

No. 141 Original

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In The  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF AUGUST 19, 2015  
ORAL ARGUMENT BEFORE  
A. GREGORY GRIMSAL, ESQ.  
SPECIAL MASTER

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Appearances:

For the State of Texas:

Somach Simmons & Dunn, P.C.  
BY: STUART L. SOMACH, ESQ.  
ANDREW M. HITCHINGS, ESQ.  
ROBERT B. HOFFMAN, ESQ.  
FRANCIS GOLDSBERRY II, ESQ.  
500 Capitol Mall, Suite 1000  
Sacramento, California 95814

For the State of  
New Mexico:

State of New Mexico  
Office of the Attorney General  
BY: SARAH A. BOND, ESQ.  
Post Office Drawer 1508  
Sante Fe, New Mexico 87504

Appearances:

For the State of  
New Mexico:

Montgomery & Andrews, P.A.  
BY: JEFFREY J. WECHSLER, ESQ.  
325 Paseo de Peralta  
Santa Fe, New Mexico 87501

For the State of  
New Mexico:

Trout Raley Montano Witwer  
& Freeman, P.C.  
BY: LISA M. THOMPSON, ESQ.  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203

For the State of  
New Mexico:

Draper & Draper, LLC  
BY: JOHN B. DRAPER, ESQ.  
325 Paseo de Peralto  
Santa Fe, New Mexico 87501

For the State of  
Colorado:

Colorado Department of Law  
BY: CHAD M. WALLACE, ESQ.  
1300 Broadway  
Denver, Colorado 80203

For the United States:

U.S. Department of Justice  
BY: JAMES J. DUBOIS, ESQ.  
A. LEE LEININGER, ESQ.  
999 18th Street  
South Terrace - Suite 370  
Denver, Colorado 80202

For the United States:

U.S. Department of Justice  
BY: STEPHEN M. MACFARLANE, ESQ.  
501 I Street, Suite 9-700  
Sacramento, California 95814

For the City of  
Las Cruces, New Mexico:

Stein & Brockmann, P.A.  
BY: JAY F. STEIN, ESQ.  
JAMES C. BROCKMANN, ESQ.  
Post Office Box 2067  
Santa Fe, New Mexico 87504

Appearances:

For the City of El Paso:

Bickerstaff Heath Delgado  
Acosta, LLP  
BY: DOUGLAS G. CAROOM, ESQ.  
2711 S. MoPac Expressway  
Building One, Suite 300  
Austin, Texas 78746

For El Paso County Water  
Improvement District  
No. 1:

JAMES M. SPEER JR., ESQ.  
300 East Main Street, Suite 1032  
El Paso, Texas 79901

For El Paso County Water  
Improvement District  
No. 1:

Modrall Sperling Roehl Harris  
& Sisk, P.A.  
BY: MARIA O'BRIEN, ESQ.  
Post Office Box 2168  
Albuquerque, New Mexico 87102

Official Court Reporter:

Toni Doyle Tusa, CCR, FCRR  
500 Poydras Street, Room B-275  
New Orleans, Louisiana 70130  
(504) 589-7778

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09:01 1 warning before the end of your allotted time, although I will  
09:01 2 exercise some discretion and flexibility as to when you  
09:01 3 actually get cut off.

09:01 4 Let me make an observation about how I am  
09:01 5 approaching the oral argument this morning. I know that you  
09:01 6 all have important arguments to make, some information you want  
09:01 7 to impart to me and a story you want to tell. I want to give  
09:02 8 you an opportunity to make those arguments and impart that  
09:02 9 information, and I want to hear you and listen to you. I'm  
09:02 10 going to try to exercise some self-discipline and keep my  
09:02 11 questions until the end of your presentation. Let me repeat.  
09:02 12 I'm going to try to exercise some self-discipline and keep  
09:02 13 those questions till the end.

09:02 14 I know we don't often, or indeed ever, actually  
09:02 15 get to sit together in the same room. If for any reason  
09:02 16 counsel feel that a status conference would be useful after the  
09:02 17 oral argument, we can certainly accommodate that and meet with  
09:02 18 you.

09:02 19 As I said, the order of oral argument is set out  
09:02 20 in the case management order. With that, I'm going to ask  
09:03 21 counsel to make your appearances for the record. Please  
09:03 22 indicate, for the benefit of Ms. Tusa, as to which one of you  
09:03 23 is actually going to present the oral argument.

09:03 24 Texas.

09:03 25 **MR. SOMACH:** Well, I will certainly start. My name

09:03 1 is Stuart Somach. I will be arguing for the State of Texas. I  
09:03 2 have other attorneys with me. I think I will allow them to  
09:03 3 introduce themselves.

09:03 4 **THE SPECIAL MASTER:** That's fine.

09:03 5 **MR. HITCHINGS:** Good morning, Your Honor. Andrew  
09:03 6 Hitchings appearing for the State of Texas.

09:03 7 **THE SPECIAL MASTER:** Good morning.

09:03 8 **MR. HOFFMAN:** Good morning, Your Honor. Robert  
09:03 9 Hoffman. I'm appearing for the State of Texas.

09:03 10 **MR. GOLDSBERRY:** Good morning, Your Honor. Francis  
09:03 11 Goldsberry for the State of Texas.

09:03 12 **THE SPECIAL MASTER:** New Mexico.

09:03 13 **MS. BOND:** Good morning, Your Honor. Sarah Bond for  
09:03 14 the State of New Mexico. I'll be making the oral argument  
09:03 15 today. With me at counsel table are Jeff Wechsler of the  
09:04 16 Montgomery & Andrews firm and Lisa Thompson of the Trout Raley  
09:04 17 firm.

09:04 18 We are also honored to have the Attorney General  
09:04 19 of the State of New Mexico with us, Hector Balderas --

09:04 20 **THE SPECIAL MASTER:** Good morning.

09:04 21 **MS. BOND:** -- and the division director for the  
09:04 22 environmental protection division, Steve Farris.

09:04 23 **MR. FARRIS:** Good morning, Your Honor.

09:04 24 **THE SPECIAL MASTER:** Good morning.

09:04 25 **MS. BOND:** We also have the state engineer for the

09:04 1 State of New Mexico, who is also the Rio Grande Compact  
09:04 2 Commissioner for New Mexico, Mr. Tom Blaine, and his general  
09:04 3 counsel, Greg Ridgley. Also here are Deborah Dixon, who is the  
09:04 4 Interstate Stream Commission Director, and her general counsel,  
09:04 5 Amy Haas. Also here for the State of New Mexico are Ken Knox,  
09:04 6 Peter Cole, and Rolf Schmidt-Petersen, as well as John Draper,  
09:04 7 who is counsel of record as well. I think that's it.

09:04 8 **THE SPECIAL MASTER:** Thank you. Good morning.  
09:04 9 Colorado.

09:05 10 **MR. WALLACE:** Good morning, Your Honor. Chad Wallace  
09:05 11 for the State of Colorado. With me in the gallery are Mike  
09:05 12 Sullivan, the chief deputy state engineer for Colorado, as well  
09:05 13 as Mr. Bill Paddock representing a variety of irrigation  
09:05 14 interests in the San Luis Valley of Colorado.

09:05 15 **THE SPECIAL MASTER:** Thank you.  
09:05 16 The United States.

09:05 17 **MR. DUBOIS:** Good morning, Your Honor. James DuBois  
09:05 18 for the United States. With me at counsel table are Lee  
09:05 19 Leininger and Steve Macfarlane from the Department of Justice  
09:05 20 as well.

09:05 21 **THE SPECIAL MASTER:** Thank you.  
09:05 22 City of Las Cruces.

09:05 23 **MR. STEIN:** Good morning, Your Honor. My name is Jay  
09:05 24 Stein, representing the amicus curiae, the City of Las Cruces,  
09:05 25 New Mexico, and I will be presenting oral argument.



09:05 1           **MR. BROCKMANN:** Good morning, Your Honor. Jim  
09:05 2 Brockmann, also with the firm of Stein & Brockmann,  
09:05 3 representing the City of Las Cruces.

09:05 4           **THE SPECIAL MASTER:** Thank you.

09:05 5                     The City of El Paso.

09:05 6           **MR. CAROOM:** Doug Caroom, Your Honor, representing  
09:05 7 the City of El Paso. I will be presenting the argument.

09:06 8           **THE SPECIAL MASTER:** El Paso Consolidated Water  
09:06 9 Improvement District.

09:06 10           **MR. SPEER:** Your Honor, I'm James Speer. I represent  
09:06 11 El Paso County Water Improvement District No. 1. At the table  
09:06 12 beside me is Ms. Maria O'Brien, my co-counsel.

09:06 13                     We had hoped that we might be allowed to divide  
09:06 14 our argument, Your Honor. Your order allows us to have  
09:06 15 15 minutes total. If that is permissible, we would like to do  
09:06 16 that.

09:06 17           **THE SPECIAL MASTER:** That's correct. That's fine.

09:06 18           **MR. SPEER:** We have a number of people from El Paso.  
09:06 19 I won't try to mention them all. I will mention that the  
09:06 20 president of the board of directors of the district, Mr. John  
09:06 21 Stubbs, is here and also the general manager, Mr. Jesus Reyes,  
09:06 22 and if they would stand.

09:06 23                     That's all I would have at this moment,  
09:06 24 Your Honor. Thank you.

