not issue permits to municipalities if that will
24 interfere with the state's ability to deliver water to
25 Texas under the Rio Grande Compact. The city's permits

1 contain such a restriction. The second is, of course,
2 impairment. The state engineer will not issue permits
3 to municipalities if doing so would impair the rights of
4 others. In other words, the City of Las Cruces cannot
5 obtain new water rights permits if doing so would dry
6 out farms in Elephant Butte Irrigation District. As a
7 consequence, the city is the owner of Compact compliance
8 permits, Compact compliant permits, and is also a party
9 in a Compact compliant water rights administration as
10 affects that municipality. The importation of a 1938
11 condition, which would roll back the clock 80 years,
12 would be completely disruptive -- disruptive to this
13 administration, would completely upend it, and more
14 importantly, wouldn't have any effect in terms of
15 improving Compact deliveries for three reasons. First,
16 the City of Las Cruces is granted a right to effect the
17 surface flows of the Rio Grande to a small extent based
18 on its pre-Compact usage. As far as post-Compact usage
19 is concerned, the city is required to obtain offsets.
20 These are additional water rights or water from some
21 other source that negates and nullifies on a one-to-one
22 basis, molecule for molecule, any depleted effect that
23 its permitting has on the surface flows of the Rio.

24 Thirdly, the city used imported water,
25 that's new water that is foreign or new water that is

1 imported into the system that is not native to the Rio
2 Grande and has the effect of adding to the supply of the
3 Rio Grande and can be used for further rate any
4 depletive effect that the city's pumping has or to be
5 used also for -- for new diversions.

6 Fourthly, this applies to Las Cruces,
7 specifically, the city is a beneficiary of the D2
8 formula or curve under which the Bureau of Reclamation
9 administers and allocates surface water to the two
10 irrigation districts, and this grandfathers in the
11 effects of the city's pumping from the period of record
12 1951 through 1978 as vested rights, and vested rights to
13 affect the river. For these reasons, the city strongly
14 supports the adoption of the index decree as argued for
15 today by the attorneys for the Compacting states, but
16 let's take a little bit of a deeper dive into municipal
17 water use and into Las Cruces' water use and look at the
18 water budget and look at the municipal use generally and
19 for the city. The -- Your Honor can think of a
20 municipal well or a municipal well field as diverting
21 100 units of water, hundred acre-feet. Typically, 50
22 percent of those are consumed in the beneficial use.
23 That's consumptive use. They're used up in the process
24 by which the city serves its various beneficial uses.
25 50 percent are not consumed. That's the return flow.

1 They are returned to the source of supply. That can
2 happen through land application on soccer fields or
3 parks and trickle down back to the aquifer or, more
4 typically, it can be discharged back into the Rio Grande
5 as treated effluent through NPDES permits and the City
6 of Las Cruces has one of those.

7 Secondly, municipal wells. Municipal wells
8 are typically the best because the cities have
9 utilities, and utilities have rate payers that can pay
10 for the best equipment. Typically they're the best in
11 the system. They are also the deepest. They go deep
12 beyond the alluvial aquifer deep into the artesian
13 aquifer. Las Cruces' wells are at 15, 17, 1900
14 acre-feet. That's very deep. That means the effects
15 that they have on the surface floors on the Rio will be
16 late. They'll be diffused. The offsets are much easier
17 to obtain because they're not all manifest in one
18 accounting error, but spread out through several. The
19 city has three well fields. The first is the -- the
20 valley well field. That's where its principal water
21 rights are and that well field is in close hydrologic
22 connection with the Rio Grande. The effects, however,
23 the depletive effects that it has are instantaneously
24 ameliorated to the extent of 50 percent or more by
25 effluent discharge, which is derived from water taken

1 from the -- from the deep artesian aquifer,
2 supplemented, as well, by water taken from effluent
3 discharge taken from the east Mesa. The area where the
4 city is currently developing its water rights is in the
5 east Mesa. The east Mesa is a sub basin that is
6 hydrologically disconnected from the Rio Grande. There
7 is a geologic formation known as the horse, which
8 separates the Jornada del Muerto east basin from the
9 Rio, and the effect of that is the pumping in the east
10 Mesa cannot propagate to the Rio Grande. The amount of
11 pumping that you do in the east Mesa will never be
12 reflected as a depleted use in the Rio Grande, first;
13 and secondly, any of the effluent that is derived from
14 the use in the east Mesa and later discharged into the
15 Rio from the -- from the treatment center is entirely
16 new water. It's entirely imported farm water, which can
17 be used to further ameliorate city depletive effects or
18 supply additional sources of supply.

