

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 FEBRUARY 6, 2023, ORAL
ARGUMENTS BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
9:00 a.m.

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P R O C E E D I N G S

1
2 **JUDGE MELLOY:** Please be seated. Good
3 morning, everyone. Pleased to see everyone here
4 today. We're here this morning in United States
5 Supreme Court, Original No. 141, State of Texas versus
6 State of New Mexico and State of Colorado with United
7 States as intervenor. As I understand it, we're
8 having some technical difficulties with the video on
9 our Zoom live feed, but we do have the audio available
10 so hopefully anyone who's interested in these
11 proceedings and has logged into the Zoom call can hear
12 what's going on even if they can't see the proceedings
13 so we'll proceed on that basis.

14 I do want to also mention that the
15 district court has been extremely helpful here. Paul
16 Deyoung was around here a minute ago, who is the clerk
17 of court. I do appreciate all the work that they've
18 done to help facilitate this hearing today. We did do
19 a number of tests in the last two weeks and so we
20 thought the video would work, but like I say, we'll go
21 ahead with the audio, and hopefully everybody can
22 listen to the arguments.

23 So let's start by having the parties
24 enter their appearances. Mr. Somach, do you want to
25 start for Texas?

1 **MR. SOMACH:** Yes, Your Honor. Would you
2 prefer we go to the podium?

3 **JUDGE MELLOY:** For appearances, you can
4 do it from your place.

5 **MR. SOMACH:** Okay. Your Honor, my name
6 is Stuart Somach, counsel of record for the State of
7 Texas. With me in the courtroom is Grant Dorfman,
8 Deputy First Assistant Attorney General for the State
9 of Texas; Priscilla Hubenak, the Chief of the
10 Environmental Protection Division in the Texas State
11 Attorney General's Office; from my office and at
12 counsel table is Theresa Barfield, Sarah Klahn, and
13 Francis Goldsberry. Also in the courtroom is
14 Mr. Bobby Skov, who is the Texas Rio Grande
15 Commissioner.

16 **JUDGE MELLOY:** Mr. Wechsler?

17 **MR. WECHSLER:** Good morning, Your Honor.
18 Jeff Wechsler from Montgomery & Andrews on behalf of
19 the State of New Mexico. We have with us James
20 Grayson, our new Chief Deputy Attorney General; Kayla
21 Brooks from my office; Lisa Thompson from Trout Raley;
22 and we also have Rolf Schmidt-Petersen the director of
23 the Interstate Stream Commission; and listening in is
24 Mike Hamman, our State Engineer and Compact
25 Commissioner.

1 **JUDGE MELLOY:** Mr. Wallace?

2 **MR. WALLACE:** Good morning, Your Honor.
3 Chad Wallace for the State of Colorado. I will be
4 representing the state today. In the audience
5 representing my client is Mike Sullivan the Chief
6 Deputy State Engineer.

7 **JUDGE MELLOY:** Then Mr. Leininger?

8 **MR. LEININGER:** Good morning, Your
9 Honor. Lee Leininger for the United States, and next
10 to me at counsel table, Judy Coleman for the
11 Department of Justice, and in the galley is Shelly
12 Randel, Department of Interior Solicitor's Office.

13 **JUDGE MELLOY:** Then for the Albuquerque
14 Bernalillo County Water Utility Authority?

15 **MR. BROCKMANN:** Good morning, Your
16 Honor. Jim Brockmann for the Water Authority, and the
17 Water Authority general counsel Charles Colberg will
18 be attending virtually today.

19 **JUDGE MELLOY:** City of El Paso?

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

22 **JUDGE MELLOY:** City of Las Cruces?

23 **MR. STEIN:** Good morning, Your Honor.
24 Jay Stein for the City of Las Cruces. With me in the
25 courtroom today is Adrienne Widmer, the Utilities

1 Director of Las Cruces Joint Utilities, and joining
2 electronically is Jocelyn Garrison, the interim city
3 attorney, and Brad Douglas of the city attorney's
4 office.

5 **JUDGE MELLOY:** El Paso County Water
6 Improvement District No. 1?

7 **MS. O'BRIEN:** Yes. Good morning, Your
8 Honor. Maria O'Brien for El Paso County Water
9 Improvement District No. 1, and participating
10 electronically, Counsel Renea Hicks and Dr. Al Blair,
11 the district engineer.

12 **JUDGE MELLOY:** Elephant Butte Irrigation
13 District?

14 **MS. BARNCASTLE:** Good morning, Your
15 Honor. Samantha Barncastle for the Elephant Butte
16 Irrigation District. I'm the only one present in the
17 courtroom today, but we have listening virtually the
18 vice president of the board of directors, Mr. Gregg
19 Daviet. I have Dr. Patrick Sullivan, our manager;
20 Gary Esslinger, our past manager and historian; and
21 Dr. Phil King, our consultant.

22 **JUDGE MELLOY:** Thank you. Hudspeth
23 County Conservation and Reclamation District No. 1,
24 anyone present?

25 (No response.)

1 **JUDGE MELLOY:** All right. New Mexico
2 pecan growers?

3 **MS. DAVIDSON:** Good morning, Your Honor.
4 Tessa Davidson on behalf of the New Mexico pecan
5 growers.

6 **JUDGE MELLOY:** Mr. Utton for New Mexico
7 State University?

8 **MR. UTTON:** Good morning, Your Honor.
9 John Utton on behalf of the University, and also
10 joining us virtually, Scott Field from the general
11 counsel's office, and Scott Eschenbrenner from the
12 president's office. Thank you.

13 **JUDGE MELLOY:** And Southern Rio Grande
14 Diversified Crop Farmer's Association?

15 **MS. DAVIDSON:** Your Honor, A.J. Olsen
16 has asked that I speak on behalf of the diverse
17 growers. This is Tessa Davidson.

18 **JUDGE MELLOY:** The gentleman sitting
19 next to Mr. Utton, I don't know that I know you. Have
20 you appeared before? Do you want to enter appearance
21 or do you represent someone in this case?

22 **MR. SHAW:** Good morning, Your Honor.
23 Chris Shaw from New Mexico Interstate Stream
24 Commission, Rio Grande Compact Legal Advisor. I am
25 not appearing today.

1 **JUDGE MELLOY:** Thank you. Have I missed
2 anyone?

3 (No response.)

4 **JUDGE MELLOY:** All right. We're here
5 today, of course, for oral arguments in connection
6 with the motion filed by the three Compacting states
7 to approve a proposed settlement decree. We have some
8 time allocations set out, and hopefully we can get
9 through this within those -- within those parameters.
10 I don't have a lot of preliminary comments. I'm
11 anxious to hear the arguments. I would ask that --
12 one thing I was thinking about is if we adopt the
13 position that you are advocating for your respective
14 side, where do we go from here; and, I guess,
15 conversely, if I don't adopt what you are advocating,
16 where do we go? So I would hope that at some point,
17 maybe at the end of your presentation or at some time,
18 you would give us -- give me some ideas of what you
19 think of as -- as next steps, so to speak, in terms of
20 -- of where we end up here. I assume if -- if I
21 recommend approval of the settlement, it'll be in a
22 report to the Supreme Court, and the objectors can
23 take exceptions; and conversely, if I recommend
24 denial, I would assume I would do the same thing, make
25 a report to the Supreme Court, and the proponents

1 could take exceptions. I guess I just want to know if
2 anybody sees it any differently or thinks -- or just
3 where -- where do you think we're going.

4 With that, have the proponents decided
5 how they're going to divide this up? How are you
6 going to go about this, Mr. Somach?

7 **MR. SOMACH:** Your Honor, Stuart Somach
8 on behalf of Texas and the Compacting states. We have
9 decided we will be sharing -- Mr. Wechsler,
10 Mr. Wallace, and I will share the oral argument, and
11 part of what I want to do in this brief introduction
12 is talk a little bit about two things. Number one was
13 the process that we're going to follow for the oral
14 argument and then secondly, I do have a couple of
15 overarching substantive issues that we wanted to
16 articulate before we moved into the -- the more
17 specific arguments.

18 Let me do this, though, as a off-agenda
19 item in terms of what I was going to say. We think
20 what you articulated as the next steps are, in fact,
21 the next steps. Some of that is subject, of course,
22 to reading the report. You know, we'll read it
23 carefully, and based upon that, particularly if you
24 rule against us, make determinations on what we would
25 like to do next. But certainly if you approve and

1 decide to make a recommendation to the Court, our
2 assumption is that that would be in a report, and if
3 the United States or others wanted to take exception
4 to that, they would do so, and we would move forward
5 and let the Court finally decide how to -- how to
6 proceed on what, you know, we believe should -- should
7 terminate the -- the original action.

8 As I said, I -- I want to first talk a
9 little bit about procedurally. We're mindful that
10 there's been a lot of briefing on the various issues
11 associated with our motion. In addition to the motion
12 and the opposition in our reply, we also had briefing
13 on the motion to strike and the motion to unseal, and
14 they dealt with very similar issues, maybe in a
15 different context, but certainly a lot of the same
16 issues. I could honestly say in all respects, we
17 think we've covered the ground at least once, and
18 unfortunately, probably a lot more than just once in
19 the briefing, and we'll be -- we'll try to be very
20 judicious in what we say here to -- to not just simply
21 repeat everything that was in the briefing.

22 The briefing itself and this oral
23 argument has been done within a -- what we believe is
24 an appropriate time period, but nonetheless, pretty
25 short, and so that's some of the reasons why the

1 briefs perhaps were overly long and -- and why our
2 presentation here may be a little bit rough given the
3 notion that we are coordinating among three different
4 states in terms of this presentation.

5 We don't think we're going to take all
6 of our two hours that you've allocated for us, but
7 would request to perhaps reserve time if it seemed
8 appropriate to add to our one-half-hour closing.
9 We'll be mindful of -- of time, the time of day, and
10 not extend the day any further than it otherwise would
11 be. We'll split our time among the three states.
12 Mr. Wallace, Mr. Wechsler, and I will share the
13 argument, as I indicated. Mr. Wechsler -- and we have
14 a little graphic that just simply outlines how we
15 think we're going to proceed. Mr. Wallace will first
16 describe the consent decree in a summary fashion,
17 including touching upon why the consent decree
18 provisions don't conflict with current Compact and its
19 accounting, and he'll also discuss how the consent
20 decree satisfies -- and -- and the motion, in
21 particular, satisfies our burden of proof in this case
22 and why it shifts to the United States. I'll follow
23 Mr. Wallace addressing the nature of the claims in
24 this original action and why the consent decree
25 properly addresses and disposes of all the Compact

1 claims that are in this claim -- case. Mr. Wechsler
2 will follow addressing and focusing on the United
3 States' claims placing them in what we believe is the
4 proper context, and also discuss why the consent
5 decree is fair, adequate, reasonable, and also why it
6 doesn't affect any substantive rights of the United
7 States. I'll close with a short conclusion at the end
8 of our presentation.

9 In the course of our argument, we'll
10 address the four questions, the questions posed in
11 your December 30th, 2022, order. I do want to
12 indicate that we have responded. In some respects we
13 anticipated questions in the motion itself, and we've,
14 again, responded to them in our reply. We've woven
15 into our oral presentation today additional responses
16 or at least amplification of those responses, but, you
17 know, we expect if you have any questions about what
18 the -- the States' respective provisions are, we're
19 more than happy to answer them.

20 And one of the things I want to say is I
21 may use the word "we" a lot. We all may use that
22 word, and what I mean by that is the three Compacting
23 states. When we talk about the individual states,
24 we'll try to be very specific and let you know that
25 that's what we're talking about. And if you have any

1 questions, you should feel free to ask any of the
2 three of us, notwithstanding the -- the -- whatever
3 the specific topic that's being discussed is. This
4 truly is a Compacting states presentation, as the
5 briefs were, also.

6 I want to turn in this introduction to
7 two, what we believe are overarching foundational
8 issues upon which our view with respect to the motions
9 stand. I want to address two points. The first is
10 the United States' claims and the fact that they are
11 derivative of the Texas claims; and the second is that
12 the nature of the apportionment and how the Compact
13 defines that -- that apportionment. First, there's
14 been a lot written and talked about, not only recently
15 but over the years, about the Supreme Court's 2018
16 decision and what it means, vis-à-vis the United
17 States, and its current opposition. It's important,
18 we believe, to keep in mind that the decision revolves
19 around a motion to dismiss the United States'
20 complaint in intervention, and in that context, it
21 included all of the assumptions and presumptions that
22 go along with the motion to dismiss. And so as a
23 foundational matter, what the Supreme Court was
24 weighing and balancing is the types of things that you
25 weigh and balance on a motion to dismiss as opposed

1 to, for example, what one would be the -- the burdens
2 in a summary judgment motion.

3 In addition to that, again in trying to
4 keep this in context, the matter was before the Court
5 on exceptions to the Special Master's Report, which
6 recommended two things: No. 1, dismissal of the
7 United States' complaint for failure to state a
8 Compact claim; and 2, a recommendation to expand the
9 scope of the original action pursuant to 28 USC
10 Section 1251(b)(2) to include what we now know are all
11 the reclamation claims associated with New Mexico. In
12 fact, the first special master describing it said that
13 what his recommendation was is to extend the Court's
14 jurisdiction to consider and resolve the United
15 States' claims which he described as, "claims against
16 New Mexico." Again, these internal New Mexico
17 Reclamation claims. The Court overruled the Special
18 Master's recommendations finding that they were
19 Compact claims, and as I'll discuss later when I --
20 when I addressed these issues to the Court more
21 directly, but described those claims in the context of
22 the Texas complaint, as well as the treaty with
23 Mexico, and -- and tied them specifically to -- to the
24 Texas complaint. The Court also overruled the Special
25 Master's recommendation to expand the litigation

1 specifically finding that the lack of expansion --
2 finding the lack of expansion is a basis for allowing
3 the United States to intervene. Those issues were not
4 part of -- of what the Supreme Court agreed with, and
5 moreover, in doing that, the Court specifically
6 limited the scope of the United States' intervention
7 and indicated that it would not allow the expansion
8 beyond what had been the four corners of the Texas
9 complaint.

10 Finally, by way of introduction, I want
11 to address two additional sub issues.

12 **JUDGE MELLOY:** Well, just to interrupt
13 you for one minute.

14 **MR. SOMACH:** Yes, Your Honor.

15 **JUDGE MELLOY:** I believe -- I think what
16 the Supreme Court actually said was they weren't
17 deciding that issue of whether the United States could
18 expand its claim.

19 **MR. SOMACH:** Yes, that's right. It --
20 it -- it said that, but it also said -- talked about
21 limiting the litigation to what was within the four
22 corners of the Texas complaint, and that's what I'm --
23 what I'm referring to when you put those two things
24 together. It's because -- just to explain the point
25 of view, it's because the Court said that -- that

1 we're allowing United States to intervene with respect
2 to the four corners of what's in the Texas complaint
3 plus the treaty obligation that there is no need to
4 address whether or not there's a need to expand the
5 case because we've already said essentially we're
6 looking at -- it -- it parallels the Texas complaint,
7 you know, it's -- it's substantially similar to the
8 Texas complaint, and so it's that total context that
9 -- that I'm talking about, as I refer to the fact that
10 we believe that the Court has actually addressed this
11 question and rejected the -- the notion in terms of --
12 of what was being offered by the Special Master in the
13 first to expand the litigation. And remember, that
14 expansion that the first Special Master talked about
15 was not a Compact expansion. It clearly was something
16 different. It was to expand the original jurisdiction
17 of the court where the court had jurisdiction but not
18 exclusive jurisdiction and cited 28 USC 1251(b)(2) for
19 -- for the -- for the structural or statutory basis of
20 the recommendation.

21 The second point I -- I wanted to make
22 as an overarching type of concept is that this is an
23 original action, and it doesn't deal with 1251(b)(2)
24 issues. It deals with an apportionment among and
25 between the -- the states. Both the first Special

1 Master and you, as well as the Court, has found that
2 the Compact is superior law and that other laws,
3 including reclamation law, are inferior laws. The
4 consent decree that we propose appropriately addresses
5 and resolves ambiguities with respect to those
6 apportionments below Elephant Butte Reservoir,
7 ambiguities that you've articulated a few times,
8 including in your summary judgment order. What is in
9 play in this case is the respective rights of
10 Compacting states in their quasi sovereign capacity.
11 There are no other rights at play in -- in this case.
12 There can be no other rights at play in the state.
13 This is a case interpreting ambiguities within a
14 Compact that apportions water not to United States,
15 not to the project, not to the districts, but clearly
16 to Colorado, Texas, and New Mexico. The rights of the
17 United States and of the districts and other amici and
18 -- and, in fact, other water users of water in the Rio
19 Grande in those respective states are derivative of
20 those apportionments and can be no greater than those
21 apportionments, and that point can't really be
22 seriously contended when one looks at the -- the large
23 body of original action law dealing with water and
24 water rights. Indeed, Texas put this very issue in
25 play with the filing its complaint. If you recall,

1 the complaint includes within it certificates of -- of
2 adjudication, which adjudicated and provided the right
3 to use the Texas apportionment and those right to use
4 were granted by the State of Texas to EP No. 1 and to
5 the United States. That's where they derive their
6 rights from. They don't derive them from the Compact
7 directly. They derive them directly from a grant from
8 the State.

9 Neither the United States or EP No. 1
10 would have the right to use water in Texas absent
11 those grants. And a similar situation exists, as
12 Mr. Wechsler will talk about, in New Mexico. In fact,
13 the pleadings are replete -- the pleadings with
14 respect to this motion are replete with references to
15 the United States' participation, EBID's participation
16 in adjudications, federal court actions and other
17 actions addressing the rights to the use of water that
18 were granted to EBID and the United States by the
19 State of New Mexico.

20 With the resolution the Compacting
21 states dispute over Compact apportionments, no
22 Compact-level dispute remains. There simply is no
23 dispute that remains. As I'll address in more detail
24 later, while the United States might have had a
25 Compact claim, as an agent, it was directly related to

1 and tied to the allegation that New Mexico's actions
2 were impairing or interfering with the delivery of
3 Texas' apportionment to Texas. That's exactly what --
4 what is talked about. This consent decree resolves
5 that issue. It resolves that issue to the
6 satisfaction of the State of Texas, and the
7 apportionment is, again, not to the -- to the United
8 States but to the State of Texas. Whether the United
9 States is satisfied is immaterial because it has no
10 right to water that's apportioned to Texas.
11 Resolution of the Texas claim with respect to its
12 apportionment means that there's nothing left of that
13 claim to litigate.

14 With that, unless you have any
15 questions, I'd like to turn the -- the podium over to
16 Mr. Wallace, who will address, among other things, the
17 specific provisions of the consent decree.

18 **JUDGE MELLODY:** That's fine. I probably
19 will have -- I will have some questions, but I -- I'll
20 bring them up in the context of when the issues come
21 around.

22 Excuse me a second.

23 Mr. Wallace, you may proceed.

24 **MR. WALLACE:** Thank you, Your Honor. As
25 Mr. Somach has already laid out, I'll be presenting a

1 high-level overview of the consent decree and relating
2 it to the Rio Grande Compact so that Your Honor can
3 see how those two relate and how specifically this
4 dispute is resolved within the scope of the original
5 dispute, that is what are the apportionments to New
6 Mexico and Texas below Elephant Butte Reservoir, and
7 that that resolution is consistent with the Compact
8 itself such that all the parties are doing is
9 resolving the ambiguity that the Court has already
10 identified for the Compacting states.

11 **JUDGE MELLOY:** I -- Mr. Wallace, that
12 podium is adjustable, although it may be up as high as
13 it's going to go.

14 **MR. WALLACE:** Yeah. I am told that my
15 height is a bit beyond the limit of the podium. I'll
16 try and lean forward if --

17 **JUDGE MELLOY:** Well, no, I can hear you
18 fine. That's no problem. But it may already be as
19 high as -- yeah.

20 **MR. WALLACE:** I'll just try and make do
21 with the undersized furniture.

22 So as I was saying, the consent decree
23 essentially at its heart, what it does is resolve the
24 ambiguity that exists within the Rio Grande Compact
25 establishing the apportionment between New Mexico and

1 Texas below Elephant Butte. It is perfectly
2 reasonable, and the Supreme Court has, in fact,
3 endorsed before the process of the Compacting states
4 at a later time resolving an ambiguity in a Compact
5 between them. This is perhaps best exemplified in New
6 Hampshire versus Maine where those two states were
7 able to more clearly define a boundary between that,
8 which boundary had existed through a Compact, yet they
9 could not agree up until the time of this resolution
10 exactly what that boundary was. The states have done
11 something similar here in resolving the ambiguity that
12 Your Honor has identified, in fact, two ambiguities
13 specifically were tasked for trial, and we've taken
14 care of those here in resolving it, the first being
15 what is the baseline condition? What is the existence
16 of the operation of the Project such that we can
17 identify what are the waters and what are the
18 apportionments given to the two states. Secondly,
19 what is that division project supply, how do we
20 measure where that water goes so we know that those
21 apportionments are being made. In addition to that,
22 there are a number of items that, Your Honor, through
23 several orders on motions for summary judgment, orders
24 on -- on legal issues already determined, has set out
25 that are known through the Compact. The first of

1 those knowns is that there is, in fact, an
2 apportionment to lower New Mexico and Texas below
3 Elephant Butte. Up until that time of the orders from
4 -- from -- from Your Honor, that -- that was a
5 contested issue. Now that's known. Lower New Mexico
6 and Texas do have Compact apportionments below
7 Elephant Butte.

8 The second item that is known is that
9 those apportionments are roughly a 57 percent/43
10 percent ratio. That is New Mexico below Elephant
11 Butte gets 57 percent of the water, Texas gets 43
12 percent. Those are the knowns. So overlaying those
13 knowns with the unknowns, what's the baseline and how
14 do you measure that division, those are resolved,
15 complimenting one another when this consent decree.
16 Before I get into the consent decree, I think it's
17 appropriate to go back to the Compact itself. The
18 consent decree needs to be consistent with it and
19 within the scope of the Compact, and it is, and I'm
20 going to lay out how that is done. But I think the
21 first point to notice and keep in mind is what the
22 Compact itself does and what the Compact does is
23 apportions all of the waters, the Rio Grande from
24 their head waters down to Fort Quitman, Texas, to the
25 three states, Colorado, New Mexico, and Texas. There

1 is nothing left. All of those waters through the
2 Compact are apportioned to the three Compacting
3 states. So how -- how is that done? And I believe
4 there are four overarching principles within the
5 Compact that explains how this apportionment is made.
6 The first is there is an apportionment set out in the
7 Compact. The second is that the Compact allows for
8 deviations of that apportionment. The third is that
9 there are adjustments, mechanisms for adjusting those
10 deviations, and the fourth is that there is an
11 administrative and accounting system set up within the
12 Compact. And I'll go into each of these in turn. So
13 first, the apportionment. How are the apportionments
14 indexed? How are they identified? Articles 3 and 4
15 establish inflow/outflow indices for Colorado and the
16 upper portion of New Mexico. Those are based on the
17 waters coming in at certain gage locations and then
18 through the table of relationships and outflow amount.
19 So that's how Colorado and New Mexico above Elephant
20 Butte establish their apportionments. Below Elephant
21 Butte, the Compact sets out delivery of water to lower
22 New Mexico and to Texas through the project. This is
23 where the ambiguity comes into play. For a while, we
24 had established apportionments to those two states
25 through deliveries of project supply. The baseline

1 and the means of measurement are not clearly laid out,
2 thus the ambiguity arises and how we get to the
3 dispute, and this is the precise ambiguity that the
4 consent decree resolves.

5 The second issue is departures. Even in
6 1938, the negotiators of the Compact from the three
7 states realized that even though they might set out a
8 specific apportionment through the tables of
9 relationship, that because of hydrologic variability,
10 limitations in water management in the sheer scope and
11 size of the water being apportioned among the states,
12 it was going to be very unlikely that those targets
13 would be imprecisely, thus we have Article 6 in the
14 Compact that allows for departures setting up debits
15 and credits as the deviation too much water delivered
16 generating credits, too little water delivered
17 generating debits, and those were accounted for.

18 However, the Compacting states did not intend to keep
19 those debits and credits on the books perpetually so
20 that leads to the third item, the adjustments.

21 Articles 6 and -- pardon me. Articles 7 and 8 in the
22 Compact specifically provide mechanisms for reducing
23 those deviations and getting back to that target
24 apportionment. Relinquishments under Article 7 can be
25 made for excess water delivered. In this case,

1 through Article 7, it's water belonging to either New
2 Mexico or to Colorado that's actually held in project
3 storage in Elephant Butte. Although it's in project
4 storage, it is not usable water available for use
5 downstream. That water belongs to the two states.
6 Through relinquishment, which is a process exclusive
7 to the Compacting states, Colorado and New Mexico may
8 choose to offer relinquishment to Texas. Texas may
9 choose to accept that relinquished water. Once that
10 happens, those upstream states give up those credits,
11 and that water itself physically then becomes
12 available for release downstream. Article 8 sets out
13 debits. In certain circumstances, debits may be
14 stored upstream in those states, New Mexico and in
15 Colorado, and in certain circumstances, Texas can ask
16 for release of that storage water in order to satisfy
17 its apportionment. Essentially, what we have is water
18 that's owed to another state, either in an over
19 delivery in a credit or an under delivery in a debit,
20 and the Compact sets out those means for adjusting
21 that water regardless of which state in which it sits.

22 The fourth item is the administration in
23 accounting. Articles 2, 5, and 12 do that in this
24 respect. They set up the Rio Grande Compact
25 Commission, which is the sole entity in charge and

1 authorized to administer the Compact, to run
2 accounting on the Compact, and to determine
3 measurement of flows and storage volumes under the
4 Compact. Article 2 allows the Compact Commission to
5 establish new gages as it deems necessary for
6 administration of the Compact. Article 5 allows the
7 Commission to move those gages as it deems necessary
8 and ineffective and don't give the type of data that
9 it actually needs. A very good example of this in
10 play is the 1948 resolution. This is after -- a
11 decade after the Compact had been negotiated, running
12 it for ten years, the states determined that the gage
13 at San Marcial that sits just upstream of Elephant
14 Butte Reservoir was insufficient to measure the
15 delivery from New Mexico to that area. So as has been
16 briefed several times, they moved the measurement
17 point from the gage at San Marcial to the reservoir
18 itself. That's not all that resolution did. In
19 addition, it changed the method of calculating the
20 delivery obligation for New Mexico upstream of that
21 reservoir. In 1938, the states were having difficulty
22 putting together a table of relationships for the
23 middle Rio Grande area, that is New Mexico upstream of
24 Elephant Butte during the summer, and this is
25 primarily because of the highly variable monsoonal

1 rains. Your Honor may remember in -- in his visit to
2 the project area, there had been some localized
3 flooding just before our visit. It was on the lower
4 end of the project area, not the upper end, but when
5 we had gotten there, even though there had been
6 extensive flooding in the El Paso area, the water was
7 no longer there. So that just gives you an idea, a
8 really concrete example of how these flows can be
9 torrential, but not widespread and very hard to
10 capture and measure. It was because of this, the
11 states had a very hard time putting together a table
12 of relationships for the summer, yet a decade into the
13 Compact, they found a way to do just that, through
14 another decade of measurements, through more
15 confidence in -- in the reliability of their data,
16 they established a 12-month measurement for the index
17 for New Mexico and you'll see something very similar
18 that the states did in the consent decree.

19 So turning to the consent decree, how
20 does that function and how is it that it sits clearly
21 within the scope of the Compact? I think Your Honor
22 will take a look at the text in the structure of the
23 Compact, you will see it's clearly within the four
24 principles that I've just outlined for the Compact
25 itself. In addition, as Mr. Somach said in his

1 introduction, this consent decree completely resolves
2 the interstate apportionment dispute. There is
3 nothing left on the Compact level between the states.
4 It resolves all of that. It resolves the baseline
5 condition. It resolves the measurement of the
6 available supply and where it's supposed to go. In
7 that regard, it's fully consistent with New Hampshire
8 versus Maine in resolving ambiguity in the Compact,
9 not veering from its existing structure, and not being
10 an impermissible side agreement. It is exactly what
11 the states are allowed to do, which is when an
12 ambiguity is presented that causes a dispute, it can
13 resolve that and define it within the scope of the
14 existing Compact.

15 So, now, turning back to the four main
16 points of the consent decree and how they relate to
17 the exact four main points of the Compact itself.
18 First, we have an index. What the -- the consent
19 decree does is it resolves ambiguity to the baseline
20 condition through the D2. The D2 curve establishes a
21 relationship between releases from project storage and
22 Caballo dam to deliveries downstream at the gage at El
23 Paso. This is, in fact, consistent with historical
24 practices. The D2 period starts in 1951. Since that
25 time, even through today, the project is operated on

1 that basis with a goal of achieving that proportionate
2 level of delivery. What does it reflect? It reflects
3 the conditions releases from 1951, taking into account
4 such things as total irrigated acres, irrigation
5 methodologies, irrigation practices. It even takes
6 into account adjustments over time since then, such as
7 well use, return flows. It takes into account some of
8 the difficult types of measurements that may explain
9 why the Compacting states didn't set up a less
10 ambiguous method of defining the apportionment due to
11 things such as cross-state canals, municipal
12 development, well technology development, and changes
13 in agricultural practices. Yet what it does is
14 maintains that proportional division, despite all of
15 the changes, that same proportional division, 57/43,
16 that has clearly existed from the data since 1951. So
17 in that regard, what we've done is -- is clearly
18 establish the use of D2 and the maintenance of the 57
19 /43 percentages.

20 This is the index that establishes the
21 apportionment to lower New Mexico and to Texas. It
22 maintains what is in effect the programmatic operation
23 of the project since that time, and simply puts on top
24 of that a clear way to measure and to ensure. 1938,
25 there was no clear way to measure that division, yet

1 that division was there. It's based on the roughly
2 155,000 acres of irrigable acreage within the project.
3 That is what was identified in the downstream
4 contracts immediately before the Compact was signed.
5 States had a clear idea of what that percentage was,
6 how those divisions between the two states would take
7 place. Indeed if all of the waters used for
8 irrigation purposes and is used on all the 155,000
9 acres that are available to irrigate, you come up with
10 a 57 percent/43 percent consumption and allocation
11 through the project. That's the same as the
12 apportionment to the states and the Compact that was
13 signed immediately thereafter. So that's the first
14 point. It clearly shows that what we've done through
15 the consent decree is simply define what has always
16 been the case, that is we've gotten apportionment
17 between the two states, and it's based on a 57/43
18 percentage, and we -- we've allowed measurement of
19 that in the baseline through the D2, which is nothing
20 more than a recognition of what has always happened
21 through history through the operation of the project,
22 and a means of measuring, which is setting down the
23 gage at El Paso. Again, that's completely consistent
24 with Article 2 of the Compact that allows the
25 Commission, the Compact Commission, to establish any

1 new gages as it sees is necessary for administration
2 of the project -- I'm sorry -- for administration of
3 the Compact. Don't mean to make my colleagues from
4 the United States overly nervous about my -- my
5 presentation this morning.

6 So we've -- we've got that. That's been
7 established. That's all we're doing is we're setting
8 up, just like we did in 1948 with that resolution, now
9 we -- we've got a handle on the monsoonal inflows, and
10 we're going to make sure we measure those and change
11 the point where that's measured. Now, we've got a
12 handle on how that project operates on a programmatic
13 basis, and we've got a means of measuring to ensure we
14 keep 57 and 43 in play.

15 **JUDGE MELLODY:** Now, the objectors -- and
16 I know Ms. O'Brien, in particular, argued quite
17 strongly that that's not just a -- a change to a gage,
18 it's actually an amendment to the Compact, that it was
19 -- that establishing a gage at El Paso was -- was
20 actually considered during the negotiations in 1938
21 and rejected, and there's some historical evidence for
22 that, so why is that not a fundamental change to the
23 Compact and require Compact amendment?

24 **MR. WALLACE:** It absolutely is not a
25 change to the Compact to the level that requires an

1 amendment. It lies completely within Article 2. The
2 Compact Commission may establish any additional gages
3 as they deem necessary. So what we're --

4 **JUDGE MELLOY:** Well, it's not the
5 establishment of the gage, I think, that's the problem
6 -- assuming there's a problem -- it's that that
7 becomes the measuring point for Compact apportionment.
8 Clearly, you can -- there's already a gage there, so
9 you're not really establishing a new gage. So it's
10 not the establishment of the gage itself. It's using
11 it as the point of measurement, I think, is the
12 concern.