09:06 25           **THE SPECIAL MASTER:** Thank you, Mr. Speer.

09:06 1 Ms. Bond, the clock starts when you start.

09:07 2 **MS. BOND:** I'm ready to go, I guess. Good morning,  
09:07 3 Your Honor. If it pleases the Court, my name is Sarah Bond,  
09:07 4 counsel of record for the State of New Mexico.

09:08 5 We have a map here of the Rio Grande Compact for  
09:08 6 your consideration, just a demonstrative exhibit to show the  
09:08 7 general contours -- which I do think looks like a seahorse --  
09:08 8 of the basin and the area covered by the compact itself.

09:08 9 As you mentioned, today is a hearing on  
09:08 10 New Mexico's motion to dismiss. So for the purposes of this  
09:08 11 motion, which is in the nature of a motion under Rules of Civil  
09:08 12 Procedure Rule 12(b)(6), we are required to assume the truth of  
09:08 13 allegations that are not merely formulaic or a recitation of  
09:08 14 elements of a claim. For that purpose, although we would  
09:08 15 dispute these facts if the matter proceeds to trial, we will  
09:08 16 assume that New Mexico's water users have increased their uses  
09:09 17 within the Lower Rio Grande, that is to say, below  
09:09 18 Elephant Butte Reservoir, below the delivery point for the  
09:09 19 compact, since the signing of the compact.

09:09 20 If you have any questions later about which  
09:09 21 allegations we might not be entitled to the presumption of  
09:09 22 truth, I would invite you actually to interrupt me because,  
09:09 23 being Irish, I have a tendency to go off on frolic and detours.  
09:09 24 So if you ask a question when it first comes to your mind, I  
09:09 25 think we can have a more productive dialogue.

09:09 1 If I don't use the whole hour, which I hope not  
09:09 2 to, I would like to reserve that and tack that onto my other  
09:09 3 15 minutes for rebuttal.

09:09 4 **THE SPECIAL MASTER:** That's fine.

09:09 5 **MS. BOND:** Thank you.

09:09 6 The Texas and United States complaints should be  
09:09 7 dismissed for failure to state a compact claim. By every  
09:09 8 method of compact interpretation that this Court has approved,  
09:09 9 Texas and the United States have failed to plead a compact  
10 claim.

09:09 11 First and most importantly, the Texas claims  
09:09 12 have no support in the plain language or express terms of the  
09:10 13 compact. The compact is a federal and state statute as well as  
09:10 14 a contract among the states; therefore, in a compact dispute  
09:10 15 the Court looks first to its express terms.

09:10 16 Of course, unlike other types of federal  
09:10 17 statutes, a compact is first bargained for among the states,  
09:10 18 using their reserved powers under the Tenth Amendment, and then  
09:10 19 ratified by Congress under the compact clause. So it is the  
09:10 20 states' intent that counts, the states who are parties to the  
09:10 21 compact, unless, of course, Congress amends the compact when it  
09:10 22 passes it, which it does with some compacts but did not with  
09:10 23 this one.

09:10 24 And the Court cannot grant relief inconsistent  
09:10 25 with the terms of the compact. That's because obviously it's

09:10 1 both state statutes of each party state as well as a federal  
09:10 2 statute. These complaints, though on the surface merely asking  
09:10 3 for an order for New Mexico to comply with the compact,  
09:10 4 effectively seek relief inconsistent with the terms of the  
09:11 5 compact because they seek the Court to order New Mexico to get  
09:11 6 a certain amount of water to the Texas-New Mexico state line or  
09:11 7 to cease interfering or impeding -- which is one of those  
09:11 8 allegations of the United States and Texas which is not  
09:11 9 entitled to a presumption of truth as it is a mixed allegation  
10 of law and fact -- to cease interfering or impeding,  
09:11 11 quote/unquote, the authority of the United States to operate  
09:11 12 the Rio Grande Project. Of course, that is not a duty that is  
09:11 13 imposed by the compact.

09:11 14 The first request is inconsistent with the  
09:11 15 compact, which requires New Mexico to deliver instead to  
09:11 16 Elephant Butte, not the state line, and the second is simply  
09:11 17 not a compact claim. As the Court said in *Texas v. New Mexico*,  
09:11 18 "Unless the compact to which Congress has consented is somehow  
09:11 19 unconstitutional, no court may order relief inconsistent with  
09:11 20 its express terms." Accordingly, where the terms of the  
09:12 21 compact are unambiguous, the Court must give effect to the  
09:12 22 express mandate of the signatory states.

09:12 23 Now, what does the compact itself provide? In  
09:12 24 Article III the compact requires Colorado to deliver a certain  
09:12 25 amount of water at the Colorado-New Mexico state line -- that's

09:12 1 in Article III. If I'm brave, I might try to use the machine  
09:12 2 here to highlight the approximate area of the  
09:12 3 Colorado-New Mexico state line.

09:12 4 You see a gage there marked "Lobatos gage."  
09:12 5 That is the compact gage that measures the compact compliance  
09:12 6 of Colorado to New Mexico.

09:12 7 Article IV, it reads "the obligation of  
09:12 8 New Mexico to deliver water in the Rio Grande at San Marcial  
09:12 9 during each calendar year," and then it refers to indices  
09:12 10 quantities in Article IV. Now, the indices refer to two gages,  
09:12 11 the Otowi gage -- I'm not sure I can circle it -- up near  
09:13 12 Espanola, above Cochiti Dam, and the San Marcial gage, which  
09:13 13 had to be removed because it was inoperable, unable to be  
09:13 14 maintained, which actually the engineer advisers in 1938  
09:13 15 foresaw that the river meandered and moved around. It's really  
09:13 16 delta-like down there. In fact, we have airboats that we hired  
09:13 17 from Louisiana to try and dredge that canal to get more water  
09:13 18 into the reservoir because it's so sloppy. So that gage is not  
09:13 19 really functional, so they moved the gage to Elephant Butte  
09:13 20 Dam, and that is where our compact compliance is measured.

09:13 21 You can see there in the little boxes, "gage  
09:13 22 below Elephant Butte Dam." At that point the river is a very  
09:13 23 stationary channel and the gage there is much more operable.  
09:13 24 They also show the gage below Caballo Dam. Caballo was added  
09:14 25 after the actual signing of the compact, at least by the

09:14 1 states, although it was in planning stage at the time. Then if  
09:14 2 you can see, the New Mexico-Texas state line is quite a bit  
09:14 3 below Elephant Butte Dam and also below the City of Las Cruces,  
09:14 4 the second largest city in New Mexico.

09:14 5 Those are the main geographic features for my  
09:14 6 purposes, and if you have any other questions, please feel free  
09:14 7 to ask them.

09:14 8 Every federal court to review the compact has  
09:14 9 held that New Mexico's obligation to Texas is to deliver to the  
09:14 10 project for the obvious reason that that's what the compact  
09:14 11 says. The Western District of the U.S. District Court of Texas  
09:14 12 so held in 1955. We cited that case in our brief. It points  
09:14 13 out the bargain that Texas made was to assure that New Mexico  
09:14 14 absolutely guarantee a certain amount of water to the project,  
09:15 15 not to the state line.

09:15 16 As the Texas compact commissioner, Frank  
09:15 17 Clayton, represented shortly after the states had ratified the  
09:15 18 compact, New Mexico could not be expected to guarantee a  
09:15 19 specific amount would reach the state line, because once the  
09:15 20 water is delivered to Elephant Butte Reservoir, it is in the  
09:15 21 custody and control of the United States. I would refer you to  
09:15 22 the appendices of our brief in which he says that. We would  
09:15 23 suggest that Texas cannot rework the deal now that it made in  
09:15 24 1938, because it didn't get any express requirement to deliver  
09:15 25 to the state line in the compact.

09:15 1 Both Texas and the United States admit there is  
09:15 2 no express requirement that New Mexico assure a certain amount  
09:16 3 of water reaches the Texas border, but this Court is being  
09:16 4 asked to essentially grant that relief. The very connected  
09:16 5 issue that Texas has alleged the compact requires New Mexico to  
09:16 6 do is the issue we call the 1938 condition wherein Texas  
09:16 7 alleges we are limited to a 1938 level of depletion below  
09:16 8 Elephant Butte.

09:16 9 It's also important to notice no one has alleged  
09:16 10 that we have increased acreage, because the acreages of the  
09:16 11 project are set, that is, the acres irrigated by the project  
09:16 12 below Elephant Butte and above Fort Quitman. Those acreages  
09:16 13 have not increased. Both the State of Texas and the  
09:16 14 United States have alleged that we have allowed new water uses,  
09:16 15 but again the judicial record could note that New Mexico has  
09:16 16 not issued any new water rights in the Lower Rio Grande since  
09:17 17 probably the project. There may be a 1914 right in there  
09:17 18 somewhere. And the State of New Mexico closed the groundwater  
09:17 19 permitting in 1980. So all of the additional wells that have  
09:17 20 been drilled were supplemental wells drilled to replace  
09:17 21 existing wells, and the applicants are required to prove that  
09:17 22 historic uses are not exceeded.