19 The city's third well field, which is
20 slated to come online in the 2030s, is on the west Mesa.
21 Two facts there. The wells there will be deep and,
22 therefore, they will have delayed and diffused effects
23 on the Rio, which makes them easier to offset.
24 Secondly, there is an existing offset requirement in the
25 state's permits, which means that the city has to have

1 its offset rights in hand before it can ever make
2 diversions from those wells. The result of this is a
3 city that is completely in balance in terms of its
4 Compact delivery obligations and which is concerned that
5 any movement toward a 1938 condition will upend this
6 balance and create a chaotic situation in which the city
7 will have to scramble for water that is going to be very
8 hard to find. Thank you, Your Honor.

9 JUDGE SMITH: Thank you, sir.

10 MR. BROCKMANN: Good afternoon, Your Honor.
11 Jim Brockmann, and with me today is Chris Melendrez, the
12 General Counsel for the Water Authority, and he and I
13 report to Mark Sanchez, who is executive director and
14 the governing board who's made up of members of the
15 county -- Bernalillo County and the City of Albuquerque.
16 The Water Authority is the largest utility water
17 provider in New Mexico serving about 675,000 people. It
18 gets its water supply from two primary sources. First
19 groundwater wells located near the Rio Grande, which as
20 Mr. Stein just explained, can have diffuse effects
21 because they're deep and some are located farther away
22 from the river, and the second major source of water is
23 the San Juan-Chama project, and Mr. Wallace for the
24 state of Colorado described that project a little bit in
25 his summary of the -- of the Rio Grande Compact, and I

1 think it was Article X that water brought in from
2 imported sources is not counted as part of the Rio
3 Grande Compact, and this is the import of water that's
4 not native to the Rio Grande. It comes from the
5 Colorado River basin. The Water Authority does support
6 the Compacting states brief and their proposed solution
7 and their proposed procedure for proceeding to trial.
8 We appear as an amicus really for two primary reasons.
9 Number one, we're concerned about a 1938 condition that
10 would be applied in the middle Rio Grande for the same
11 reasons Mr. Stein just explained. It would be
12 disastrous to state permitting and right now, the Court
13 has allowed the United States to pursue a 1938 condition
14 and that remains a concern and we're an amicus to
15 participate with respect to that. The second reason has
16 to do with the federalization of groundwater. One of
17 the complaints -- one of the allegations in the United
18 States complaint is that non-project users that take
19 groundwater should have to have a federal -- federal
20 contract to use groundwater, and in the middle Rio
21 Grande, we're located adjacent to the middle Rio Grande
22 conservancy district, and we remain concerned that if
23 the United States claim were to prevail, our groundwater
24 permits from the state would be worthless, and we'd be
25 required to look for a federal contract. So those are

1 the two primary interests that the Water Authority is
2 participating in.

3 JUDGE SMITH: Thank you very much.

4 MR. BROCKMANN: Thank you.

5 MR. UTTON: The microphone is just right.

6 JUDGE SMITH: Excuse me. There was some --
7 some misunderstanding, I think, on -- on our part in
8 chambers is just how many people were sharing time for
9 this.

10 MR. UTTON: Your Honor, I think I'm the
11 last, I believe.

12 JUDGE SMITH: Excuse me?

13 MR. UTTON: Your Honor, I'm John Utton. I
14 believe I'm the last one.

15 JUDGE SMITH: All right.

16 MR. UTTON: And I can be quick.

17 JUDGE SMITH: No, no, that's all right. I
18 don't mean to rush you. I just wanted to make sure I
19 had all the names here and -- and -- but it is good
20 news.