13 **MR. WALLACE:** So two responses, Your
14 Honor, to that. One is it's really no different than
15 moving the existing gage at San Marcial to a mass
16 balance measurement using reservoir storage in
17 Elephant Butte. So as you point out, there is a gage
18 at Courchesne, the El Paso gage. It exists. It has
19 not been used for Compact accounting purposes. So
20 what we are doing is identifying that gage as one to
21 be used for Compact accounting purposes. Second, it
22 is correct that it is not listed in Article 2, that is
23 the El Paso gage is not listed in Article 2, as one of
24 those to be used for Compact accounting in 1938, and
25 -- and the reason I would offer is that: In 1938, it

1 was too difficult because of the -- of the various
2 elements that I mentioned, the several cross-state
3 canals, return flow measurements, the vagaries of
4 clearly splitting out what is Texas' and what is New
5 Mexico's was too difficult at that time to use a gage
6 at El Paso to measure compliance. So they weren't
7 able to do that. That's very similar to the inability
8 of the Compacting states in 1938 to measure the
9 monsoonal rain inflows during summer months in New
10 Mexico. That doesn't mean that there wasn't an
11 apportionment and wasn't a delivery obligation from
12 upper New Mexico to the lower reach. What that means
13 is the states did not have the means to measure it at
14 that time. By 1948, they did, and they were confident
15 they had the right data and the right method to put
16 together those relationships. Now summer monsoonal
17 inflows are included. The exact same situation
18 applies here. We have a programmatic operation of
19 Reclamation project between two states. At that time
20 it was too difficult to parse out the drains, the
21 cross-state canals, the return flows and say this is
22 New Mexico's, and that is Texas'; however, the states
23 were clear that because the downstream contracts had
24 existed, and those contracts identified the 57/43
25 percent irrigable acreages, and that all that water is

1 used for irrigation purposes, it ends up being an
2 appropriation amount in the same 57/43 percent split.
3 Now, the states are able to put together a measurement
4 method using the D2 baseline and using the El Paso
5 gage and the effective El Paso index. So that --
6 that's not, Your Honor, just looking at what crosses
7 the gage. The effective El Paso index is more. It
8 includes the gage flows plus the Mesilla Valley use in
9 Texas. That was that tricky part, so that includes
10 municipal wells in Texas, but upstream of the gage.
11 It includes return flows in the Mesilla Texas, and it
12 includes consumption within Mesilla Texas, and that's
13 both irrigable -- irrigated consumption and
14 non-irrigation. I believe several of the documents
15 called DCMI, so we're talking about domestic,
16 commercial, municipal, and industrial uses. That
17 proved too tricky for the Compacting states in '38 to
18 clearly identify. Now, we can, and the Compacting
19 states are comfortable, not that they're changing
20 anything, but they can accurately measure the split
21 that they've already agreed to. So -- so that's the
22 explanation, Your Honor, that the effective El Paso
23 index and the use of the gage without amending the
24 Compact, it is very similar to what we did in 1948 and
25 simply come up with a reliable measurement method to

1 measure the split that we already agreed to.

2 So I think I'm going to go into the
3 second overarching principle of the consent decree
4 which mirrors the Compact, which is deviations. So
5 this is, again, the idea that there is a split, 57/43,
6 but it is not practical to expect that the project is
7 going to hit that each and every year. So we've
8 allowed a deviation. Essentially, what this does is
9 avoids a technical violation. If we've got a strict
10 57/43 split, you're off by an acre foot, that might be
11 construed as a Compact violation. There's no need to
12 come to the Court and say this state has violated the
13 Compact. That way we've built into the deviations
14 recognizing that, again, the vagaries of hydrology and
15 the challenges presented by administration of water
16 over an essential large area, you're going to get
17 close, but you're not always going to hit the target
18 in the bull's eye. So positive deviations are when
19 too much water is delivered by New Mexico to Texas.
20 Negative deviations are when too little water is
21 delivered by New Mexico to Texas. So when you have a
22 positive deviation, that means that Texas had access
23 to water that actually belongs to New Mexico.
24 Conversely, a negative deviation means New Mexico has
25 held onto or consumed water that actually belongs to

1 Texas.

2 That gets to the third principle, which
3 is the adjustments. The Compact -- in the consent
4 decree, we call those triggers, and what those are,
5 are requirements to get -- to take action to get back
6 to that 57/43. We have identified interim steps so
7 this is before we start to get to the outer limits of
8 our -- our deviation allowances that New Mexico has
9 agreed to take certain actions. Again, the goal to
10 get it back to the 57/43 split. There are a number of
11 specifics in those triggers, actions that need to be
12 taken, and -- and I want to hit on here that it does
13 include allocation transfers within project storage.
14 This is very similar to the transfers of Compact
15 apportionment that are already allowed with
16 relinquishment under the Compact. As I mentioned
17 earlier, New Mexico and Colorado, if they have credit
18 water, that's water actually in storage in the
19 project, doesn't belong to the project, it belongs to
20 the states under the Compact through a relinquishment,
21 which is an exercise among only the Compacting states,
22 they will trade that water and make it available for
23 the downstream segment.

24 The same thing happens here. If there
25 is a positive departure, that means Texas got water

1 that actually belongs to New Mexico, and that's
2 already gone downstream. That's just the -- the
3 geographical nature of how the system works. Your
4 downstream user got the water, really hard to give it
5 back because it's all uphill. The only place that
6 Texas can get access to that water is through project
7 storage, and -- and it's an acknowledgment that that
8 water in project storage, more of it actually belongs
9 to New Mexico at that point in time to pay back and
10 get to the 57/43 split. The opposite, of course, is
11 true for a negative departure. That means New Mexico
12 has used water actually apportioned to Texas.

13 **JUDGE MELLOY:** Well, let me ask you
14 something on that issue that I'm -- one of the briefs
15 raises or affidavits raises an issue. Let's assume
16 that there's -- Texas has water in project storage,
17 that means it's physically in the reservoir, right,
18 and as a result that water is not passing through the
19 El Paso gage, and it could then -- which could then
20 result in a negative accrual. So is there double --
21 is there a problem with double accounting? What --
22 how do you reconcile the negative accrual that occurs
23 by Texas not ordering the water and, therefore, not
24 passing through the El Paso gage?

25 **MR. WALLACE:** Your Honor, that's

1 actually something that came up in discussions, how to
2 put this together, and this is essentially -- I
3 believe it's a topic that Mr. Wechsler is -- is going
4 to talk about in more detail, but I'll give you a
5 high-level summary because I don't want to leave you
6 hanging. This is how we came to the allowed
7 deviations. We looked at the historical period of
8 record, how that water was managed, and it is true, if
9 less water is ordered by the Texas irrigation
10 district, less water in total is released. That means
11 on a percentage basis, it could be that the New Mexico
12 irrigation district is using a larger percentage of
13 the total releases. All right. That would then get
14 you off the 57/43 split because less water ends up
15 going down to the El Paso gage. That's where we came
16 up with the allowed deviations, positive and negative.
17 We looked at historical practices, what would happen,
18 including the period through carryover allowance. How
19 is it that they've used carryover? That will have an
20 impact on that 57/43 split. How much? And that's one
21 of the factors we used to come up with that -- that
22 variation. On the double accounting issue, that comes
23 into play if you've got carryover and then you're
24 releasing it or -- or in this instance, if you make a
25 transfer from Texas to New Mexico or vice versa. That

1 can have that same offsetting amount in calculating
2 actual release from the reservoir down to El Paso.
3 That's where the New Mexico escrow and the Texas
4 escrow accounting comes into play. It's not a project
5 allocation issue. It's 100 percent a Compact
6 accounting issue, and all this does is it serves to
7 prevent the double accounting because we -- we know it
8 could be there. The escrow accounts are designed to
9 take the double accounting off the books so that we
10 see that water passing through only once, and keep us,
11 again, on that 57/43.

12 **JUDGE MELLOY:** Well, I'll let
13 Mr. Wechsler go into a little more detail on that, but
14 go ahead, Mr. Wallace.

15 **MR. WALLACE:** So having gone through the
16 adjustments, I think I believe I covered that,
17 especially with your question on that. The fourth
18 point would be administration. And, again, consistent
19 with the Compact, it's the Rio Grande Compact
20 Commission that is administering and keeping the
21 account on this. As you've noted, we are adding the
22 El Paso gage. Physically it exists. It's not used
23 for Compacting purposes. The Commission will, upon
24 entry of the consent decree, use the El Paso gage for
25 Compact accounting purposes, which they're able to do

1 under Section 2 -- or Article 2 of the Compact, and --
2 and that's really all there is to it. The Compact
3 Commission is including now -- we haven't had this
4 issue before below Elephant Butte down through Texas,
5 we've not had an adequate means to measure, are we
6 making 53/47 -- 57/43 split, are we making that or
7 not? We couldn't tell, and that's the ambiguous
8 point. The area is not a hundred percent under
9 irrigable acreage or not irrigating 155,000 acres
10 anymore. Those variables have all changed. But the
11 effective El Paso index does provide us a means to
12 measure that, including how those changes have taken
13 place to make sure we're still in the 57/43 that
14 existed in 1938.

15 **JUDGE MELLOY:** One of the matters we've
16 talked about from early on in this case is -- is an
17 attempt to keep the 2008 operating agreement out of
18 the case, and maybe I was naive in thinking we could
19 do that. What does this do to the operating agreement
20 or does this become operating agreement 2.0 or what is
21 -- what is the relationship with the operating
22 agreement?

23 **MR. WALLACE:** So as Mr. Somach pointed
24 out in -- in his opening statements, that Compact is
25 the premier operating legal authority. That controls.

1 However, there's not necessarily a direct conflict
2 between the consent decree and the day-to-day
3 operations under the 2008 operating agreement. And
4 this is -- this is a point that was raised in some of
5 the response brief, and I believe some of the amici
6 were raising this question, what happens? And the
7 overarching answer is as long as the apportionments to
8 the two states remain on a 57/43 level and were using
9 the effective El Paso index to measure that, how that
10 water then is divided within each of the states
11 separately is not a Compact issue; therefore, to the
12 degree you're talking about varies measurement points
13 within Texas, for example, those are not impacted.
14 Texas' apportionment is governed by the effective El
15 Paso index. That's what measures that. Thereafter,
16 it's an issue internal to Texas how that water is
17 divided up and measured. Likewise, with New Mexico,
18 when New Mexico is within that 57 percent of its
19 Compact apportionment, any further actions as between
20 the irrigation districts or municipalities or who has
21 contracts or who doesn't is internal to New Mexico's
22 administration of its 57 percent. So in that respect,
23 consent decree doesn't touch on it. And, in fact,
24 that's one of the points I want to make in addition on
25 this administration in accounting. The consent decree

1 does not get into the daily operations of the project.
2 In fact, the allowed deviations are built in because
3 of the programmatic nature of the project and -- and
4 the carryover and the adjustments and the various
5 things that have happened over the years that we see
6 cause it to vary from a 57/43. Those same deviations
7 allow the United States and the districts to manage
8 their daily operations. It gives them that
9 flexibility because we've got these deviations. Even
10 though the goal and the actual apportionment is 57/43,
11 there won't be a technical violation of the Compact as
12 long as we're within these -- these two extremes laid
13 out in the consent decree, which are based on
14 historical operations. Again, it's nothing new. It's
15 this is how the project has operated historically, and
16 that's what we're baking in to the consent decree.

17 **JUDGE MELLODY:** Well, let -- let me make
18 sure I understand in somewhat simplistic terms. If
19 there is a measurement of -- of a release of, say,
20 500,000 acre-feet in a given year, is what this
21 consent decree provides for is that the parties will
22 be in compliance with the Compact if 43 percent of
23 that 500,000 acre-feet passes through the El Paso gage
24 to Texas?

25 **MR. WALLACE:** Roughly. The real answer

1 -- the system is more complex than that. We've got
2 return flows and river approvals, but if we're looking
3 at project supply, 43 percent of project supply, as
4 measured by the El Paso -- effective El Paso index
5 gets to where it's supposed to go, then yes, that's
6 compliance.

7 **JUDGE MELLOY:** So how does this -- how
8 does this account for the diminution in return flow
9 that Texas has alleged occurs because of pumping?

10 **MR. WALLACE:** So return flows, higher or
11 lower, are built into the effective El Paso index.
12 Again, we're looking at -- we've established through
13 the consent decree the baselines. The baseline is the
14 D2 period. The study period for the D2 is 1951 to
15 1978. So that operation becomes the baseline. The
16 project has since been operated to attempt to
17 replicate that baseline since that time. In -- in the
18 '80s, the United States agreed to use the D2. Going
19 forward, in effect, the D2 is also the baseline
20 operational target for the operating agreement. So it
21 hasn't changed. That -- that's what stayed
22 consistent. It is built in. So if -- if, let's say,
23 on a hypothetical, New Mexico increases its
24 consumptive use over today, if it does that, as you
25 would assume, less water is ending up getting to the

1 gage, that shows up. Since we're measuring against
2 the D2 baseline, the effective El Paso index is going
3 to show less than 43 percent of project supply being
4 delivered to Texas. That will start to accumulate a
5 negative departure. Once it hits a certain threshold,
6 it mandates New Mexico to take certain remedial
7 actions to get back to delivering 43 percent. So
8 adjustments in -- in consumption, whether it's through
9 new crop types, new wells, a population growth, will
10 be taken into account and measured and need to be
11 managed for by New Mexico to make sure no matter what
12 they do, Texas continues to get the 43 percent of
13 water apportioned to it.

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

15 **MR. WALLACE:** Just a few other points I
16 want to hit on, and this has to do with -- with
17 maintaining flexibility of project operations. As I
18 said, the day-to-day is not impacted. What happens
19 entirely within each state within its apportioned
20 water not impacted by the consent decree. There are
21 some operational suggestions that the consent decree
22 appendices have. They have to do with updating the D2
23 curve to include multi -- a multi-year regression
24 because that more accurately represents the 57/43
25 using the El Paso index with measurement at the gage

1 and evaporative calculations. In essence, those are
2 all measurement changes that better cleave to a 57/43
3 split. Could the United States choose not to
4 implement those? Yes. In doing so, it's choosing to
5 operate in a way that accelerates deviation from that
6 split. I don't know why it would want to choose to do
7 that. That option is there. But in the end, it will
8 still be responsible for not violating a 57/43 split,
9 which is that split is what they've operated to
10 historically. So -- so this really provides them with
11 a better measurement means of tracking project
12 operations programatically so that it adheres to what
13 the states agreed to in 1938 as far as their
14 apportionment split.

15 **JUDGE MELLOY:** Thank you.

16 **MR. WALLACE:** So if Your Honor has any
17 more questions, that -- that concludes my high-level
18 overview of the consent decree and how it's within the
19 scope of the Compact and provides the just, fair, and
20 reasonable solution to what has previously been an
21 ambiguous apportionment.

22 **JUDGE MELLOY:** Thank you.

23 **MR. SOMACH:** Your Honor, I will address
24 now why the United States has not met its burden by
25 addressing -- excuse me. If I can get some water. I

1 have been battling this whatever for a month now, so I
2 apologize.

3 But I want to address the various
4 general claims made by the United States. In order,
5 the arguments that are made that I want to address
6 are, first, the nature of the Compact claims in this
7 case; second, the argument related to project
8 impairment; and third, there were two more specific
9 arguments made by the United States. First, it's
10 quibble about the word "agent," and "number two," the
11 1938 Condition. So I'd like to -- to -- to move
12 through those.

13 The nature of the Compact claim, let me
14 start there. In our reply brief, we say that the
15 consent decree will not dispose of any Compact claims
16 of the United States. What we mean when we say that
17 is there's simply are none left, no Compact claims
18 left, after the entry of the consent decree. As I
19 noted in my introduction, the only Compact claims
20 articulated by the United States relate to the Texas
21 claim that New Mexico actions have interfered with the
22 ability of the project to deliver the Texas
23 apportionment to Texas. That's -- that's the four
24 corners of -- of the United States' hook into a
25 Compact claim. There's nothing more to it, and this

1 claim is absolutely derivative of Texas' claims.
2 There would be no other Compact nexus between the
3 United States and its claims with respect to the
4 Compact, other than the allegations of impairment,
5 interference by New Mexico with the delivery of water
6 into Texas.

7 **JUDGE MELLOY:** Well, it seems to me,
8 Mr. Somach, that the point you're making or discussing
9 right now is the real crux of this case.

10 **MR. SOMACH:** Yes.

11 **JUDGE MELLOY:** A lot of the other
12 issues, accounting, I'm not saying they're not
13 important, but they're not as important, in my view
14 anyway. The concern I have is the language in the
15 Supreme Court opinion that talks about the Compact
16 being inextricably intertwined with the Rio Grande
17 Project, the downstream contracts, says it can only
18 achieve the apportionment because by the time the
19 Compact was executed and enacted, the United States
20 had negotiated and approved the contracts, which they
21 assumed legal responsibility to deliver water to
22 Texas, then goes on with its agent language and so on
23 so forth. And it ends by saying, "A rough analogy,
24 the Compact will be thought to implicitly incorporate
25 the downstream contracts." So if we take the Supreme

1 Court at its word that they incorporate the downstream
2 contracts, does that not mean that by changing this
3 settlement, if it in any way impacts those contracts,
4 that means that the United States then has a Compact
5 claim?

6 **MR. SOMACH:** No. And, in fact, you
7 know, I want to address that -- that very
8 specifically. One needs to take a look at what it is
9 that the Supreme Court is talking about when it talks
10 about the downstream contracts. The downstream
11 contracts are -- are Reclamation contracts, and what
12 the Supreme Court focuses on in those contracts is the
13 155,000 acre-feet -- acres of water within the project
14 and the basic 57/43 split, and they talk about that
15 specifically in the opinion, and they pull that out,
16 and that is, of course, what we're talking about here
17 when we talk about the Compact apportionment. That's,
18 I believe, what -- what has been talked about
19 previously by you in the summary judgment order, also.
20 It's not -- it's not everything about Reclamation
21 water or Reclamation contracts. The Court could not
22 possibly have said the repayment obligation of the
23 districts is incorporated into the Compact. It could
24 not possibly have said or meant that the districts in
25 1938, their -- their sole role was a tax collector at

1 that point in time, that their tax collecting role was
2 incorporated into the Compact. What was incorporated
3 into the contract, and we agree, was that 155,000
4 acre-feet and the 57/43 split, and that's why that is
5 what's talked about specifically within the -- within
6 the -- within the opinion. Now, it's clear that the
7 United States exploits that language, and in our
8 opinion, conflates two very simple different things.
9 The project, as a Reclamation project with all the
10 bells and whistles associated with Reclamation law,
11 which go well beyond repayment obligations, but they
12 have nothing to do with the apportionment in an
13 interstate Compact. All of that stuff -- and I want
14 to address that in a moment separately. What the
15 Court was talking about and says that what it's
16 talking about is the project as the mechanism that the
17 Compact uses to effectuate the apportionment to Texas
18 and a part of New Mexico. That's the context -- the
19 exact context that the Court utilizes when it uses
20 those phrases. Conflating project and all the bells
21 and whistles associated with Reclamation law with
22 project as the means to effectuate the apportionment
23 among -- between Texas and a part of New Mexico is
24 quite a different thing. They're not the same thing.
25 And what the Court, we believe, is talking about is

1 the latter. The project has effectuated the
2 apportionment, the 57/43, the 155,000 acres, all of
3 which are talked about in the opinion, the repayment
4 obligation, the taxing authority of the districts, and
5 I could -- you could pull apart these Reclamation
6 context forever. They have absolutely nothing to do
7 with compacts and apportionments of water. So -- so
8 in the first instance, that's -- that's how I would
9 address it, but it's not just us that understood it.
10 The United States may have a totally different view
11 now, but their view when they were trying to ensure
12 that EP -- EP No. 1 could not/did not intervene in
13 this case, they took a totally different point of
14 view.

15 Why don't we put that up?

16 We actually quoted this in our motions
17 and, you know, point authorities in support of the
18 motion. The United States acknowledged then the
19 equitable apportionment is the defining issue of the
20 litigation. And, again, it's the equitable
21 apportionment that this lawsuit is all about. But in
22 opposing E P No. 1's intervention, the United States
23 wrote this, and actually, this paragraph you could
24 divide into three parts. The first part is where --
25 where they say, "The complaints filed by Texas and the

1 United States seek to establish the sovereign rights
2 among the States, the nature of the apportionment of
3 water agreed to by the States under the Compact, and
4 the rights of the United States on behalf of the
5 Project and under the treaty with Mexico." Okay. No
6 argument that that's -- that's what we're talking
7 about in -- in that context. They go onto say in the
8 second clause, "EPCWID is not a party to the Compact,
9 and it acknowledges that the United States operates
10 the Project's dams and reservoirs and determines how
11 much water is allocated to EBID and EP No. 1,
12 respectively, pursuant to the 1938 contract and the
13 2008 Operating Agreement. EP1's receipt and delivery
14 of Project water" -- the Project that I just talked
15 about that is Reclamation law with all the bells and
16 whistles including repayment obligations, taxing
17 authority, and whatever else -- "has no effect on how
18 the water is allocated among the States under the
19 Compact." This is the United States that's saying
20 that, making the distinction that I'm trying to make
21 here in terms of what the Supreme Court was talking
22 about. First, the United States concludes
23 with, "Those contractual rights and obligations are
24 considered only after the respective rights of the
25 States under the Compact - the subject of this

1 original action - are defined." That's exactly the
2 point we're making. That's the point that the Supreme
3 Court made when it talked about how the downstream
4 contracts were incorporated into the Project.

5 In any event, if resolution of the Texas
6 claims are ones that ensure that the Texas
7 apportionment are not interfered with or impaired by
8 New Mexico and that the apportionment actually gets to
9 Texas, and that's also -- that's also part of the
10 Supreme Court decision because it said that the
11 Project effectuates the equitable -- the delivery of
12 water to make sure that the apportionments to Texas
13 and part of New Mexico actually get there.

14 Parenthetically, I want to respond a little bit more
15 to the question posed about the El Paso gage. This
16 case has always been about getting water into Texas,
17 that Texas was apportioned. It never got more
18 complicated than that. We said the delivery of water
19 into the reservoir was the delivery obligation under
20 the Compact and that we were entitled to 43 percent of
21 that unimpaired, un-interfered with in Texas. Well,
22 the only way -- no matter what the remedy was, that --
23 that -- that we came up with or that we went through a
24 whole trial and remedies section, at the end of the
25 day there had to be some measurement to ensure that

1 what we paid for actually got to us. That's all the
2 El Paso gage does. It's a mechanism for measuring
3 that the water delivered into the reservoir, in fact,
4 actually gets to Texas. That -- that -- that's what
5 it is, and it -- it doesn't get any more complicated
6 than that.

7 Again, when you look at the notion of
8 apportionments, which is what this case is all about,
9 the United States doesn't get an apportionment, and --
10 and I think it was EP No. 1 brief that said, Oh, no,
11 the apportionments to the project. Well, you just
12 have to read the Compact. The Compact says the
13 apportionments are to Colorado, Texas, and New Mexico.
14 There's no reference to the Project as getting an
15 apportionment. There's no reference to United States
16 getting a -- a apportionment. It -- it -- it just
17 defies a bare reading of the Compact to argue
18 otherwise.

19 The United States' Compact claims
20 vis-a-vis the apportionments to Texas and a portion of
21 New Mexico were never independent. They could not be
22 independent because they were derivative and
23 absolutely tied to the actual apportionments under the
24 Compact, in this case to part of New Mexico and Texas.
25 The reality is that the argument the United States

1 makes has nothing to do with Texas' apportionment, but
2 is rather a complaint about New Mexico water rights.
3 Earlier, I quoted from the Special Master -- the first
4 Special Master in his report where he just says that.
5 He says that the claim is all about New Mexico water
6 rights. Calling a purely intrastate dispute an
7 interstate dispute, as the United States does, just
8 simply doesn't make it so. You've got to look beyond
9 just the sentence, and you've got to look at what is
10 in play here.

11 The second point I want to make is that
12 the United States' arguments related to Project
13 impairment. As I noted above, the question of Project
14 impairment is not open ended, and that's confirmed in
15 our view by what I just talked about in terms of the
16 2018 decision, and the meaning of what it called
17 distinct federal interest. Again, we've talked a lot
18 about the 2018 opinion or briefing. We just talked
19 about it. But the discussion that the Court had about
20 the Project and downstream contracts is -- is
21 fundamentally -- you know, what -- what -- how we've
22 described it in terms of separating out those
23 interstate claims with the intrastate claims.

24 The recognition that the Supreme Court
25 had that the Project plays an integral part of the

1 Project operation deals with, again, interstate
2 Compacts, apportionments, and not with the normal and
3 ordinary operation of a Reclamation project.
4 Moreover, it -- you know, the Supreme Court
5 characterizes the role of the United States. Didn't
6 leave it to question. It basically said the United
7 States acts as a -- sort of an agent to effectuate,
8 through Project operations, the apportionments that
9 were involved.

10 The other, you know, significant thing
11 is that the Court allowed the United States to
12 intervene, and -- and this is replete. It's repeated
13 more than a few times in the decision, but the concept
14 was that the United States was allowed to intervene
15 fundamentally because it claims parallel those of the
16 State of Texas. The Court stated that the United
17 States has asserted Compact claims in an existing
18 action brought by Texas seeking -- and here I think
19 this is significant -- substantially the same relief
20 as Texas. Texas never raised any of the internal New
21 Mexico water rights administration issues. You won't
22 find that anywhere in the Texas complaint, but the
23 predicate or the basis of allowing intervention is
24 that the United States was seeking substantially the
25 same relief as Texas and without our objection. Now,

1 we went to -- in our separate brief, we went to length
2 about the fact that we didn't object, but we
3 definitely qualified what -- what our view was fearing
4 the exact thing that's happening now. I mean, we
5 spelled it out in our briefs to the Supreme Court what
6 we were concerned about, and our view is that the
7 Supreme Court listened to us, and the limiting
8 language within the Supreme Court opinion, even citing
9 the Texas briefs, we believe is evidence of the fact
10 that the Court intended not to expand the lawsuit
11 beyond what Texas had brought, but rather to confine
12 it within the four corners of the Texas complaint.
13 And, in fact, that's what the Supreme Court said as
14 part of its -- its fourth -- and I think we talked a
15 little bit about this, but its fourth point. Again,
16 this is where the Court says, "The United States has
17 asserted its Compact claims in existing action brought
18 by Texas seeking substantially the same relief without
19 the State's objection." Then the Court says what this
20 case is not about. And he said -- the Court said that
21 the case does not present the question of whether the
22 United States could initiate litigation to force the
23 state to perform its obligations under the Compact.
24 And this is the critical language that we talked about
25 earlier in our view that this is the operative

1 language, "Or expand the scope of an existing
2 controversy between states." That was not an
3 unanswered question. It was an unanswered question if
4 that was the issue before the Court, but what the
5 Court said here is this is not a case where there will
6 be an expansion of the scope of existing controversy
7 between the states.

8 I want to just briefly talk about this
9 agent argument. We used that in our brief to the
10 Supreme Court. The Supreme Court used it and cited.
11 I'd argue we knew, I knew what I meant when it was
12 written, but I won't quibble about that. You could
13 use the word "agent." You can use the word "servant."
14 You can use the word whatever you want to use. The
15 operative language is what the obligation of the
16 United States was, because it was an agent for a
17 purpose. It's the purpose that is the important
18 thing, and the purpose was to operate the project to
19 effectuate the apportionment. That's the operative
20 language, and there can be no quibble, no doubt about
21 it, and it -- and it's a limiting factor, as well as
22 an obligation. It limits the role of the project
23 vis-a-vis its Compact role to effectuating the
24 apportionment.

25 **JUDGE MELLOY:** Would it be fair to say

1 that this would be typical of any project where
2 there's an apportionment and the water has to be
3 released, so to speak, pursuant to the apportionment
4 by Reclamation?

5 **MR. SOMACH:** Well, I'm going to give you
6 an exception to that in a moment because they raised
7 the exception in their brief, but I would say there
8 are certainly other Supreme Court cases where that's
9 the case, and we've cited a lot of those in our -- in
10 our brief so -- so I don't see this as an exceptional
11 notion at all. There are other interstate Compacts
12 that also involve Reclamation projects, and in those,
13 the United States, you know, to the extent it's ever
14 claimed more rights than the Compacting states, the
15 Court has severely limited that -- that ability. And,
16 again, the Project is a tool where they exist to
17 effectuate what the Compact says. The Compact is
18 clearly the superior law here and the Projects need to
19 operate within that ambit. That doesn't mean, as
20 Mr. Wallace said, there need to be conflicts between
21 how to operate the Project and the Compact, but to the
22 extent that you believe there are, Project operations
23 have got to defer to what the Compact says.

24 **JUDGE MELLOY:** Well, if I understand
25 what you're saying, another way of saying it would be

1 that you could -- United States could effectuate
2 compliance with the Compact, even if there weren't
3 contracts with -- with the two water districts, they'd
4 just have to be done in a different way?

5 **MR. SOMACH:** That's right. Remember the
6 contracts. What the contracts are, I'll talk about --
7 I'll talk about it now. States don't use water. You
8 know, when you get an apportionment of water pursuant
9 to a Compact or a Supreme Court decree, depending upon
10 how the rights go to you, the states are given those
11 apportionments or provided those apportionments in
12 their quasi sovereign capacity, and they don't -- in
13 that sovereign capacity, they don't use water. Others
14 use water based upon grants of rights that are
15 provided by the states, and I said that much earlier
16 today in the introduction. And so -- so, you know,
17 the apportionment is -- is quite different than
18 anything they're talking about in terms of the
19 district's rights to water, which I've already said.
20 The fact that there needs to be a Reclamation contract
21 to use that water is not a -- it's not an unusual or
22 -- or startling statements. I -- I would concur
23 hardly that it does need to do that. But the fact
24 that -- that -- that a user of water needs a
25 Reclamation contract or that -- or that -- the point

1 I'm trying to make is -- is it may need a Reclamation
2 contract, but first, it needs a right to that water
3 granted by the respective states because that's where
4 the apportionment is, and that's where the right to
5 use water, whether it be by the United States as part
6 of a Reclamation project, or by the districts as
7 recipients of project water, that's where that
8 emanates from. And as I've said earlier, that is the
9 case here. They all got rights granted by the State
10 of Texas for use within Texas of the sovereign
11 apportionment the State of Texas was provided, and --
12 and so those apples and oranges just -- just can't get
13 -- get mixed up the way -- the way the districts and
14 the way the United States are attempting to do here.

15 I want to turn to the other little
16 specific argument that -- that is made, and that's the
17 1938 Condition. We've spent a lot of time on the 1938
18 Condition, and I've -- I've shown irritation with the
19 United States' position, but I -- but I do think that
20 is worth walking through what the United States has
21 said about the United States Condition. First,
22 there's nothing in the 2018 opinion that touches on
23 the 1938 Condition. It's not there at all. Second,
24 while the Texas complaint clearly raises and addresses
25 the '38 Condition, as we've defined it as the proper

1 baseline, and I think we said in the brief, if we have
2 to go back to litigation, that will continue to be our
3 position. The United States' complaint is devoid of
4 any reference to it, and we went through it again just
5 to make sure that when I made that statement, I wasn't
6 going to be shown wrong. They make no reference in
7 their complaint to the '38 Condition. In your summary
8 judgment motion, you said that the baseline was akin
9 to the 1938 Condition that we had argued, but that we
10 needed evidence to flesh out the contours of what that
11 meant. In that context, and in their summary judgment
12 briefing, we cited this. In their Footnote 9 of that
13 brief, they went to great lengths to say our view,
14 Texas' view of the '38 Condition, wasn't their view.
15 Their view have all kinds of additional uses of water
16 after 1938. And then ironically in their reply brief,
17 they cite at length the Texas historian, partly
18 because they didn't present any evidence on this in
19 the first phase of the trial, and the quotations all
20 related not to their view of the 1938 Condition, but
21 to the Texas view of the 1938 Condition, you know, and
22 -- and finally in that regard, the record is devoid,
23 absolutely devoid, other than these legal arguments
24 they're making, of any evidence by the United States
25 to support its contentions with respect to the 1938

1 Condition. The evidence that dealt with baseline
2 conditions or conditions, I think it was their
3 witness, Michelle Estrada-Lopez, the EBID then general
4 manager Gary Esslinger, they all related not to a 1938
5 Condition, but, again, ironically to the D2 Condition.
6 The baseline used in the consent decree is the D2
7 Condition, and the reality is that's a curve that's
8 been around, you know, for a long time. It's based
9 upon a 1951 to '78 period. It was informally adhered
10 to after that for Project operations, and since 2008,
11 it was formally adopted by the United States and the
12 districts as the baseline for Project operations with
13 the D2 curve, which the 2008 Operating Agreement
14 parenthetically and interestingly enough says that --
15 that is consistent with the Compact. Now, the
16 argument is inconsistent with the Compact, but they
17 themselves in the 2008 Operating Agreement, both the
18 United States and both districts, clearly articulated
19 that, and we cited to the -- to the specific
20 provisions.