09:17 23 So this 1938 condition is also not in the  
09:17 24 compact. The compact drafters, however, knew how to draft such  
09:17 25 a condition because they had one in the 1929 compact. The 1929

09:17 1 compact expressly required in Article XII that New Mexico  
09:17 2 agreed with Texas "that prior vested rights above and below  
09:17 3 Elephant Butte Reservoir will never be impaired hereby, that  
09:17 4 she will not cause or suffer the water supply of the  
09:17 5 Elephant Butte Reservoir to be impaired by new or increased  
09:18 6 diversion or storage within the limits of New Mexico unless and  
09:18 7 until such depletion is offset by increase of drainage return."  
09:18 8 That's Article XII in the 1929 compact. It was not included in  
09:18 9 the 1938 compact.

09:18 10 The plaintiffs have it exactly backwards. The  
09:18 11 1938 compact was intended to free the upstream states of  
09:18 12 Colorado and New Mexico from the constraints that had limited  
09:18 13 development on the Rio Grande from about 1896, I believe, on  
09:18 14 and off but for most of the period up until 1938. So they  
09:18 15 clearly knew how to draft a limitation on depletions and they  
09:18 16 clearly know how to draft a state line requirement because  
09:19 17 Colorado is required to deliver to the state line.

09:19 18 Neither of those was included in the 1938  
09:19 19 compact, and it's our position that this Court cannot grant  
09:19 20 relief that would require such a delivery or require New Mexico  
09:19 21 to cede her jurisdiction over water development, because those  
09:19 22 terms are clearly not in the compact.

09:19 23 As a point of clarification, although New Mexico  
09:19 24 does not control the allocation of the Rio Grande Project -- I  
09:19 25 believe one of the plaintiffs refers to it as relinquishing



09:19 1 control -- we retain jurisdiction over southern New Mexico  
09:19 2 because, as Justice Sotomayor remarked in the *Tarrant* case, a  
09:19 3 state does not cede its jurisdiction lightly and certainly  
09:19 4 would not cede it silently. States rarely relinquish their  
09:19 5 sovereign powers. So when they do, we would expect a clear  
09:20 6 indication of sufficient devolution, not inscrutable silence.

09:20 7 So *Tarrant* is directly on point. They are  
09:20 8 suggesting that this Court order relief inconsistent with the  
09:20 9 compact, which it cannot. The Court, also in *Tarrant*, recently  
10 noted that compacts should be interpreted with this strong  
11 background presumption that sovereign states who negotiated  
12 them do not restrict their jurisdiction easily. It should be  
13 noted that Texas has not restricted its water development, and  
14 yet they are seeking essentially an order that this Court  
15 require New Mexico to do the same.

09:20 16 *Alabama v. North Carolina* is also directly on  
17 point. The Court reaffirmed it is "reluctant to read absent  
18 terms into an interstate compact given the federalism and  
19 separation of powers concerns that would arise were we to  
20 rewrite an agreement among sovereign states to which the  
21 political branches consented."

09:21 22 As I indicated, comparing this compact with  
23 other interstate compacts, which is another approved technique  
24 of interpreting compacts, I would note that the special master  
25 in the *Republican*, in his first report of 2000, which is up on

09:21 1 the Supreme Court website, on page 19 talked about the analysis  
09:21 2 for interpreting compacts and specifically looked not only at  
09:21 3 other interstate compacts but also the predecessor compacts to  
09:21 4 the Republican. New Mexico's position is that the Court apply  
09:21 5 those same analytic tools to interpret this compact.

09:21 6 As I indicated, the 1929 compact has express  
09:21 7 language limiting New Mexico's development below  
09:21 8 Elephant Butte. The 1938 compact does not. I would also note  
09:21 9 that the 1929 compact, which was fully intended to restrict  
09:21 10 New Mexico from developing throughout the Rio Grande, had  
09:22 11 additional gaging stations with which those limitations could  
09:22 12 be measured. They had gaging stations at Courchesne, Tornillo,  
09:22 13 and Fort Quitman. Those gaging stations were removed in the  
09:22 14 1938 compact because New Mexico has no compact obligation below  
09:22 15 the reservoir. So we know the parties understood how to craft  
09:22 16 such a limitation, and they simply did not include it in this  
09:22 17 compact.

09:22 18 We noted in our brief the Pecos River Compact,  
09:22 19 another compact being negotiated about this time, expressly  
09:22 20 contains a 1947 condition requirement. The Arkansas River  
09:22 21 Compact also has material depletion in Article IV(D), which  
09:22 22 although it doesn't use the *state line* word in that section, it  
09:22 23 does refer to the waters of the Arkansas River, and that  
09:22 24 definition includes reference to the state line. So, again, we  
09:23 25 have other compacts that may require depletion limitations but

0 9 : 2 3 1 do reference a state line, and this compact does not.

0 9 : 2 3 2 Again, in the Arkansas it referred to human,  
0 9 : 2 3 3 man-made activity, depletion by the actions of man, and clearly  
0 9 : 2 3 4 groundwater pumping would be such an activity. This compact  
0 9 : 2 3 5 does not have such a limitation below Elephant Butte. There is  
0 9 : 2 3 6 depletion language in Article IV. It refers only to the  
0 9 : 2 3 7 tributaries above Otowi Bridge and not below Elephant Butte.

0 9 : 2 3 8 Another compact of interest is the Yellowstone  
0 9 : 2 3 9 River Compact, and that compact also includes springs and  
0 9 : 2 3 10 swamps, which clearly implicates water below the surface of the  
0 9 : 2 3 11 ground.

0 9 : 2 3 12 Further, the course of conduct of the parties  
0 9 : 2 3 13 reveals that this compact commission, unlike, for example, the  
0 9 : 2 4 14 Republican, has never dealt with depletions in New Mexico below  
0 9 : 2 4 15 Elephant Butte officially on the record. All of their  
0 9 : 2 4 16 accounting is relative to whether New Mexico delivers at  
0 9 : 2 4 17 Elephant Butte, not the state line. There are questions with  
0 9 : 2 4 18 respect to technical issues of river gain and river loss below  
0 9 : 2 4 19 Caballo, but that's a matter of just understanding how the  
0 9 : 2 4 20 river works.

0 9 : 2 4 21 Finally, the negotiation and legislative history  
0 9 : 2 4 22 of the Rio Grande Compact, including the contemporaneous  
0 9 : 2 4 23 writings of Frank Clayton and technical adviser Raymond Hill,  
0 9 : 2 4 24 strongly support New Mexico's argument that Texas knew exactly  
0 9 : 2 4 25 what it was getting when it bargained for this compact. It

0 9 : 2 4 1 bargained for a guaranteed supply to the reservoir, which does  
0 9 : 2 4 2 limit New Mexico depletions above Elephant Butte Dam but not  
0 9 : 2 4 3 below.

0 9 : 2 4 4 Texas wrongly claims that New Mexico contends  
0 9 : 2 4 5 the only way Texas can enforce its compact rights is through  
0 9 : 2 5 6 New Mexico state law, from a reclamation priority call to  
0 9 : 2 5 7 junior appropriators. New Mexico does not argue that. We  
0 9 : 2 5 8 argue that Texas may enforce against either upstream party, for  
0 9 : 2 5 9 example, for violation of the storage restriction in  
0 9 : 2 5 10 Article VII. Once the Elephant Butte Reservoir falls below  
0 9 : 2 5 11 400,000 acre feet, in order to keep the balance of the river  
0 9 : 2 5 12 appropriate for maximum beneficial use, which is required under  
0 9 : 2 5 13 both reclamation law and New Mexico state law, there's an  
0 9 : 2 5 14 Article VII restriction against either upstream state storing  
0 9 : 2 5 15 waters in reservoirs built after 1929. That kind of a cause of  
0 9 : 2 5 16 action has been brought before and can certainly be brought  
0 9 : 2 5 17 again.

0 9 : 2 5 18 Texas can't simply change the delivery point now  
0 9 : 2 5 19 because, based on hindsight and climate change, it thinks now  
0 9 : 2 6 20 with hindsight that maybe it didn't make as good a bargain as  
0 9 : 2 6 21 it thought it made. The fact is it understood the bargain it  
0 9 : 2 6 22 made at the time, and the Court is not free to rewrite it.

0 9 : 2 6 23 The United States' complaint must also be  
0 9 : 2 6 24 dismissed. Although the United States' complaint -- excuse me.  
0 9 : 2 6 25 Strike that.

09:26 1           While New Mexico asserted the U.S. presence was  
09:26 2 required if the Court were to hear the Texas compact claims  
09:26 3 when we filed our brief in opposition to the motion for leave,  
09:26 4 that position did not encompass the assertion that the  
09:26 5 United States could file its own additional claims in this  
09:26 6 case. I note that when the United States filed its initial  
09:26 7 brief for reliance on its jurisdictional authority of the  
09:26 8 Court, it cited only 28 U.S.C. § 1251(a), and it has added now  
09:27 9 § 1251(b) which, of course, is the nonexclusive original  
09:27 10 jurisdiction of a case that would include the United States in  
09:27 11 a state dispute.

09:27 12           The Court recently affirmed in *Alabama v.*  
09:27 13 *North Carolina*, which was in the question about whether the  
09:27 14 commission itself could remain as a party when some of the  
09:27 15 claims were dismissed, that a nonstate party to a compact in a  
09:27 16 compact enforcement action cannot bring any of its own claims,  
09:27 17 and the Court remanded -- I think Justice Scalia -- for a  
09:27 18 determination of whether the commission's claims were exactly  
09:27 19 the same as the plaintiff states', citing *Arizona v.*  
09:27 20 *California*, I believe.