21 MR. UTTON: It is good news for everybody.

22 JUDGE SMITH: Ambiguity is not an issue
23 here.

24 MR. UTTON: One of the advantages of going
25 last, a lot of the other lawyers have prepared the

1 groundwork and set the table. One of the disadvantages
2 is they've said it all. But I will be quick. I just
3 want to describe a little bit about my clients'
4 interest, who I'll talk about in a second, and discuss
5 one issue that I think has not gotten enough attention.
6 So I'm representing New Mexico State University, Texas
7 New Mexico Energy, which used to be P&M, public Service
8 Company of New Mexico. But somehow in the spirit of the
9 states joining together, now my client is Texas New
10 Mexico Energy, and then the Camino Real Utility
11 Authority or CRUA, we appreciate the opportunity to
12 speak before you, and we're appreciative that you've
13 given amici an opportunity to participate. All three of
14 those clients are groundwater users. NNMSU, or New
15 Mexico State University, is also a member of Elephant
16 Butte Irrigation District. It has experimental farms.
17 When you come on the site tour, the basin tour,
18 hopefully you'll get to see some of the agriculture,
19 including NMSU's farm, so they get surface water from
20 EBID, as well as groundwater for their main campus,
21 which is located in Las Cruces. These three groundwater
22 users really cover the spectrum of water use --
23 groundwater use in the lower Rio Grande and New Mexico.
24 NMSU was founded in the late 1800s. The first use of
25 water there was in 1890. So similar to the description

1 Mr. Stein had about the early Las Cruces wells, that --
2 that water use, which has been continuous since 1890,
3 both pre-Compact, pre-project. So how does it fit into
4 these proceedings and these claims? The power plants
5 that Texas New Mexico Energy has is the Afton power
6 plant. It's just out of Las Cruces. It produces 230
7 megawatts of electricity. The water that supplies that
8 plant and allows it to cool its operations consists of
9 groundwater rights that were purchased by the power
10 plants between 1849 -- I'm sorry -- 1949 and 1961. So
11 right in the middle of the D2 period. They purchased
12 water rights, they transferred them in, nobody protested
13 the transfer of those water rights, but if a 1938
14 condition were applied, that -- that power plant is
15 illegally using water and illegally operating. The
16 Camino Real Regional Utility Authority consists of
17 22,000 residents along the border with Mexico and also
18 just near El Paso. It's the Santa Teresa/Sunland Park
19 area. It's the City of Sunland Park and Santa Teresa.
20 Hopefully you can come see that on your tour, as well.
21 The Camino Real Regional Utility Authority is both a
22 sewer district, maybe along the lines that you used to
23 represent, and also water district. It has groundwater
24 that is used to supply the residents. So those -- those
25 -- our clients, my clients, are concerned about the same

1 issues that we've heard today, that it's important that
2 D2 be accepted as the operating principal. It vests
3 water rights that have been used for a long time. It
4 grandfathers them, and the State of Texas is agreeable
5 to that. State line delivery with the proposed index
6 decree, we agree with that. We're greatly concerned
7 about the 19 -- the 1938 condition. Actually surprised
8 that the United States is placing a lot of its argument
9 on that as it did not do that before, but it is now.
10 The one issue that I wanted to just give a little bit
11 more detail to and then I'll be done is our concern
12 about the overlap between the United States' claims and
13 what is going on in the adjudication in the lower Rio
14 Grande and New Mexico, because Mr. Wechsler described
15 that case has been going on for decades and is
16 adjudicating all of the water rights in that stretch of
17 the Rio Grande and New Mexico, including the United
18 States interests, and how does that relate to this case.
19 The -- there appears to be an overlap between the U.S.'s
20 claim and what is happening in that case. If you
21 compare that to what Texas filed, Texas filed a claim
22 saying we want our apportionment delivered at the state
23 line. The United States wants more than that.
24 Mr. Snodgrass said it again today. It's also repeated
25 in their answers to issues that were submitted to the