21 Let me -- let me -- I want to close
22 because I'm going on too long here, but I just want to
23 address this Reclamation law. Mr. Wechsler is going
24 to get into this in more detail, but -- but I wanted
25 to create some kind of context for you in terms of

1 that. Reclamation law, as I said, in and of itself,
2 has nothing to do with the Compact, but it has a lot
3 to do with what comes after the consent decree is --
4 is entered. The apportionments are different from the
5 right to use water, as I've said. States in their
6 sovereign capacity get apportionments. Those rights
7 then that they grant out to use the water to -- to
8 others. But that's important, because those grants
9 are pursuant to state law. The Reclamation Act of
10 1902, which is the Reclamation Organic Act, Section 8
11 has a provision in it that says, "Reclamation has to
12 defer to state law," and to the extent there was any
13 ambiguity about Section 8 at all, the Supreme Court
14 addressed that absolutely in the case California
15 versus United States, a 1978 or 1979 case, which --
16 which emanated from California, and which clearly
17 articulated that the requirement is United States,
18 you've got to get your water rights from the state
19 wherein you -- you reside, the Project resides, unless
20 there's some express congressional directive going the
21 other way. In this case, the only express
22 congressional directive is the Compact itself, which
23 certainly doesn't do this. The -- the result of that
24 is the issues that are raised by the United States as,
25 quote unquote, Compact issues are, in fact, intrastate

1 New Mexico issues, and under Reclamation law under
2 Section 8, they have to be resolved pursuant to New
3 Mexico state law. The EBID brief is instructive on
4 this point. That brief is mainly about New Mexico
5 state law issues and forums and so forth, and
6 Mr. Wechsler will, again, explain a little bit more
7 about that, but there's nothing in the consent decree
8 that prejudices EBID or the United States' rights and
9 their ability to pursue those rights in New Mexico
10 state administration procedures, and, in fact, they're
11 in those procedures right now. But -- but the
12 fundamental point is there's nothing in the consent
13 decree that prejudices those rights. I want to
14 briefly mention these Colorado River examples because
15 the Colorado River examples the United States uses in
16 their brief proves the -- are the exception that
17 proves the rule that I'm talking about. On the
18 Colorado River, there are two Compacts, one among
19 seven basin states that divide the water between upper
20 basin and lower basin. There's an upper basin
21 Compact, and then the lower basin, California,
22 Arizona, and Nevada's rights are pursuant -- those
23 apportionments are pursuant to a Supreme Court decree
24 in Arizona versus California. Okay. A lot of
25 apportionment related actions there, but as is pointed

1 out by the United States, there is also a lot of
2 congressional legislation, particularly the Boulder
3 Canyon Project Act, which create different directives
4 that overrule -- actually don't overrule it, but they
5 micromanage the apportionments. Congress, when it
6 wants to do that, knows exactly how to do that, and
7 the Colorado River example is -- is that situation.
8 There are -- there's none of that on the Rio Grande.
9 There is none of that on the Rio Grande, and the
10 United States has not pointed to any directive
11 contrary to anything that -- that we've argued in our
12 -- our case.

13 Finally, I do want to at least touch on
14 this notion of the treaty. That clearly was one of
15 the things the Court specified. The language of the
16 consent decree is exactly the language that's in the
17 Compact. It doesn't vary whatsoever, and that
18 language was approved by Congress. So we know that
19 language is okay because Congress approved it, and
20 with respect to any specific ways that the consent
21 decree may impair treaty obligation, the United
22 States' opposition is absolutely devoid of any
23 explanation, and so our view is, of course, that --
24 that -- that the consent decree is consistent with the
25 Compact, doesn't impair treaty obligations, and the

1 United States is not offered anything to the contrary.

2 **JUDGE MELLOY:** Thank you, Mr. Somach.

3 Just for clarification on scheduling,
4 what I was planning to do, unless there's an
5 objection, is go through the presentation by the
6 Compacting states, take a break. Probably we'll have
7 to break for lunch during the middle of the U.S.
8 presentation, but -- at least that's sort of my
9 tentative plan unless there's any objection.

10 **MR. SOMACH:** No.

11 **JUDGE MELLOY:** Mr. Wechsler?

12 **MR. WECHSLER:** Good morning, Your Honor.
13 I'll be addressing three major issues. First, I'll
14 pick up where Mr. Somach left off and explain why the
15 remaining intrastate claims should be litigated in
16 other alternative forums; second, I'll show that the
17 consent decree should be entered because it doesn't
18 impact or add any substantive obligations to the
19 United States; and third, I'll address that issue of
20 substantive and procedural fairness. So turning to
21 the alternative forum argument, Mr. Somach
22 demonstrated that the United States has a preexisting
23 obligation to operate the project in a manner that's
24 consistent with the Compact, with the apportionment
25 under the Compact. The claims that the United States

1 properly brought in this case were interference with
2 the Texas apportionment and interference with the
3 ability to deliver water under the treaty, but as
4 Mr. Somach just discussed, the consent decree itself
5 takes care of that delivery of the Texas
6 apportionment, and the United States has never raised
7 the issue of the treaty obligation here. So the
8 question is what's left? Once you eliminate those
9 claims related to Texas and Mexico, all that's left is
10 interference with intrastate deliveries, deliveries
11 within the state of Mexico. Now, the United States
12 says that those intrastate, intra New Mexico delivery
13 claims are somehow related to the Compact, but that's
14 incorrect for three different reasons, and the first
15 is it's contrary to the longstanding principles of
16 equitable apportionment, which are articulated in the
17 Court's cases of *Hinderlider*, *New York versus New*
18 *Jersey*, *Nebraska versus Wyoming*, the other cases we
19 cite in our brief. Now, the Compact divides the
20 waters among the states. That means that -- and the
21 Court has long held that New Mexico represents all of
22 its water users *parens patriae* in terms of its
23 apportionment, and in contrast, the Court has also
24 said these intramural disputes, disputes amongst how
25 to divide the water, distribute the water amongst

1 users within a single state, those are not within the
2 Court's original jurisdiction. A quote from Nebraska
3 versus Wyoming is instructive where the Court said
4 that, "They have said on many occasions that water
5 disputes among states may be resolved by Compact
6 without the participation of individual users who are
7 nonetheless bound." That is to say that the rights of
8 New Mexico water users, including EBID, can rise no
9 higher in the Court's words than those rights of the
10 State of New Mexico. Now, the United States' argument
11 is it's inconsistent with that principle, because it
12 depends on the idea that the Project and not the
13 Compact defines the division of water.

14 **JUDGE MELLOY:** Let me just make an
15 observation, Mr. Wechsler, and I'll ask you to respond
16 to it if you would. I don't want to put words in the
17 mouth of the United States, but what I -- the theme
18 that I'm reading in their briefing is that the El Paso
19 index in and of itself is probably not that difficult
20 for them to accept, that they would probably go along
21 with that. I think the -- pretty hard for them to say
22 with a straight face that the D2 curve can't be used,
23 but what sort of animates their briefing, and also, I
24 think, to some extent the two water districts is
25 fundamental distrust of New Mexico to do what it says

1 it's going to do. There seems to be this sense in the
2 briefing that, well, you say you'll take action, but
3 you might at the end of the day just take the easy way
4 out and transfer water from EBID. You won't make the
5 hard decisions. It's going to be a lot of accounting
6 issues that are going to arise, and there will be lack
7 of cooperation, future burden on the United States. I
8 don't know. That's the sense I get from the briefing.
9 Maybe I'm wrong. But how do you respond to, you know,
10 can New Mexico be trusted to -- to make the hard
11 decisions, and what are you going to do about the
12 non-EBID pumping that Ms. Barncastle has talked about
13 extensively in her briefing.

14 **MR. WECHSLER:** So, Your Honor, you're
15 correct, they do raise that in their opposition brief.
16 They argue that New Mexico is up to all manner of
17 improper shenanigans. They claim that New Mexico
18 doesn't intend to do any water administration, and I
19 agree with you, it ultimately boils down to this issue
20 is the United States and, to a certain extent, the
21 districts don't trust the state of New Mexico. Let me
22 first say that argument is unbecoming of the United
23 States and well beneath the dignity of a dispute
24 between sovereigns in the United States Supreme Court.
25 We cite a number of cases in our briefing that

1 indicates that there's a presumption that parties will
2 follow a consent decree. That's particularly true
3 here. The idea that somehow New Mexico is not
4 obligated to engage in any kind of water
5 administration is simply untrue. Section 2B2A of the
6 Consent Decree obligates the State of New Mexico --
7 this is a quote -- to manage and administer water in a
8 manner that is consistent with the decree, including
9 satisfying the effective El Paso index. I want to
10 emphasize that the real issue at the heart of this
11 case was the apportionment itself, how do you define
12 that apportionment, and you, yourself, Your Honor,
13 identified that in one of your earlier orders. I'm
14 going to read from your March 31st, 2020, order where
15 you said, "Inherent in these allegations is a
16 fundamental disagreement as to Compact interpretation
17 regarding the underlying equitable apportionment
18 between the states." Now, that inherent fundamental
19 disagreement has been resolved, no less than -- than
20 the New Mexico state engineer, the chief water
21 official has confirmed and articulated the State's
22 commitment to be managing water consistent with the
23 consent decree. I think that New Mexico has earned
24 the right to a presumption that it's going to comply
25 with that consent decree, and I think as we point out

1 in the brief, I think as the New Mexico amici point
2 out in their brief, as well, there are a number of
3 forums existing today in which the United States can
4 avail itself, in fact, it's directly involved in some
5 of those in which it can both protect its project
6 right from impairment or interference. That's through
7 water administration, priority administration, the
8 active water resource management, regulations that the
9 state engineer identifies. There are also alternative
10 forums for being able to define the project right,
11 again, in which the United States has actively
12 engaged, and that includes the New Mexico supreme
13 litigation adjudication. And I'll point out that
14 there's a significant advantage there to litigate
15 those claims in that case, and that is that court has
16 expertise in New Mexico water law, expertise that this
17 court doesn't have. It also has the participation of
18 all of the actual water users, the other ones that
19 might be impacted by the United States, who would be
20 necessary parties to the extent that their individual
21 rights are being impacted. And -- and so as you think
22 about, I was talking generally about the -- the
23 reasons that these intrastate claims are not Compact
24 claims, and the first one was sort of the overall
25 Compact equitable apportionment principles, and the

1 second one is one that Mr. Somach spoke about and that
2 is the intrastate argument is inconsistent with that
3 longstanding principle of Reclamation deference to
4 Reclamation law. So as you apply that to New Mexico
5 in case, that means that the water rights that the
6 United States has under the project and the
7 distribution of that water to New Mexico users, all of
8 that is governed by New Mexico law. You asked about
9 the downstream contracts. Those downstream -- the
10 downstream contract that EBID has a right to, again,
11 govern that distribution of water. That definition of
12 that right is defined in the first instance by New
13 Mexico law, which shows that it can't rise higher than
14 New Mexico's Compact apportionment. And I -- I think
15 the third reason that the United States' argument that
16 the intrastate ones are Compact claims is that it's
17 inconsistent with their claim and inconsistent with
18 the way the Court understood their claim. So in that
19 instance, I would point you to Paragraph 15, which is
20 the operative paragraph of their complaint, and there
21 they focus on interference with the EP No. 1
22 deliveries and Mexico. The Court certainly
23 fundamentally understood this as an interstate case.
24 So moving to that issue that we've briefed about
25 expanding this case beyond the scope of what was

1 originally intended, now it's black letter law. We
2 cite a bunch of cases for the proposition that the
3 Court is very careful in its exercise of its original
4 jurisdiction and that practice includes changes to the
5 scope of the case as you proceed through the case.
6 You, again, express that concept in your April 14th,
7 2020, order where you said, "As the case plays out and
8 facts are developed, it will remain necessary to
9 determine whether and how the parties' claims diverge
10 and whether any such divergence improperly expands the
11 case." So as this stage of the case, where the
12 Compacting states have reached an agreement on the
13 equitable apportionment, we agree as to what Texas
14 should get, we agree as to what New Mexico gets, and
15 it's only the United States attempting to object and
16 prevent that settlement among the Compacting states,
17 it's appropriate to evaluate -- it's necessary to
18 evaluate whether that action, that position that
19 they're taking, expands the case beyond what the Court
20 originally intended. And it's clear that it would
21 expand the case in two significant ways. Most
22 importantly as the Court held, as Mr. Somach
23 discussed, the Court allowed the United States to
24 bring claims that were the same as Texas. Now, the
25 Court also emphasized that the U.S. intervention

1 was "without Texas' objection," and, therefore, the
2 Court was clearly contemplating that the -- the claims
3 of the United States and those of Texas were aligned,
4 but now the United States is no longer aligned with
5 the State of Texas, and they are attempting to block a
6 settlement, they're attempting to argue for an
7 apportionment that's different than the Compacting
8 states themselves have determined is necessary. It
9 would also expand the case in the sense of it would
10 turn the case into a dispute over the intrastate
11 distribution of water within the State of New Mexico,
12 which the Court has held multiple times, it's not
13 inclined to do. So that brings me to that -- that
14 issue of alternative forums. As I mentioned, there
15 are a number of those alternative forums, both
16 administration and that definition. I mentioned those
17 already. The United States' only response to that is
18 not that those alternative forums don't exist, but
19 that the alternative forums are burdensome, they would
20 take too long, but they don't cite any cases --

21 **JUDGE MELLO:** Unlike our case, which is
22 in its tenth year.

23 **MR. WECHSLER:** The longest federal case,
24 I think, Your Honor, in the history of the federal
25 judiciary is an adjudication out of the State of New

1 Mexico that lasted somewhere around 60 years. This is
2 a baby by those standards. The point I was making is
3 that the U.S. doesn't dispute those alternative
4 forums. Only they say it's slow. There's no support
5 for that in the case law of the United States Supreme
6 Court, and also to your point, there's -- like adding
7 that slowness, that -- the difficulty of evaluating
8 all of those intrastate rights to the Supreme Court
9 certainly makes no -- no sense, would be inefficient.
10 A good example -- well, a directly on point case, and
11 there are a number in the United States Supreme Court,
12 where the equitable apportionment claims of the states
13 have been resolved or other intrastate disputes have
14 been resolved, and another party, often the United
15 States is saying, well, we want to continue litigating
16 here in the original jurisdiction. In those cases
17 without exception, the Court has said, no, we're going
18 to dismiss the case, we're going to allow you to bring
19 that claim in an alternative forum, which is perfectly
20 appropriate. The best case there I would point you to
21 is the United States versus Nevada where once the
22 states had resolved their interstate issue over the
23 river involved in that case, the United States Supreme
24 Court dismissed the U.S. claims saying
25 that, "Litigation in other forums seems an entirely

1 inappropriate means of resolving whatever questions
2 remain."

3 Let me turn now to this question of
4 whether or not the consent decree adds any legal
5 obligations for the United States. We explained in
6 our briefing that the consent decree does not alter
7 those legal obligations, and we rely principally on
8 two principles, and that is as explained by
9 Mr. Somach, the United States does not have a direct
10 interest in the apportionment itself. That's an
11 interest very unique to the states -- the states. And
12 second, the United States has a preexisting obligation
13 to operate the Project in a manner that's consistent
14 with the Compact and apportionment. That's something
15 that they have admitted a number of times in this
16 case, including in oral argument with you. So on this
17 question, the primary argument that the United States
18 advances is that it's irrelevant that the United
19 States has a preexisting obligation, and according to
20 them, even a change to a preexisting obligation is
21 disallowed. But the problem with that principle is
22 they don't cite any cases in support of it. In fact,
23 the cases don't support that. We cite a whole number
24 of cases. We point to three specifically in the
25 reply, but really all of them are consistent with the

1 principle that it's not objectionable merely because
2 it affects an existing right of a party. And I think
3 there's a helpful comparison between the Supreme Court
4 Seminole case of Local 93 and the case we cite of the
5 11th Circuit Case of the City of Hialeah. The reason
6 is both of those cases involved union objections to
7 consent decrees, and both of them involved objections
8 over the seniority scheme for union workers. Now, in
9 Local 93, the Supreme Court held that even though the
10 consent decree would impact the union, the union
11 couldn't prevent that consent decree because it didn't
12 have specific cognizable rights to that -- to a
13 particular seniority scheme. That was different in
14 the city of Hialeah where the union actually had a
15 provision of its collectively bargained agreement and
16 that spelled out exactly how that seniority system, it
17 was entitled to, and there they were allowed to object
18 to the consent decree. So the principle to take away
19 from those cases and the others we cite in our brief
20 are that where the objecting party as a specific and
21 cognizable right and interest in the consent decree,
22 it has a right to object, but where it's only
23 indirectly impacted by a preexisting obligation, there
24 is no right. So here it's undisputed that the United
25 States has no actual right in the apportionment, and

1 that's the only thing being adjusted by the consent
2 decree. So although the consent decree obviously
3 better defines the ambiguity that we've been talking
4 about this morning on the Compact obligations, because
5 the United States has a preexisting obligation to
6 comply with the Compact, it has no rights that are
7 impacted, and it can't object. So -- so I do want to
8 talk about then those specific issues. They raise, I
9 think, four of them. And I'll talk about each of
10 those in turn, but I want to offer this general
11 obligation, and that is on each of those, their
12 argument fails because they -- the -- each of those
13 issues relates directly to the apportionment. That is
14 the division of water between the states, 57/43, and
15 as I've discussed, the states have -- the United
16 States, rather, has no discretion to operate the
17 project in a way that is inconsistent with the
18 Compact. That is their obligation. Now, you asked, I
19 believe, Mr. Wallace about the 2008 Operating
20 Agreement and what the impact of the consent decree on
21 that is. My answer to that is taken together, so long
22 as the project operations don't disturb or change the
23 Compact apportionment, that is the division of water,
24 Paragraph 3A of the consent decree makes it clear that
25 the project has full discretion to continue its

1 operations or its accounting in whatever manner they
2 -- they would like.

3 **JUDGE MELLOY:** Would this -- would this
4 settlement, if entered, resolve your lawsuit to
5 invalidate the 2008 Operating Agreement?

6 **MR. WECHSLER:** Yes, Your Honor. This --
7 just as it does with Texas, this resolves New Mexico's
8 concerns with the operating agreement. We believe
9 that the apportionment is fair to both states.

10 As I turn to the -- that first issue,
11 I'll first mention the United States raised an issue
12 with the two-year regression, and as we talked about,
13 the division of water is governed by the Compact but
14 not the Project. The Project and the consent decree
15 both use a D2 curve, but unlike the Project, the
16 consent decree uses a two-year regression. The
17 Project uses only a one-year regression. The reason
18 for the two-year regression in the consent decree is
19 that it accounts for year over year variability
20 better, and it better matches the data from that D2
21 period that we are relying on.

22 Now, the potential problem is the
23 inconsistency between the two, and so if the Project
24 is doing something inconsistent that results in a
25 different division of water, that's the only place

1 where we think there is a problem. You can see from
2 this slide that's exactly what happened. So if you
3 look at the orange line, that's the one-year D2
4 allocation, but the blue line is what the index
5 obligation does, and as you can see, they diverge from
6 each other. So if the United States were to continue
7 doing something inconsistent with the index, there
8 would be a systematic change from the amount of water
9 that the two states are getting and, therefore, it
10 impacts upon the apportionment. Similar to the charge
11 point, and, again, the charge point issue is directly
12 related to the Compact apportionment. We can look at
13 the next slide. Really, what this is just showing you
14 is that as Mr. Wallace explained the measuring point
15 for the index is at the state line, and under the
16 consent decree for the very first time, that El Paso
17 gage at the state line is going to provide a way to
18 measure compliance with the 57/43, we think is very
19 important. It's the only way to implement the orders
20 that you've already entered. And the biggest reason
21 for putting that division at the state line is to
22 ensure, as we think the Compact requires, that the
23 water users in each -- in each -- or each state,
24 rather, is responsible for the depletions and uses of
25 its own citizens, but not the citizens of the other

1 state.

2 Then if we look at the next slide,
3 though, these are the -- the accounting points that
4 the project is using, and as you can see, there are a
5 number of ones that are different. Now, the Project
6 is free to use those additional accounting points for
7 different purposes, their own internal purposes, but
8 using those additional points for dividing the water
9 would be inconsistent with the Compact apportionment
10 and, therefore, is something that is a concern and is
11 governed by the Compact. Turning to the issue of
12 carryover, the Section 8.2.2 articulates the principle
13 -- or a principle that I just mentioned. It
14 says, "Each state is responsible for the water use of
15 its own citizens." So, now, the practice of
16 carryover, that allows one district to hold water over
17 for the next year for the district's use, and the
18 consent decree doesn't prevent that practice from
19 continuing. It only provides that if that happens,
20 the district and the state that is benefitting from
21 carrying that water over, who's making that choice, is
22 responsible for the -- for the depletions associated
23 with evaporation and transit loss. Again, that's
24 consistent with that principle that each state must be
25 responsible for that.

1 **JUDGE MELLOY:** Well, the question I
2 asked, and this would -- I think would -- would impact
3 your state negatively is if -- if the -- if Texas has
4 carryover, that means that that's water that's not
5 going to pass through the El Paso gage and, therefore,
6 will show up as a potential negative departure. So is
7 that -- is that -- am I misunderstanding something?
8 Is that the double accounting or a double negative hit
9 to New Mexico?

10 **MR. WECHSLER:** It's not, Your Honor. I
11 mean, the reason is that water will be held over.
12 Let's take the example, the Texas district that's
13 carrying over the water. You're correct. In Year 1,
14 there's a greater percentage of the water that's being
15 released is going to New Mexico because Texas is
16 entitled to -- or is carrying that water over. The
17 result at the index is that there's a negative
18 departure. We used more than 57 percent. But that
19 water that's held over in -- in the reservoir,
20 eventually that 's going to be released, and when it's
21 released, it'll get to the state line. In that year,
22 there's going to be New Mexico's use will be less than
23 57 percent, and it essentially makes up, and we've
24 done an awful lot of evaluation of that, and over the
25 long term, it does -- it operates in a way that it

1 ends up being 57/43. Mr. Wallace is correct. It's
2 one reason for the -- the larger departure limits, and
3 the second thing I would say is it's precisely the
4 reason that evaporation and transit loss must be
5 charged to the state so that there isn't sort of an
6 impact on the 57/43 division.

7 Let me turn to that last issue then
8 which is the apportionment transfer, and this is the
9 issue that the United States focuses most of their
10 attention on, on these provisions that allow for the
11 transfer of part of the state's apportionment from one
12 state to the other. Again, this is directly related
13 to that 57/43 apportionment, and in essence, the
14 trigger provisions, those are in Paragraph 2D of the
15 consent decree, what they're doing is providing
16 guardrails that ensure that the states are receiving
17 their 57/43. So if one state is exceeding the trigger
18 set out in that consent decree, what it means is that
19 systematically, that state, its water users within
20 that state, have been using a greater percentage of
21 the water than they're entitled to. So what the
22 consent is, uses those guardrails to push that back so
23 the ultimate apportionment remains in 57/43 over a
24 length of time, and that's really what's being shown
25 here. You can see there's not a lot of -- it stays

1 within a fairly narrow band, basically 100,000
2 positive departures, 100,000 negative departures, and
3 as you can see those apportionment transfer divisions
4 happen both from a positive side and a negative side
5 impacting both states to, again, ensure that that
6 57/43 is ultimately accomplished.

7 **JUDGE MELLOY:** Do I understand this
8 chart is a retrospective analysis of what would have
9 happened if you'd used the index?

10 **MR. WECHSLER:** That's correct. This is
11 Figure 3, I believe, to -- to Mr. Brandes'
12 declaration.

13 **JUDGE MELLOY:** And do I understand that
14 under the operating agreement, there's already
15 transfers being taken -- taking place?

16 **MR. WECHSLER:** That's exactly correct,
17 Your Honor. You know, at one point, EBID makes the
18 point in its brief that -- perhaps it's Dr. King that,
19 you know, these kind of transfers are going to be very
20 difficult on the district, but, of course, that's been
21 going on for years, and it was New Mexico's primary
22 claim that that resulted in over 800,000 acre-feet of
23 water improperly being allocated to the Texas district
24 and not the New Mexico district, and this consent
25 decree actually is much fairer, it's much better for

1 EBID and its users, and it's overall fair because it's
2 a 57/43.

3 So let me turn just very briefly to the
4 issue of both substantive and procedural fairness. We
5 briefed the issue of substantive fairness. We talked
6 about the issue of trust for New Mexico. So thinking
7 then about the procedural fairness issue, the United
8 States has had every opportunity to present their
9 objections. There's really no reasonable argument
10 that the process has been unfair in any way, and you
11 asked about the provision providing for the
12 reservation of continuing jurisdiction that is part of
13 the consent decree. Now, that provision or a
14 provision like it has been part of basically every
15 consent decree of which we're -- rather, every decree
16 of the Supreme Court in its original jurisdiction of
17 which we're aware of, we looked for ones that lacked
18 that provision and didn't find that. Despite that, if
19 you go back 50 or more years, there's only been four
20 or five cases of which we're aware in which one of the
21 states invoked that provision to try and seek recourse
22 in the United States Supreme Court. So to put simply,
23 that retention of jurisdiction provision, it's really
24 not a cause for concern.

25 And, finally, I want to address just two

1 issues very briefly that were raised in the amici
2 briefs that we wanted to hopefully address their
3 concerns. The first comes from the City of El Paso
4 who raised concerns about the implications of the
5 consent decree on the City of El Paso's contract
6 rights. To be clear, nothing in the consent decree
7 impacts or alters the City's existing contract rights,
8 which is a matter of Texas intrastate use,
9 distribution and use of water exclusively within the
10 State of Texas. And second, EBID suggested the
11 consent decree does not foreclose EBID from asserting
12 claims, asserting positions in other forums, including
13 the New Mexico adjudication, and we agree. The
14 Compact -- the consent decree defines the
15 apportionment among the states, the relative rights
16 and obligations of EBID and other New Mexico water
17 users to the New Mexico apportionment, those are
18 intrastate matters, and we agree that those are being
19 addressed in other forums. Thank you.

20 **JUDGE MELLODY:** Thank you, Mr. Wechsler.

21 **MR. SOMACH:** Your Honor, I'd like to
22 just briefly in conclusion address a couple of things.
23 The first is, you know, it is kind of funny, we -- we
24 close here where the litigation began with the Texas
25 complaint. As we noted, United States has attempted

1 to characterize the complaint, but Texas knows what
2 its complaint was about, and at its heart, the
3 complaint focuses on ensuring delivery of apportioned
4 water to Texas for use in Texas. That's the heart of
5 the complaint. And the consent decree provides this
6 prayer. It -- it -- it provides this relief by
7 guaranteeing that index flows measured at the El Paso
8 gage for use in Texas will be there. It's a guarantee
9 by New Mexico. It's a guarantee within the consent
10 decree. By doing this, the consent decree also
11 addresses, to the extent it's a separate issue, this
12 notion of our view that they needed to stop impairing
13 and interfering with the flow of water. By measuring
14 compliance at the El Paso gage, by definition, any
15 actions above that gage can't interfere with -- with
16 -- with the Compact apportionment to Texas because
17 compliance is measured at that -- at that point. You
18 know, we'd be remiss, I think, if I didn't -- if we
19 didn't underscore the significance of the consent
20 decree and what it stands for. The Compacting states
21 have been fighting in this original action since 2013,
22 and the issues themselves have been the subject of
23 dispute for decades before that, that notwithstanding
24 this acrimonious history, the states have been able to
25 put their differences aside, and in the public

1 interest, resolve their differences and work together
2 in the development of the consent decree, its
3 appendices, as well as the joint briefing that we've
4 undertaken, as well as this argument that you've seen
5 here today. I know I -- and I've been involved since
6 the drafting of the original complaint and since
7 before. I appreciate the efforts of Judge Boylan, the
8 mediator who worked diligently over the last almost a
9 year to -- to bring us to this point, and I -- I
10 appreciate greatly the -- the efforts of the State of
11 New Mexico and State of Colorado. We -- we've had our
12 differences. The Court has repeatedly -- and we put,
13 you know, this quote up here because it's -- it's
14 relevant. The Court has repeatedly counselled that
15 states engaged in kind of litigation that we're
16 engaged in here before it are more likely to be wisely
17 solved by cooperation, study, and mutual concessions
18 on the part of the respective states, in large part
19 because those states are the most interested in what's
20 being dealt with. In this case, what's evidenced by
21 the Compacting states' motion, the states have taken
22 seriously the counsel of the Supreme Court. While it
23 is unfortunate, indeed unfortunate, the United States
24 opposes our cooperative study, conference, and mutual
25 concessions, that opposition does not at all diminish

1 the efforts that we have collectively made or the
2 propriety of what we have developed together. Simply
3 stated, we urge you to recommend adoption of the
4 consent decree to the Court and -- and thank you for
5 the time today, sir.

6 **JUDGE MELLOY:** Thank you, Mr. Somach.

7 All right, we'll take a 15-minute recess
8 and then hear from the United States. Thank you.

9 (Break.)

10 **JUDGE MELLOY:** All right. Please be
11 seated. All right. We'll hear from the United
12 States. Mr. Leininger, are you going to go first or
13 Ms. Coleman or how are you going to handle this?

14 **MR. LEININGER:** Thank you, Your Honor,
15 and, again, good morning. So I will give this initial
16 presentation. I will try to be short and concise, and
17 so we'll hope to reserve some of our two hours for
18 purposes of -- of rebuttal and rebutting some of the
19 arguments that we're going to hear from the amici
20 later if that's okay with the Court.

21 **JUDGE MELLOY:** All right. Go ahead.

22 **MR. LEININGER:** Your Honor, I'd like to
23 actually begin with the last slide that we saw
24 presented by New Mexico, and if we could,
25 Mr. Wechsler, put that slide up on the screen again.

1 I'm sorry. I'm talking about your power point slide,
2 and it's the one titled, "Example of Apportionment
3 Transfers and Adjusted Accrued Index Departures."

4 Thank you, Your Honor. This -- this
5 presentation, these demonstratives that we just saw
6 last night. They were given to us last night so we
7 haven't had much chance to thoroughly analyze these,
8 but I did talk to our engineers with regard to some of
9 the figures that are shown on here, and this is
10 important. It's important because it's showing the
11 impact from this index obligation. If you look at the
12 period that -- it's shown in the green here. It's the
13 apportionment transfers to Texas irrigation district.
14 You'll see three bars there at the end in a 2018 to
15 2020 period. If you look at the 2020 bar, that
16 transfer is approximately 90,000 acre-feet that would
17 transfer from EBID to EP No. 1. That's in addition to
18 what the operating agreement already does. The
19 operating agreement is operating in a time of
20 depletions. So the operating agreement has already
21 transferred certain amounts of water, surface water,
22 from EBID to EP No. 1. This index, if it is adopted,
23 will have an addition 90,000 acre-feet of water
24 transferred. Now, that year EBID in 2020 had an
25 annual allocation of 104,000 acre-feet of water, so

1 it's approximately 90 percent of what EBID would have
2 expected in 2020. What happened in 2020 was that
3 there was actually a total allocation because there
4 was a carryover provision that is in the operating
5 agreement, and that carryover provision allowed for
6 EBID to receive approximately 202,000 acre-feet of
7 water. Still if you take an additional 90,000
8 acre-feet away, you're talking about a 45 percent
9 reduction to EBID.

10 **JUDGE MELLOY:** Excuse me one second.
11 Something started printing. I don't know what it is,
12 but I don't think we need it here. All right. I'm
13 sorry. Go ahead, Mr. Leininger. You were saying that
14 in 2020, 90,000 acre-feet would have been transferred,
15 which is almost 90 percent of EBID's allocation for
16 that year?