09:27 21           We believe the United States' complaint should  
09:27 22 be dismissed because it is seeking to bring claims of its own  
09:28 23 that are based on reclamation law and the project, not the  
09:28 24 compact. Again, the United States is not a party to the  
09:28 25 compact and has no standing to enforce it. Although it is a

0 9 : 2 8 1 federal law, the United States only has authority to enforce  
0 9 : 2 8 2 where there has been a congressional determination that they  
0 9 : 2 8 3 have that authority. That delegation of authority to enforce  
0 9 : 2 8 4 this compact has not been granted to the United States.

0 9 : 2 8 5 The claims it's raising are based on the  
0 9 : 2 8 6 operation of the project and the U.S. ongoing refusal to follow  
0 9 : 2 8 7 available state remedies open to it as a senior appropriator  
0 9 : 2 8 8 for addressing any interference with project deficiencies  
0 9 : 2 8 9 allegedly caused by New Mexico groundwater right holders. Yet  
0 9 : 2 8 10 without having ever availed itself of those processes and  
0 9 : 2 8 11 ignoring congressional mandate under Section 8 of the  
0 9 : 2 8 12 Reclamation Act to follow state law where it is consistent with  
0 9 : 2 9 13 federal law, as it is here, it comes to this Court and  
0 9 : 2 9 14 essentially seeks to litigate its project rights, which is  
0 9 : 2 9 15 basically a collateral attack on the adjudication court below.  
0 9 : 2 9 16 It should be required to exhaust its state remedies.

0 9 : 2 9 17 This Court always serves as a court of appellate  
0 9 : 2 9 18 review, which is its primary function. Then it would follow  
0 9 : 2 9 19 the course of *U.S. v. New Mexico*, where the United States also  
0 9 : 2 9 20 filed unsubstantiated claims, unfounded claims in the Gila  
0 9 : 2 9 21 adjudication for reserve water rights. The state courts  
0 9 : 2 9 22 determined those rights did not exist, and this Court affirmed,  
0 9 : 2 9 23 based on the cooperative federalism that infuses our water law.

0 9 : 2 9 24 As indicated, the claims do not arise under the  
0 9 : 2 9 25 compact but under reclamation law. Those issues are currently

09:29 1 before the United States District Court for the District of  
09:29 2 New Mexico, a court far better suited for the analysis of the  
09:30 3 complicated facts that are raised by the operational issues  
09:30 4 before the court there. We urge the Court to take the same  
09:30 5 action it took in *U.S. v. Nevada & California*, dismiss this  
09:30 6 entire case and leave the United States to its litigation in  
09:30 7 the U.S. District Court. Again, this Court always serves as an  
09:30 8 appellate court.

09:30 9           The fact is that the United States is alleging  
09:30 10 that a violation of some project operations issue somehow  
09:30 11 automatically is a compact claim. This Court has addressed a  
09:30 12 similar claim in the 1995 phase of *Kansas v. Colorado*. There  
09:30 13 Kansas showed that Colorado had violated the operating  
09:30 14 principles for the Trinidad Reservoir. Those operating  
09:30 15 principles were admittedly enacted to protect compact  
09:30 16 deliveries to Kansas, and the Court held that proof of project  
09:31 17 operating principles did not raise to a compact violation,  
09:31 18 because in order to establish a compact violation, it was  
09:31 19 required to demonstrate that this failure resulted in a compact  
09:31 20 violation also.

09:31 21           In other words, just because a project principle  
09:31 22 is violated -- here the United States is similarly arguing that  
09:31 23 New Mexico is interfering with project efficiencies. If that  
09:31 24 is a violation of state water law or maybe even reclamation  
09:31 25 law, the U.S. District Court has jurisdiction over that claim

09:31 1 and should be allowed to address it and develop the factual  
09:31 2 record in the first instance.

09:31 3 So the Court in the 1995 phase clearly indicated  
09:31 4 that the compact itself -- you have to show an actual compact  
09:31 5 violation or the Court can't order relief. Here the  
09:31 6 United States is essentially saying, "They are interfering with  
09:32 7 our project water right, and this Court should order New Mexico  
09:32 8 not to do that." Well, they have also said you should order  
09:32 9 New Mexico to comply with the compact, and that's well said,  
09:32 10 but they are not a party to the compact and don't have standing  
09:32 11 to make that argument. They would have standing to make a  
09:32 12 project argument if the Court was the right court. Obviously,  
09:32 13 again, this Court has appellate jurisdiction of that claim, but  
09:32 14 we believe the Court should allow the lower courts to follow  
09:32 15 their usual course for that claim.

09:32 16 Again, the United States here is not only  
09:32 17 seeking to avoid the U.S. District Court case, which might be  
09:32 18 able to rule on the operational claims faster than this Court,  
09:32 19 but it is seeking to circumvent long-standing congressional  
09:32 20 preference that it adjudicate its rights in state adjudication  
09:32 21 by raising essentially its water right claims here.

09:33 22 The claims it attempts to raise here are just  
09:33 23 another in a long string of legal actions in which the  
09:33 24 United States has sought to circumvent congressional directive  
09:33 25 of the McCarran Amendment to follow state adjudicatory



0 9 : 3 3 1 proceedings. The Tenth Circuit, in *U.S. v. The City of*  
0 9 : 3 3 2 *Las Cruces*, noted that the district court below had been  
0 9 : 3 3 3 concerned that the United States had long engaged in procedural  
0 9 : 3 3 4 fencing because it had moved to dismiss the New Mexico case on  
0 9 : 3 3 5 jurisdictional ground a number of times. Again, that Court  
0 9 : 3 3 6 found the essence of the federalism issue, i.e., that the  
0 9 : 3 3 7 United States has an expressed congressional directive to  
0 9 : 3 3 8 follow state law and to go to adjudications in state  
0 9 : 3 3 9 adjudication court and ordered the United States to do that.

0 9 : 3 3 10 It is now proceeding in the adjudication court,  
0 9 : 3 4 11 and that adjudication is timely proceeding as we speak. It has  
0 9 : 3 4 12 already completed adjudicating most of the project elements.  
0 9 : 3 4 13 Contrary to the picture the United States paints here of a  
0 9 : 3 4 14 state court intent on eviscerating its project rights, the  
0 9 : 3 4 15 state court has actually granted many of the United States'  
0 9 : 3 4 16 motions for summary judgment on its project right elements.

0 9 : 3 4 17 In February of 2014, for example, they granted  
0 9 : 3 4 18 the United States' motion for summary judgment to the right to  
0 9 : 3 4 19 2,638,860 acre feet of storage in Elephant Butte Reservoir,  
0 9 : 3 4 20 with the right to fill and refill. That's a specific right  
0 9 : 3 4 21 under the prior appropriation doctrine special to some storage  
0 9 : 3 4 22 right holders. The United States was granted that, and the  
0 9 : 3 5 23 State of New Mexico did not oppose that.

0 9 : 3 5 24 It also granted the moving parties the right to  
0 9 : 3 5 25 release from storage a normal annual release of

09:35 1 790,000 acre feet or as otherwise provided by the Rio Grande  
09:35 2 Compact. So the court is recognizing the efficacy and impact  
09:35 3 of the Rio Grande Compact on the water rights. It also granted  
09:35 4 the moving parties' motions regarding the right of the U.S. to  
09:35 5 divert project water at downstream diversion dams.

09:35 6 Can you put up the project map for me, please,  
09:35 7 Jeff.

09:35 8 We also have a project map, Your Honor,  
09:35 9 somewhere. There it is.

09:35 10 **THE SPECIAL MASTER:** Never let a machine know you are  
09:35 11 in a hurry.

09:35 12 **MS. BOND:** Well, it can tell. It can sense that, I'm  
09:36 13 sure.

09:36 14 You see Leasburg Diversion Dam, Percha Diversion  
09:36 15 Dam, and Mesilla Diversion Dam. The court granted the  
09:36 16 United States the right to divert at those diversion dams  
09:36 17 without limitation on the diversion amount, as requested by the  
09:36 18 United States and the state, and the court recognized the  
09:36 19 376,000 acre feet of water that the Texas certificate of water  
09:36 20 rights for the project in Texas has been granted in  
09:36 21 acknowledgment of that 2006 TCEQ decree.

09:36 22 Now, of course, that isn't an enforceable right  
09:36 23 in New Mexico because we don't assert extraterritorial  
09:36 24 jurisdiction over Texas, which I assume is okay with Texas, but  
09:36 25 the court did recognize that that was what the water was for,

09:36 1 and that's the extent of its power, based on our territorial  
09:36 2 jurisdiction.

09:36 3           You see, by the way, there's a gage at the state  
09:37 4 line, which is called Courchesne gage by El Paso. That gage,  
09:37 5 however, is an International Boundary and Water Commission  
09:37 6 gage, not a compact gage.

09:37 7           Again, the United States makes a number of  
09:37 8 claims here that are not contested in the adjudication court in  
09:37 9 New Mexico. The State of New Mexico agrees that Texas and the  
09:37 10 project -- well, the project is entitled to recapture return  
09:37 11 flows and seepage. Any water that makes it back to the water  
09:37 12 through a drain is project water. Not straying too far into  
09:37 13 the substance of appropriative law of the usufruct of the prior  
09:37 14 beneficial use rights, it is black letter appropriation law  
09:37 15 that while an appropriator is entitled to return flow and  
09:38 16 seepage so long as it was within his ability to recapture and  
09:38 17 reuse -- we agree with that. However, once that water seeps  
09:38 18 well below the drains and escapes the ability of the  
09:38 19 appropriator to appropriate it, it returns to the public domain  
09:38 20 and then may be appropriated by other appropriators.