1 Court that there's a duty of New Mexico below Elephant
2 Butte reservoir to prevent project interference. So
3 they want not only water delivered to the state line so
4 that the appropriate amount is delivered to Texas,
5 they're making a claim of project interference solely
6 within New Mexico and the interest they claim. So how
7 does that relate to -- to what the lower Rio Grande
8 court is considering? That court has already made
9 decisions on United States priority dates for the
10 project. Got a very early priority date. That court
11 has said that the United States does not own
12 groundwater. That court has also said that the United
13 States can seek administration if it feels that its
14 interests in New Mexico are being harmed. There is one
15 thing that my clients and a lot of other people have in
16 common with the United States, and that is we're all
17 parties in that state adjudication. There's 16,000
18 parties. Why are there so many parties in that case?
19 It's because they all own property rights or they all
20 have the opportunity to contest each other's claims.
21 Both federal law and state law require a comprehensive
22 proceeding. Ms. O'Brien just talked about how you can't
23 have a contract dispute without the parties in the room.
24 Well, you can't adjudicate water rights and administer
25 water rights without all the property owners, the water

1 rights owners in the case, and the court has joined all
2 of those claimants and is proceeding to determine all
3 the water rights, including the United States, on the
4 intrastate portion, and if the United States is able
5 through ascribing something as project interference, get
6 the United States Supreme Court to -- to enter a
7 judgment that is contrary to what the state court may
8 do, that seems improper and goes beyond what an original
9 jurisdiction should do. We've heard a lot of discussion
10 about there's federal interests, there's federal
11 contracts, there's federal reclamation law, but for over
12 a hundred years, United States Congress has deferred to
13 state administration of water law and of water, and if
14 the United States is proceeding with just a purely
15 intrastate claim, should continue to state
16 administration, state adjudication in the state form.
17 That's -- that's all I have. Thank you, Your Honor.

18 JUDGE SMITH: Thank you very much.

19 I believe that concludes the presentations
20 from the Compacting states, Compacting parties, the
21 United States, the amici who have sought to participate
22 by oral presentation here, and I'm grateful for all of
23 the assistance that you have provided today and sought
24 to provide. When I agreed to the assignment, I decided
25 I wanted to learn something about the Rio Grande, and I

1 looked high and low for a book. The most I could find
2 was a 1950s era book, *Great River: The Rio Grande in*
3 *North American History*, which won a Bancroft award and
4 is exceptionally well written. Unfortunately, I'm 200
5 pages into it, and it's only told me history and nothing
6 in the way of information that might assist me here.
7 200 pages isn't a lot since the book is more than 900
8 pages, and I suspect it will take me -- well, I'll
9 probably die before I finish the book. But anyway, I'm
10 trying to learn as much as I can so I am thankful to all
11 of you, and I have urged and I continue to urge
12 discussion, consultation with one another, and insist
13 upon mediation. An old colleague of mine in the
14 district court days now passed and who was a wonderful
15 mentor of mine was quite an advocate of settlement to
16 the point where he used to say every time a judge has to
17 take the bench, he's failed, by which he meant that
18 every case ought to be settled. That may be a little
19 simplistic, but I -- I'm a great fan of Abraham Lincoln,
20 and Lincoln was a great lawyer. He used to speak and
21 talk to young lawyers, in fact, on the benefits and the
22 advisability of settlement, and I don't think that that
23 is any less important here than it is in a case of small
24 dimensions. All of you represent interests, and some of
25 those interests diverge more than others, but there is

1 an incalculable cost to litigation that lingers,
2 litigation that has no end to it, and I hope this is not
3 such an example. I've asked Judge Boylan if he would to
4 speak for a few moments before I adjourn these
5 proceedings. I hesitate to use the word adjourn because
6 I -- I really haven't considered this so much a formal
7 proceeding, although it is a proceeding of record, and
8 counsel who's been involved in this, please tell me, did
9 my -- did my friend Judge Melloy wear a robe during -- I
10 don't know what special masters are supposed to do.
11 It's freshly dry cleaned. It's one I take on the road.
12 I just wasn't sure how formal to be.