17 **MR. LEININGER:** Yeah. As it -- as it
18 turns out -- yes. And that transfer, again, this is
19 with the index in place. This is what the index does
20 in addition to the reallocations that are already in
21 the operating agreement to account for these
22 depletions to the project supply. So in addition --

23 **JUDGE MELLOY:** Now, I -- I'm sure the --
24 the proponents will -- they will have an opportunity
25 to respond to that. I didn't understand that the

1 transfer in the index was in addition to what was in
2 the operating agreement, that if the operating
3 agreement already accounted for the transfer, that
4 should not result in an additional --

5 **MR. LEININGER:** No, that's not correct,
6 Your Honor. This is -- this is a catch-up provision
7 that is in the index for -- well, you see in the line
8 in the depletions, but it's harsh, harsh provision.
9 You -- you said it takes away 90 percent. I just want
10 to make clear. What happened in 2020 is a total
11 allocation as a result of transfer of carryover,
12 another provision that's in the operating agreement
13 that this -- this proposed decree wants to re-examine.
14 They don't have any specifics about examining
15 carryover effects on -- on their index. They want to
16 study that and perhaps change that, too. That's part
17 of the ambiguity of their index. That's part of the
18 problem we have that they are proposing additional
19 changes. We don't even know what these changes may
20 be, but they will change the operating agreement.
21 They will change the downstream contracts.

22 **JUDGE MELLOY:** Well, let's -- let me ask
23 you this: One of the things that -- I don't want to
24 jump around here too much, but one of the things that
25 sort of came out to -- or jumped out to me in -- in

1 some of the arguments that you were making is that
2 some of these are fundamental arguments against the
3 operating agreement itself. You're -- you're arguing
4 that the D -- the D2 curve cannot be used because it
5 violates the Compact, which requires a 1938 Condition,
6 but the -- so that's -- isn't that just proving New
7 Mexico's point in its litigation?

8 **MR. LEININGER:** We want to be clear as
9 to what we were saying is the baseline condition here.
10 The baseline condition is what the parties negotiated
11 in 1938. That was the hydrologic regime that was
12 existing, and it was existing because the -- the
13 project had been in effect operating for -- fully
14 operating for almost 14 years.

15 **JUDGE MELLOY:** But I understood -- maybe
16 I didn't understand your brief, but I understood your
17 brief to be saying you can't approve this agreement
18 because it uses the D2 curve, and that violates the
19 Compact. So if that violates the Compact, how can you
20 use it for the operating agreement?

21 **MR. LEININGER:** So we want to be
22 completely clear as to what -- what is in this index
23 with regard to a solution to this problem. The index
24 -- the index gage, for example, appears nowhere in the
25 Compact, and I'll get into the details why as to how

1 that was viewed and how we think that was viewed by
2 the Supreme Court. It was because of the preexisting
3 project and the need for New Mexico to only deliver
4 into Elephant Butte Reservoir. But for purposes of
5 both the index and the D2, what we have here is a
6 project and a delivery system that's in crisis. What
7 the operating agreement did in relying upon D2 is to
8 account for depletions, and our main problem, our main
9 concern with this proposed decree is there is nothing
10 that accounts for those depletions and creates
11 enforceable injunctions to correct those depletions.

12 **JUDGE MELLODY:** So am I -- did I
13 mischaracterize your position when I said to
14 Mr. Wechsler that basically you don't trust New Mexico
15 to do what they say they're going to do?

16 **MR. LEININGER:** Your Honor, it's --

17 **JUDGE MELLODY:** I mean, I understand you
18 keep --

19 **MR. LEININGER:** This is not a matter of
20 trust. It is a matter of having enforceable
21 injunctions that are consistent and will provide
22 relief, the relief that we are seeking in this case.

23 **JUDGE MELLODY:** But, I guess -- and I
24 don't want to beat a dead horse, but how can you say
25 that use of the D2 curve violates the Compact when you

1 use it for the 2008 Operating Agreement?

2 **MR. LEININGER:** Okay. We're using the
3 D2 -- D2 curve in the Operating Agreement because we
4 have to manage water, and what we are doing and what
5 we have been doing since not many years after the
6 Compact was signed was managing a depleted supply, so
7 we have to get the --

8 **JUDGE MELLOY:** If it violates the
9 Compact, how can you use it? I mean, that's the
10 point, I guess, I keep hearing the other side say is
11 that, well, if it's good enough for the Operating
12 Agreement, why isn't it good enough for this decree?

13 **MR. LEININGER:** Second point, Your
14 Honor, that Operating Agreement expired, but what
15 we've got here is a Compact, and we're trying to
16 resolve without having to come back to the Court,
17 without having to engage in -- in any future
18 litigation. So what should be the basis for resolving
19 all of those Compact complaints, it should be a
20 complete resolution. So whether or not a final
21 resolution for proposed -- proposed for purposes of
22 settlement include a index delivery, a D2 scale,
23 whatever, it also has to -- has to include some sort
24 of enforceable injunctions to ensure that we can get
25 back to a reasonable project delivery. Now, can we

1 get back to 1938 Conditions? That's -- that would be
2 difficult; however, right now, we're operating under
3 D2 because we have to, and we have to because these
4 depletions have not been addressed.

5 So may it please the Court, I'd like to
6 begin with the legal infirmities of the proposed
7 decree are -- are glaring, and they prevent the entry
8 of the proposed consent decree. Number one, it
9 disposes of the claims of a third party without that
10 party's agreement; number two, it imposes duties or
11 obligations on a third party without that party's
12 agreement; number three, it conflicts with federal
13 law; and number four, it undermines the objectives of
14 the Compact. I'd like to begin with the first point
15 that the settling parties cannot dispose of the claims
16 of a third party without the party's consent. We cite
17 the firefighter -- I believe it's been referenced as
18 the Local 93, but subsequent Supreme Court law short
19 cites it as the Firefighters v. Cleveland case, so
20 I'll be referring to it that way. We cite to
21 Firefighters v. Cleveland Supreme Court decision for
22 this proposition, and Firefighters is clear on
23 this, "A Court's approval of a consent decree between
24 some of the parties cannot dispose of the valid claims
25 of nonconsenting individuals." In that case, as

1 Mr. Wechsler pointed out, the Firefighter's Union was
2 allowed to intervene, but was not required to give its
3 permission prior to approval of the consent decree,
4 and it was because that the union has failed to raise
5 any substantive claims. And this is the theme that
6 the states are trying to bring up here in the
7 briefing. They cite to a district court case that the
8 -- this is the Steiner case, that the consent judgment
9 must not prevent intervenor from litigating any
10 possible legitimate claims. They highlight, they
11 italicize legitimate claims and they cite to the 11th
12 Circuit case, the City of Hialeah case, that a consent
13 decree requires the consent of all parties whose legal
14 rights would be adversely affected by the decree.
15 Again, they emphasize bolding the legal rights. So
16 the states here admit that the United States' claims
17 are disposed of in their proposed decree and so they
18 do it under the pretext that the United States' claims
19 are not substantive, they're not valid, they're not
20 legitimate, and they're not based on law. The Supreme
21 Court, Your Honor, has already addressed and answered
22 this question in 2018. Supreme Court held that the
23 United States may pursue the Compact claims that it
24 has pleaded in this original action. We were allowed
25 to intervene in this case because of our distinctive

1 federal interest. The states cannot extinguish our
2 valid claims based on our distinct federal interest,
3 and for that reason alone, this proposed decree is
4 dead on arrival.

5 **JUDGE MELLOY:** What specifically are the
6 Compact claims that you are being disposed of?

7 **MR. LEININGER:** That is the continuation
8 of my presentation here, Your Honor. So what is the
9 root of our federal interest, which have been
10 recognized in the Compact, it derives from the Rio
11 Grande Compact and the Compact's reference to the Rio
12 Grande Project as a means of distributing the water in
13 the Rio Grande that was a federally built, federally
14 financed, fully operating 14 years before the Compact
15 was ratified. The Compact codified based upon federal
16 contracts to protect the project. New Mexico's
17 obligation under the Compact is not a state line
18 delivery. It's to deliver water under Article 4 to
19 Elephant Butte Reservoir. The Compact is not silent,
20 though, on what becomes of that water. The water
21 becomes project storage at Elephant Butte in the
22 downstream reservoirs, Caballo reservoir. It becomes
23 usable water that is, quote, available for release in
24 accordance with irrigation demands including
25 deliveries to Mexico. The Supreme Court looked at

1 this Compact language and concluded that the federal
2 project, not the states, not New Mexico or Texas,
3 effectuates the intent of the Compact in the lower --
4 in lower New Mexico and Texas. The Supreme Court
5 found that the federal project has a central role in
6 the Compact. It's integral to its operation.

7 Mr. Wallace makes a point about ambiguity, but it's
8 important not to confuse a lack of specificity with
9 ambiguity. This Compact is not ambiguous. The water
10 is to be delivered into the reservoir under Article 4.
11 What happens then is it becomes project water for the
12 project for Reclamation through its downstream
13 contracts with the districts to distribute that water.
14 Nothing is ambiguous about that.

15 Fundamental to the Project effectuating
16 the Compact apportionment is protecting the Project
17 supply after its release from storage. In that issue,
18 Project interference for non-Project groundwater
19 pumpers and Project beneficiaries exceeding their
20 contractual rights is why we're in this case.

21 **JUDGE MELLOY:** So that -- that -- that,
22 to me, is -- is maybe the fundamental issue here is
23 what is the responsibility of the United States,
24 presumably through Reclamation, to protect the water
25 after -- do you have an obligation below the dam, I

1 guess, is what I'm -- another way of putting it to
2 protect the water, to make sure it reaches EBID and EP
3 No. 1 in the proportions they're supposed to do it,
4 and I take it your position is you do have that
5 obligation?

6 **MR. LEININGER:** It's not only that we
7 have an obligation. I think the Supreme Court said
8 there's a legal responsibility with regard to our
9 obligations of effectuating the Compact. Effectuating
10 the Compact by ensuring that that water, once
11 delivered, is not interfered with, not taken back.
12 The states, in their reply, Your Honor, state that the
13 United States' claiming interest in the actual
14 apportionment, their reply at Page 10, that is not an
15 accurate characterization. Our interest is our
16 contractual obligations, which effectuate the
17 apportionment and maintain the integrity of the Rio
18 Grande Project. This doesn't come as a surprise to
19 the Court, you stated in May 2021 summary judgment
20 order that New Mexico has a Compact-level duty to
21 avoid interference with Reclamation's delivery of
22 Compact water to Texas, i.e., a duty to avoid --
23 again, quoting from your decision -- to avoid and
24 prevent the capture of Rio Grande surface water, drain
25 return flows, and hydrologically connected groundwater

1 to the extent that the overall impact of the capture
2 is inconsistent with Compact water deliveries to Texas
3 or interferes with long-term operation of the Project.
4 You -- you found that the Compact did not merely
5 require the delivery of water into the reservoir
6 without further concern for or reference to how
7 downstream water use might affect all three states.
8 Now, what must come as a surprise to the Court is the
9 proposed decree is utterly devoid of enforceable
10 actions by the State of New Mexico that will protect
11 the project and mitigate for project interference.
12 The proposed decree only requires New Mexico take,
13 quote, water management actions to reduce accrued
14 departures, end quote, at the -- at the index. New
15 Mexico State Engineer's declaration is loaded with
16 aspirational statements of potential actions that New
17 Mexico State Engineer, quote, may be required to take
18 to reduce depletions from aquifers connected to the
19 lower Rio Grande. This is Mr. Hamman 's declaration
20 from -- from November 14th at Paragraph 12, but it is
21 essentially a wish list of proposals. It's not an
22 enforceable remedy. You asked the question about
23 trust, but it's really not a matter of trust. It's a
24 matter of what the Compact calls for to address these
25 questions of lack of concrete enforceable parameters,

1 which we think should be in the form of injunctions to
2 ensure that this interference is abated, is mitigated
3 somehow. I've been litigating Rio Grande water issues
4 on behalf of Reclamation and the Project for almost 30
5 years, and in my 30 years, there's always been
6 expectation that New Mexico would get its groundwater
7 management in order and reduce depletions to the
8 aquifer, and instead what we've seen is continued
9 depletions across the Rincon and Mesilla basins. The
10 Compact, Your Honor, for example, stepping back a
11 little bit, describes a full release of 79 -- 790,000
12 acre-feet, and the estimates of project water
13 delivered at the time of the Compact, 1938, in a full
14 release year was 960,000 acre-feet. That's a 1 to 1.2
15 release to diversion ratio, and it's because of the
16 importance of return flows, the diverted water
17 returning to the river to be re-diverted downstream.
18 Diversion ratio over the last decade is averaging
19 about 1 to 0.76 and so a full release under the
20 Compact of 798 acre-foot therefore would yield about
21 600,000 acre-feet. Again, full release at the time of
22 the Compact, 960 acre-feet available for diversion, a
23 full release now would yield about 600,000 acre-feet
24 available for diversion. That's why the Project is in
25 crisis management. The Operating Agreement in 2008

1 was a result of litigation over water scarcity
2 beginning in, I believe it was 2001, we should not be
3 operating with depleted return flows. We should not
4 be operating with diversion ratios as low -- in one
5 year over these last ten years as low as 0.64. We
6 need relief. Our brief makes two factual points
7 regarding the depletions. One, the groundwater caused
8 depletions to surface water flows within the project
9 from Elephant Butte Reservoir down to the Texas state
10 line, went from 2,700 acre-feet annually in 1938 to an
11 average of 34,639 acre-feet annually from 1952 to
12 1978, the D2 period, and while the average annual
13 amount of groundwater pumping from EBID members has
14 stabilized over the D2 period, non-project pumping,
15 primarily what's called DCMI, domestic something and
16 municipal and irrigation -- commercial, excuse me,
17 domestic, commercial, municipal, and irrigation.
18 Pumping went to an average of 34,639 acre-feet
19 annually during the D2 period.

20 **JUDGE MELLOY:** So I want to make sure I
21 understand what the United States is asking for in
22 this lawsuit. If this settlement is not approved, and
23 assuming that there's no other settlement, at the end
24 of the day, what you would be asking for in this
25 lawsuit would be a decree or an order requiring the

1 farmers in New Mexico who are pumping to substantially
2 -- a substantial reduction in pumping, if not back to
3 a 1938 Condition, which is essentially zero pumping,
4 at least a very large and substantial pumping
5 cessation; is that the position of the United States
6 in this case?

7 **MR. LEININGER:** We -- we, of course,
8 we're halfway through our liability trial here, so
9 trying to figure out the liability figures is
10 something that I think we do need the factual record,
11 we need to establish, and then we would go into an
12 appropriate remedies stage, which would take into
13 account equities. So exactly how the decree would
14 eventually look, I -- I can only speculate except for
15 the fact that somewhere in this decree, there has to
16 be some sort of statement with regard to injunction to
17 prevent Project interference and to address these
18 depletions.

19 **JUDGE MELLOY:** But you keep talking
20 about pumping. That's what we keep hearing about is
21 pumping, pumping, pumping. So, I mean, what I'm
22 hearing you say is you want pumping stopped.

23 **MR. LEININGER:** That is the source of
24 the depletions.

25 **JUDGE MELLOY:** And that -- and that

1 that's what is -- and if you're aligned with Texas,
2 Texas wants pumping stopped at least initially before
3 the settlement. So if the two of you are aligned,
4 what we're talking about here is a decree at the end
5 of this case that's going to say, New Mexico, you have
6 to tell your farmers to quit pumping?

7 **MR. LEININGER:** That's not in this
8 proposed decree.

9 **JUDGE MELLOY:** That's what?

10 **MR. LEININGER:** That is not in this
11 proposed decree.

12 **JUDGE MELLOY:** It's not in the proposed
13 decree now, but that's what you're asking for?

14 **MR. LEININGER:** That would be what --
15 that would be a comprehensive complete settlement of
16 all claims.

17 **JUDGE MELLOY:** No. But I'm asking for
18 -- what I'm trying to get my head around is, okay, we
19 -- we go through -- you say this settlement is not --
20 cannot be approved, and I'm assuming that if this
21 settlement blows up, that it's going to be a long,
22 long time before there's another one. I mean, you
23 know, if we throw out the El Paso index and the D2
24 curve and everything else that you find objectionable,
25 if we blow up this settlement and we go through full

1 litigation, the position of the United States is
2 aligned with the position of Texas, which is we go
3 back to a 1938 Condition, which means basically total
4 cessation of all pumping in New Mexico. You're
5 nodding. Is that -- is that essentially where the
6 United States is in this case?

7 **MR. LEININGER:** Well, certainly, if we
8 cannot settle this case, yes, we would go back to
9 trial. We would establish liability. We would then
10 -- and if we are successful in establishing liability
11 for these depletions, then we would go to a remedy
12 phase, an appropriate remedy phase. So, yes, that --
13 that is one possibility. You asked at the very
14 beginning where do we go from here. Going back to
15 resuming our trial certainly is one option of where we
16 go from here. Settlement, the United States is always
17 open to settlement. As you recall last -- last --
18 well, ten months out of last year, we were
19 negotiating, but as you recall, that I stood before
20 you back in August and September regarding the status
21 of settlement negotiations, and they were aborted.
22 Very simply, they were aborted, and six weeks later,
23 we saw a proposed decree, which did not address our
24 Project Compact claims.

25 **JUDGE MELLOY:** Well, I mean, I don't

1 want to get too much into the negotiations, but as I
2 understand it, you have not been willing to engage in
3 any settlement discussions since then.

4 **MR. LEININGER:** No, Your Honor, that's
5 -- that's not the United States' position. The United
6 States' position is we can settle this case, we will
7 set down with the parties. Right now, we have a
8 proposed decree, which -- which eviscerates our claim.
9 It basically eliminates our claim, and we cannot
10 settle on those terms.

11 **JUDGE MELLOY:** I know that. I mean,
12 that's obvious. I mean, you haven't agreed. But that
13 doesn't mean you can't settle on some other terms. I
14 don't understand the idea that because there's this
15 proposed on the table, you will not talk.

16 **MR. LEININGER:** I'm not quite sure where
17 you got that impression, Your Honor. United States,
18 for purposes of settlement, is always, always
19 available to sit down with the parties and discuss
20 reasonable options. The -- the impediment here really
21 is this whole idea that we don't have a substantive
22 claim. We don't have a substantive claim to resolve.
23 How do you go into settlement if the other parties
24 don't even recognize that Project interference is a
25 Compact-level duty?

1 **JUDGE MELLOY:** Well, I don't think you
2 ever go into settlement negotiations with
3 preconditions, and if your precondition is they have
4 to recognize your claim, well, that's -- that's an
5 impediment to settlement, but -- but why don't you
6 just talk about those things? Why don't you negotiate
7 those issues out? And whether you call it your claim
8 or not or you call it EBID's claim or you call it
9 Texas' claim, at the end of the day, does it make a
10 difference if you have a decree that resolves the
11 issues?

12 **MR. LEININGER:** Not at all, Your Honor.
13 Your just articulated my frustration with the result
14 of those ten-month negotiations where they ended.
15 They ended abruptly, and they did not address what
16 I've been stating here with regard to the United
17 States' interest and the United States' interest in
18 protecting the Project such that we can effectuate a
19 Compact apportionment.

20 **JUDGE MELLOY:** I mean, cutting away all
21 the chaff in the briefing, it seems to me it really
22 comes down to one issue from what I'm reading between
23 the lines and even what you said specifically. You
24 know, the accounting issues, you can work those out,
25 and -- and quite frankly, if we go through a

1 settlement or a trial, you're going to have to change
2 your accounting regardless, and, you know, who's going
3 to pay \$50,000 for a gage? I mean, let's face it,
4 that's not the biggest issue in this case. And using
5 the D2 curve, you've used it for 30 years. I can't
6 believe that that's a big problem. Using an index I
7 don't think is a big problem. The big problem, as I
8 understand it here, is whether you call it trust,
9 whether you call it enforceable conditions, is you
10 want New Mexico to do more to guarantee that they'll
11 do something, whether it's pumping or some other
12 remedies within the State of New Mexico to address
13 what you believe are problems with -- I mean, that is
14 the bottom line.

15 **MR. LEININGER:** Ultimately, that is the
16 resolution, yes.

17 **JUDGE MELLOY:** And between you and New
18 Mexico, you haven't been able to resolve it. I don't
19 know if you can resolve it. But -- but at this point,
20 it just seems to me -- and I haven't tried to get this
21 much into the settlement, but it just seems to me that
22 if this goes away, I don't -- I don't know that we
23 would have lost a whole year of negotiation, but I
24 can't help but think it's going to really set it back
25 a long, long way, and that we ought to be talking

1 about a resolution with -- before we get to that point
2 of either approving a settlement that you then have to
3 go to the United States Supreme Court and take
4 exceptions to or disapproving a settlement at which
5 time I can hear Mr. Somach now saying let's -- let's
6 -- let's strap it on and get ready for trial, we're
7 not going to -- we're not going to spend six months
8 talking about another settlement. I mean, isn't this
9 the time to be doing that?

10 **MR. LEININGER:** You're not going to hear
11 any complaints from me, Your Honor, with regard to
12 whether or not there is a -- a pathway to resolve this
13 case short of another year, year and a half, two years
14 of trial, for example, or exceptions. There is --
15 again, we think there is an impediment in this, and
16 this is the reason why I'm standing before you telling
17 you that this proposed decree does not address this
18 fundamental issue of Compact-level duty that we have
19 in which to deliver water that is now being
20 intercepted and interfered with. If we don't get some
21 sort of ruling or indication that -- that the states
22 are wrong, that they can force a decree against our
23 interest, you know, contrary to us agreeing to their
24 terms, including their substantive changes to the
25 project operations through this proposed decree, that

1 if we don't have some sort of something out of this
2 court which says the states are wrong to have this,
3 what is really a partial resolution of this case to be
4 presented as a final resolution. We heard
5 Mr. Wechsler say these other cases, for example, will
6 be resolved. Well, this -- what -- what they are
7 saying is that a ruling from the Supreme Court along
8 the lines of entering their proposed decree will
9 basically foreclose any of these other discussions,
10 any of the United States' complaints in these other
11 forum --

12 **JUDGE MELLODY:** I did not hear them say
13 that. What I heard them say was there are other
14 forums where you can discuss these issues, but the
15 only thing I heard them say was that as far as their
16 specific complaint and lawsuit to invalidate the
17 operating agreement, that they would not be pursuing
18 that -- they would not be pursuing their claim. I did
19 not hear him say that any claims that the United
20 States or the water districts for that matter have in
21 state court would be adjudicated or cut off by this
22 lawsuit.

23 **MR. LEININGER:** But that is a major --
24 that is a major problem with this proposed decree.
25 You know, not -- not only that statement is true, but

1 New Mexico brought counterclaims that you had
2 dismissed, but these counterclaims challenging the
3 Project operations. So we -- the -- the difficulty
4 with all this, besides the sovereign immunity
5 questions that we've raised and that you recognize is
6 that we're right back to where we were with regard to
7 this proposed decree mandating certain changes to the
8 Operating Agreement directly and indirectly with a
9 fair amount of ambiguity, just this requirement that
10 there be consistency. So -- so basically, New Mexico
11 is getting the relief that they had sought in their
12 counterclaims. They're getting the relief that they
13 sought in the federal district court case. Why should
14 they proceed to federal district court case if, in
15 fact, there's a Supreme Court ruling that said we have
16 to change Project operations to be consistent with
17 their proposed decree.

18 **JUDGE MELLODY:** Well, I guess all I can
19 say about this whole issue of settlement -- I think we
20 should move on -- is that, you know, I know that you
21 have taken the position previously that you do not
22 want to settle -- you do not want to simultaneously
23 litigate and settle -- and engage in settlement
24 discussions, that you do not have the resources to do
25 that, and -- and I -- I know Ms. Coleman chided me for

1 being unsympathetic to that argument, and maybe I was,
2 but it seems to me that after this hearing is over,
3 there is going to be some period of time while we try
4 to get a ruling out -- can't tell you how long that's
5 going to take, but it's not going to be next week or
6 probably even next month -- where hopefully you will
7 not have a lot to do to either get ready for trial or
8 propose a settlement where you will have some time,
9 and all I can do is encourage you to get with Judge
10 Boylan, and if you want to try to, you know -- I can't
11 imagine the Supreme Court is going to be happy getting
12 a case where they say the -- the named parties have
13 all resolved it, the big issue about apportionment of
14 the water has been resolved, but we can't -- but we're
15 going to block this because United States and State of
16 New Mexico couldn't come to agreement on Project
17 operations. I just -- I don't know. Maybe I'm wrong,
18 but I can't imagine Supreme Court is going to be too
19 happy to get into Project operations.

20 **MR. LEININGER:** I -- I don't think that
21 would be the result at all, Your Honor. I think what
22 the result would be is the Supreme Court would not be
23 happy with a proposed decree after they had already
24 ruled and such opinion that we had this legal
25 responsibility that is, as you stated, a Compact-level

1 duty. So it is directly related to the Compact, and
2 if it's not resolved -- and it is not resolved in this
3 proposed decree -- I think that will give the Supreme
4 Court pause.

5 **JUDGE MELLOY:** Well, I think we've kind
6 of gotten off track. I'll let you get back to
7 whatever you -- wherever you were in your argument,
8 Mr. Leininger.

9 **MR. LEININGER:** Well, Your Honor, I --
10 going back to the impacts that we're facing right now
11 in these chronic depletions, talked about the
12 difference between what was going on at the time of
13 the Compact, which was depletions in the estimate of
14 the 2,700 acre-foot annual range in 1938, to
15 approximately 35,000 acre-feet annually during the D2
16 period, and then on top of that, we had the DCMI
17 pumping. The DCMI pumping, just since the D2 period,
18 non-Project pumping in New Mexico below Elephant Butte
19 dam has increased over the last 15 years by
20 approximately 17,000 acre-feet per annum. That's in
21 addition to the 40,000 acre-feet, I believe you had
22 heard earlier. I can't remember what counsel had
23 mentioned, but -- so in total, and more recently, you
24 have this increase of -- of DCMI pumping. So how is
25 this over pumping addressed in the proposed decree?

1 It's not. There's only one specific action New Mexico
2 may take to address under delivery of surface water to
3 Texas by, quote, transferring part of the water
4 apportioned to New Mexico from the irrigation district
5 in New Mexico to the irrigation district in Texas.
6 There are no injunctions against continuing Project
7 interference by the groundwater pumpers, just
8 injunctions placed on Reclamation and the Districts to
9 give up their allotted Project water to meet index
10 demands. The states should not be allowed to settle
11 this case on the backs of the irrigation districts and
12 the abrogation of a federal contract in the allocation
13 of Project water. The states argue --

14 **JUDGE MELLOY:** One of the notes I made
15 to myself about -- as I was reading through this,
16 again, going back to the 2008 Operating Agreement, is
17 if you assume that there is a -- you have already
18 mentioned there is a transfer of water allocation from
19 EBID to EP No. 1, which is, as I understand, sort of
20 the gravamen of the complaint that New Mexico filed in
21 the U.S. District Court. What gives non-Compact
22 members the authority to transfer Compact water?

23 **MR. LEININGER:** There is none, Your
24 Honor. This is a Reclamation Compact, and the
25 downstream contracts are recognized. So what the

1 Supreme Court has done is recognized that it is our
2 contracts which are effectuating this apportionment.
3 So can a -- a entity that does not have a -- a
4 contract, a non-Project entity, take -- take that
5 water, and I think that is one of the questions that
6 would have to be addressed in -- in a remedy. That
7 alone, Your Honor, is of such -- such concern to us in
8 the fact that it is not addressed at all -- at all in
9 this proposed decree.

10 The states argue against your
11 determination that there is a Compact-level duty to
12 avoid Project interference, that it's not a Compact
13 issue at all, that the claims are intrastate, when
14 frankly, that argument is absurd. This Project has
15 always been a statutorily created federally controlled
16 interstate system for the distribution of water of the
17 Rio Grande in New Mexico and Texas. The Compact
18 mandates Rio Grande water delivery to the Project, and
19 that creates a pool of water for diversion. So
20 there's a release from storage and combined with the
21 return flows we're talking about return flows
22 crisscrossing the state line, it's an interstate
23 feature. Depleting the overall pool affects the
24 overall project. So preventing interference with the
25 Project, Your Honor, is a Compact-level interstate

1 obligation. This is the distinctly federal interest
2 of the Supreme -- that the Supreme Court recognizes
3 the basis for the United States' claim. Those federal
4 interests and the protection of the Project in order
5 to effectuate the Compact stand on their own. The
6 U.S. interests are not derivative of any interest or
7 claim of Texas. It's common, yes, but it's not
8 derivative. Until this proposed decree was submitted
9 to the Court, it was Texas' position that protection
10 of the Project and not interference with Project
11 operations is a Compact-level interstate obligation.
12 It's worth repeating what the states admitted to in
13 their brief, Texas' claim to noninterference with the
14 Project operations is, quote, directly linked to
15 ensuring that Texas receives its apportionment. The
16 States' Memorandum 37. Texas in its haste to settle
17 this case not only reversed course on its claim that
18 Project interference in New Mexico must be remedied to
19 ensure it receives its apportionment, Texas has also
20 abandoned its claims in the 1938 Conditions. It's
21 given up on the core complaint -- on its core
22 complaint that was entitlement to the water that the
23 State negotiated when it entered into the Compact. So
24 we're not here to try to save Texas from a bad
25 bargain. They must have their own sovereign reasons

1 for completing a deal and dismissing the lawsuit, but
2 in compromising away its claim to 1938 Conditions and
3 the depletions of tens of thousands of acre-feet of
4 surface water after 1938, they're also left with
5 proposed decree that lacks enforceable prohibitions or
6 restrictions on water uses in New Mexico to protect
7 the Project. That may satisfy Texas, but it falls far
8 short of the relief the United States has sought in
9 this case. The Supreme Court held that the United
10 States may pursue the Compact claims it has pleaded in
11 this original action. The states cannot extinguish
12 that claim. That is exactly what the states are
13 attempting to do here.

14 The second part -- Your Honor, if I may
15 take a sip of water.

16 **JUDGE MELLOY:** Well -- that's fine,
17 sure. I would like you to respond at some point, and
18 it doesn't have to be now, but whenever it works in
19 your argument, but to the paragraph from your brief
20 about -- that was quoted about the complaints filed by
21 Texas and the United States seek to establish the
22 sovereign rights among the states, and that has to be,
23 in essence, decided before we start talking about the
24 rights of EBID and Elephant Butte. You don't have to
25 respond to it now, but at some point.

1 **MR. LEININGER:** With the Court's
2 permission, I'd like to go to the other prong that's
3 in the Firefighters v. Cleveland Supreme Court case,
4 and that is that the proposed decree imposes duties or
5 obligations on a third party without that parties'
6 agreement. Again, this is why the proposed decree
7 fails as a matter of law. That decision, Supreme
8 Court states quote, of course, a Court may not enter a
9 consent decree that imposes obligations on a party
10 that did not consent to the decree. As the Court
11 stated in our case, the federal government has an
12 interest in assuring it can meet its duties under
13 downstream contracts, which are themselves essential
14 -- essential to the fulfillment of the Compact's
15 expressly stated purpose. This is the 2018 decision
16 at 959. It's the purpose of effecting through the
17 Project in the downstream contracts delivery of the
18 equitable portion of the waters in the Rio Grande
19 between the states. First, as you have noted, the
20 Compact apportioned water below Elephant Butte
21 programmatically. In contrast to Colorado's
22 obligation at the New Mexico/Colorado state line, the
23 Compact does not set an acre-foot delivery requirement
24 to the Project users below the dam. Stating, as the
25 States do, that the United States lacks an interest in

1 the, quote, precise division of water as between Texas
2 and New Mexico, ignores the programmatic nature of an
3 apportionment downstream of Elephant Butte. It is
4 Reclamation and the District's programmatic
5 administration of the usable water in storage for
6 release and delivery downstream that fulfills the
7 Compact's apportionment, and this is effectuated
8 through the federal contracts. In -- in this vein,
9 the Project -- the States, rather, attempting to
10 subordinate the Project and its operations under
11 federal contract to the demands of the proposed
12 decree. That's particularly galling. Nothing in the
13 Compact -- nothing in the Compact authorizes the
14 States to enter -- to instruct those operating the
15 Project about what they should, may, or must do. In
16 fact, it's worth noting that the Compact Commission's
17 powers are very limited. Other than advising credit
18 water and ensuring gages are functioning, under
19 Article 12, the Commission's jurisdiction extends to
20 data collection and record maintenance and making
21 recommendations connected with the administration of
22 the Compact. It's the Project's role, not the
23 Commission's role, to operate and distribute the water
24 below Elephant Butte dam. There was an argument
25 raised, I believe, for the first time in the reply

1 regarding Section 8 of the 19 -- 1902 Reclamation Act,
2 and that somehow abrogates our contractual duties
3 because Section 8 has a reference to compliance with
4 state law, but what -- what is not cited to in their
5 case is -- is pretty much the preeminent Supreme Court
6 case on Section 8, and that's *Ivanhoe Irrigation*
7 *District v. McCracken*, 357 U.S. 275, and what it
8 stands for is Section 8 does not compel the United
9 States to deliver water on conditions -- excuse me --
10 imposed by the States. And the quote from the Supreme
11 Court is, "But the acquisition of water rights must
12 not be confused be the operations of federal
13 projects." So what Section 8 does and what we are
14 doing, what the United States is doing, is they are --
15 they are participating in the state adjudication for
16 determination of the state law based rights to water.
17 That is all that -- that is all that Section 8
18 mandates. Section 8 does not mandate that we must
19 follow state mandates here in how we operate our
20 Project.