09:38 21           The United States doesn't have any wells, and a  
09:38 22 diversion point or a well is a *sine qua non* of an appropriative  
09:38 23 right, so the U.S. doesn't have any groundwater rights. Of  
09:38 24 course, that issue could be brought up to this Court just like  
09:38 25 it was in *U.S. v. New Mexico*, if it came to it, but they are

09:38 1 essentially rearguing their claim for groundwater in the  
09:38 2 adjudication court.

09:38 3 The U.S. conflates the groundwater rights that  
09:38 4 the farmers have perfected under state jurisdiction with their  
09:38 5 rights to seepage and return flows, but no one disputes their  
09:39 6 right to return flows. If the groundwater pumpers in  
09:39 7 New Mexico are impairing project return flows to which they are  
09:39 8 entitled, they have a remedy under both state administrative  
09:39 9 remedies -- as the adjudication court ruled -- or, of course,  
10 they can always bring an independent action in district court  
11 in New Mexico alleging impairment.

09:39 12 Again, on page 45 the U.S. has alleged the  
09:39 13 hypothetical prospect of so much pumping in New Mexico that  
09:39 14 interferes with project deliveries that possibly someday the  
09:39 15 U.S. would not be able to deliver its Mexican treaty water.  
09:39 16 That allegation, of course, is not only speculative, but it's  
09:39 17 hypothetical and not entitled to the truth of a presumption  
09:39 18 under *Ashcroft v. Iqbal*.

09:39 19 For about 100 years, up until 2008, it operated  
09:40 20 and represented its project rights as surface water rights.  
09:40 21 When it filed the quiet title action that was ruled upon in  
09:40 22 *U.S. v. City of Las Cruces*, it offered to the Court its 1906  
09:40 23 and 1908 territorial filings, which do not mention groundwater,  
09:40 24 as the basis for its water rights. It should not be allowed to  
09:40 25 circumvent the Reclamation Act by coming to this Court and

09:40 1 claiming to have these other rights.

09:40 2 Again, in summary, neither the United States nor  
09:40 3 Texas are raising compact claims. The claims they raise may be  
09:40 4 viable and judicially cognizable in other fora. They are not  
09:40 5 compact claims, and this Court could not grant the relief  
09:40 6 requested without granting relief inconsistent with the  
09:40 7 compact.

09:40 8 The compact does not require New Mexico to  
09:41 9 maintain depletions below Elephant Butte, as is alleged, and it  
09:41 10 imposes no affirmative duty on New Mexico to prevent  
09:41 11 interference with deliveries of project water by the  
09:41 12 United States.

09:41 13 We would ask the Court, in the interest of  
09:41 14 judicial efficiency, to be as precise as possible in its  
09:41 15 rulings so that if some claim is allowed to proceed, the Court  
09:41 16 could be clear with us on what the proof of that claim would  
09:41 17 be. In our view, the complaints filed do not allege compact  
09:41 18 claims.

09:41 19 Again, we have assumed certain matters as true  
09:41 20 for purposes of this motion, as we are required to do. We  
09:41 21 vigorously contest those should the motion not be granted.

09:41 22 I see that I have some time left, and I would  
09:41 23 like to add that onto rebuttal if I could. I was hoping you  
09:41 24 would ask a lot of questions.

09:41 25 **THE SPECIAL MASTER:** I have some questions.

09:41 1 **MS. BOND:** Yay.

09:41 2 **THE SPECIAL MASTER:** Thank you, Ms. Bond. Let me  
09:41 3 start off with your discussion of the Rule 12 standard. I want  
09:42 4 to make sure I understand exactly what you were saying in that  
09:42 5 regard.

09:42 6 I thought I understood you to say that Texas  
09:42 7 fails to allege a compact claim for Rule 12 purposes, that they  
09:42 8 haven't alleged a damage that New Mexico has done to Texas for  
09:42 9 Rule 12 purposes. Was that your argument?

09:42 10 **MS. BOND:** Yes, Your Honor. Facially they say they  
09:42 11 have alleged a compact claim.

09:42 12 **THE SPECIAL MASTER:** Let's look at it. Do you have a  
09:42 13 copy of the complaint?

09:42 14 **MS. BOND:** I do.

09:42 15 **THE SPECIAL MASTER:** Look at paragraph 19 of the  
09:42 16 complaint.

09:43 17 **MS. BOND:** Yes, Your Honor.

09:43 18 **THE SPECIAL MASTER:** The second half of paragraph 19  
09:43 19 says: "By its failure to control and prevent the proliferation  
09:43 20 of post-Rio Grande Compact pumping of water hydrologically  
09:43 21 connected to the Rio Grande and by its acquiescence in surface  
09:43 22 water diversions and failure to prevent nonpermitted diversions  
09:43 23 of surface water, New Mexico has ignored and undermined Texas'  
09:43 24 right to water from the Rio Grande Project and has breached and  
09:43 25 continues to breach its obligations and responsibilities under

09:43 1 the Rio Grande Compact."

09:43 2 It seems to me that in this paragraph, they are  
09:44 3 precisely saying that New Mexico's exercise of jurisdiction  
09:44 4 constitutes a breach of its -- you may disagree with that, but  
09:44 5 for Rule 12 purposes it seems to me that's what they are saying  
09:44 6 here. Am I missing something?

09:44 7 **MS. BOND:** Your Honor, clearly that is what they are  
09:44 8 saying here.

09:44 9 **THE SPECIAL MASTER:** Okay.

09:44 10 **MS. BOND:** The compact, however, does not preclude us  
09:44 11 from -- they are incorrect. The compact does not prevent  
09:44 12 New Mexico from interfering with project water. What they  
09:44 13 bargained for in the compact, based on the plain language of  
09:44 14 the compact, was delivery to the project. Although that's what  
09:44 15 the words say, even if those facts were true, they do not  
09:44 16 constitute a compact violation.

09:44 17 **THE SPECIAL MASTER:** Okay. Then let's talk about the  
09:44 18 plain language of the compact which you referenced in your  
09:44 19 argument. As you well know, the plain language of the compact  
09:45 20 states that its purpose is to effect an equitable apportionment  
09:45 21 of the waters of the Rio Grande River above Fort Quitman,  
09:45 22 Texas; and the signatory states are New Mexico, Colorado, and  
09:45 23 Texas. Let me start off with a very broad question.

09:45 24 Ms. Bond, what is an equitable apportionment?

09:45 25 **MS. BOND:** An equitable apportionment is either a

09:45 1 judicial or, here, by compact determination of the relative  
09:45 2 rights of sovereign states to an interstate river.

09:45 3 **THE SPECIAL MASTER:** I ask not to test your knowledge  
09:45 4 or to give you a pop quiz, but I'm really curious as to what  
09:45 5 authority you -- you are clearly relying on some authority when  
09:46 6 you discuss that. Is there a case that sets out the standard  
09:46 7 for what an equitable apportionment is that you have in your  
09:46 8 mind?

09:46 9 **MS. BOND:** Your Honor, no. There are a lot of really  
09:46 10 wonderful bits of language.

09:46 11 **THE SPECIAL MASTER:** Okay.

09:46 12 **MS. BOND:** I will say, in answer to that, however,  
09:46 13 that despite the lack of precise quantification here at the  
09:46 14 state line, which is exactly what the compact is missing, the  
09:46 15 Court has never held that a compact has failed of its essential  
09:46 16 purpose. That is, of all the interstate compact enforcement  
09:46 17 actions that have come before the Court, it has never said,  
09:46 18 "Boy, you know, Congress said when they ratified this and the  
09:46 19 state said when they enacted it that it is an equitable  
09:46 20 apportionment, but we don't think it is."

09:46 21 So while it is clearly unclear as to the actual  
09:47 22 numbers, in fact, the hydrologists can give you numbers for  
09:47 23 those delivery points. This is a delivery equitable  
09:47 24 apportionment, not a depletion equitable apportionment.

09:47 25 **THE SPECIAL MASTER:** Okay. So does this compact



09 : 47 1 actually "effect an equitable apportionment" of these waters?

09 : 47 2 **MS. BOND:** Your Honor, yes, we believe it does.

09 : 47 3 Again, we are not aware of a case in which the Court held that  
09 : 47 4 Congress had failed of its essential purpose. The hydrologists  
09 : 47 5 can look at those indices -- and I admit that I cannot -- and  
09 : 47 6 tell you exactly what the delivery obligations of the upstream  
09 : 47 7 states are to Texas. That's the equitable apportionment.

09 : 47 8 Texas could have bargained for something at the  
09 : 47 9 state line. They did not. They understood this at the time.  
09 : 47 10 They believed at the time that adequate protection existed from  
09 : 47 11 the reclamation project contracts, which divided the project  
09 : 48 12 waters 57/43. Thus they knowingly and intentionally bargained  
09 : 48 13 for the deal that we do have a depletion limit above  
09 : 48 14 Elephant Butte Reservoir; we do have a guaranteed delivery  
09 : 48 15 obligation. Those numbers can be agreed upon by the engineer  
09 : 48 16 advisers to the compact commission, and are every year, based  
09 : 48 17 on the gaging stations. They just didn't get a delivery at the  
09 : 48 18 state line.