13 So in any event, Judge Boylan, would you
14 mind going to the podium?

15 JUDGE BOYLAN: Well, it turns out Mr. Utton
16 was not the last to speak.

17 JUDGE SMITH: That's all right. I asked.

18 JUDGE BOYLAN: Judge, you remarked this
19 morning almost immediately that you were going to be
20 guided by a north star, and that was Rule 1 of the
21 Federal Rules of Civil Procedures that directs the
22 courts to determine matters in a just and expedient
23 manner, and I believe that you've made it abundantly
24 clear that you believe that in achieving that result,
25 mediation at this particular time would be appropriate.

1 I would propose three things in reference to mediation.
2 Number one, that the sessions be conducted as soon as
3 possible, at least the initial sessions, no later than
4 mid December. Number two, that the session to be venued
5 in Washington DC, and that number three, that you direct
6 or order that appropriate decision makers personally
7 attend the sessions where decisions need to be made.
8 I'm suggesting Washington DC for the reason that I think
9 that the U.S. interests have a difficult job. They have
10 a lot of constituents they need to report to. They
11 mentioned a couple of them this morning. The folks at
12 the environmental and natural resources division, DOJ,
13 Reclamation, just to suggest a few, and I think the best
14 way to perhaps wrestle making decision makers be present
15 is to have a venue in Washington DC. And I might
16 mention that I think that that applies equally to the
17 Compacting states. Those parties should have decision
18 makers in person and present.

19 JUDGE SMITH: I was always a believer in
20 that, at least in major cases and difficult cases when
21 there was a trial judge, that we have someone there to
22 whom counsel would answer for and vice versa.

23 JUDGE BOYLAN: I'm envisioning a three-day
24 session. The first would include a great opportunity to
25 amici to engage with, especially I think New Mexico,

1 because the intrastate administration of water in New
2 Mexico seems to be a key component to getting anything
3 done, and at least on that first day, that first day
4 simply devoted to allowing amici to engage with their
5 counterparts in New Mexico and others if -- if they're
6 interested. Texas and Colorado, as well as other
7 parties, the U.S., would be invited to attend if they
8 wish, but I think that first day, devoting it between
9 the New Mexico amici at least and perhaps El Paso and
10 just being able to -- for both parties to listen to
11 their concerns and to understand what their positions
12 would be, would be, I think, a very wise way to proceed.
13 I would think that the second and third days certainly
14 would be in-person discussions between the -- the
15 Compacting states and the United States, and, again, I
16 am not suggesting that a stay needs to be considered by
17 the Court because if we do schedule this between now and
18 the first week of December, there's not much to really
19 stay, it would appear to me.

20 I did want to talk about the question as to
21 whether or not I should remain as mediator. There was
22 at least a concern that a fresh set of eyes might be
23 important to come to the table as a mediator. I really
24 wasn't sure when I read that if they were remarking at
25 my age, and if they are, I just want to remind

1 everybody, I'm not -- I'm young enough yet to still run
2 for President of the United States.

3 JUDGE SMITH: Would you, please.

4 JUDGE BOYLAN: But seriously, I do take
5 that with a great deal of concern. I do want to be just
6 and fair to all parties. I want to be an instrument to
7 allowing the parties to find some way of getting this
8 done. If I'm a hindrance to that, I will alert you
9 immediately, and I'm more than willing to step down. I
10 have been involved with thousands of mediations, and I
11 mean that. I've been -- I was a judge for 27 years,
12 both state and federal, and have done mediations for
13 more than almost 15 years full time after that. I've
14 done mediations where I've stepped aside, and I've done
15 mediations where I've stepped in and so I get it and I
16 don't take any personal affront with that. If that's
17 the best way to proceed, I will certainly do that, and
18 I'll alert you immediately. But at least between now
19 and December, I'd like to take a crack at it, give
20 everybody a chance to try to get this thing done, and
21 see where we go.