21 The proposed decree impinges on the
22 Project operations in direct ways and in the obscure
23 ambiguous directives in the proposed decree directly
24 by allowing the States to change Project allocations,
25 the water by which the respective districts have

1 contractual rights without Reclamation or the
2 District's consent. Settling parties cannot impose
3 duties or obligations on a third party without the
4 parties' agreement, and I want to be unequivocal here,
5 we do not agree to the States' control of the Project.
6 There is a further mandate with regard to IBWC gage
7 improvements, and they somewhat belittle that in their
8 briefing as to, well, it's a gage, it's a poorly
9 functioning gage, it should be -- but it is a mandate
10 in the proposed decree for the United States to take
11 further action and to spin costs. The obscure and the
12 ambiguous provisions in the proposed decree basically
13 would allow state regulation of the Project by Fiock.
14 Any action by Reclamation of the Districts that States
15 deem inconsistent with their proposed decree would be
16 subject to change. Furthermore, Reclamation and the
17 Districts would be required to conduct studies of the
18 cause of failures of New Mexico to meet its index
19 delivery obligations with no defined methodology and
20 no provision of how the disagreements among the states
21 on causation would be resolved. It's a recipe for
22 disaster and invites further Supreme Court
23 intervention to resolve these ambiguities.

24 I'm sorry, Your Honor. I need to --

25 **JUDGE MELLOY:** Go ahead.

1 **MR. LEININGER:** Thank you, Your Honor.
2 The States are actually proposing that the Court
3 retain jurisdiction to modify the appendices. That's
4 in their decree, Section 5, and to issue any order,
5 direction, modification, or supplementary decree
6 deemed proper in relation to this decree or an action
7 by Compacting states for the enforcement of a decree.
8 The Court may therefore be asked to determine whether
9 a particular Project operational decisions are
10 consistent -- that's their word in the decree --
11 consistent with the terms of the decree, and
12 continuing jurisdiction to act as an arbiter of this
13 ambiguous consent decree terms is not a role that the
14 Supreme Court should be expected to adopt. New Mexico
15 has successfully negotiated an agreement here that
16 circumvents its dismissed counterclaims challenging
17 the Project operations, but that does not pass legal
18 scrutiny. There is no waiver of the United States
19 sovereign immunity to challenge federal contract in
20 this proceeding. You made that determination two
21 years ago. It still applies to the contractual
22 changes the States are trying to implement here. As
23 you stated in your May 21 order, the Court will not be
24 examining or determining the rights and obligations in
25 and to the Rio Grande Project and the contracts

1 relating to the Project. That was your order at 6.
2 Your order at 7 says, "The terms of implementation of
3 2008 Operating Agreement are simply not a part of this
4 litigation and detract from the actual focus of the
5 litigation." We support that ruling, but this is
6 basically an end run around your ruling, this proposed
7 decree, and allowing the States to mandate how the
8 operations will be altered. The ultimate disaster
9 with this proposed decree, Your Honor, may be the end
10 of the Project and the function of the districts, and
11 this is not hyperbole. The mandates of the proposed
12 decree to make the index delivery overrides the
13 Compact operations of the Project that ensure the
14 releases and deliveries of the Project water. You
15 listened to testimony, a year and a half ago, I
16 believe, that Dr. King, EBID's principal engineer gave
17 somewhat abundant testimony as to how intricate these
18 Project operations are to make sure that they are
19 efficient. It's not the blunt instrument that the
20 index would use with regard to these reallocations of
21 water amongst the Project members. Dr. King stated in
22 his declaration that in particularly bad
23 circumstances, the transfer process could even result
24 in a negative allocation to EBID. We saw that example
25 in their chart, the rating of EBID's surface water

1 allocation by New Mexico combined with reduced surface
2 water due to climate change and drought could cause
3 EBID to fail. The Project, in ten years,
4 Reclamation's Ms. Estrada-Lopez, EBID's Dr. King, EP
5 No. 1's Dr. Blair have all submitted declarations
6 explaining the complexity of the Project operations to
7 ensure the efficient release and delivery of water.
8 The obligations and duties imposed by the decree
9 disregards and even flouts the operating agreement's
10 thoroughly considered and definitely administered
11 terms. One instrument of this proposed decree is not
12 a matter of project adjustment. It is, as Dr. Blair's
13 opinion says, unworkable.

14 I do want to address, just briefly, the
15 argument raised by counsel for EBID that the Court may
16 modify the proposed decree retaining the index
17 delivery, but striking the Project operations. That
18 argument misses the point here, and EBID suggests that
19 we could go back to the State adjudication process,
20 but it -- it really misses the point here. The New
21 Mexico -- New Mexico is not a defendant in that case.
22 New Mexico is a defendant in this case, and it is a
23 Compact-level duty for New Mexico to avoid material
24 interference with Reclamation's delivery of the
25 Compact water to Texas and the long-term operation of

1 the Project. In the context of this lawsuit, the
2 Court would need to review the evidence on liability
3 for the Project depletions and determine for remedies
4 to correct the unlawful Project -- determine the
5 remedy to correct the unlawful Project interference,
6 and once those parameters are set, there may well be
7 additional litigation over who among the water users
8 in New Mexico get cut back. But regardless, New
9 Mexico's duty to avoid, as you've stated, to avoid and
10 present -- prevent the capture of Rio Grande surface
11 water drain return flows hydrologically connected
12 groundwater to the extent that the overall impact is
13 inconsistent with the Compact water deliveries to
14 Texas or interferes with the Project remain. It's a
15 claim that we raised in this case, and it must be
16 decided in this case.

17 I'm going to sum up, Your Honor, and
18 then I hope I have reserved time for rebuttal later
19 after the amici have spoken, but to sum this up, Your
20 Honor, the American Southwest is in severe and
21 prolonged drought. Climate change impacts may make
22 available supply of water even more dire. The rushed
23 negotiations by the States to complete a carveout
24 agreement is evident in the legal and practical
25 infirmities of their proposed consent decree. It

1 fails to address the Compact-level duty to avoid
2 interference with Reclamation's delivery of Compact
3 water or interfere with the long-term operations of
4 the Project. It contains vague, inconsistent, and
5 ambiguous provisions that impose constraints on the
6 United States' discretion to administer the Project
7 that are inconsistent with the law and unworkable in
8 Project operations. We ask that you deny the States'
9 motion.

10 **JUDGE MELLOY:** Thank you, Mr. Leininger.
11 Do you have any further presentation by either you or
12 Ms. Coleman?

13 **MR. LEININGER:** If we have --

14 **JUDGE MELLOY:** Let's do this. I'll give
15 you a chance. We've been going for about
16 three-and-a-half hours. Why don't we -- it's 12:30
17 now. Why don't we break until 1:30, and you can
18 confer over the -- over the noon hour as to whether
19 you want to add anything to your presentation. So
20 we'll break at this point until 1:30. Thank you,
21 everyone.

22 (Break.)

23 **JUDGE MELLOY:** All right. Ms. Coleman,
24 are you going to -- you may proceed.

25 **MS. COLEMAN:** First, like Mr. Somach,

1 I'll start with a disclaimer, which is at least this
2 side of the room is frigid so my argument might be a
3 bit rough as a result of that.

4 I want to start with the question that
5 you presented to Mr. Leininger before the break about
6 the -- the passage in the United States' opposition to
7 EP1's motion to intervene. Since we're doing a lot of
8 historical revision in the course of this argument, as
9 it turns out, I want to clarify and provide context
10 for that filing, which occurred when the only issues
11 in this case were the apportionment issues. It was
12 not until New Mexico filed its counterclaims without
13 leave of court that the operating agreement became a
14 part of this case. In fact, Texas in its own
15 opposition to EP1's motion to intervene reiterated
16 time and again, and Ms. O'Brien will cover this, that
17 the operating agreement and the project contracts and
18 Reclamation law were not at issue in this case at all,
19 and we've seen something dramatically different ever
20 since those counterclaims were allowed against Texas,
21 even though in Counterclaim 4, at least it's virtually
22 against the United States. So now that the operating
23 agreement is front and center and we've got these
24 mandatory/not mandatory accounting changes,
25 mandatory/not mandatory allocation transfers, the

1 operating agreement is now right in front of you, and
2 the two districts who are necessary parties to any
3 adjudication relating to the operating agreement are
4 not right in front of you. It's just the United
5 States. And so the United States' opposition to the
6 motion to intervene at that point was based on a
7 completely different case from the one that this
8 decree resolves. So on the subject, actually, of
9 necessary parties, another part of the history that
10 has been belied here is New Mexico's concession that
11 the United States is an indispensable party to this
12 lawsuit because of its interest in the Project. Texas
13 stayed neutral on that issue, but the United States
14 entered into this suit, and it was only because the
15 United States entered into this suit that Texas was
16 allowed to proceed with its claims without a motion to
17 dismiss from New Mexico citing the United States'
18 absence as a reason for dismissal. In fact -- excuse
19 me. I think they might have raised that in their
20 response to Texas' motion for leave. But we're here,
21 and the only reason the states have achieved this
22 remarkable agreement that we partly wrote is because
23 we're in the suit, and now they want to kick us out,
24 having done their -- their work, and put all their
25 compliance burden on us. They just say, Okay, thank

1 you, thank you for giving us jurisdiction, good-bye,
2 and that is fundamentally unfair. And I noted that
3 the States left that part of their argument out
4 because Mr. Wechsler ran out of time and couldn't
5 address substantive fairness. So I'll come back to
6 that.

7 Just a -- I want to clarify just a
8 couple of things more and then just return to this
9 trust issue. So the first interim report of the
10 Special Master has been highlighted in this argument
11 today, despite not having been highlighted
12 significantly in the briefing. Mr. Somach was talking
13 about the distinction that the first Special Master
14 made, indeed invented, between the Compact claims and
15 so-called Reclamation law claims. That was the first
16 Special Master's creation to find a way for the United
17 States to stay in the suit and, in fact, every one of
18 the States argued on the exceptions from that report
19 that the United States should be able to pursue some
20 claim in this suit. They disagreed on what the claim
21 was. Notably, New Mexico wanted us to bring a Compact
22 claim. Colorado said we could only bring a claim
23 based on the treaty, and Texas, several times in its
24 briefs, referred to our claims as Compact claims. In
25 fact, the Texas Solicitor General said eight or nine

1 times in the oral argument that the United States'
2 claims are Compact claims. Now, this question of
3 alignment between the United States and Texas came up
4 at that stage, not in the way that Texas is
5 suggesting, but their concern as stated in argument
6 was that the United States would seek D2 while they
7 would seek 1938. And so that was their concern stated
8 argument, and now we're in a reverse position, and
9 they're saying that we're not aligned with them. So,
10 you know, the -- I think it's important to -- if we're
11 going to be going back to looking behind the Court's
12 opinion to look fully at everything that was presented
13 to the Court at that time, and notably at that point,
14 the United States did not advocate bringing
15 Reclamation law claims in this suit because our claims
16 are not Reclamation law claims. They are Compact
17 claims, as the Court itself said and as we've repeated
18 ad nauseam in our brief. So the question of
19 ambiguity. We hear -- that is the keyword that the
20 States use to unlock, also, the door to everything
21 that they want to do. They don't like that it's not
22 specific. It's ambiguous. Now, we can just write a
23 new Compact. They don't like that -- that, you know,
24 delivery point versus measurement point, ambiguous.
25 It's not ambiguous. The Compact requires delivery at

1 the San Marcial gage because it's delivery to project
2 storage where that water becomes usable water to be
3 distributed by the Project in accordance with
4 Reclamation law in the contracts. Mr. Leininger
5 mentioned that ambiguity can't be confused with a lack
6 of specificity. This contract is not ambiguous. We
7 talk about variables that have changed since the
8 Compact was entered, changes in air irrigation
9 efficiency, changes in what source of water is being
10 used, but the fact that variables change after the
11 Compact does not make the Compact ambiguous at the
12 time it was written. This is -- I mean, it's just
13 standard. Just because the statute doesn't say what
14 you would like to say now doesn't make it ambiguous,
15 and that's the gravamen of their argument. They're
16 basically asking you to rewrite the Compact and redo
17 the equitable apportionment because the equities
18 support their being in agreement right now, but we've
19 got a Compact here. It is a statute. The United
20 States is at the center of the statute, and Congress
21 signed off on this statute as it was, with a delivery
22 in Project storage. So while we agree, and as we all
23 know by now, the United States was fully involved in
24 developing the index. We think that it can be a
25 useful tool. We think it is a good idea, but it must

1 be part of a comprehensive solution that includes the
2 obligation that you, yourself, included in your
3 summary judgment order, an obligation to avoid
4 interference with the operation of the Project. And
5 we hear a lot from this side about, well, it was a
6 caveated obligation. It's -- there's disclaimers. We
7 cut it out here, and it's only insofar as it applies
8 to Texas. You know, we don't represent EBID. We
9 don't represent the citizens of New Mexico. We
10 represent the United States. That's true. And we
11 have a federal interest in fulfilling our contractual
12 obligations to our contractors who are sitting right
13 there. It's not that -- we have interest in the
14 citizens of New Mexico and Texas of our own, as we are
15 also a sovereign with *parens patriae* responsibilities.
16 I grant that the states are *parens patriae* for their
17 water users, but that doesn't mean no one else has any
18 interests. We have interests on behalf of our
19 contractors in Texas and interests on behalf of our
20 contractors in New Mexico that these states are not
21 representing and cannot represent as a matter of Rule
22 19 and indispensable parties. They are the
23 contractors, and they need to be involved.

24 So returning to this issue of trust.
25 There's been a lot of peeking behind the curtain about

1 what's going on in settlement in this case, and, in
2 fact, the curtain is almost thrown open completely,
3 and I will try not to do that any more, but I think it
4 was clear at the September status conference that the
5 disagreement right now or the disagreement at that
6 time was no longer between the United States and New
7 Mexico. So this notion of not trusting New Mexico is
8 actually, to the extent it ever existed, outdated and
9 irrelevant. We worked very well with our colleagues
10 in New Mexico. We do not accuse them of, quote
11 unquote, shenanigans. We are not making arguments
12 unbecoming of the United States. We do trust them to
13 implement the obligations they are given, and there
14 are no obligations in this decree. Yes, it says you
15 should generally administer to be consistent with the
16 decree. Okay. How do you enforce that? You shall
17 take water management actions of some kind, but you
18 also at the same time can demand that Reclamation
19 transfer EBID's allocation. So they don't have
20 obligations. We were in very productive negotiations
21 to -- to come up with commitments because we do trust
22 them. We came -- you know, we developed a good
23 trusting relationship in settlement. Where it didn't
24 work, and as I think was pointed out at the September
25 status conference is that the two other states decided

1 that they wanted nothing else to do with the -- with
2 defining New Mexico's obligation to prevent Project
3 interference. We got the index. Don't need to point
4 the finger at anybody. Don't need to find liability.
5 Don't need to enjoin anyone. We've rewritten the
6 Compact, and we're all good. That is the attitude, as
7 I think Mr. Leininger was pointing out, that needs to
8 be dispelled, and so our -- our -- we are happy to go
9 -- to go back to the table with all of these parties,
10 but mistrust between the United States and New Mexico
11 is not the issue.

12 So I think that's actually all I really
13 wanted to clarify at this point, except -- oh, I'm
14 sorry, one more thing about the treaty. So the States
15 say that we don't contend that there's any risk of the
16 treaty delivery, and that is true, we have not said
17 that. Of course, we're also responding to this on a
18 relatively short time frame outside the context of a
19 full trial on the merits with witnesses, but there 's
20 another part of the treaty that is in addition to the
21 delivery requirement, and that is the provision
22 Article 2 of the treaty that allows for a
23 proportionate reduction in the delivery to Mexico
24 based on the proportionate reduction to the districts,
25 and that -- and this is pleaded in our motion to

1 intervene at least in this case that as part of this
2 detailed allocation determination that happens at the
3 beginning of the year, to which Ms. Estrada-Lopez
4 testified at length at trial, is a determination about
5 whether there will be a proportionate reduction to
6 Mexico, and as she detailed in her declaration, there
7 will be -- this whole -- even if it's not the Rio
8 Grande Compact Commission sitting at the table during
9 allocation decisions at the beginning of the year, the
10 cloud of Compact Commission or state potential
11 interference, the decision to transfer allocations or
12 apportionments, whatever the word is today, sits there
13 and hovers over this determination that may seem
14 innocent enough but does include consideration of a
15 treaty obligation, and the United States presented
16 that very argument to the Court in seeking to
17 intervene and bring its complaint in intervention. So
18 it's the -- the states sort of sticking their fingers
19 in the pie project allocation creates uncertainty at a
20 minimum around that obligation, and the United States'
21 discharge of it.

22 So I do -- finally, one more thing. I
23 do want to take up this notion that all of a sudden
24 the decree requires nothing of the United States.
25 That was news to me Friday at 5:00 p.m. Eastern when I

1 got their reply brief. Oh, wait, but their experts
2 don't agree on whether we're actually required to do
3 anything. Mr. Hutchison isn't really sure.
4 Mr. Sullivan and Dr. Barroll say, Yes, you are
5 required to change some things. The States' brief
6 says, No, no, no, not as a technical matter. You are
7 not required as a technical matter to implement any of
8 this stuff. It's just that if you don't, the index is
9 going to be messed up, and then we're going to sue you
10 under the administrative procedure act. That's not
11 required as technical matter by the decree. You're
12 just going to get sued immediately after you don't
13 implement it. So it's just a whole -- this whole idea
14 of it not requiring anything. It is an injunction,
15 and lest there be any dispute about this issue, I'll
16 direct you -- I'm going to Cite to Page 13 of the
17 decree itself rather than rattling off the
18 subsections. Subsection 1 at the top of 13. I will
19 rattle off the subsections. It's Part 2, which is the
20 injunction section of the decree, Subsection D --
21 Subsection 2, Subsection C, rather, "During Years 4 to
22 6, following the year" --

23 **JUDGE MELLODY:** Slow down just one
24 second.

25 **MS. COLEMAN:** Sure.

1 **JUDGE MELLOY:** Where are you?

2 **MS. COLEMAN:** It's Page 13 of the decree
3 document.

4 **JUDGE MELLOY:** The decree document?

5 **MS. COLEMAN:** The decree supporting the
6 Rio Grande Compact.

7 **JUDGE MELLOY:** Page 13 I have is Compact
8 accounting charges.

9 **MS. COLEMAN:** That's the appendix.

10 **JUDGE MELLOY:** Oh, I'm sorry. I'm
11 sorry. Okay. Go ahead.

12 **MS. COLEMAN:** So you'll see there in
13 Romanette 1, "During Years 4 to 6 following the year
14 the negative departure trigger is reached, Reclamation
15 will implement allocation transfers by transferring
16 water from the current year diversion allocation from
17 the New Mexico district to the current year diversion
18 allocation to the Texas district." Reclamation will.
19 I do not know how they can have a brief that says this
20 doesn't enjoin the United States to do anything when
21 there is an injunction saying that Reclamation will
22 take a particular action. And you'll find the exact
23 same language on the following page in Subsection B,
24 Romanette 1, for the positive departure trigger.
25 There, there's not even a waiting period. It's during

1 Years 1 to 3 following the year of the accrued
2 positive/negative -- sorry -- accrued positive
3 departure trigger is reached, Reclamation will
4 implement allocation transfers. So right there on the
5 face of the decree is a mandate to the United States
6 in the absence of a claim against the United States,
7 and in the absence of a waiver of immunity by the
8 United States. So the decree is unlawful on its face
9 on the basis of these two provisions alone. And I
10 think --

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

12 **MS. COLEMAN:** -- that is all. Thank
13 you.

14 **JUDGE MELLOY:** Let me just say, before I
15 turn to the amici. You -- you had indicated at the
16 outset of your presentation, Mr. Leininger, that you
17 were -- would like to reserve some time for rebuttal.
18 Somebody is going to have to get the last word, and
19 since the States are the movants, I will let -- their
20 rebuttal will go last, but I will give you some of
21 your reserved time if you want it to respond to
22 anything the amici may say so -- so we'll do the
23 amici, who are proponents, amici who are joining the
24 opponents, and then give the United States a chance to
25 -- to respond to any of the arguments that are made by

1 the amici, and then I'll give the movants the -- their
2 last word.

3 All right. Mr. Stein, looks like you're
4 going to go first?

5 **MR. STEIN:** Yes, Your Honor.

6 **JUDGE MELLOY:** Have you decided how
7 you're going to divide this up?

8 **MR. STEIN:** Yes, Your Honor. The New
9 Mexico amici have met. I'm going to go first. I'm
10 going to speak for the City of Las Cruces. I'm going
11 to be followed by Ms. Davidson. She will be speaking
12 for the New Mexico pecan growers, and also for
13 Mr. Olsen's client, the Southern New Mexico Diverse
14 Croppers. She will be followed by Mr. Utton speaking
15 for New Mexico State University, and he will be
16 followed by Mr. Brockmann, speaking for the
17 Albuquerque Bernalillo County Water Utility Authority,
18 i.e., the City of Albuquerque.

19 **JUDGE MELLOY:** Go ahead.

20 **MR. STEIN:** What we're going to do, Your
21 Honor -- what at least Mr. Brockmann and I are going
22 to do are give you a new perspective, some new
23 thoughts on the path forward. This case has focused
24 exclusively on the agricultural sector, and irrigators
25 and the Bureau of Reclamation and irrigation

1 districts, but there are two cities involved, and
2 they've been there a long time. City of Las Cruces
3 was settled or founded in the 1840s before there was a
4 Bureau of Reclamation, and the City of Albuquerque,
5 the first stirrings began before there was a United
6 States, and they have -- they represent a lot of
7 people. The City of Albuquerque's customer base is
8 some 650,000 to 700,000 people, and the City of Las
9 Cruces has a customer base of some 125,000 people, and
10 that will grow over time. These cities perform
11 essential functions, essential public health and
12 welfare functions for their communities. They -- they
13 serve a -- a water supply to their communities that
14 provides water for homes and hospitals and
15 recreational facilities, school districts, government
16 buildings, and they treat and dispose of wastewater
17 through NPDES permits, and they have a common -- a
18 common requirement. This -- this supply, this
19 municipal supply, has to be adequate for those public
20 health purposes, and it has to be continuous and
21 uninterrupted, and we believe that the best method,
22 the best way through this case of preserving an
23 uninterrupted municipal supply is for Your Honor to
24 recommend adoption of the consent decree that was
25 agreed upon by the three states, and the City of Las

1 Cruces will identify four reasons why it is in its
2 interest for Your Honor to do so. Briefly, Your
3 Honor, those are that the proposed consent decree
4 resolves the dispute; secondly, it provides an
5 intrastate administrative process for compliance, and
6 it also preserves the D2 equation or formula, which
7 grandfathers in certain city pumping, and finally, it
8 reserves intramural or inter- -- intrastate disputes
9 among water users for a proper intrastate forum, which
10 is the adjudication court in the Third Judicial
11 District of Las Cruces. So turning to the first, the
12 first benefit for the City of Las Cruces is that the
13 case is resolved. The interstate issue is resolved,
14 and the expense and uncertainty that the City faces as
15 the case goes forward is ended, and the case is
16 resolved in a way that creates clear -- a clear and
17 numeric delivery obligation on the State of New Mexico
18 that's completely comprehensible, and it also contains
19 triggers and remedies for when that delivery
20 obligation is jeopardized and may not be met or, in
21 fact, isn't met, and it also then preserves the -- for
22 intrastate administration, the measures that are
23 necessary to comply with New Mexico to meet its
24 delivery obligation. That's the second area that I
25 want to discuss, and that gets us into the question of

1 trust, which seems to be the topic of the day. The
2 question has been raised by the United States and the
3 amici that New Mexico cannot be trusted for one reason
4 or another to ensure that the Compact compliance goals
5 in the consent decree are, in fact, met. What I want
6 to describe in relation to this, Your Honor, is how
7 the permitting process operates with respect to a
8 large municipality, Las Cruces, and how the Compact
9 compliance issue exists with respect to us. Water
10 rights in New Mexico, Your Honor, are obtained through
11 an application process to the state engineer. The
12 City conceives of an application. It's drafted.
13 There may be some discussion with state officers, but
14 it's submitted for -- to the state, and then it is
15 noticed publicly. It's protested. The protests have
16 to be resolved through a hearing process with the
17 protestants, and also with the water rights division
18 of the state engineer office, and they appear to raise
19 any issues that the -- that the protestants didn't
20 raise, and also to raise issues that are of concern to
21 the State. Those issues for municipalities along the
22 Rio Grande always concern Compact compliance. The --
23 I want to go through the City's permits. The City has
24 a permit on the East Mesa, it's called the Jornada del
25 Muerto basin. It's for 10,200 acre-feet of water.

1 The East Mesa is separated from the Rio Grande by a
2 geologic formation called the horst. What that does
3 is it prevents any depletive effects from migrating to
4 the river. They're stopped. No depleted effects that
5 result from Las Cruces' diversions from its East Mesa
6 applications, which at full build out will be 10,200
7 acre-feet, can ever reach the Rio Grande, and in
8 addition, all treated effluent derived from those
9 diversions when they are discharged into the Rio
10 Grande are completely additive to the Rio Grande.
11 It's new water. It's imported water. It's a new
12 source of supply that's being added into the river.
13 That's an important benefit that was raised in the
14 course of that application by the City of Las Cruces,
15 which made clear to the state engineer that that was a
16 Compact compliance aspect of the process, and the
17 process was approved by the state engineer.

18 The City has a decree for its main body
19 of water rights on the valley, the LRG 430s. That's
20 gone through the adjudication process. That decree
21 contained a limitation that prevented the City from
22 land applying treated effluent from that application
23 at any time when the allocation within EBID was less
24 than 2 feet, which is probably going to be the
25 circumstance from now on. Under those conditions, the

1 City has to return all of that treated effluent into
2 the river. Similarly, the City has a third well field
3 that has been obtained. That's in the West Mesa.
4 That gives the City 8,000 acre-feet of water, 4,000 of
5 which will create a depletive effect on the Rio. The
6 City cannot exercise that permit until it has offsets
7 in hand. Not only must it have offsets in hand, but
8 the offsets have to be in priority. In other words,
9 the offsets have to have a priority date that protects
10 the most senior rights on the river, otherwise, it
11 can't make any diversions. It can never exercise the
12 permit. So the experience of the City of Las Cruces
13 and its relations with the state engineer in obtaining
14 its municipal permitting is that the -- there can be
15 no depletive effects that it causes on the river, and
16 in one instance, we have a permit that not only does
17 not create depletive effects, but actually adds water
18 to the river as imported water.

19 The second point I would make, Your
20 Honor, is with respect to the D2 curve or equation.
21 The City -- my understanding is that the manner in
22 which the State will supply the -- its delivery
23 obligation is through a methodology known as the
24 effective El Paso index. That methodology will
25 utilize the D2 curve, which represents the manner in

1 which the Bureau of Reclamation distributed water to
2 the irrigation districts, EBID, and EP No. 1 during
3 the years 1951 through 1978, also to the Republic of
4 Mexico, and it also grandfathers in all of the pumping
5 that was occurring in Texas, as well as in New Mexico
6 during that period of time. That grandfathers in the
7 pumpage that Las Cruces was doing during that period
8 of time, and that is a significant advantage for the
9 City. The questions have been raised as to the
10 efficacy or to the viability of the D2 curve by the
11 United States. I want to point Your Honor to the fact
12 that the D2 curve has been employed since at least
13 1978 -- that's 45 years -- potentially since 1951 --
14 that's 80 something years. That's decades of use.
15 There is a case -- an analogous case in the Nebraska
16 v. Wyoming series which Your Honor will find at 507
17 U.S. 584 in which a similar circumstance arose where
18 the State of Nebraska -- where the Bureau of
19 Reclamation operated the North Platte Project.
20 Similar to the Rio Grande Project, the North Platte
21 Project consisted of reservoirs and irrigation
22 districts in two states, Wyoming upstate and Nebraska
23 downstate downstream. The State of Wyoming sued the
24 Bureau over the priority date that the inland lakes,
25 the four lakes in the state of Nebraska, had been

1 given seeking to obtain a later priority date to use
2 the water that would be developed from that for the
3 purpose of establishing a new project. The Bureau of
4 Reclamation, together with the State of Nebraska,
5 argued that they could not do that because there had
6 been decades of reliance upon that priority date, and
7 that is very much the situation that we have here.
8 There have been decades of reliance upon the D2 curve,
9 and in the case of Nebraska v. Wyoming at 507 is
10 analogous, if not directly on point on that issue.

11 Finally, Your Honor, I have no -- I do
12 not have much to add in Mr. Wechsler's description of
13 the alternative forum for addressing questions that
14 water users have in New Mexico between themselves for
15 interference with their rights, but the adjudication
16 process in New Mexico is designed to address exactly
17 that point because it exists in two phases. The first
18 phase exists or occurs when the State quantifies a
19 water right vis-a-vis an individual water rights
20 claimant, but there's a second phase where each
21 individual claimant has the opportunity to assert an
22 interstate challenge against the water right of his
23 neighbor. That enables anyone who is claiming
24 interference to his right to raise that issue in state
25 forum where it was intended to be raised and to obtain

1 relief there. The -- in concluding, Your Honor, there
2 was a discussion between you and Mr. Leininger this
3 morning where the question of returning to a 1938
4 state of development was raised with respect to
5 groundwater. That would be a catastrophic situation
6 for a city like Las Cruces, which depends entirely on
7 groundwater usage, and which is the core of the
8 economy of Southern New Mexico. It's simply not
9 feasible, and it's something that could not be
10 considered.

11 **JUDGE MELLOY:** Thank you, Mr. Stein.

12 **MR. STEIN:** Thank you.

13 **JUDGE MELLOY:** Ms. Davidson?

14 **MS. DAVIDSON:** May it please, Your
15 Honor. I'm here speaking on behalf of New Mexico
16 pecan growers and also on behalf of Southern Rio
17 Grande Diversified Crop Farmers Association.
18 Mr. Olsen does give his apologies. He had a medical
19 matter he had to attend to and was not able to travel
20 for this hearing.

21 Your Honor, I'm here today to express
22 the farmer group's support for the Court's entry of
23 the consent decree, and we support entry of the
24 consent decree because it incorporates the 57/43 split
25 in the downstream contracts. It respects historic

1 project operations in accordance with the D2 curve
2 that have been occurring for almost half a century,
3 and on the aggregate, it provides EBID members more
4 surface water than they're getting currently under the
5 2008 Operating Agreement.

6 **JUDGE MELLOY:** Can you explain that to
7 -- well, go ahead. I -- that's one of the questions I
8 had, and I -- I guess Mr. Leininger said it's going to
9 give you less so why do you say it's going to give you
10 more?

11 **MS. DAVIDSON:** I was going to note here
12 that I believe the United States misunderstands the
13 allocation transfer chart that Mr. Leininger referred
14 to earlier this morning, and I understand Mr. Wechsler
15 is going to clarify what it shows. But on average,
16 Your Honor, and we've looked at this technically, and
17 I know the States have, as well, that some of the
18 unfairness of how the accounting procedures occur
19 under the 2008 Operating Agreement are adjusted by
20 moving the gage upstream at the El Paso gage, and so a
21 lot of the disputes regarding some of the unfairness
22 on how accounting occurred does result in getting New
23 Mexico farmers more surface water on aggregate. And
24 I'll let M. Wechsler address the specifics of your
25 questions when he speaks.

1 As you know, Your Honor, our farmers
2 rely on Project water and supplemental groundwater to
3 grow pecans, hatch chile, vegetables, and other crops
4 in the lower Rio Grande, and all together their use
5 comprises over 80 percent of the groundwater use in
6 the basin. They, not EBID as an entity, are the
7 majority stakeholders in New Mexico in this matter.
8 The farmers themselves have always been the ones with
9 the most to lose in -- in in lawsuit. No --

10 **JUDGE MELLOY:** Let me ask you this:
11 Among the group that you represent, I assume you have
12 both EBID and non-EBID members?