09 : 48 19 **THE SPECIAL MASTER:** You discuss Article III as  
09 : 48 20 requiring Colorado to deliver water. Does Article III also  
09 : 48 21 constitute and set forth an equitable apportionment?

09 : 48 22 **MS. BOND:** Yes, Your Honor. I think the entire  
09 : 48 23 compact is an equitable apportionment.

09 : 48 24 **THE SPECIAL MASTER:** I'm going somewhere with this.

09 : 48 25 **MS. BOND:** I believe you. Should I stop?

09:49 1 THE SPECIAL MASTER: No. Go ahead. Please.

09:49 2 MS. BOND: We consider the entire compact an  
09:49 3 equitable apportionment of the Rio Grande among the three  
09:49 4 states.

09:49 5 THE SPECIAL MASTER: If Article III embodies an  
09:49 6 equitable apportionment, how about Article IV? Does that  
09:49 7 embody an equitable apportionment also?

09:49 8 MS. BOND: Yes.

09:49 9 THE SPECIAL MASTER: So you would agree, then, that  
09:49 10 Texas has received an equitable apportionment of the waters of  
09:49 11 the Rio Grande through the compact?

09:49 12 MS. BOND: Received?

09:49 13 THE SPECIAL MASTER: Right. Does the compact  
09:49 14 equitably apportion some of the waters of the Rio Grande to  
09:49 15 Texas?

09:49 16 MS. BOND: Yes, Your Honor. It simply doesn't  
09:49 17 require delivery of that water to Texas.

09:49 18 THE SPECIAL MASTER: That's different, but that was  
09:49 19 my question.

09:49 20 MS. BOND: Yes. We agree that Texas obtained through  
09:49 21 this agreement an equitable apportionment of its share of the  
09:49 22 waters of the Rio Grande.

09:50 23 THE SPECIAL MASTER: Again turning to the text of the  
09:50 24 compact, Article I(1) of the compact defines water delivered  
09:50 25 into Elephant Butte as "usable water" that is available for

09:50 1 release by the project in accordance with irrigation demands  
09:50 2 and for delivery to Mexico.

09:50 3 What irrigation demands are being incorporated  
09:50 4 here?

09:50 5 **MS. BOND:** Your Honor, we would note, of course, it's  
09:50 6 exclusive of credit water, which is within the exclusive  
09:50 7 control of its own state.

09:50 8 **THE SPECIAL MASTER:** Right, but the term "irrigation  
09:50 9 demands" --

09:50 10 **MS. BOND:** Well, we think that's the 60,000  
09:50 11 New Mexico -- 57 percent to lands in New Mexico and 43 percent  
09:51 12 to Texas of project water.

09:51 13 **THE SPECIAL MASTER:** In your brief you say, and in  
09:51 14 your oral argument as well, other state compacts usually  
09:51 15 require the upstream state to deliver to the state line. In  
09:51 16 looking at other compacts, it seems to me that states have  
09:51 17 engaged in a fair amount of creativity in the dispositions and  
09:51 18 arrangements they make in their apportionments.

09:51 19 So, for example, with respect to the Colorado  
09:51 20 River, the Colorado River Compact creates, if you will, two  
09:51 21 fictive basins, an upper basin and a lower basin, and  
09:51 22 apportions water between these two fictive basins.

09:52 23 The Yellowstone River Compact has, as I recall,  
09:52 24 sort of a timed release. First one state gets it, then the  
09:52 25 other state gets it.

09:52 1 So there seems to me a fair amount of creativity  
09:52 2 that these compacts apportion, suggesting that states have a  
09:52 3 fair amount of freedom and independence about what they can do,  
09:52 4 how they can equitably apportion the water.

09:52 5 This is a theoretical question. As states can  
09:52 6 equitably apportion interstate streams in, it seems to me, any  
09:52 7 way they see fit, would you agree that the states here had the  
09:52 8 power to allocate Texas' equitable portion of the Rio Grande  
09:52 9 above Fort Quitman to the Rio Grande Project?

09:53 10 **MS. BOND:** Yes, Your Honor, although water that is  
09:53 11 delivered to the project is also destined for Mexico and for  
09:53 12 lands within New Mexico.

09:53 13 **THE SPECIAL MASTER:** Right.

09:53 14 **MS. BOND:** But, yes, it seems to me that if you read  
09:53 15 the contemporaneous writings of Frank Clayton as well as  
09:53 16 Raymond Hill, that was what they bargained for and that was  
09:53 17 what they got and Congress ratified that.

09:53 18 **THE SPECIAL MASTER:** That tees up my next question  
09:53 19 very well. You did refer to Mr. Clayton's letter. Before I  
09:53 20 get into the details on that letter, let me ask you this,  
09:53 21 again, general question.

09:53 22 If you rely on negotiating or legislative  
09:53 23 history in your argument regarding what the compact provides,  
09:53 24 are you suggesting that the compact is ambiguous, particularly  
09:53 25 with respect to how it equitably apportions the water? Is the

09:54 1 compact ambiguous in that regard?

09:54 2 **MS. BOND:** Your Honor, I think the equitable  
09:54 3 apportionment is not ambiguous, and the Court should rely  
09:54 4 solely on the plain language of the compact. However, in  
09:54 5 addressing every argument that we can on the motion to dismiss,  
09:54 6 we are addressing all possible arguments, and their argument is  
09:54 7 that the compact prevents depletions.

09:54 8 **THE SPECIAL MASTER:** Let me emphasize I'm not being  
09:54 9 critical about any party referring in these papers to, if you  
09:54 10 will, parol evidence, and I'm not making any comment about what  
09:54 11 would be appropriate for a Rule 12 motion or not. I'm  
09:54 12 particularly focused on does this mean you think it's ambiguous  
09:54 13 and so --

09:54 14 **MS. BOND:** Your Honor, no. We think the compact is  
09:55 15 clear and that the Court can make its ruling upon just the  
09:55 16 plain language of the compact.

09:55 17 **THE SPECIAL MASTER:** With respect to the Clayton  
09:55 18 letter, your reading of the compact -- you've argued from the  
09:55 19 Clayton letter, who negotiated the compact, but didn't  
09:55 20 Commissioner McClure in a written statement say, "New Mexico is  
09:55 21 willing to negotiate with the State of Texas as to the right to  
09:55 22 the use of water claimed by citizens of Texas under the  
09:55 23 Elephant Butte project on the basis of fixing a definite amount  
09:55 24 of water to which said project is entitled"? That was  
09:55 25 Mr. McClure.

09:55 1 MS. BOND: Yes, that was the New Mexico commissioner  
09:55 2 at the time.

09:55 3 THE SPECIAL MASTER: Is that likewise probative of  
09:55 4 what the parties were doing in the compact with respect to the  
09:55 5 equitable apportionment?

09:56 6 MS. BOND: Your Honor, we assert that the compact  
09:56 7 expressly requires New Mexico to deliver water to the project.  
09:56 8 So Texas' apportionment -- that's where the Texas equitable  
09:56 9 apportionment is delivered. Is that an answer to your  
10 question?

09:56 11 THE SPECIAL MASTER: I'm not suggesting what the  
09:56 12 answer should be. I want to hear what your thoughts are on  
09:56 13 that issue. Particularly what I'm curious about is whether you  
09:56 14 maintain -- or actually all of the parties, whether you  
09:56 15 maintain the water is apportioned to Texas and New Mexico as  
09:56 16 below Elephant Butte or whether you maintain it's apportioned  
09:57 17 to the project.

09:57 18 MS. BOND: Your Honor, it is an interstate compact.  
09:57 19 We believe legally Congress meant what it said and effected an  
09:57 20 equitable apportionment to the states. The means by which the  
09:57 21 Texas water is delivered to the territorial jurisdiction of  
09:57 22 Texas is the Rio Grande Project. It is, however, the Texas  
09:57 23 apportionment.

09:57 24 THE SPECIAL MASTER: So the water that is delivered  
09:57 25 to the project is equitably apportioned water?

09:57 1 MS. BOND: Correct, to Texas. And that's where their  
09:57 2 enforcement point is; that's where they can bring a compact  
09:57 3 claim against the State of New Mexico if we fail to deliver  
09:57 4 that water to the dam.

09:57 5 THE SPECIAL MASTER: You focus particularly on  
09:57 6 Article III of the compact, governing your deliveries to the  
09:57 7 reservoir, which you argue identifies your only obligation  
09:58 8 under the compact. Can you point to --

09:58 9 MS. BOND: To point of delivery.

09:58 10 THE SPECIAL MASTER: Yes. Can you point to any  
09:58 11 provision in the compact or other authority that entitles  
09:58 12 New Mexico to water leaving Elephant Butte?

09:58 13 MS. BOND: Meaning -- I'm sorry, excuse me -- Texas?

09:58 14 THE SPECIAL MASTER: No.

09:58 15 MS. BOND: New Mexico?

09:58 16 THE SPECIAL MASTER: Correct. Can you point to a  
09:58 17 compact provision that entitles New Mexico to water leaving  
09:58 18 Elephant Butte?