22 I do have some housekeeping matters that
23 should merit your attention, I believe. I did not file
24 my previous invoices with Judge Melloy and ask Judge
25 Melloy at that time to approve those for payment.

1 Instead, what I did was directly billed the parties, and
2 they agreed between themselves how the -- the
3 responsibilities of each respective party would be in
4 reference to the payment of the entire bill. I'm happy
5 to change that procedure, and if you would like me to
6 provide you with invoices and have the Court approve
7 those beforehand, I'm happy to do that. If you would
8 prefer that I continue in the fashion that I did with
9 Judge Melloy, I'm happy to do that. By doing all that,
10 we have not had any mediation sessions since the time
11 that the Compacting parties reached their agreement.
12 Nonetheless, it's been a significant amount of time
13 devoted to reading the submissions of the parties and
14 all of the submissions made to the United States Supreme
15 Court. I did not bill the parties for that time. I do
16 not intend to bill the parties for that time. I did
17 climb back into it and grab the baton, so to speak,
18 following the Supreme Court's decision in June and
19 invited the parties to meet with me if they wished. We
20 have not had any mediation sessions despite that
21 invitation. I've had an opportunity to talk with the
22 former special master. I've had an opportunity to visit
23 with you. I've had some opportunity to visit with the
24 parties and to review all of their submissions in
25 anticipation of today. So from the time from June 21st

1 until today's date, I would certainly be billing the
2 parties for that but nothing prior to that time
3 appearing before the Supreme Court. And I invite any of
4 the parties if they think that's not the appropriate way
5 to go, to alert me, and I'll certainly be happy to talk
6 about that.

7 JUDGE SMITH: I don't know anything about
8 the invoicing that's gone on before, and I'll speak in a
9 moment. I received no information or instructions from
10 the Supreme Court clerk's office about anything to do
11 with that so we can address that after -- after this
12 proceeding.

13 JUDGE BOYLAN: So the three things I'm
14 asking of you, Judge, today is to direct the parties to
15 engage in the mediation as soon as possible, and if it's
16 agreeable with you and meets reasonable expectations --

17 JUDGE SMITH: Why don't I enter an order?

18 JUDGE BOYLAN: So I'm thinking the first
19 week of December.

20 JUDGE SMITH: Why don't I enter an order in
21 short order to that effect? I've already directed the
22 parties that they are to participate in mediation. I
23 will direct that it be done so at -- right now, I direct
24 that in accordance with the dates that you have
25 mentioned, but I'll enter a formal order, probably not

1 until I return to the place where I live that I like to
2 think of as the -- the joiner of the -- well, I was just
3 about to engage in a -- in a water metaphor, and we have
4 -- we have constantly in chambers and discussing this
5 case, it's impossible to engage in conversation for more
6 than 15 minutes without talking about, well, upstream or
7 -- or we'll reach that point and cross the stream, you
8 know, constantly use water metaphors that I've got to
9 change my lineage anyways. But the confluence of Tigris
10 and Euphrates and my home in Pennsylvania. But we'll --
11 we'll get that order out.

12 JUDGE BOYLAN: That would be fine, Judge.
13 And I don't believe that any -- any order needs to
14 specify the spot in Washington DC.

15 JUDGE SMITH: Right.

16 JUDGE BOYLAN: The parties have been great
17 about meeting and conferring and one party or the other
18 takes responsibility for finding the appropriate venue
19 with the right space and right amenities and so I would
20 suggest that they would still be able to do that.

21 JUDGE SMITH: We'll just hope Washington DC
22 is a hospitable place.

23 JUDGE BOYLAN: I think that's what I would
24 recommend. Thank you, Your Honor.

25 JUDGE SMITH: Thank you very much, Judge

1 Boylan.

2 Well, again, I -- I thank the parties for
3 educating me on the subject at hand or as they say out
4 in the country outside of where I live, I'm serious
5 about this, you know, you learned me a lot today. It
6 has been eye opening in some respects, and certainly
7 educational, as I have intended it to be, and I -- I
8 thank you for all of that.