13 **MS. DAVIDSON:** Yes, sir. A very small
14 portion of groundwater-only members.

15 **JUDGE MELLOY:** Okay. I think one of the
16 arguments that Ms. Barncastle makes in her briefing is
17 that the non-EBID members, or as the United States
18 refers to them, non-contract members, are taking water
19 that should -- that they're not entitled to. Is one
20 of the reasons that you are supporting the agreement,
21 quite frankly, is this allows you to continue to -- to
22 pump that water without having to have your rights
23 adjudicated?

24 **MS. DAVIDSON:** No, sir, not at all. No,
25 that's not our position. Our position is that the

1 adjudication is well along its way in defining
2 individual water right holders and priority dates, and
3 the proper way to enforce priorities and -- and to
4 enforce against project interference in New Mexico is
5 to seek priority enforcement from the state, and that
6 will protect the Project users in New Mexico. What's
7 happening, Your Honor, is United States resists
8 seeking enforcement of priorities in the state. And
9 I'll get to that. We have already got a state court
10 determination that the project has a senior priority
11 date, yet the United States says, and Ms. Coleman says
12 there's no way we can get New Mexico to do anything,
13 that absolutely ignores the administration process in
14 New Mexico that imposes an absolute duty on the state
15 engineer to administer water rights in accordance with
16 their priorities. What the United States wants
17 instead is they want this Court to tell New Mexico
18 what to do. It wants a say on how New Mexico manages
19 its groundwater use. But there are -- there are
20 opportunities for the -- for the United States to
21 protect against Project interference in New Mexico.

22 **JUDGE MELLOY:** You just said that the
23 Project has a priority date. Now, as I understand it,
24 in the New Mexico adjudication court, there's two
25 different priorities. There's the priority for

1 groundwater and priority for surface water, which are
2 different. Am I correct?

3 **MS. DAVIDSON:** Yes, sir. There's
4 another -- there's one other aspect. There's a
5 combined groundwater/surface water use. In New
6 Mexico, the farmers and EBID and -- I assume, the
7 United States isn't going to change its position in
8 the adjudication, but the farmers, EBID, and the
9 United States have all supported a combined surface
10 water/groundwater priority date of 1903 for up to 3
11 acre-feet of farmer use. That amount is the amount
12 that was used during the D2 period, and we call that
13 supplemental or combined surface water/groundwater
14 use.

15 **JUDGE MELLOY:** Is that for both EBID and
16 non-EBID?

17 **MS. DAVIDSON:** No, sir. Non-EBID
18 members do not get to use surface water. So non-EBID
19 members who only have groundwater rights will have a
20 junior priority date to the project. Automatically,
21 they have a junior priority date.

22 **JUDGE MELLOY:** To both the combined and
23 the groundwater?

24 **MS. DAVIDSON:** The -- the
25 groundwater-only users will have a junior priority

1 date based on when they drilled their well to the
2 Project combined surface water 3-acre-feet amount. If
3 we get what we're after the adjudication, we're
4 seeking protection of up to 3 acre-feet per acre with
5 a senior priority date in the adjudication. And so
6 far, my clients, EBID, and the United States have all
7 been on the same page on that issue. That is an
8 unresolved issue that we're going to have to get final
9 resolution in the adjudication.

10 **JUDGE MELLOY:** Okay. All right.

11 **MS. DAVIDSON:** And, Your Honor, no party
12 in this matter denies it's the farmers that own the
13 right to use Project water in New Mexico. EBID and
14 the U.S. do not use Project water. They deliver it
15 pursuant to state and federal law, and they do not
16 administer water rights. The administration of water
17 rights is up to the state sovereignty, the sovereign
18 New Mexico, and in your order on dispositive motions
19 filed in this matter, you correctly noted that
20 whatever duties the Compact may impose, it does not
21 provide a comprehensive scheme for managing the
22 relative rights of persons in New Mexico, and as we've
23 been discussing, that scheme is New Mexico's prior
24 appropriation system, and it involves the Lower Rio
25 Grande adjudication that began in 1980. Now, let me

1 tell you what happened after that suit was filed. For
2 almost 30 years, there had been no progress in
3 adjudicating the farmers' water rights or the United
4 States' interest in the Project. The United States
5 fought the adjudication at every turn, and the result
6 was deadlock. And in about 2008, our farm groups were
7 dissatisfied with that impasse, and we started working
8 with the State and asking the Court for stream system
9 proceedings. We had several folks butting against us,
10 literally making cash bets on the courthouse steps
11 that we would accomplish anything, but we did. We
12 prevailed at getting the irrigation water requirements
13 for all farmers to find. That's a final determination
14 in the Lower Rio Grande adjudication, and as I was
15 discussing, a senior priority date was established for
16 the Project of 1903. Yet the United States still
17 resists in seeking enforcement of that priority date.
18 As you noted, the decree establishes a state line
19 delivery to Texas based on a D2 baseline that does not
20 differ much from the baseline in the Operating
21 Agreement. So you have to ask yourself, why does the
22 U.S. want more delay, more gridlock, more roadblocks
23 to prevent New Mexico from doing what is necessary to
24 protect the Project in New Mexico? The consent decree
25 finally provides a measuring stick by which the state

1 must administer and enforce priorities in the basin.
2 We haven't had that measuring stick. We haven't had a
3 state line delivery defined. We finally have it, and
4 now, we have the political motivation and support from
5 all levels in the state government to ensure New
6 Mexico can comply with the requirements of the consent
7 decree. Our legislature right now -- tomorrow,
8 there's a big meeting. They're working to secure
9 necessary funding. Our governor, our new attorney
10 general, our state engineer, and the majority
11 stakeholders, municipal, agricultural, commercial, are
12 all working together to get done what needs to be done
13 to help New Mexico comply with the consent decree and
14 prevent Project interference in New Mexico, but yet
15 again, the United States seeks to stall our progress.
16 Your Honor, our farm groups have been on the same side
17 of the courtroom as the United States and EBID. We
18 continue to have an interest in working together with
19 them to protect the project users in New Mexico. We
20 are interested in achieving certainty for our members
21 so they can move forward and continue their
22 livelihoods for farming. We view the consent decree
23 as a very major step forward. It provides one level
24 of certainty and allows New Mexico to manage its water
25 resources in conformance with the historic D2 time

1 period.

2 Now, if you'll bear with me, Your Honor,
3 I'm going to conclude by briefly resurrecting the
4 fancy dinner metaphor that's been used in other
5 arguments. Under the consent decree, the size of the
6 meal, New Mexico gets to serve its dinner guests every
7 year is defined. New Mexico already knows its guest
8 list, and it wants all of its guests, including the
9 farmers, to sit at the grownup's table together in the
10 dining room. The only thing that remains to be
11 determined is the portion size each guest will be
12 entitled to eat and whether some guests will share
13 with others when the meal was less than filling.

14 On the other hand, the United States
15 seeks to relegate the farmers to the kiddie's table,
16 tell them what they can eat, when they can eat it, and
17 in what amounts; but without any right to use
18 groundwater for farming, there will be very little to
19 eat for dinner, if anything at all. The U.S. claims
20 it needs to protect New Mexico's portion of the
21 Project through enforceable injunctions issued by this
22 Court, but exactly who or what is the U.S. trying to
23 protect? The U.S. previously sought to protect the D2
24 baseline, and the States accomplished that. Now, it
25 argues for a 1938 Condition, but for whose benefit?

1 Certainly not for New Mexico's farmers. The farmers
2 and EBID as an entity would certainly suffer if the
3 Project were rolled back to a 1938 Condition. If the
4 United States was really concerned with protecting New
5 Mexico Project users, it would support entry of the
6 consent decree, but what the United States is really
7 after is to control New Mexico and its management of
8 groundwater. Your Honor, the farmers, the majority
9 water rights owners in the Lower Rio Grande support
10 the consent decree, and we ask that you recommend its
11 entry into the Court. Thank you.

12 **JUDGE MELLOY:** Thank you.

13 **MR. UTTON:** Good afternoon, Your Honor.

14 **JUDGE MELLOY:** Mr. Utton.

15 **MR. UTTON:** As you directed us, the New
16 Mexico amici did coordinate, and I'm going to try not
17 to repeat what Mr. Stein and Ms. Davidson have
18 described we agree with, and I'll try to -- but I've
19 got a few points I want to make, and I'll try to make
20 it as short as I can. So our -- our law firm
21 represents amici New Mexico State University in the
22 Lower Rio Grande. Our firm also represents Public
23 Service Company of New Mexico, which has a power plant
24 in the Lower Rio Grande, and also the Camino Real
25 Regional Utility Authority, which also includes the

1 City of Sunland Park. As Your Honor granted, they
2 were allowed to participate in the settlement
3 discussions, and those three groundwater users did
4 participate in those discussions. All three of them
5 support the settlement. Among them, they represent
6 really the full spectrum of priority dates and types
7 of water uses from some of the most senior groundwater
8 uses to some of the most junior. They also represent
9 municipal and industrial, for instance, the power
10 plant that P&M has produces enough electricity to
11 serve 125,000 houses. The Camino Real Regional
12 Utility Authority supplies water to the border area of
13 Southern Dona Ana County and the City of Sunland Park
14 for all types of uses. New Mexico State University is
15 a member of EBID, as Your Honor observed when we went
16 on the -- the basin tour, has experimental irrigation,
17 but it also provides what one would call municipal and
18 industrial water for its facilities.

19 The -- those -- those parties would have
20 preferred a comprehensive settlement, and without
21 complicating the food analogy, I think we see this as
22 half a loaf or as an old rancher friend of my family's
23 would say, take potatoes when potatoes are passed.
24 Don't wait for the steak. If potatoes are coming by,
25 take it. So we're happy to get some potatoes on our

1 plate. There's still a lot to be done in New Mexico
2 on the intrastate side, so we realize this is not the
3 -- the end of things, but this is a very important
4 achievement if we can resolve the interstate issues.
5 Mr. Stein and Ms. Davidson described some of the --
6 the reasons that their -- their clients and our group
7 supports. The settlement, I'd just like to highlight
8 two of them that particularly are obvious to -- to my
9 clients, and I almost think we can't emphasize enough,
10 but by agreeing on adopting the D2 period and the D2
11 baseline, that is critical to, I think as Mr. Stein
12 described, recognizing the decades of reliance of a
13 longstanding decades and decades of use held and
14 carried out in New Mexico that Reclamation through its
15 practices in the -- recognizing the D2 period from
16 1951 to 1978 effectively included. To change that to
17 exclude those uses would be highly disruptive, would
18 really cause chaos, and how does -- how does a power
19 plant operate if it has to comply with the 1938
20 Condition, it has to shut off, has to do something,
21 even though they've transferred water rights -- you
22 know, senior groundwater rights into that power plant.

23 The second item is that -- the two
24 overriding items -- so there's the D2 and then second
25 is that it leaves the determination of adjudication

1 and administration in the proper forum. That's not
2 the Supreme Court of the United States. It's in the
3 machinery of the states in the west that Congress and
4 the United States has deferred to, to administer
5 water, and that is -- that is all that we're doing
6 here. In New Mexico, that means that the lower Rio
7 Grande adjudication has jurisdiction. It means that
8 state engineer administration is the proper forum,
9 proper mechanism, to administer water rights if
10 there's impairment or if there's shortage. The United
11 States objects because the decree, the proposed decree
12 doesn't address all the issues that they would like.
13 The U.S. calls its additional claims Compact claims.
14 Mr. Leininger repeatedly referred to them as
15 Compact-level duty. We simply disagree with that.
16 Calling them Compact claims that they just involve
17 administration of water rights in New Mexico does not
18 make it so. There's long standing machinery that the
19 United States, through both Supreme Court decisions
20 and by acts of Congress puts in the -- in the hands of
21 state jurisdiction, state officials, to administer
22 water rights within their own boundaries. Under
23 Section 8 of the Reclamation Act, United States is one
24 of those claimants. Their water rights are
25 adjudicated just like anyone else's. They don't get

1 to go to the Supreme Court to get some kind of edict
2 that then applies in the -- in the Lower Rio Grande
3 adjudication. That is where they have to go to have
4 that issue resolved.

5 Mr. Leininger mentioned that the consent
6 order lacks the mechanism for enforcement in New
7 Mexico. Well, that -- that's what it should do. It
8 should lack it. It should not be in a U.S. Supreme
9 Court decree. Those kinds of functions fall squarely
10 within the State's administration and adjudication
11 authority. And the reason --

12 **JUDGE MELLOY:** I just want -- I think I
13 want to make one thing clear. As I understand what
14 the United States is saying is they're not -- Ms.
15 Coleman or Mr. Leininger can correct me if I'm wrong,
16 but they're not saying that priority adjudication
17 should not take place in the New Mexico courts. I
18 don't think anybody is saying that, but it's what --
19 it's Project interference issues that are the gravamen
20 of their complaint. Now, I may be wrong, but I don't
21 think anybody is saying that priority adjudication
22 should be any place other than in New Mexico.

23 **MR. UTTON:** Sometimes it's hard to tell,
24 Your Honor. When -- what does that mean when you boil
25 down that the U.S. Supreme Court said there can be no

1 Project interference within New Mexico. That's
2 basically saying that the Project has the first
3 priority, and no one else -- no other water user
4 within New Mexico, with those -- those parties who are
5 claimants in the Lower Rio Grande case, there's 16,000
6 parties, so the U.S. Supreme Court would be telling
7 those parties that they cannot interfere because the
8 U.S. has the senior right. That's what Project
9 interference means. It is the same thing. I -- if
10 someone can explain it differently to me so that I can
11 understand it in a way that it doesn't mean that, I'd
12 like to hear it, but that's not my understanding. My
13 understanding is that that would be a way of imposing
14 on the New Mexico State District Court a priority
15 administration standard that it has to abide by, and
16 it would be by a court, U.S. Supreme Court, will none
17 of those parties on whom it is being imposed had a
18 chance to participate. So NMSU is an amici. My
19 colleagues over here represent amici. They are not
20 parties to this case. P&M and CRRUA are not parties.
21 Those other 16,000 claimants that have been joined in
22 that case, the state court went through the process of
23 joining 16,000 parties. Why? Because they own
24 property rights. Water rights are property rights,
25 and this idea that somehow Supreme Court under the

1 guise of an interstate case can expand the scope of it
2 and impose a specific restriction on property owners
3 just doesn't work. So, you know, the doctrine of
4 parens patriae, look at the principles in Hinderlider
5 where the state is sovereign and having respected an
6 imposition of a ruling by the Court, it -- it can
7 absorb that. It can administer that on its citizens.
8 That doesn't work on -- on an -- on an intrastate
9 basis. How does -- so if New Mexico is ordered to
10 avoid Project interference just within its own
11 administrative area, that's completely contrary to the
12 McCarran amendment, which Congress passed in 1952 that
13 says that sovereign immunity of the United States is
14 waived, and it will participate and will be joined in
15 these comprehensive stream adjudications. That is why
16 the United States is in the Lower Rio Grande case.
17 That's why the City of El Paso is in the case because
18 it owns land in New Mexico. In that case, the parties
19 have the opportunity, as Mr. Stein described, to have
20 inter se objections to contest its water rights. That
21 is the process that is set up. You know, the United
22 States doesn't like -- doesn't like it. For 30 years,
23 they haven't liked it. We've detailed in our brief
24 the long history of resistance against the Lower Rio
25 Grande adjudication and the Court of Appeals in New

1 Mexico, the U.S. District Court in New Mexico, the
2 10th Circuit Court of Appeals have all told the United
3 States no, you don't get to have a separate proceeding
4 on your own of your own water right. You're in with
5 these other people. They're all interrelated. You
6 all have to be in the same case. It's a combined
7 comprehensive stream adjudication. And I believe in
8 2019, the U.S. Supreme Court said the same thing. You
9 can only come in here to the extent that you're --
10 you're raising Compact claims, interstate claims. I
11 think they've been told that at least four times, but
12 yet in their motion for summary judgment in 2020 and
13 then in their opposition to the settlement agreement,
14 they don't listen to that. They want to have this
15 intrastate issue resolved that for 30 years they've
16 been told no, you've got to go and get it done in the
17 state court, and that is where they belong, and that
18 is -- that will provide remedy. The Supreme Court
19 shouldn't be getting involved in -- I mean, is Your
20 Honor going to become the water master and come down
21 to the Lower Rio Grande with the marshals and start
22 administering water? No, you don't want to do that.
23 New Mexico has the legal authority and the machinery
24 to do that.

25 **JUDGE MELLOY:** I think your time is

1 about up if you're going to leave Mr. Brockmann any
2 time.

3 **MR. UTTON:** Yeah. Thank you, Your
4 Honor. We ask the Court to approve the settlement.
5 Leave the U.S. adjudication administration claims
6 where they belong, and approve the settlement. Thank
7 you.

8 **JUDGE MELLOY:** Thank you.

9 **MR. BROCKMANN:** Good afternoon, Your
10 Honor. Thank you for stopping Mr. Utton and giving me
11 a few minutes. Your Honor is well aware, the Water
12 Authority has been in this lawsuit as an amicus
13 largely to protect its interests in the Middle Rio
14 Grande and to ensure that decisions that are made with
15 respect to apportionment in the Lower Rio Grande do
16 not migrate or move up -- upstream or somehow negative
17 precedence that can be applied to the Water
18 Authority's water rights. The Water Authority
19 definitely supports the three states' settlement and
20 their proposed consent decree, and really for three
21 primary reasons that have been expressed in some of
22 our briefs. One relates to the United States
23 groundwater claim in the Lower Rio Grande, the other
24 the '38 Condition, and carryover storages are the
25 third reason. With respect to the groundwater claims,

1 the consent decree is neatly packaged where the
2 interstate issues are resolved, Texas and New Mexico
3 had articulated the apportionment as between the two
4 states, and it's up to New Mexico to enforce its water
5 rights to provide that delivery obligation. Mentions
6 the Lower Rio Grande adjudication, and in that case,
7 the adjudication court has heard a motion for summary
8 judgment on the United States' groundwater claims and
9 found that -- that the source of the water is surface
10 water, and that there is no independent appropriation
11 of groundwater. That decision ultimately is stayed
12 pending decisions here so the appellate time is told,
13 but in the opinion of the Water Authority, it sort of
14 neatly wraps up that claim. The consent decree leaves
15 it up to state administration. We're comfortable
16 where state administration is on that issue, and the
17 prospects for unravelling that and starting to
18 litigate those groundwater claims, if -- if the
19 consent decree is not adopted, is -- is troublesome to
20 -- to wade back into that issue.

21 I won't redescribe the '38 Condition or
22 -- or the D2. Suffice it to say on behalf of the
23 Water Authority, when the motions for summary judgment
24 were -- were written, there was some claims and
25 comparisons made to a '38 Condition above Elephant

1 Butte Reservoir that went into the Middle Rio Grande
2 and Colorado, and at the time in the Water Authority
3 amicus brief, and I believe the State of Colorado also
4 expressed some concern with -- with the effect of a
5 ruling on a '38 Condition the Lower Rio Grande meant
6 for the Middle Rio Grande and for Colorado in terms of
7 the indexes. In our opinion, that issue is put to bed
8 if the consent decree is adopted. It's clear it's
9 based upon D2, and the Middle Rio Grande should be out
10 of that issue.

11 The final issue that the Water Authority
12 had expressed some concern about was carryover
13 storage, and it might not be really apparent, but the
14 Water Authority has water that is imported from the
15 Colorado River basin, from the San Juan basin in
16 northwest New Mexico, comes trans basin, and it's
17 deposited into the Rio Grande. So as imported water,
18 it has a little bit different character than the
19 native water supply, but about ten years ago, the
20 Water Authority put in a half-a-billion-dollar project
21 to take that surface water, that imported surface
22 water that came from the Colorado River basin, divert
23 it, and became a primary water supply for, as
24 Mr. Stein said, some 650,000 people. In that permit,
25 there was a lot of discussion about potential Compact

1 implications. So the State of New Mexico and the
2 Interstate Stream Commission were right on top of any
3 potential effects. That permit has two conditions in
4 it, one that has a minimum native Rio Grande flow
5 condition, that if that's not met, the Water Authority
6 has to curtail or reduce their diversion. So it's
7 absolutely imperative for the Water Authority to know
8 that a consent decree or the result of the litigation
9 is not going to change a historic Compact
10 administration or water rights administration in New
11 Mexico, and what the states have -- have proposed does
12 not do that. It -- it keeps it in -- in a historical
13 context. There's another condition of approval in
14 that permit that -- that says that water rights can be
15 curtailed for Compact compliance purposes. So in that
16 respect, it's -- it's very specific. But coming back
17 to the carryover storage issue, some of that water
18 comes down the Rio Grande and cannot be diverted so
19 there is a storage pool in Elephant Butte reservoir
20 for San Juan-Chama water. The Water Authority has to
21 get congressional approval to put it there. There's
22 evaporation losses that are assigned to it, and
23 there's actual -- actually rules that say when that
24 spills in relation to other project water. The
25 consent decree takes care of that issue. It has rules

1 for carryover storage and individual carryover
2 accounts, and I think it's important to note, also,
3 that -- that the Compact itself has no provision for
4 individual carryover storage accounts, and
5 historically, there weren't any until the 2008
6 Operating Agreement. So in my opinion, it's sort of a
7 significant compromise or concession among the states
8 to set up those individual storage accounts. But the
9 consent decree does provide rules and -- and
10 evaporation losses, so that's largely wrapped up into
11 the consent decree and to the satisfaction of the
12 Water Authority. Without a settlement, we'd go right
13 back into litigation on those issues. So those are
14 the major concerns that the Water Authority has
15 brought to the Court's attention, and we're very
16 satisfied with the three states' consent decree in
17 that regard and support it.

18 **JUDGE MELLOY:** Thank you, Mr. Brockmann.

19 All right. I'll turn to the amici who
20 are going to speak in opposition.

21 **MS. BARNCASTLE:** Thank you, Your Honor.
22 Samantha Barncastle for EBID, and we've divided our
23 time. Mr. Caroom will go first. He needs only a
24 couple of minutes, then Ms. O'Brien and I will follow
25 up.

1 **JUDGE MELLOY:** All right.

2 **MR. CAROOM:** And I appreciate the
3 generosity of the Districts sharing their time. I
4 will be brief. Doug Caroom for the City of El Paso.
5 El Paso supplies water to over 750,000 people in the
6 city and in the county. About half of this water
7 supply during years when irrigation water is available
8 is satisfied by surface water, and that -- El Paso
9 gets that water all by purchase from the districts.
10 It has a series of conversion contracts, the largest
11 of which is the 2001 implementing contract. Most of
12 the water under the 2001 implementing contract comes
13 from the American Canal Extension Credit. It's water
14 that's saved by having this huge concrete-lined
15 channel that doesn't lose water to evap -- as much to
16 evapotranspiration or seepage, and that water is what
17 is calculated and determined to be available for the
18 city to support a great deal of this water demand. So
19 we were extremely concerned when the joint motion was
20 filed requesting entry of the consent decree because
21 Dr. Barroll's affidavit declaration, which accompanied
22 it, said that the American Canal Extension Credit was
23 going away. It said it was superfluous. It said it
24 would go away once you changed the delivery point to
25 the El Paso gage. That concerned us a lot. So our

1 response to the joint motion was to raise this issue
2 and say that it looks like it's taking away our
3 contract rights. These are vital to us. And to
4 request clarification if we were reading it wrong.
5 Fortunately, Dr. Barroll clarified in her subsequent
6 declaration and said that the American Canal Extension
7 Credit goes away in terms of New Mexico delivery
8 obligations, but it doesn't impact the conversion
9 contract that El Paso has, and the states' joint reply
10 brief said essentially the same thing, the conversion
11 contracts are not impaired. So we are not in a
12 position where we -- we hope to -- hope to not be of
13 opposing the consent decree. However, in light of our
14 review of the district briefs and the United States
15 briefs, it appears like they're raising some good
16 points, too. So it's El Paso's position that we are
17 neither for nor against entry of the consent decree.

18 **JUDGE MELLOY:** Thank you, Mr. Caroom.
19 Ms. O'Brien?

20 **MS. O'BRIEN:** Yes. Good afternoon, Your
21 Honor. Maria O'Brien for El Paso County Water
22 Improvement District No. 1. Your Honor, there is not
23 a party represented in this room that does not want a
24 settlement of the important issues that Texas and the
25 United States have brought to the Court, but any

1 settlement agreement must comply with the law. This
2 settlement agreement does not. Because of the legal
3 infirmities, Your Honor irrespective of the clearly
4 disputed facts in the declarations as to what the
5 consent decree actually would mean on the ground, as a
6 matter of law, Your Honor should not and cannot
7 recommend that the Court approve the settlement
8 agreement the three states have brought to you. The
9 proposed decree is illegal on its face because it
10 rewrites the Compact in at least three fundamental
11 ways. You cannot rewrite a Compact without
12 congressional approval. The states certainly could
13 try and negotiate a new Compact and bring that to
14 Congress. They have not done that here. The proposed
15 consent decree also contravenes Reclamation law and
16 the equal -- coequal federal mandates, the coequal
17 congressional mandates in Reclamation law, coequal
18 with the Compact, the consent decree contravenes those
19 so it violates federal law.

20 The consent decree also undermines two
21 principles that are bedrock in federal law. It
22 imposes legal obligations on nonconsenting parties,
23 namely the United States and the districts, and
24 abrogates contractual rights of parties that are not
25 before the Court, separate and apart from any overlay

1 of Compact law. That cannot be done. Finally, Your
2 Honor, the consent decree is simply unworkable and
3 un-implementable as a decree, even if you could get
4 beyond -- beyond these very significant threshold
5 legal infirmities.

6 Your Honor, as an initial matter, I want
7 to dispel completely the notion that Texas is, as a
8 legal or a practical matter, the parens patriae of EP1
9 in the context of this proposed settlement, and in the
10 context of the state's proposed decree, and that
11 therefore, somehow, EP1's rights are subordinated to
12 not only Texas' but New Mexico's and Colorado's
13 alleged rights under the Compact, and that because of
14 that, EP1 somehow has no right to object to the
15 abrogation of its federal Reclamation law and contract
16 rights. The States' argument frankly is a distraction
17 from the essential legality of the consent decree,
18 which I described. It is not legal. But to the
19 answer -- the answer to why EP1 is not subject to the
20 parens patriae of the State of Texas, the answer to
21 that is instructive for understanding how the states
22 have gotten it so wrong in this proposed decree.
23 First, the subordination of EP1's rights is wholly
24 unnecessary to reconcile, harmonize the Compact and
25 Reclamation law and effectuate the apportionment to

1 the states while maintaining the United States and the
2 District's rights in the Reclamation project. That
3 subordination is made necessary only because the
4 states have an upside down view of a relationship
5 between the Project and the Compact that's found
6 nowhere, not only in Reclamation law, but it's found
7 nowhere in the Compact. So, again, it's made only
8 necessary by the State's upside down view of the law
9 and the world. That's compounded -- the State's
10 consent decree compounds the effort of the states to
11 subordinate EP1's rights because of the effort to
12 settle New Mexico's dismissed counterclaims as to the
13 United States challenging the operating agreement.
14 Those claims have been dismissed, and it's only
15 through the gymnastics of trying to settle those
16 counterclaims in the consent decree that you end up
17 with a conflict between Reclamation law and the
18 Compact.

19 EP1 stands here, not just as some water
20 user subject to state jurisdiction regarding in-state
21 use, again, but as a federal contract holder with
22 statutory rights and obligations in and to the Rio
23 Grande Project. The States' rights of administration
24 of interstate water use that's been aptly described by
25 the amici here, that's not an issue here. This is not

1 a matter under Hinderlider in terms of Compact
2 compliance regarding interstate water use. The States
3 also rely on throughout their opening brief and
4 subsequently in their reply what they call Nebraska
5 versus Wyoming 1 and 2, the 1935 case and the 1945
6 case, which were equitable apportionment cases
7 involving, to some extent, Reclamation projects that
8 the United States made a claim for an appropriative
9 right. In that case, the Court recognized, as you
10 should do here in rejecting the consent decree, the
11 necessity to give existing Reclamation contracts their
12 effectiveness. Say, the United States might not have
13 an appropriate right. They want to throw away the
14 analysis, but we have existing Reclamation contracts
15 as to storage and distribution, and those contracts
16 must give full -- full weight. Your Honor can read
17 that for yourself. It's at 325 U.S. 589 at Pages 629
18 to 632. What is at issue here in the processed decree
19 is the States' proposal to abrogate statutory
20 contractual rights of storage, allocation, and
21 delivery. That's exactly what the Court in Nebraska
22 versus Wyoming said was that they would not do.
23 Moreover, the issue of Texas' role as a state relating
24 to appropriative rights vis-a-vis the Rio Grande
25 Project was decided over 50 years ago. This case was

1 decided by the district court in Texas, affirmed by
2 the 5th Circuit, was denied, and this is instructive
3 for, again, our understanding of the proper
4 relationship between the Project and the Compact. And
5 in that case, and we cite this in our brief, the Court
6 says that the Compact -- the Compact shows
7 convincingly that the water belonging to Texas is
8 definitively committed to the service of the Rio
9 Grande Project, not the way the states would have it
10 and flipping it, and that makes the paramount
11 disposition of the rights to the river, that being the
12 Rio Grande Project. Texas itself has recognized this
13 relationship in their water code at 55.364 where they
14 directed, in fact, the Texas Water Districts
15 distribute water according to federal contracts.

16 EP1's project allocation may ultimately
17 manifest as Texas apportionment, but that is not
18 equivalent to what the states would like to do here,
19 which is take the states and give them carte blanche
20 rights in the Rio Grande Project and there by
21 subordinate both districts' and the United States'
22 rights to the States' interpretation and rewriting of
23 the Rio Grande Compact, not the Compact that we know
24 today. The law does not allow for this, and, again,
25 it flies in the face of the existing Rio Grande

1 Compact.

2 So the States rewrite the Compact in
3 three ways. They can't do that. This is a Compact
4 enforcement action. The States repeatedly in their
5 briefs and in oral argument talk about an equitable
6 apportionment. As Ms. Coleman artfully stated, there
7 is no ambiguity in the Rio Grande Compact above or
8 below Elephant Butte. Even if there were, as
9 Mr. Wallace seemed to argue, some level of ambiguity
10 does not transform this case into an equitable
11 apportionment case where the Court can do whatever it
12 might want to do with regard to a Compact that was
13 negotiated by the States in 1938 and approved by
14 Congress. It's a federal law. It's a federal
15 contract. We need to look at the Compact. The States
16 cannot rewrite the Compact. Reformation of the
17 Compact, as much as the States may wish it, is simply
18 not within the Court's equitable tool box in a Compact
19 enforcement action. That's what this is. It's an
20 enforcement action.

21 **JUDGE MELLOY:** So where do you think we
22 go with this then? Is it back to the -- the 1938
23 Condition?

24 **MS. O'BRIEN:** Your Honor, as you know,
25 we're not a party to the case.

1 **JUDGE MELLOY:** But you're making a lot
2 of argument so...

3 **MS. O'BRIEN:** How about I answer it like
4 this: You asked at the outset of the hearing today,
5 based on the position we take and where you think the
6 Court should go next or where we think things might
7 go. As I said at the outset, I don't think that
8 there's a party in this room that didn't and still
9 doesn't want settlement of this action.

10 **JUDGE MELLOY:** But you're telling me you
11 can't settle this case because a settlement along any
12 -- along any of the lines that are outlined in this
13 agreement would be a reformation of the Compact. I
14 suppose you could settle it by writing a whole new
15 Compact. Maybe that's what you're tell -- I mean,
16 basically that's what you're telling me. The only way
17 this case can be settled that's anything close to what
18 is in this decree is write a new Compact; is that what
19 you're saying?

20 **MS. O'BRIEN:** No. I disagree, Your
21 Honor. The fundamental problem that we have here are
22 the States are trying to settle without the assent of
23 the United States or the Districts regarding --

24 **JUDGE MELLOY:** But you're telling me
25 even if with your assent, it would be an illegal

1 contract.

2 **MS. O'BRIEN:** We believe that there is a
3 past forward. What you have here is you're taking the
4 federal project away from the federal contractors and
5 the United States that is tasked by over a century of
6 federal law with operating and running the Rio Grande
7 Project in particular, and Reclamation projects as a
8 general matter.