09:58 19 MS. BOND: Not specifically, except that credit water  
09:58 20 that would be stored in Elephant Butte is not part of usable  
09:58 21 water. Indeed, as the Western District Court of Texas  
09:59 22 recognized, not all of the water delivered to the project is  
09:59 23 Texas' water.

09:59 24 THE SPECIAL MASTER: Right. Precisely.

09:59 25 MS. BOND: Pardon?

09:59 1           **THE SPECIAL MASTER:** Precisely. So where in the  
09:59 2 compact does it confer rights to New Mexico for water coming  
09:59 3 out of Elephant Butte?

09:59 4           **MS. BOND:** Your Honor, the contracts between the  
09:59 5 districts were signed almost contemporaneously with the  
09:59 6 compact. We don't have any serious argument that the compact  
09:59 7 incorporates a 43 percent to Texas, 57 percent to New Mexico  
09:59 8 scheme, with 60,000 off the top for Mexico, as a part of the  
09:59 9 understanding of the compact. I don't think that the question  
10:00 10 of New Mexico's rights from the project is before the Court  
10:00 11 here today, though.

10:00 12           **THE SPECIAL MASTER:** Okay.

10:00 13           **MS. BOND:** Unfortunately.

10:00 14           **THE SPECIAL MASTER:** In your argument you referred to  
10:00 15 *Tarrant Regional Water District v. Hermann*. Is that case  
10:00 16 really helpful here -- and, of course, this is Texas'  
10:00 17 argument -- insofar as the compact requires you to deliver  
10:00 18 water and hence relinquish control of it? So *Tarrant Regional*  
10:00 19 is not entirely germane here, because in this instance, so  
10:00 20 Texas argues, you have to release the water. So it's not --

10:00 21           **MS. BOND:** Your Honor, indeed, the facts of *Tarrant*  
10:00 22 were different and, in fact, it didn't go up as an original  
10:00 23 action.

10:00 24           **THE SPECIAL MASTER:** Right.

10:00 25           **MS. BOND:** The question there was



1 cross-jurisdictional rights to enter the territorial  
2 jurisdiction of another state to effect the apportionment.

3 **THE SPECIAL MASTER:** Right. Texas wanted to go into  
4 Oklahoma to get the water.

5 **MS. BOND:** Correct. Right. So we think it's an  
6 important federalism case and cited it for that purpose. And,  
7 in fact, as you note, states are very creative and can craft  
8 different protections for the downstream states differently in  
9 each compact, as was true in that compact and this compact.  
10 The protections Texas bargained for in this compact it now  
11 decides it doesn't like, but the Court isn't free to rewrite  
12 the compact.

13 **THE SPECIAL MASTER:** Well, to the extent you cite  
14 *Tarrant Regional* for, if you will, the federalism principle of  
15 the default position for state sovereignty, however,  
16 sovereignty goes as far as the state line, and at some point  
17 doesn't sovereignty -- isn't there a countervailing principle  
18 in other Supreme Court cases whereby, for all its sovereignty,  
19 a state cannot sit in judgment of its own rights as against a  
20 sister state? So at some point there's a countervailing  
21 principle here. I'm suggesting *Tarrant Regional* is confined  
22 somewhat in this case because in this case we are dealing with  
23 sister states fighting over a compact, and so you can't be your  
24 own judge.

25 **MS. BOND:** Correct, Your Honor. We agree with that,

1 which is why we would seek dismissal of these cases, because  
2 the relief they request is not consistent with the compact,  
3 allow the two lower court proceedings that are currently  
4 ongoing -- the district court case, which deals with the  
5 operational issues about the project, and the state  
6 adjudication, which actually is what Congress intended for  
7 reclamation projects to adjudicate their water rights. Appeal  
8 would be to this Court, of course, and this Court would sit in  
9 final judgment of those rights.

10 **THE SPECIAL MASTER:** *Tarrant Regional* didn't really  
11 deal with an adjudication. It was Texas attempting to  
12 physically go into Oklahoma. There was no Oklahoma court that  
13 was sitting in judgment of its own rights.

14 **MS. BOND:** Your Honor, I would request permission to  
15 be able to refer to the case on a break --

16 **THE SPECIAL MASTER:** That's fine.

17 **MS. BOND:** -- but my recollection is that the Court  
18 required Texas to appear before the administrative process and  
19 obtain an Oklahoma permit for the water it sought. So in that  
20 way it is somewhat analogous.

21 **THE SPECIAL MASTER:** You did cite it, so I had a  
22 couple questions.

23 **MS. BOND:** Oh, sure. Every compact is different, so  
24 we do make that argument, but it is not unheard of that one  
25 state would comply with the administrative or court processes

1 of another state to effect its own apportionment, as was  
2 required in *Tarrant*.

3 **THE SPECIAL MASTER:** Well, in *Tarrant Regional* the  
4 Red River Compact actually contains a provision expressly  
5 reserving to signatory states the power to administer and  
6 regulate water within their borders, so I think it's  
7 distinguishable from what we are dealing with here.

8 Certainly, by all means, have a look at the case  
9 during the break. I don't want to bog us down in that at this  
10 point. I have some other material I want to go into.

11 You have argued in your papers that once  
12 New Mexico delivers water to Elephant Butte Reservoir,  
13 New Mexico's obligations below Elephant Butte arise under  
14 reclamation law, and the doctrine of prior appropriation  
15 protects the project right from impairment. That's from your  
16 reply brief at page 4.

17 However, in *Hinderlider* -- by the way, we had an  
18 academic discussion this morning on whether it's pronounced  
19 Hinderlider or Hinderleeder. So I think what I really want to  
20 know is how do people who actually practice water law pronounce  
21 it?

22 **MS. BOND:** We have all always said Hinderlider.

23 **THE SPECIAL MASTER:** Great. I think that's the  
24 German. Good. I'm glad we got it right.

25 **MS. BOND:** Absolutely. We would always say the Court

1 got it right.

2 **THE SPECIAL MASTER:** That's very kind of you.

3 The Supreme Court in *Hinderlider* held that an  
4 equitable apportionment by compact is binding upon the citizens  
5 of each state and all water claimants even where the state had  
6 granted the water rights before it entered into the compact.  
7 Your position, can that be squared comfortably with the  
8 principles in *Hinderlider*?

9 **MS. BOND:** Yes, Your Honor. We agree that the  
10 compact superimposes -- maybe that's the wrong term. It  
11 doesn't create a water right.

12 **THE SPECIAL MASTER:** That's how I think of it.

13 **MS. BOND:** It limits the state's ability to grant  
14 water rights in excess of the apportionment vis-à-vis the other  
15 states. That's why we believe, if the United States were to  
16 avail itself of the processes Congress has directed the  
17 executive branch agency to avail itself of, i.e., the state  
18 processes, those matters can then be determined at that point,  
19 whether that has occurred.

20 **THE SPECIAL MASTER:** Going back to the Clayton  
21 letter, you have argued that the compact included no  
22 requirement of New Mexico below Elephant Butte because the  
23 parties understood that existing reclamation law, which  
24 incorporated New Mexico state law, provided effective  
25 protection for Texas water law. That's your reply brief at

10:06 1 page 6. Again, can you point to specific language in --

10:07 2 Do you have Mr. Clayton's letter?

10:07 3 **MS. BOND:** It's attached to our reply brief?

10:07 4 **THE SPECIAL MASTER:** Yes.

10:07 5 **MS. BOND:** What page is that?

10:07 6 **THE SPECIAL MASTER:** The text from your brief was at  
10:07 7 page 6.

10:07 8 I'm sorry. The letter appears as an appendix to  
10:07 9 your motion to dismiss. The Clayton letter appears as an  
10:07 10 appendix to your motion to dismiss. It's at page 32, I think.

10:07 11 **MS. BOND:** Yes. I'm sorry. Could you repeat the  
10:07 12 question.

10:07 13 **THE SPECIAL MASTER:** Sure. Sorry to be obscure.

10:07 14 In your reply brief you argued -- you are citing  
10:07 15 the Clayton letter here --

10:07 16 **MS. BOND:** Right.

10:07 17 **THE SPECIAL MASTER:** -- the compact included no  
10:07 18 requirement of New Mexico below Elephant Butte because the  
10:07 19 parties understood that existing reclamation law, which  
10:07 20 incorporated New Mexico state law, provided effective  
10:07 21 protection for Texas' water.

10:08 22 I guess my question is: Is there any language  
10:08 23 in the Clayton letter that indicates the parties' understanding  
10:08 24 that existing reclamation law, which incorporates New Mexico  
10:08 25 state law -- is there any language in the Clayton letter that

1 says the parties understand that existing reclamation law  
2 incorporating state law is sufficient protection for Texas'  
3 water? Is there any language in the Clayton letter to support  
4 that?

5 **MS. BOND:** Your Honor, there is language in the  
6 Clayton letter that indicates that the best deal they thought  
7 they could get -- and they thought they got all that they were  
8 entitled to -- was a guarantee of delivery to the project.

9 The Clayton letters also referenced that it  
10 understands that the bureau, not the State of New Mexico, is in  
11 charge of the allocations from the project.

12 On our App. 25, the Clayton letters do refer to  
13 a guarantee against further encroachments and depletions, but  
14 all of that is above Elephant Butte, and it recalls that this  
15 is the best Texas could get.