9 Again, I do hope that we can reach a -- an
10 end to this odyssey, whether it be by trial scheduled
11 into next year or whether it be preferably by -- by way
12 of settlement through mediation or otherwise. But as I
13 pondered the request from Judge Boylan about invoices of
14 which I know nothing of when I was contacted about this
15 from a justice of the Supreme Court and then afterward
16 in follow-up discussions with the clerk's office, and I
17 don't mean this as a criticism, but I -- I suspect at
18 the end of the term, which is when I got called, this
19 case was not at the top of their list of priorities
20 there. They pretty much wanted to get out of town, I
21 think. And I received very little guidance in the way
22 of what I was to do and how I was to do it here so this
23 has been very -- that has been a learning experience, as
24 well, and I've been mindful, I told you, about my love
25 of Lincoln. He liked to talk about the man who had been

1 tar feathered and run out of town on a rail, and when I
2 asked him how he felt about it, he said, well, if it
3 weren't for the honor of the whole thing, I would have
4 just assumed walked out on my own. If it weren't for
5 the honor of the whole thing, I might well, too, but I
6 should thank you-all for everything you've provided me
7 today. We'll no doubt have very quick follow-up. We'll
8 get an order out regarding the mediation, as I've
9 indicated.

10 Is there anything further from the
11 Compacting parties or the United States? Briefly, of
12 course. I'm sorry. I neglected to call upon you when I
13 came back in.

14 MR. WALLACE: We did cover that, Your
15 Honor. I can repeat verbatim what I already said. But
16 I just want to offer a helpful suggestion by way of
17 housekeeping. I know as far as Colorado state
18 procurement rules and it probably bears equally for the
19 other states and government agencies, it might be easier
20 for us to get those invoices paid if we have an order
21 from the Court, especially for backdated issues. And I
22 suggest that the parties confer perhaps offer a proposed
23 order to Your Honor about dates and costs sharing
24 agreement with regard to mediation.

25 JUDGE SMITH: All right. I request that

1 you do both talk to Judge Boylan about that and then
2 I'll follow whatever is the recommended course. I want
3 to make sure that not use it as being a -- an approval
4 of that kind, but I -- whatever will facilitate things
5 for -- for everyone, I'm perfectly willing to take on.
6 I mentioned that to you about lack of direction from the
7 clerk's office, and in connection with vouchers, I'm
8 still, as you know, carrying a case load same as judge
9 in the third circuit and it was explained to me that the
10 Court used to hire counsel to serve as special masters,
11 but they charged too damn much so if -- just imagine how
12 that makes me feel at this point about my value to the
13 process. In any event, Mr. Sanders, please feel free to
14 follow up with that written submission.

15 MR. SANDERS: Thank you.

16 JUDGE SMITH: For some reason, we traveled
17 Monday, so something -- and the entire -- the entire
18 electronic system from the 8th circuit was transferred
19 to us. Maybe something fell through the cracks.

20 MR. SANDERS: Yes, sir. Thank you very
21 much for that. I will also follow up with the clerk,
22 and I will make sure that there's nothing wrong with my
23 appearance. I apologize for that if there is.

24 JUDGE SMITH: No, no. Matter of fact, I
25 was excited when I saw you, D.L. Sanders, I thought Deon

1 Sanders?

2 MR. SANDERS: That's right. That's right.
3 I am confused always. I'm a great receiver.

4 JUDGE SMITH: Good. Good.

5 All right. If there is nothing further
6 from the Compacting parties --

7 MR. SOMACH: Nothing else, Your Honor.

8 JUDGE SMITH: -- if there is nothing
9 further from the United States, I thank the amici and
10 their counsel very much. We will have many discussions
11 in chambers when we return to Pennsylvania. Thank you
12 very much. This matter is concluded.

13 (The proceedings concluded at 4:06 p.m.)

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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 10th day of December, 2024.



HEATHER L. GARZA, CSR, RPR, CRR
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