9 **JUDGE MELLOY:** Here's my problem,
10 Ms. O'Brien: This case has been ongoing for ten
11 years. I've been a Special Master for six. We've
12 gotten through half a trial in ten years, and now,
13 what we're saying is we're going to put aside a whole
14 year of negotiations, and we're going to start all
15 over, and you want to go back to the negotiating
16 table, and I just don't see how that's going to
17 happen. I mean, how -- the United States says they
18 can't do both. They can't litigate and negotiate.
19 How -- how in the world are we ever going to get this
20 case over with if -- if after a year of mediation with
21 Judge Boylan, we can't -- I mean, to me, there only is
22 one option at this point. We go and finish the trial
23 and -- and either we go back to 1938 Condition or we
24 don't.

25 **MS. O'BRIEN:** Your Honor, I -- again, I

1 disagree. Without going too much into what was and
2 could be discussed in settlement negotiation, I
3 disagree that we would need to start over. The --
4 again, the problem is that prior to the States
5 deciding to carveout, carve up how they wanted to
6 resolve this case, the United States and the Districts
7 were active participants in trying to come to a
8 resolution. You know, we won't go into why things
9 might have broken down or how they may have been
10 successful, but it would not be starting over. There
11 are significant important parts of the proposed
12 consent decree that could be worked with. You can --
13 the States cannot take those and implement them on
14 their own.

15 **JUDGE MELLOY:** But I don't want to wait
16 six months.

17 **MS. O'BRIEN:** Understood.

18 **JUDGE MELLOY:** And that's what -- that's
19 what I think I'm hearing you say and I'm hearing the
20 United States say. We've got to stop everything
21 because we can't do both. We can't simultaneously
22 litigate and negotiate so we've got to stop
23 everything, and maybe after six months, we'll get to
24 where we couldn't get to in the last year, and I'm
25 just not -- I -- I'm not there. I've yet -- what

1 gives me any confidence if I say put this case on hold
2 for six months that you'd actually get some place?

3 **MS. O'BRIEN:** Well, Your Honor, with all
4 due respect to the United States, go out a little bit
5 here, I think you should order the parties back to the
6 settlement table.

7 **JUDGE MELLOY:** Well, Mr. Liu asked I not
8 order the United States to participate in mediation,
9 and I agreed I would not do that. Now, I could ask --
10 I could change my mind obviously, but I was asked by
11 the United States not to order mediation, and I agreed
12 I would not.

13 **MS. O'BRIEN:** I understand. I am asking
14 you to consider ordering the parties, including the
15 United States, back to the settlement table, and with
16 a tight leash and perhaps more oversight from Your
17 Honor.

18 **JUDGE MELLOY:** Well, I -- well -- okay.
19 How long? What are you talking about? A month, six
20 months, a year?

21 **MS. O'BRIEN:** I would want to confer
22 with the United States on how long that they believe
23 they would need. Again, I do not think -- it's a
24 fool's errand, and I certainly would not suggest --
25 you know --

1 **JUDGE MELLOY:** Well, there's going to be
2 a period of time, as I said earlier, between today's
3 hearing and any ruling. Why can't you use that?

4 **MS. O'BRIEN:** There is not a reason, but
5 I do think it would require an order from Your Honor
6 to have all three states, who believe they have
7 proposed a decree that would solve, you know, the law
8 be damned, solve the problem for them. So I believe
9 an order from Your Honor as to what that time period
10 was used for would be necessary.

11 **JUDGE MELLOY:** Okay.

12 **MS. O'BRIEN:** Your Honor, certainly my
13 district -- I don't think, again, anybody in this
14 room, as much as I do believe that everybody does want
15 a settlement that works for everybody. I do -- no one
16 wants to spend, you know, more time than is necessary
17 or be sent on a fool's errand. I do not believe it
18 would be a fool's errand.

19 **JUDGE MELLOY:** Go ahead.

20 **MS. O'BRIEN:** You know, Your Honor,
21 think about it this way, too, we hope you agree with
22 us that the proposed consent decree cannot be approved
23 because of its legal infirmities, and a period of time
24 for you to work through those issues, send it up to
25 the Court, certainly with its exceptions, for the

1 Court to sort through that, that's not as if it
2 wouldn't take time, resources of the parties and Your
3 Honor, as well.

4 So the -- the three ways that the
5 proposed decree seeks to, in fact, does rewrite the
6 Compact is first, it imposes a Texas state line
7 delivery. Mr. Wallace's analogy earlier at the
8 beginning of the day that it was simply analogous to a
9 resolution of the Compact Commission, which has no
10 authority except the very, very narrow authority given
11 to it under Article 12 of the -- 5 and 12 of the
12 Compact. He analogizes delivery obligation, new
13 Compact requirement to a 1948 resolution where the
14 Compact Commission changed the measuring point for New
15 Mexico's Article 4 delivery. It did not change the
16 delivery obligation of New Mexico. It simply changed
17 the measuring point. That's not what we have here.
18 Yes, we have a measuring point established.

19 Commission can do that under Article 5. It cannot
20 create a delivery obligation. The Compact has not.
21 It's a Compact enforcement action. They cannot change
22 the terms of a Compact. Again, it's inconsequential
23 about whether this is a good idea. It cannot be done,
24 at least as the States have presented it, packaged in
25 this consent decree. It legally reforms the Compact,

1 violating the constitution's Compact clause, as well
2 as the separation of powers. The fact that other
3 parts of the Compact have a state line delivery shows
4 that there is no state line delivery for the State of
5 Texas. The plain text shows this. This is what the
6 Supreme Court also found in the one decision we have
7 from them in 2018. Indeed, there was no need, and
8 there remains no need at this point for state line
9 delivery. Plain and simple, the Project takes over
10 delivery of any apportionment once New Mexico delivers
11 its Article 4 required water into Elephant Butte. The
12 States seem to make a big deal out of how we
13 articulate this in our brief. We say it was an
14 apportionment to the Project. Well, they take part of
15 a sentence from a much fuller paragraph that explains
16 that it's the apportionment to the States below
17 Elephant Butte, but once delivered into the Project,
18 it becomes Project supply, usable water for release by
19 the United States and delivery to the Districts. So
20 it's a matter, again, of this proper balance between
21 the Compact and the Project, and that's the second
22 revision that the States propose to the Compact. The
23 States' proposed consent decree reverses the Compact's
24 confirmation, so Congress's confirmation, of
25 delegation to the Project and Reclamation to

1 effectuate the apportionment below Elephant Butte, and
2 this is pretty much exactly what Your Honor found in
3 your order on summary judgment. Reclamation has a
4 duty to -- Reclamation law and the congressional
5 authorization thereunder, thereby controls the
6 allocation. The proposed decree up ends this
7 congressionally mandated balance, comes from the
8 Compact, as well as Reclamation law. To understand
9 how this balance is up ended, just kind of think about
10 it like this. The Project doesn't need the Compact to
11 function. It functioned just fine before the Compact.
12 But if Reclamation and the Districts walked away from
13 the Project, the Compact is annulled. There is no
14 Compact. So, again, let's look at the balance that
15 Congress struck. The balance actually relatively
16 straightforward. I think Your Honor got it right in
17 your summary judgment order, but it's become very
18 twisted in the course of this case and completely
19 subverted from the States' proposed decree. Again, I
20 think this can largely lie -- this twisting and
21 subversion largely lies at the feet of the States in
22 trying to settle New Mexico's counterclaims, which
23 deal with Project operations delegated to Reclamation
24 and the Reclamation law contracts under that
25 delegation. The Compact for the states comes into

1 play below Elephant Butte as a prohibition on both New
2 Mexico and Texas not to interfere with that Project
3 supply upon release and then each state has a right to
4 enforce against the other that obligation not to
5 interfere. That, however, is not a right in or to
6 specific Project allocations, releases, or delivery.
7 The State argues, well, this is wrong, because it
8 relies only on Reclamation law, but that's what the
9 Compact did. It's the States that have it backwards.
10 So the Compact provided checks and balances. The
11 check and balance that was in play in place and
12 remains at play in place was a Reclamation project
13 taking over upon New Mexico's delivery with the
14 assumption and subject to noninterference by the
15 states to that project supply. Indeed, New Mexico's
16 one and only obligation -- its only right and
17 obligation below Elephant Butte not to interfere with
18 Project supply is turned on its head in the proposed
19 decree, which provides New Mexico with the right of
20 interference. Well, if we get what we want or what we
21 think we want or what we think we can get, you can do
22 -- you can interfere with Project supply and then when
23 New Mexico does interfere, it gives New Mexico the
24 right to raid the district project allocation accounts
25 to erase its noncompliance. I think Your Honor looked

1 a little surprised before when it was explained that
2 those, call them apportionment transfers, those are
3 allocation transfers. Those are the District's
4 allocation accounts to Project water supply. It's
5 been delivered by New Mexico into the reservoir.
6 That's Project supply, that's Reclamation's and the
7 Districts' purview. Your Honor looked surprised when
8 it was explained that the so-called apportionment,
9 which are allocation transfers, are above and beyond
10 what is provided for in the Operating Agreement. And,
11 Your Honor, let's be clear here. EP1's, we're not
12 arguing for greater than 43 percent. Reclamation law
13 already puts the side boards, and this is why the
14 Compact could adopt the Project with the mechanism to
15 effectuate the apportionment. Reclamation law puts
16 the side boards on that allocation, on that
17 apportionment, 43 percent to EP1, 57 percent to EBID.
18 People talk about this 43/57 percent coming from the
19 downstream contracts, but it goes further back than
20 that. Under Reclamation law, federal law, Reclamation
21 law, Congress has said in order to have an irrigation
22 project, in order for us to authorize it as Congress,
23 you need to denote the authorized acreage. That's 43
24 percent in Texas, 57 percent upstream. So this notion
25 that there's, you know, some -- Reclamation can

1 exercise some unbounded discretion or authority in
2 effectuating the apportionment of the Project, which
3 seems what the States imply and are concerned with is
4 simply not true. But what the States can't do is
5 determine how, when, and where we get that Project
6 supply and how we can conserve it as carryover. Texas
7 has no storage. New Mexico has no storage. That's
8 Project supply. The Compact is clear on that. Once
9 New Mexico delivers into Project storage, with a
10 capital P, then it becomes usable water for release
11 based on irrigation demands. It is not for the whim
12 of the states to direct or determine how that is
13 distributed, you know, and, again, I'll point to the
14 Nebraska versus Wyoming case. I'll point to this
15 Compact, and that's what it's established. The
16 consent decree completely upends the congressionally
17 established and mandated balance. Not that -- again,
18 going back to your question about whether settlement
19 -- further settlement discussions would be a fool's
20 errand. It would not. You can't carve out the
21 Project Reclamation and the Districts from a
22 settlement where a Compacted issue directed that the
23 Project effectuate the apportionment. Can't do it.
24 And that's what they're trying to do here.

25 And, Your Honor, recognizes, again, in

1 finding that the apportionment is programmatic in
2 nature in your 2021 summary judgment rulings. Can't
3 take the program out of a programmatic apportionment
4 where you can't re-delegate that programmatic
5 apportionment to states that have not been authorized
6 by Congress to do so.

7 I think this has been mentioned before.
8 I think it is definitely worth emphasizing it. What's
9 being settled here is not the case that was brought to
10 the Court by Texas or the United States. Ms. Coleman
11 explained the statement of the United States that
12 Texas seems to rely on frequently in their briefing
13 and then, again, in oral argument today. At the time,
14 again, that that statement was made, New Mexico had
15 not brought counterclaims, that they have still not
16 been granted leave of court to bring, that have been
17 dismissed by Your Honor, and what is being settled
18 here today is really not the limit of New Mexico's
19 interference with Project supply, which is the claim
20 that Texas brought, the Compact claim the United
21 States brought, but it's giving New Mexico and the
22 other states a right to take over Project operations
23 and, thereby then determine how much New Mexico does
24 get to interfere with the Project.

25 The third revision to the Compact that

1 the States propose, which excuse the pun, but flows
2 from its two other efforts to revise it, that it
3 unlawfully empowers the Rio Grande Compact Commission
4 complete contravention of the Compact's limitations.
5 If you look at Article 5 and Article 12 of the
6 Compact, the powers of the Commission are incredibly
7 narrowing circumscribed, and why? There was no need.
8 Commission did not need any authority vis-à-vis the
9 Project, did not need authority below Elephant Butte.
10 It needed authority to reconcile accounting based on
11 the delivery obligations, as written, not as
12 rewritten. In contrast, this proposed decree has the
13 Commission administering and overseeing the Project
14 operations, holding escrow accounts for water,
15 allocating and reallocating water at various times in
16 the year, all subject to revision over time. This is
17 not the Commission that Congress created.

18 The consent decree contravenes
19 Reclamation law. That was the law the Compact left to
20 provide for the programmatic apportionment. The
21 Compact is not a super statute. The States keep
22 referring to it as one, yet I can find no law that
23 they cite to which supports this unique proposition.
24 It is a federal law like any other. We, in fact, do
25 cite to cases that support that proposition, that's

1 Kansas versus Nebraska and Arizona versus California.
2 In fact, in Arizona versus California, the Court was
3 unwilling to give the states or the federal government
4 more power than Congress already provided through
5 congressional balancing. The states here want you to
6 do the opposite. The states make an effort in a very
7 lengthy footnote, Page 48 of their brief, Footnote 22,
8 it's unavailing. They miss the point by arguing that,
9 well, the Boulder Canyon Project Act has specific
10 apportionments, the Rio Grande Project Act and the
11 Compact here don't. Wrong. Again, the Compact
12 recognize not just the project, but an understanding
13 of what the law was with regard to Reclamation law,
14 and so this Compact, this Project act, in fact, are
15 fully analogous to the kind of balancing that the
16 Court did in Arizona versus California. Again,
17 there's no doctrine that gives Compact superiority
18 over federal Reclamation law in this case. As I
19 noted, the Nebraska versus Wyoming cases, which, in
20 fact, recognized the effectiveness necessary to give
21 preexisting Reclamation contracts. United States has
22 ably demonstrated why Section 8 belatedly raised in
23 the States' reply does not apply here and those
24 arguments were dispensed with uniformly, also in the
25 first Special Master's decision in this case.

1 The States do not manage to explain why,
2 you know, any of the other fundamental law applying to
3 harmonizing two federal statutory schemes do not apply
4 here. There's -- there's no conflict between the
5 Compact and Reclamation law, unless you have a
6 proposed decree like the States want. That creates
7 the conflict. There is no conflict between
8 Reclamation law and the Compact. The fact the
9 drafters of the Compact, Congress approving the
10 Compact harmonized existing Reclamation law and the
11 Project with the Compact at the time it was drafted.
12 That's the Compact that we need to look at today to
13 see whether the consent decree passes the muster. It
14 does not.

15 Belatedly in the reply, the States argue
16 that, well, the more specific statute, presumably the
17 Compact controls over the more general one. Well, in
18 that event, Your Honor, there's nothing more general
19 here than the Compact, Reclamation law, and how the
20 Project can and must effectuate the apportionment
21 through Project deliveries couldn't be more specific,
22 so there's no rewriting, overturning of Reclamation
23 law. There's no repeal by implication. That's, as
24 you know, highly disfavored, and, you know, I would
25 note New Mexico was legally disabled by its own

1 enabling act when it became a state and was admitted
2 to the union where it agreed that that admission to
3 the union would basically divest it of the ability to
4 contravene Reclamation law as applying to then
5 existing Reclamation projects, which was the Rio
6 Grande Project. The decree does, in fact, impose
7 obligations on nonconsenting parties. To the extent,
8 Your Honor, that you have any doubt in your mind of
9 the differing declarations submitted by the United
10 States and the states, you must resolve any disputes
11 as against the states and on the law, we believe that
12 we win and that the Compact -- excuse me -- the
13 proposed consent decree should be -- should not be
14 approved, but the consent decree does impose legal
15 obligations. Of course the United States in operation
16 of the projects and the Districts are required to
17 comply with the Project -- excuse me -- with the
18 Compact. That does not mean that additional new
19 mandates, again, as described by Ms. Coleman, are not
20 legal obligations that are imposed upon the Project,
21 the Districts, and the United States, and that's not
22 even considering the fact that the operation --
23 Operating Agreement is basically rewritten. You're
24 very familiar, Your Honor, with the origins of the
25 operating agreement. As you know, that agreement is

1 itself the result of federal litigation and federal
2 legislation effectuating congressional and contractual
3 obligations relating to title transfer under
4 Reclamation law. There's a Reclamation contract
5 that's governed by federal law. I think it's
6 important to remind ourselves, or to note, if you
7 don't already know, the Operating Agreement solved
8 what was in the purview of the parties to that
9 agreement, operational issues, and accounting for
10 depletions to Project supply, to make sure the United
11 States could deliver to the Project in accordance with
12 the Compact and to make sure that that allocation of
13 43/50 [sic] percent accounted -- took into account
14 Project supply taken through the ground in New Mexico.
15 Consent decree disregards that. Sure. EP1 still gets
16 43 percent maybe. Not when it needs it. We'll get it
17 when it doesn't need it. Won't be able to plan
18 appropriately. Its federal contracts will be
19 aggregated, and it will have a new overlord from the
20 states. But New Mexico will get 57 percent surface
21 water, plus groundwater pumping, which is a depletion
22 of Project supply. So they get 57 plus. What the
23 Operating Agreement could not resolve and was supposed
24 to be the focus of this case was interference of
25 Project supply by New Mexico. Instead of resolving

1 New Mexico's continuing interference as a specific and
2 explicit manner, as Mr. Leininger said, as an
3 enforceable obligation, the decree focused on the
4 Operating Agreement, seeking to dismantle it and make
5 it and the Project the remedy for New Mexico's
6 depletions of Project supply through the ground. Your
7 Honor found that the validity of the Operating
8 Agreement itself is not at issue here and dismissed
9 all counterclaims challenging the validity of that
10 contract and the allegations that the Operating
11 Agreement itself somehow violated the Compact. The
12 States are now coming back saying we've resolved those
13 dismissed counterclaims, this is how we want to revise
14 the Operating Agreement. In fact, before the
15 attempted settlement agreement, Texas agreed, no, the
16 Operating Agreement is not part of this case, it's not
17 part of a remedy, it's not part of the substantive
18 allegations, it's nowhere in this case.

19 **JUDGE MELLOY:** You're down to about five
20 minutes. I don't know if you're going to leave Ms.
21 Barncastle any time.

22 **MS. O'BRIEN:** Okay. I will wrap up then
23 here. I wasn't -- maybe I was getting the evil eye.
24 I feel it from this side of the room but not from that
25 (indicating). Just another note on the counterclaims

1 of New Mexico and the notion of other forum, the
2 States are all over the place on this. They argue
3 that there are other fora -- a forum in which the
4 United States could litigate claims recording Project
5 operations in the operating agreement and they point
6 to the federal district court case in New Mexico, the
7 Operating agreement case. Mr. Wechsler says that New
8 Mexico will dismiss that case. There's no opportunity
9 for either the districts who are parties to that case
10 or the United States to defend against those claims.
11 Those claims are effectively litigated here through a
12 settlement. There is no other fora, and there's legal
13 prejudice to the districts and the United States
14 through settlement of those claims here.

15 Thank you, Your Honor.

16 **JUDGE MELLOY:** Ms. Barncastle, can you
17 do it in five minutes?

18 **MS. BARNCASTLE:** No, Your Honor, I'm
19 sorry, I cannot.

20 **JUDGE MELLOY:** Well --

21 **MS. BARNCASTLE:** Isn't it fitting,
22 though, that EBID would go last and not get a say? I
23 ask leave of the Court for ten minutes.

24 **JUDGE MELLOY:** All right. Go ahead.

25 **MS. BARNCASTLE:** Good afternoon, Your

1 Honor, and I don't normally wear black to court or
2 dresses for that matter, but it seemed appropriate
3 today because while this side of the room is dinner
4 partying away and celebrating their feast, it's a very
5 different situation on my hands. For my presentation,
6 in addition to everything Team Rio Grande Project
7 members have said before me, I'm -- I've been given
8 the distinct honor of providing the eulogy for the Rio
9 Grande Project today, a task that I am privileged to
10 accept and yet altogether unworthy of, as well. It's
11 a somber day, Your Honor. My farmers wish they could
12 have been here with the rest of us to celebrate the
13 life that once thrived in the Lower Rio Grande, but
14 we've come to a point where inflation, drought, and
15 increased depletions all contributed to the death of
16 our beloved Rio Grande Project, and under the weight
17 of the proposed decree, the Rio Grande Project simply
18 cannot survive. My farmers were unable to be here
19 today in person, but most, I think, are listening from
20 our board room remotely at home, and we thank Your
21 Honor for that opportunity. They've elected to stay
22 home instead of traveling in an effort to try to keep
23 their farms stable at a time when their water supply,
24 investment, culture, and history are all under attack.
25 So I begin our eulogy, Your Honor, with a poem.

1 The west was once wild, dry, and dusty,
2 and our country was avidly lusty for new lands for its
3 masses of the poor working classes, and new farms in
4 the west they could just see. Western rivers will
5 flood or go dry, so to irrigate only fools try. To
6 farm takes so much water, the states thought they
7 ought to make the feds build the dams with costs high.
8 So the Texas folks in Santa Fe went to Congress and
9 simply said hey, we have an idea dandy, the feds dam
10 Rio Grande that taxpayers and farmers will pay. So
11 Congress ordered Reclamation, build the Project to
12 help out the nation, and from Colorado down to old
13 Mexico, you'll get water and start irrigation, and the
14 water you store will suffice if return flows are used
15 at least thrice, so hoist up your britches, build
16 canals and ditches, and the states won't get stuck
17 with the price. Things worked fine until the project
18 was faced with the loss of supplies so they raced to
19 compose a Compact for the water they left, and each
20 state a delivery faced. If deliveries weren't quite
21 enough, the states faced injunctions quite tough.
22 Just stop storing you brute to fill Elephant Butte, we
23 don't care if not storing is tough. But the system
24 hit several bumps when storage got grabbed by the
25 pumps so the Project supply just got left high and

1 dry, and the Project was down in the dumps. Texas
2 sued because they didn't get their share, and the feds
3 sued because they're in despair, for return flows are
4 snagged, Project water gets bagged, but these guys who
5 don't pay, it's not fair. Now the States' big idea,
6 you see, is to take water from EBID to make Texas
7 quite happy, but it's really quite crappy and the
8 District is wholly at sea. Their existence is
9 threatened and so is the farming in New Mexico. The
10 onions and chile are gone willy-nilly, and the Project
11 has nowhere to go. The Rio Grande Project will fade
12 as the deals with the cities get made. The row
13 croppers will sell their supply to some well, and
14 their future is lost to this raid.

15 We're here today to celebrate the life
16 of the Rio Grande Project and to commemorate its place
17 in history as one of the first and only of its kind,
18 the Project, a single purpose Project first authorized
19 by Reclamation in 1902, was the first and remains
20 among the only of its kind to ever be transferred to
21 private ownership. It was transferred to the farmers
22 when they completed their repayment obligation. It
23 was, like all other western Reclamation projects, to
24 be the corner stone of the community, the very reason
25 for the community's being, but it was also unique.

1 Its genesis, being based in the needs of the
2 community, and the willingness of the farmers to
3 invest in themselves and their future, to reclaim an
4 area of the world not previously permanently settled
5 due to the extreme conditions that once prevailed.
6 The Rio Grande Project tamed wild rivers and arroyos,
7 controlled torrential waters and delivered that water
8 in an orderly manner to allow it to serve as the life
9 blood of a soon-to-thrive agricultural community.
10 This is quite an engineering policy and legal fete
11 considering it was done over a hundred years ago and
12 without the technology we've become accustomed to.
13 Life simply put was different then. In the beginning,
14 farmers were satisfied with their ability to simply
15 control and slow down the water to ensure it was
16 usable to sustain life along the Rio Grande, but they
17 quickly learned that blessing sometimes come with new
18 adversities to overcome. Once the water was
19 controlled, slowed, and delivered to farms, it became
20 apparent that the water table was rising and would
21 soon present the opposite problem of what previously
22 existed. This was because farmers in New Mexico,
23 unbeknownst to them, were sitting on a vast and
24 ancient aquifer system with a shallow alluvium that
25 directly communicates with the surface supply. When

1 the surface supply became more regular and reliable,
2 the groundwater table rose saturating the shallow
3 alluvium and choking up crops, prompting the farmers
4 to take on further debt, to build up the project and
5 fit it with drains. These drains were not originally
6 planned but were an important component of how the
7 project would come to operate in the future. The
8 drains recaptured and delivered surface water,
9 returned it to the Project system, and allowed for
10 redelivery and reuse of water throughout the Project.
11 This process allowed a release of 790,000 acre-feet to
12 yield a diversion of 960,000 acre-feet annually. The
13 project hit a rough patch in the drought of the '50s
14 when it eventually became apparent that farmers may
15 not have in all years an adequate surface supply to
16 grow crops with so the farmers, doing what they do the
17 best, adapted. They started by commissioning a study
18 of the groundwater system. They learned that the
19 shallow alluvium was not a different source of water
20 than the surface supply they brought to the area, so
21 they carefully crafted a plan to ensure all farmers
22 had access to surface and/or groundwater as necessary
23 to achieve an approximate 3 acre-feet delivery to all
24 Project acreage. They worked together, drilled wells,
25 and supplied each other with water, shifting supplies

1 around to ensure those with access to groundwater used
2 it while those who had no such access were kept whole
3 by surface water deliveries. The farmers survived and
4 even thrived through the drought, but in time, it
5 would become clear that increased depletions by
6 groundwater pumping would take their toll, as would
7 jurisdictional battles with its parens patriae that
8 sought to relieve the Rio Grande Project of the
9 ability to shield itself from reliance on it by all
10 who might seek water, a situation a Project knew would
11 become overburdensome. It was not simply a matter of
12 the farmers pumping what they previously deposited
13 into the shallow alluvium any longer, but instead it
14 became a much larger problem when all who would need
15 water in the Lower Rio Grande would come to figure out
16 that they simply needed to find an available well
17 driller and enough capital investment to drill a
18 groundwater well and then water would flow freely
19 unimpeded by regulation or administration, and the
20 pumping would eventually exact its vengeance like an
21 extreme cancer sweeping through one's body and
22 replacing one's viable infrastructure system with a
23 system that was barely able to function. Now, a
24 790,000 acre-foot release in a year like this year can
25 be expected to yield no more than maybe a diversion of

1 600,000 acre-feet, and that's if the Project is lucky,
2 and we know sitting in this room today that luck is
3 not one of our strong suits, not to mention the fact
4 that we have nowhere near 790,000 acre-feet. But,
5 again, it was not the farmers who increased their
6 depletions but DCMI, who are responsible for the death
7 spiral. Farmer water use has actually remained
8 constant by decreasing acreage in production over
9 time. The same is true of jurisdictional struggles
10 that came home to roost and would eventually deprive
11 the project of its ability to prevent against the
12 reliance on Project supply so many others who did not
13 pay for this support but whom nonetheless expected it
14 came to rely on. When the farmers in New Mexico
15 sought the assistance of their *parens patriae* going
16 back as far as negotiation of the Rio Grande Compact
17 itself, those farmers learned there were strange and
18 abnormal jurisdictional hurdles in the Lower Rio
19 Grande that are not present anywhere else in the
20 United States. In fact, it was not the State of New
21 Mexico who negotiated for the Project in the Compact
22 negotiations, but the State of Texas and the United
23 States' interest that sought to protect the Project
24 from upstream depletions that would limit the water
25 flowing into the reservoir. This made sense, though,

1 given that all involved knew the structure and
2 intentions of the Project and its members. The
3 Project had long been protected by the federal
4 government from interference by anyone else including
5 protection that was pursued in courts of all levels,
6 treaties, enabling acts, and other state statutes
7 created at its insistence.

8 As an aside, these laws are all
9 thoroughly discussed in my brief, and I'm not going to
10 go into them again. I'm just going to stay in eulogy
11 mode.

12 The United States even has a history of
13 physical battle and war-like responses when outside
14 forces sought to threaten the inhabitation of the local
15 area. It had been clear that the states enjoy no
16 rights in the project beyond those rights of the
17 irrigation districts or their members and when EBID
18 farmers later asked the state for support and
19 assistance to curb the harmful groundwater uses by
20 those other than project farmers, it wasn't until the
21 1980s that New Mexico decided it was finally time to
22 accept jurisdiction over the groundwater, an
23 obligation and right it clearly enjoys but failed to
24 timely pursue thereby finally declaring the Lower Rio
25 Grande underground water basin and stopping further

1 development, but still that simple act did not signal
2 a change from history, and each time farmers were
3 faced with attempts to deprive the project of its
4 water, it was the position of the state that either it
5 would be the farmers who were cut back first or it was
6 the farmer's responsibility to protect their own
7 investment. This latter scenario is what led to EBID
8 negotiating the 2008 Operating Agreement as the
9 settlement in the absence of its home state, who at
10 the time said it was not their prerogative nor their
11 financial burden to assist the Lower Rio Grande
12 farmers in fighting off claims of the neighboring
13 states irrigation district. It was and remains the
14 lack of interest in protecting EBID farmers that led
15 to the downfall of the entire Rio Grande Project. The
16 enormous strength it took to survive more than 100
17 years it survived cannot be discounted or set aside in
18 history. The farmers long thought it necessary to
19 support the entire community, recognizing the need to
20 seek reimbursement that not forcing the issue also
21 because the need to work collectively as a group
22 toward the betterment of Southern New Mexico
23 prevailed, but ultimately the project succumbed to the
24 weight of the entire Lower Rio Grande incapable of
25 surviving the mandates placed on it by the proposed

1 decree. These mandates required that regardless of
2 who is responsible for depletions of surface water
3 that caused the shortfalls under the index, EBID
4 farmers would be required to transfer their water to
5 the Texas Irrigation District to make up for those
6 shortfalls. Incapable of protecting itself from
7 continued and unfettered harmful groundwater
8 depletions as a matter of Compact law, the Rio Grande
9 Project was left helplessly to the mercy of the parens
10 patriae proposed alternative administration or strict
11 priority administration, both of which as construed by
12 its parens patriae lead to the same conclusion. The
13 farmers lose access to water before anybody else.

14 **JUDGE MELLOY:** Let me ask you something,
15 and then I'm going to ask you to wrap it up. This has
16 been going -- I've given you at least ten minutes
17 beyond what I've given everybody else. Ms. Davidson
18 indicates she represents the farmers, and you're
19 telling me you represent the farmers. So who
20 represents the farmers?

21 **MS. BARNCASTLE:** We both do, Your Honor.
22 I represent a board that is elected by her members.
23 Not all of her members always agree with my board of
24 directors. They, for whatever reason, choose not to
25 run for our board or sometimes they have. It's

1 definitely a situation where we all speak for the
2 farmers in different realms, but not always have
3 farmers agreeing.

4 **JUDGE MELLOY:** All right. Okay.

5 **MS. BARNCASTLE:** With the mandates to
6 transfer water from EBID in the event groundwater
7 depletions were not curbed, it was the EBID farmers
8 who were first to go, but then the El Paso farmers
9 down the river found the weight of the financial
10 burden to be too great once EBID was no longer
11 carrying its almost two-thirds share of the operating
12 costs of the Project and the El Paso farmers were next
13 to fail. Eventually the Project all together failed
14 to be able to support all who would come to it for
15 water. The system not being maintained because the
16 farmers could no longer afford to fell into disrepair
17 and disuse before it eventually faltered and all
18 together failed. Soon to follow will be even more
19 than \$1 billion agriculture economy on which it was
20 based. Farmers have long relied on the rule of law to
21 protect their investment. Protecting their interest
22 was necessary to ensure their survival. Despite their
23 communal tendencies and their interest in ensuring all
24 the Lower Rio Grande had an opportunity to work
25 together toward our collective survival, it ultimately

1 became abundantly clear that the farmers were the only
2 ones willing to pay money to achieve the community
3 goals. All others expected a share of water that the
4 farmers brought to the area, though without
5 contributing to the Project or the farmers to ensure
6 the water continued to arrive. The farmers have a
7 long history of being the sole and only source of
8 support for protection of the Rio Grande Project, a
9 fact that would ultimately lead to its downfall. Your
10 Honor, I recognize that you don't necessarily want to
11 go through the whole eulogy so I will skip some parts,
12 but there are some I would like to ensure.

13 **JUDGE MELLOY:** Two minutes, and that's
14 it.

15 **MS. BARNCASTLE:** Federal government
16 tried to intervene and tried to protect the farmers in
17 their investment in the name of keeping the prices
18 reasonable --

19 **JUDGE MELLOY:** Slow down. Two minutes
20 doesn't mean you're just --

21 **MS. BARNCASTLE:** Sorry, Heather.

22 **JUDGE MELLOY:** Five minutes of speech
23 into two minutes of time.

24 **MS. BARNCASTLE:** -- at the grocery store
25 among other federal interests, but it was told it

1 could not overstep certain boundaries including
2 stepping on toes of the parens patriae who decided
3 knowing better, they sought an easy and ill-suited
4 solution to the Project's ailments.

5 Your Honor, I'm just going to close with
6 a few more comments. At the heart of this case are
7 two questions: What is the Project supply and what
8 authority do the states have to interfere with it?
9 The states have sidestepped the merits of the
10 discussion to arrive at a conclusion that harms the
11 project when instead it should have been seeking a
12 mechanism for protecting the project. This quick-fix
13 mentality has led to a fundamental change in the
14 relationship of the Compact and the Project will
15 ultimately be the slow motion downfall of the Project.
16 The struggle has been, and I know, Your Honor, that it
17 has not advisable to close when I'm already behind
18 time by addressing this fact, and judges don't like to
19 be told they're wrong so here goes nothing. The
20 struggle has been the states are working outside their
21 lawful authority from the perspective that they need
22 not protect EBID. They've bisected the Project and
23 said they protect EP No. 1 under the Compact, but not
24 EBID. How is that possible? How does programmatic
25 mean that one portion of the Project has a Compact

1 base right but the other does not? If you enter the
2 order as it's written, it doesn't matter what court I
3 go into next. I can never win my case because our
4 case has always been based around protection under the
5 Compact under Reclamation law and under state law
6 because every time we try to find a way to solve a
7 problem, it's well, this law works against you or that
8 law works against you. The Compact was our saving
9 grace. Luckily, this isn't a real funeral, and you
10 don't have to go down in history as the judge who had
11 the chance to save the Rio Grande Project and didn't.
12 Don't go for their bait, Your Honor. Don't go for the
13 easy solution or the quick fix. Order us back to
14 settlement. We were close. We can still get there.
15 We were very close. We need some legal rulings most
16 likely. My belief is that we probably would benefit
17 from going up to the Supreme Court on exceptions with
18 an order from you telling us where you think you're
19 headed, and we'll be able to determine further whether
20 settlement could actually flow from that, but the fact
21 that the United States has not been at the table has
22 not prevented EBID from staying at the table. We're
23 still working through these issues, and we hope that
24 we are close with our friends from New Mexico.

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

1 Let's take a 15-minute recess, and we'll hear from the
2 United States at that point in time.

3 (Break.)

4 **JUDGE MELLOY:** All right. Mr. Leininger
5 or Ms. Coleman, do you have anything you want to say?

6 **MS. COLEMAN:** Good afternoon, Your
7 Honor. Two very quick things. One, based on what we
8 heard from the New Mexico amici, I do want to clarify
9 the nature of --

10 **JUDGE MELLOY:** Slow down just a little
11 bit.

12 **MS. COLEMAN:** Sorry. Sorry. And I
13 haven't even had a normal amount of coffee today.

14 So on the nature of relief we are
15 seeking, and we discussed this injunction to prevent
16 Project interference, we hear from the amici that they
17 believe this will be catastrophic, that this will
18 completely subvert the adjudication, that they want
19 the Supreme Court to take over priority adjudication,
20 New Mexico. None of that is true. We see an
21 injunction to prevent Project interference as
22 triggering the discretion of the State of New Mexico
23 to account for the impacts, find ways other than -- in
24 addition to curtailment, frankly, but not just an
25 injunction against all pumping back to '38 or D2 or

1 something in the middle, but -- although that's one
2 part of the mix of the remedies that they could
3 implement. They've discussed fallowing retirement of
4 groundwater rights, et cetera, and we understand there
5 is a multimillion-dollar appropriation being requested
6 in the New Mexico legislature that would contain some
7 of these components. So this is not about the Court
8 dictating things or even really about impinging on
9 state discretion, but we do think there has to be an
10 enforceable obligation at least the general level of
11 defining their Compact obligation.

12 **JUDGE MELLOY:** Well, how do you do that
13 -- you say you don't want the Court to dictate it, but
14 if you want enforceable A, B, C, D, E, how do you do
15 that without the Court dictating it unless New Mexico
16 agrees to it? Obviously if there's an agreement,
17 that's a whole different story, but, I mean, that's --
18 isn't that what you're asking for is the Court to
19 dictate enforceable requirements?

20 **MS. COLEMAN:** Well, our complaint and
21 our prayer for relief contains declaration for New
22 Mexico's obligation to prevent interference and a
23 declaration as to preventing interference by
24 non-contract or non-Project water use essentially.

25 **JUDGE MELLOY:** But it's black letter

1 law, I think. We talk a lot about black letter law
2 today, but an injunction that just says don't file a
3 law is not an enforceable injunction. You have to
4 tell somebody specifically what they can and cannot
5 do. You can't just -- can't just say don't interfere,
6 you know.

7 **MS. COLEMAN:** This sounds very familiar,
8 Your Honor. I can't think of where I placed it,
9 perhaps our summary judgment argument or our
10 opposition brief. Correct. I'm not saying we're
11 asking for more than an injunction that says follow
12 the law. I mean, I'm not --

13 **JUDGE MELLODY:** Or don't interfere.

14 **MS. COLEMAN:** Or don't interfere. Of
15 course, we would prefer a term such as interference to
16 be defined in some way, and we're talking -- if we're
17 talking about a trial context, we're talking about
18 completing the liability phase and remedies, and
19 frankly, I think after a liability ruling, I -- I
20 can't imagine not -- there not being another round of
21 attempts at settlement. But what we're not -- we're
22 not asking for the Court to write an order -- to write
23 a state engineer order for Mr. Hamman to enter in New
24 Mexico. I think we want relief consistent with the
25 Compact, and we're not looking to change the -- the

1 order of relationship between state law and federal
2 law.

3 As for settlement, we don't think an
4 order -- well, we don't think it's necessary for you
5 to order the parties back to settlement, but we do
6 think it's necessary for the states to have an
7 incentive to return to settlement because right now,
8 they -- what incentive do they have to come back to
9 the table? They've put a proposed decree in front of
10 you. They think they're going to walk out of the
11 courthouse with it so why would they come back to --
12 to talk to us? I don't think that they will --

13 **JUDGE MELLOY:** I think the incentive is
14 that it may not be approved or if I recommend it, you
15 -- your exceptions may be sustained by the Supreme
16 Court, and they would have lost a year's time and are
17 back to where they -- you know, back to square one, so
18 to speak. I mean, the incentive is that -- I would
19 think it would be in everybody's best interest to
20 present a united front to the Supreme Court on a
21 proposed settlement, but I -- I don't know. I'll let
22 you finish, but I think where you're going is
23 disapprove this settlement then tell everybody to go
24 back to the table.

25 **MS. COLEMAN:** I don't have an order of

1 -- you know, order of events that I would prescribe,
2 but I -- I think that the States need to -- they can
3 tell you themselves, I mean, if you wanted to ask them
4 point-blank when they get up here if they would go
5 back to settlement without an order.

6 **JUDGE MELLOY:** New Mexico has already
7 said they will. I don't know about Colorado.

8 **MS. COLEMAN:** As we discussed, we're on
9 good footing for talking to New Mexico. So the -- so,
10 yes, I think absent them saying on the record that
11 they'll go back to settlement or if they perceive --
12 or, you know, they perceive some indication that their
13 decree is in danger of not being entered, I don't know
14 why they would really come back to talking to us.

15 **JUDGE MELLOY:** I do have one question
16 that you've talked about and Ms. O'Brien has talked
17 about is that somehow the other -- this proposed
18 settlement gives New Mexico what it wanted in its
19 counterclaim, and I don't quite understand that
20 argument. I mean, I understand the argument that --
21 that -- that you're saying you want an injunction --
22 first of all, you're saying that in the liability
23 phase, you're going to prove that New Mexico's
24 interfering with Project operations, correct?

25 **MS. COLEMAN:** Correct.

1 **JUDGE MELLOY:** And then once that
2 determination is made, then you're going to ask for an
3 injunction, absent the settlement, in -- in a remedies
4 phase that will address Project interference; is that
5 correct?

6 **MS. COLEMAN:** Sounds right.

7 **JUDGE MELLOY:** So how does that -- how
8 does this settlement -- I don't understand how this
9 settlement rewards New Mexico's counterclaim. I
10 understand your argument that it doesn't specifically
11 require concrete steps that they have to take to
12 address Project interference, but how does that -- how
13 -- I -- I'm missing the step to how that -- somehow
14 the other means they won their counterclaim.

15 **MS. COLEMAN:** Well, I think that would
16 be their defenses, I think, but their -- the
17 counterclaims -- the dismissed counterclaims against
18 the United States asks for, among other things,
19 rulings that carry over accounting, was not consistent
20 with the Compact, they don't like any -- basically any
21 of the Project accounting that happens below the El
22 Paso gage, such as the AC E credit, various other
23 complaints about D2, and so these different elements
24 of Project accounting and allocation practices that
25 are the subject of their counterclaims and their

1 claims in a district court are being imposed through
2 this decree. Now, those are the counterclaims against
3 the U.S. They have the two counterclaims against
4 Texas, and the Counterclaim 4, which is unjust
5 enrichment, the United States was originally a party
6 to that -- party defendant to that counterclaim, and
7 it was dismissed against us, but unjust enrichment --
8 the unjust enrichment counterclaim argued that Texas
9 was getting too much water as a result of the
10 operating agreement because of all these things that I
11 just talked about, and in particular carryover
12 allowing the district more water than it would have
13 been allocated in a single year. So they are getting
14 -- so basically through that counterclaim -- notional
15 counterclaim against Texas, they're getting the
16 restriction -- a restriction on carryover that they
17 would have sought in some form or other in their
18 counterclaims in the district court. That is all.
19 Thank you.

20 **JUDGE MELLODY:** All right. Who's going
21 to speak for the Compacting states?

22 **MR. SOMACH:** Mr. Wechsler will carry
23 most of our response, but there -- there are a few
24 points that I want to make initially. The first
25 actually related to this -- this last point. From our

1 perspective, that is the Texas perspective, this case
2 hasn't changed at all since we filed the complaint.
3 There was all this discussion and argument about how
4 it had changed in the context of the United States'
5 opposition to EP No. 1's intervention, and that
6 somehow now something has changed where -- I don't
7 know that I entirely understood the argument, but now
8 they should be allowed to intervene. I'm not sure
9 that's what they said, but that's certainly what was
10 implied in that and I, for the life of me, as lead
11 counsel for the Texas lead plaintiff since the time
12 the complaint was filed, I have no idea what has
13 changed in this case from then to now. Interestingly
14 enough, this question of whether or not that was
15 discussed here, what Texas' position was on the United
16 States' intervention, we made our point clear twice on
17 that. The second time was in the context of briefing
18 on exceptions. I'm not going to repeat that because
19 we've written it out chapter and verse to you already,
20 but the first time that issue came up actually was in
21 the context of the New Mexico opposition to our filing
22 our initial complaint where the argument was the
23 United States was a necessary party, you couldn't
24 proceed without the United States. We contested that.
25 We didn't think in terms of the Compact claims, that

1 the United States was a necessary party, and if you
2 look at our -- our briefs in response to the
3 opposition there, that's exactly what we said, and we
4 said it very clearly and concisely because it was a
5 live issue at that time. The Supreme Court granted
6 our position over that opposition, and as I said, I
7 don't know what has changed between them, the 2018
8 decision, and now. We don't see any modification,
9 although I now understand -- and I am being a little
10 facetious here, but I think that's what I heard was
11 that EP No. 1 is no longer subject to Texas and Texas
12 state law. It's as if they seceded from the state in
13 the context of they're not subordinate in any way,
14 shape, or form to Texas or Texas' apportionment. That
15 cannot be right. That -- that simply cannot be right.
16 And I don't want to -- I don't want to belabor it
17 because it just -- it just makes no sense. I have
18 just a few other points I want to make. There has
19 been a lot of discussion -- I think it was Ms. O'Brien
20 that talked about the coequal Reclamation law and
21 Compact priority. There was no priority. They were
22 coequal, and -- and that gives rise to the -- to this
23 notion that Reclamation law somehow has got equal
24 dignity with the Compact, and as I explained earlier,
25 Reclamation law has no application to the Compact

1 appportionments. It only has import in the context of
2 the intrastate dispute that Mr. Wechsler will talk
3 about, but which really is at the heart of everything
4 the United States has talked about. In that context,
5 I was surprised that Mr. Leininger cited the Ivanhoe
6 case, right down to -- to quoting from that case on
7 the question of the relative role of state law in the
8 Reclamation context. That case was -- that language
9 was specifically disavowed by the Supreme Court in
10 1978 in California versus United States, 438 U.S. 645,
11 and the whole discussion revolves around a whole
12 series of Reclamation law cases from the City of
13 Fresno to Ivanhoe to others where the Court in
14 California versus United States said, Well, perhaps
15 those decisions were -- were talked broader than they
16 needed to on the very issue that Mr. Leininger quoted
17 them for, and then at the certain point in time called
18 -- the Supreme Court called all that language at best
19 dictum, and then it said to the extent that that
20 dictum is contrary to what we find in California
21 versus United States, which is that state law controls
22 the allocation of water to Reclamation projects within
23 states, we disavow that language, and it -- it is as
24 clear -- and I'm astounded that Ivanhoe was -- was
25 quoted here for the exact -- the exact language is

1 quoted here that the Supreme Court specifically
2 disavowed in California versus United States. The
3 other kind of global comment I wanted to make was
4 listening to both the districts and the United States'
5 arguments, they talk a lot about the Compact involving
6 the Project and the Reclamation contracts, and that,
7 you know, I know parenthetically that Reclamation
8 contracts can get amended and do get amended all the
9 time. In 2008, they amended things associated with
10 movement of water between the two states.

11 Conspicuously absent in the discussion of the Compact
12 was the apportionment to the states. This is exactly
13 what I mentioned earlier. It is they are arguing to
14 you that the apportionments were to the projects and
15 the districts. There is absolutely no support for
16 that -- for that concept, and we're not saying that
17 this is a case about an equitable apportionment. We
18 agree it's a Compact enforcement case. The equitable
19 apportionment that we're talking about was made in the
20 Compact. That's what the Compact says. This is an
21 equitable apportionment among the states of Texas, New
22 Mexico, and Colorado and so that's what we're talking
23 about. It wasn't an equitable apportionment to the
24 Project, to the United States, to the two districts.
25 Their right to use water is subject to and granted by

1 the states, recognized by Reclamation law in
2 California versus United States.

3 The last point I want to make, because I
4 want to make sure that Mr. Wechsler has sufficient
5 time, is the citation to Arizona v. California and the
6 Boulder Canyon Project Act in the Colorado River. I
7 have -- I recommend in terms of addressing -- and I
8 don't remember now whether it was the United States or
9 Ms. O'Brien that made the argument about Arizona
10 versus California. That case is -- is very clear.
11 What you have on the Colorado River is a -- is a
12 pervasive statutory structure created by Congress that
13 governs the river and where the Court basically said
14 the United States acts as a water master with respect
15 to the river, that you can't have any water, at least
16 in the lower basin, without a -- what they call a
17 Section 5 contract with the Secretary of the Interior.
18 The statutory structure is so pervasive there that --
19 and the Court recognizes that, and that's the context
20 between -- within which the statements that the Court
21 makes about the Colorado River are made. I mean, the
22 Colorado River is so papered over with statutes and
23 authority that -- that they call it the law of the
24 Colorado River, and it goes on for -- for volumes and
25 volumes and volumes. That has nothing to do with what

1 this case is about. That has nothing to do with the
2 apportionments or the operation of the Project on the
3 Rio Grande.

4 That's all I have unless you have any
5 questions, Your Honor.

6 **JUDGE MELLOY:** Thank you.

7 **MR. WECHSLER:** Good afternoon, Your
8 Honor. I'll start with a couple general observations
9 and then I'll turn to the interstate issues. So the
10 first one, really starting where Mr. Somach is leading
11 off again, the position of the United States is
12 inconsistent with Compact law and the law of
13 apportionment, all of this Court's apportionments, and
14 Mr. Somach just mentioned that the U.S. position would
15 essentially provide no apportionment to the states,
16 which is the very purpose of the Rio Grande Compact.
17 The position would also allow the apportionment to
18 change at the discretion of Reclamation, and, again,
19 that provides no apportionment, no division of water
20 at all, and finally, we know that this position is
21 incorrect because the Court said it was. I mean, this
22 is the position that we advocated for in our motion to
23 dismiss at the beginning of the case. There we
24 argued, as the United States does here, that the
25 Compact apportioned water to the Project, protected a

1 supply to the Project. There we argued, as the United
2 States does here, that down below the Project, our --
3 the protections afforded were through Reclamation law.
4 That's the exact argument they're making here today.
5 That motion to dismiss was rejected. The argument is
6 foreclosed. Staying on the general issues and -- and
7 Compact law, Ms. Coleman suggested that the U.S.
8 somehow represents the districts in this case or that
9 the districts have independent rights to water apart
10 from the states. Again, that argument has been raised
11 and rejected by the Court, this time in the motion to
12 intervene. It's, again, inconsistent with the Court's
13 precedent that says that the District's rights may
14 raise no higher than those of the states. We
15 addressed the EP1 suggestion that a Compact is a
16 garden variety statute in our brief. It's a
17 surprising argument given the unique provisions of the
18 constitution that allow for Compacts and the various
19 provisions that the Court has said. Both
20 Mr. Leininger and Ms. Coleman suggests that the
21 Compact is not ambiguous. That's directly contrary to
22 your order on the motion for summary judgment in which
23 you found that the Compact was ambiguous on several
24 points, including most notably the baseline, and as
25 Mr. Wallace explained this morning, it's precisely

1 those ambiguous points that are being resolved
2 pursuant to the authority the Court has given in -- in
3 New Hampshire versus Maine.

4 Turning to the idea that the premature
5 demise of the Project, I think those tales are greatly
6 exaggerated. I want to talk first about Figure 3 and
7 so the United States is mischaracterizing this figure.
8 That figure shows the index based on historical data.
9 There's a number of other ones that were presented in
10 the -- in our declarations. For example, Figure 3 to
11 Mr. Sullivan's declaration also provides another one,
12 this time done through the New Mexico modeling. If
13 you want to understand the scope of what that might
14 look like in --

15 **JUDGE MELLOY:** Excuse me one second.
16 That chart -- that chart that you're talking about --

17 **MR. WECHSLER:** It's Figure --

18 **JUDGE MELLOY:** -- which declaration was
19 that attached to again?

20 **MR. WECHSLER:** The one we showed this
21 morning is Figure 3 to Mr. Brandes' declaration.

22 **JUDGE MELLOY:** And that's in the reply?

23 **MR. WECHSLER:** It's not. It's in the
24 original briefing.

25 **JUDGE MELLOY:** Oh, the original

1 briefing?

2 **MR. WECHSLER:** Correct. In the reply in
3 the second declaration, in Dr. Barroll's second
4 declaration, she gives an idea of the scope of those
5 -- those apportionment transfers, basically that those
6 look like they'll range anywhere from 12 to 30,000
7 acre-feet, but really you can see from the modeling,
8 you can see from that Figure 3, they -- they rarely
9 happen because the index functions the way that we
10 anticipate it was. The reason that the United States
11 is fundamentally misunderstanding that is they were
12 suggesting that, you know, those allocation transfers
13 are additive. In other words, first you do whatever
14 the Operating Agreement does and then you do something
15 additional, but this is the one issue that the United
16 States does not have discretion on, and that is the
17 amount of water that is divided as between the two
18 states. So, of course, you can't do -- send some
19 water to the State of Texas or the State of New Mexico
20 and then change it again. It's that very figure that
21 is being shown that's a depiction of what the index
22 is, what the division of the water is. We've actually
23 evaluated the -- New Mexico has evaluated the amount
24 of water that would go to EBID in a number of
25 different ways using a number of different models.

1 Suffice it to say that we think that it's a very fair
2 apportionment that gives New Mexico 57 percent, 43 to
3 Texas. I will say that on average, approximately 35
4 to 45,000 acre-feet more surface of water will be
5 going to EBID.

6 **JUDGE MELLOY:** Well, let me make sure I
7 understand here, and there isn't any confusion about
8 this. Under the Operating Agreement, as I understand
9 it, there is a -- if we want to use the terminology --
10 transfer of water, of surface water from EBID to EP
11 No. 1 to compensate for groundwater pumping. Is that
12 essentially correct?

13 **MR. WECHSLER:** It's essentially correct.

14 **JUDGE MELLOY:** And part of your
15 complaint was that it was too much, but we'll put that
16 aside for a moment. Under the proposed settlement,
17 there will be these adjustments made based upon the
18 flow through the El Paso gage, the effective El Paso
19 index adjustments. What is the interrelationship
20 between those adjustments, which I think is what's
21 shown on this Figure 3, and the transfers that are
22 already taking place under the Operating Agreement?

23 **MR. WECHSLER:** The transfers that take
24 place on the -- in the Operating Agreement are done
25 basically step one is figure out what the D2 amount to

1 EP No. 1 is. They get that amount essentially.
2 There's a few other, but I'll -- I'll gloss over the
3 details. And then what they do is they determine
4 EBID's allocation based on a diversion ratio. So
5 they're looking at the diversion ratio, both at the
6 beginning of the year and then as the year progresses,
7 and they apply that to EBID, and our complaint focused
8 on the fact that doing that, because there's many of
9 those charge points below the -- the state line, New
10 Mexico gets charged for all deviations from D2, even
11 those actions that were happening down in Texas, so
12 groundwater pumping in Texas, use of municipal
13 effluent in Texas. Now, you're asking about how those
14 two apply. The index -- or how they interrelate, I
15 should say. The index -- those apportionment
16 transfers, what they're doing is essentially ensuring
17 that New Mexico and Texas are receiving 57 and 43
18 percent of Project supply. So overall, as we said, we
19 want to make sure that that's within those guardrails.
20 Now, the United States, if it wanted to, could
21 continue to apply in the initial stage a diversion
22 ratio, and it could continue to -- to do that, but at
23 the end --

24 **JUDGE MELLOY:** When you say "diversion
25 ratio," you're talking about what's in the Operating

1 Agreement?

2 **MR. WECHSLER:** That's correct. Yes.

3 **JUDGE MELLOY:** Okay.

4 **MR. WECHSLER:** The difference is
5 ultimately they have to be allocating an amount that's
6 consistent with the index because it's the index that
7 derives from the Compact, and as we've talked about,
8 the Compact is the one that sets the apportionment as
9 between the states. So ultimately, it's that index
10 that's meaningful to the states because as we measure
11 it, we're going to be looking at the end of the year
12 to see, you know, did New Mexico satisfy its index
13 obligation or not and -- and where we are overall, and
14 so that has to -- the -- the allocations have to be
15 consistent with that because ultimately, that's the
16 division of water.

17 **JUDGE MELLOY:** So would it be -- so if I
18 understand correctly, it's theoretically possible that
19 if they -- if they continue to use the Operating
20 Agreement and the diversion ratios under the Operating
21 Agreement, that could -- could satisfy New Mexico's
22 obligation under the index?

23 **MR. WECHSLER:** The expectation actually
24 is that the Project operations are going to track very
25 closely with the -- the index obligation, if that's

1 what you're asking. And part of that is -- that will
2 particularly be true if the Project goes to a two-year
3 regression. The -- you know, and then the amount
4 allocated to EP No. 1 will very closely track what the
5 index does. That's the amount that they'll be allowed
6 to order on any given time and -- and as you've heard
7 at trial, the water that's ordered is -- is
8 essentially tracked down to the state line with very
9 little deviations from it.

10 So turning then to another issue, and
11 that is throughout this briefing, the U.S. has been
12 unable to answer the question of what additional
13 relief they would seek after entry of this consent
14 decree, and that's true because the consent decree
15 ensures that Texas will receive its apportionment. So
16 the issue of interference goes away. Now, U.S.
17 suggests that there is no obligation to reduce
18 depletions in the consent decree. That's incorrect.
19 The index sets limits on New Mexico water use and
20 depletions based on the D2 period, and New Mexico is
21 forced to live within that because we're obligated to
22 deliver the index to Texas. You just heard the United
23 States say, well, what it is we really want is a
24 decree that sets some sort of limit but that allows
25 New Mexico the kind of discretion in order to ensure

1 that limit, and what I would pose to you is that is
2 precisely what we have here. That is what the index
3 does. It sets the limits and then it allows New
4 Mexico the sovereign discretion to ensure that it is
5 fulfilling those limits. So it's really not the level
6 of depletions, which as I said are in the -- the index
7 itself that the U.S. is concerned about. It's the
8 how. How will the state of New Mexico administer
9 water? It wants to reach inside New Mexico, and it
10 wants to tell New Mexico, Here are the specific water
11 users that must be changed or turned down, or here are
12 the specific provisions that you must take in order to
13 comply with the Compact. But there's a number of
14 problems with that. First, the Court has repeatedly
15 recognized and honored a state sovereign authority to
16 accomplish Compact compliance in the manner that it
17 deems to be most appropriate, and for that, I would
18 point you to the Kansas versus Colorado case, the
19 Kansas versus Nebraska case, and most recently the
20 Kansas versus Wyoming case. The how is
21 quintessentially an intrastate issue with intrastate
22 remedies, as very ably discussed by the New Mexico
23 amici, and those remedies afford complete relief. So
24 to give you an example, if at any year, the Project
25 was concerned that, you know, there's additional

1 depletions being caused, we're unable to deliver our
2 water, going to the state engineer, seeking priority
3 administration, seeking use of the various tools that
4 the state engineer identified is a mechanism by which
5 he would say that's correct, the state -- the Project
6 is not receiving its right, and here is what we have
7 to do in order to comply with that. So it -- those --
8 those remedies are complete, and there's no reason --
9 and the U.S. offers none why those can't be
10 accomplished here.

11 **JUDGE MELLOY:** It seems like the concern
12 here is that if New Mexico doesn't commit to specific
13 remedies to address depletions or Project
14 interference, that we -- we get back to what we sort
15 of started to talk about first thing this morning,
16 which is, well, just take the easier way out and take
17 the water from EBID, and -- which may or may not
18 interfere with Reclamation contracts but would be
19 something that EBID farmers would be very upset with.
20 So what -- what's your response to -- to the concern
21 that you're just going to take it from EBID?

22 **MR. WECHSLER:** Yeah. And I provided
23 that this morning. I mean, I don't think that that's
24 a correct reading of the -- the consent decree itself,
25 which obligates New Mexico to administer water

1 consistent with the index. I mean, that is a Supreme
2 Court decree directed at a sovereign state, New
3 Mexico, saying you must do that. I mean, there is no
4 indication, no evidence whatsoever that New Mexico is
5 not going to comply with that, and I also --

6 **JUDGE MELLOY:** But one way to comply is
7 just to divert the water. I guess that's the -- I
8 think that's the argument. Well, you say you could do
9 all these different things, but one of them is -- and
10 actually at the end of the day, one of them is
11 required is that you -- is that you transfer EBID's
12 allocation to EP No. 1 and that that -- and that
13 that's -- you know, you say you could do all these
14 other things, but at the end of the day, you'll just
15 do the easy one, which is the transfer.

16 **MR. WECHSLER:** I think that's
17 inconsistent with the index, I mean, with the consent
18 decree because the consent decree requires
19 administration consistent with the index, but what
20 that separate provision is doing is not administration
21 at all. I mean, that's a -- that's a transfer of
22 apportionment, and so I don't see how those two -- how
23 New Mexico could be in compliance if all it said was,
24 you know what, we're not doing a single thing here,
25 and all we're going to do is rely on that provision.

1 The index would not work. It wouldn't be to New
2 Mexico's benefit, and the reason that's true is if New
3 Mexico continued to allow unchecked groundwater
4 pumping, then what would happen gradually is our
5 aquifer would continue to decline, the percentage of
6 surface water that we actually got would reduce
7 because we'd be taking our apportionment through
8 groundwater. It would be more expensive, and it would
9 cause a significant problem in our aquifer, all the
10 things that you've heard are concerns to the state and
11 the state engineer. The state engineer, also in his
12 declaration, pointed out, and you heard Ms. Davidson
13 mention this, you know, that there are already efforts
14 afoot in the New Mexico legislature to be addressing
15 this very issue. New Mexico is seeking significant
16 dollars in order to get additional personnel down in
17 the Lower Rio Grande to be able to address
18 administration. There's also significant -- a very
19 significant appropriation being sought for things like
20 fallowing and depletion reduction programs, and so
21 those things are already afoot, and I don't know what
22 else to say to the Court other than, again, the chief
23 water official of the State of New Mexico has
24 indicated that this is going to be done. If you
25 needed additional reassurance, what I would point to

1 is New Mexico is also party to a number of other
2 decrees in other cases, the Animas La Plata, the
3 Canadian, most recently the Pecos decree, which does
4 set a state line delivery, and in each one of those
5 cases, once the apportionment was established, it was
6 determined what that -- that apportionment was. New
7 Mexico has been in full compliance with each one of
8 those decrees, including the state line delivery, and
9 so there's simply no indication, evidence, and it
10 would be inappropriate for the Court to be saying,
11 well, we don't think New Mexico is simply going to
12 comply.

13 And turning back to the how. Allowing
14 the U.S. to govern that how, as we've discussed, I
15 haven't really heard an answer, other than the
16 miscitation to the Ivanhoe case and that is that we
17 know that Reclamation has a very long history of
18 deference to state law in both its definition of water
19 and the distribution of that.

20 I want to end on the question of the
21 impact of the consent decree on the LRG. You hear the
22 United States suggest it will be a disaster. We think
23 the opposite. We think that the consent decree was a
24 very significant accomplishment. It will set the
25 division of water between the states going forward.

1 It will help provide clarity and stability. That's an
2 overarching issue, and we think that will help
3 everything else fall into place. We think that it's
4 good for all three of the Compacting states, and we
5 ask that it be approved. Thank you.

6 **JUDGE MELLOY:** Let me ask one other
7 issue. What -- what litigation is ongoing in state
8 court that will continue that might address some of
9 the issues that -- I know this is covered in the
10 briefing, but just -- what do you understand --
11 particularly if you dismiss your complaint on the
12 Operating Agreement, what other litigation is ongoing
13 that would address some of these issues?

14 **MR. WECHSLER:** The LRG adjudication is
15 the place in which all of the water rights are defined
16 in New Mexico and so that one is ongoing. There's a
17 number of issues that direct -- are directed
18 specifically at the rights both of the Project and of
19 the -- of EBID. It also has the benefit of addressing
20 each and every one of the water users in the Lower Rio
21 Grande. That's what it's designed to do. So that is
22 -- there have been a number of global stream system
23 issues that have been resolved, but that is an ongoing
24 process and certainly available for the Project to be
25 addressing almost all of these issues. There's also,

1 you see in the briefs the reference to what is
2 sometimes referred to as a quiet title suit. That one
3 was stayed. There, the United States brought a claim
4 seeking quiet title to its water rights as to, you
5 know, the definition of its water rights and what it
6 was vis-a-vis other New Mexico water users. It went
7 up to the 10th Circuit. The 10th Circuit essentially
8 -- I mean it set as a matter of a stay -- sort of
9 prudential stay, allowed that matter to be stayed, but
10 it's technically still alive, pending the need for
11 that case to be brought back up. I believe there is
12 still a lawsuit that was filed over the -- the lack of
13 an operating agreement filed in approximately 2006. I
14 think there were some claims particularly brought by
15 the City of Las Cruces and maybe some brought by the
16 United States and so those are three that I can think
17 of.

18 **JUDGE MELLOY:** Okay. All right. Thank
19 you. Anything else from the proponents?

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

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

22 **JUDGE MELLOY:** All right. If not, we'll
23 show the matter submitted and get an order out in due
24 course.

25 Just to circle back for one minute on

1 this whole issue of whether there will or will not be
2 further negotiations concerning settlement. I'm not
3 going to do anything in that -- other than to ask
4 Judge Boylan to contact the parties. If you want to
5 work with Judge Boylan further, I'm sure he'll be
6 available. If you tell him no, I guess that'll be the
7 end of it and leave it up to the parties to decide if
8 they want to discuss some of these issues further with
9 or without the benefit of the mediator and -- but
10 other than that, I don't plan to do anything further.

11 All right. Thank you, everyone. It's
12 been a long day. I appreciate you.

13 (The proceedings adjourned at 4:28 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 18th day of May, 2023.



Heather L. Garza

HEATHER L. GARZA, CSR, RPR, CRR

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