16 It also indicates, on App. 26, that by contract  
17 between the New Mexico interests and the Texas interests in the  
18 project, all the lands in the project have equal water rights,  
19 and the acreage to be irrigated is practically frozen with a  
20 3 percent cushion. And it indicates that New Mexico could  
21 hardly be expected to guarantee a certain amount at the state  
22 line because Reclamation is in charge of the reservoir. So I'm  
23 not sure that I can point you to the same wording in those  
24 things, but I think that's an adequate paraphrase.

25 **THE SPECIAL MASTER:** Article VIII of the compact

1 permits Texas to demand that Colorado and New Mexico release  
2 water from storage and reservoirs constructed after 1929 to the  
3 amount of accrued debits sufficient to bring the quantity of  
4 "usable water" in the project to 600,000 feet.

5 The question is: Why would Article VIII  
6 authorize Texas to demand that this water be released from  
7 storage if New Mexico were free to divert it at will?

8 **MS. BOND:** I believe, Your Honor, this refers to  
9 debit, which would be the cases in which New Mexico had not  
10 delivered to Elephant Butte in the first place but had stored  
11 water during that same period upstream. So it only refers to a  
12 situation, which is not alleged in either complaint here, that  
13 we didn't make the deliveries we were required to make to  
14 Elephant Butte. That's because --

15 Can you put up the compact map again.

16 The papers of Raymond Hill and all of the  
17 contemporaneous writings of all of the parties indicate that  
18 the Rio Grande -- it was the United States' intent and the  
19 parties' intent to operate this river as an entire unit. I  
20 think the Bill Paddock article covers this quite nicely.

21 So if you look at the indices between all the  
22 gaging stations, as well as the spill provisions in  
23 Article VII, you see that, yes, the project was intended to be  
24 protected; and so long as the project is protected, upstream  
25 development can occur. There's a resounding silence about

1 New Mexico obligations below Elephant Butte.

2 So these provisions protect the project from  
3 situations in which New Mexico has not delivered its amount at  
4 San Marcial, and such a case is not before the Court.

5 **THE SPECIAL MASTER:** Article VIII also refers to "a  
6 normal release of 790,000 acre feet." Why would the drafters  
7 ensure a set amount of delivery into the reservoir without  
8 knowing how much water would be released from it? It's a  
9 practical matter. It's a nuts and bolts matter.

10 **MS. BOND:** Your Honor, the 790,000 normal release is  
11 an average release, and the proceedings of the commission from  
12 1938, that March session just before they signed the compact,  
13 you see a lot of discussion about that number, which at one  
14 time was 800,000, now it's 790,000.

15 Because the rights in the river are usufructs  
16 under the prior appropriation doctrine, the water released from  
17 the reservoir will vary every year depending upon the needs of  
18 the parties. So as they noted in the commission proceedings,  
19 they understood that some years it would be less because it's  
20 very rainy. No irrigator is allowed to waste water. So if the  
21 water supply from heaven is adequate, they don't call for as  
22 much water.

23 So they never really know what the project  
24 release is going to be until they know what the irrigation  
25 demands are, but they guaranteed to the project an amount which



1 was understood to be adequate to protect existing uses at the  
2 time.

3 **THE SPECIAL MASTER:** Does it suggest that Texas has  
4 rights to the water that are not subject to New Mexico law?

5 **MS. BOND:** Yes, Your Honor, but it's not a quantified  
6 amount. There's no quantified amount that we believe would be  
7 impacted by Section 8 of the Reclamation Act and a  
8 determination of project efficiencies and other factors below  
9 Elephant Butte.

10 **THE SPECIAL MASTER:** I have a couple questions about  
11 the United States' intervention. If Texas' complaint fails for  
12 failure to state a claim, would this Court continue to have  
13 jurisdiction over the case under -- and I know you touched on  
14 this, but I want to make sure I understand your position.  
15 Would this Court continue to have jurisdiction under  
16 28 U.S.C. § 1251(b)(2), which deals with controversies between  
17 the United States and a state? It's original but not  
18 exclusive.

19 **MS. BOND:** Correct. Your Honor --

20 **THE SPECIAL MASTER:** So we would have the  
21 jurisdiction. You can make the policy argument that we  
22 shouldn't exercise it, but we would have it, would we not?

23 **MS. BOND:** Yes, Your Honor. I would never tell the  
24 United States Supreme Court that they don't have jurisdiction.  
25 Indeed, that statute expressly grants that jurisdiction. Only

1 note that the Court has never allowed a plaintiff intervenor in  
2 a situation like this to proceed when the original complainant  
3 is dismissed.

4 **THE SPECIAL MASTER:** If, as the United States  
5 alleges, that New Mexico is interfering with the United States'  
6 ability to honor its treaty obligations to Mexico, is that  
7 ample reason for the Court to continue to exercise jurisdiction  
8 even if Texas' claim fails?

9 **MS. BOND:** Your Honor, we assert that the  
10 United States' hypothetical that perhaps someday they would not  
11 be able to deliver water to Mexico is one of those allegations  
12 that under *Ashcroft v. Iqbal* is not entitled to the presumption  
13 of truth. It is clearly a hypothetical and speculative, and  
14 they have not alleged that such interference has occurred at  
15 this time. So we would suggest that that claim is not properly  
16 before the Court as a matter of standing. And, of course, it's  
17 not a compact claim.

18 **THE SPECIAL MASTER:** That's all I have, Ms. Bond.  
19 You have 15 minutes for your rebuttal.

20 **MS. BOND:** Thank you, Your Honor.

21 **THE SPECIAL MASTER:** You came in right at an hour.  
22 Good job.

23 **MS. BOND:** Thank you, Your Honor.

24 **MR. SPEER:** Your Honor, since the attorney for  
25 Tarrant Regional is sitting in the jury box behind me, maybe

1 Ms. Bond would like to discuss the *Tarrant* case with him.

2 THE SPECIAL MASTER: We have other business at hand,  
3 if you don't mind. Thank you.

4 MR. SPEER: Well, I'm just speaking at the break.

5 THE SPECIAL MASTER: Thank you. I appreciate your  
6 courtesy.

7 MS. BOND: Thank you, Your Honor.

8 THE SPECIAL MASTER: Thank you.

9 Mr. Stein.

10 MR. STEIN: May it please the Court.

11 THE SPECIAL MASTER: Good morning.

12 MR. STEIN: Good morning, Your Honor. For the  
13 record, my name is Jay Stein, of the firm of Stein & Brockmann,  
14 water counsel to the City of Las Cruces, New Mexico.

15 Your Honor, the City of Las Cruces is appearing  
16 as an amicus curiae in this proceeding for the purpose of  
17 supporting the State of New Mexico in its motion to dismiss the  
18 complaints for failure to state a claim upon which relief can  
19 be granted.

20 Your Honor, the city concurs in the argument  
21 that was presented by Ms. Bond. We urge the Special Master to  
22 file a report with the full Court in Washington recommending  
23 dismissal of these complaints for failure to state a claim upon  
24 which relief can be granted.

25 For our part, Your Honor, what we are going to

1 do today is identify and emphasize three issues that highlight  
2 and bring to the Special Master's attention water supply issues  
3 that are unique and critical to the City of Las Cruces and  
4 which would be impacted by this case should it proceed.

5           And the focus will change a bit, Your Honor.  
6 You have been discussing surface water allocations with  
7 Ms. Bond. With the City of Las Cruces, the focus becomes  
8 groundwater.

9           First, with respect to the City of Las Cruces,  
10 conventional wisdom has it that this case is a case about  
11 agricultural interests, primarily or exclusively, or about  
12 agriculture in southwestern New Mexico, south of Elephant Butte  
13 Reservoir, but that is not the case. The City of Las Cruces is  
14 the second largest city in the State of New Mexico, and our  
15 interests and our ability to provide a municipal water supply  
16 is directly impacted by this proceeding.

17           Your Honor, the City of Las Cruces was founded  
18 in the mid-1840s. At that time it derived its water supply  
19 entirely from surface water that was diverted from the  
20 Rio Grande into a community ditch, or acequia, known as the  
21 Acequia Madre de Las Cruces, and that acequia provided domestic  
22 water supply to the emerging city.

23           Today, as I have indicated, the City of  
24 Las Cruces is New Mexico's second largest city. The service  
25 area for water supply for the city is currently 100,000, a

1 little over that, but that is expected to rise to 150,000 over  
2 the next 40 to 50 years. The city frequently appears on lists  
3 of the 10 fastest growing cities in the western United States  
4 and, indeed, the 10 fastest growing cities within the  
5 United States.

6 The city's water supply today, Your Honor, is  
7 entirely from groundwater, that is, water that is derived from  
8 the underground aquifer underlying the City of Las Cruces and  
9 which is diverted from wells and then supplied to the city  
10 through the municipal supply system within the administrative  
11 area that is known as the Lower Rio Grande underground water  
12 basin.

13 The city's well field was initiated in 1905 with  
14 the drilling of the first well, and that process was  
15 continually expanded and supplemented over the decades with the  
16 drilling of additional wells as the city grew and as the city  
17 expanded and as improvements were made, until around the year  
18 2002. The capacity of the well field was complete, and then at  
19 that time the city obtained a vested right to some  
20 20,000 acre feet of water, which was evidenced by filing with  
21 the New Mexico state engineer's office, which is the agency of  
22 state government responsible for regulating water rights.

23 The City of Las Cruces' water rights are  
24 entirely derived from the New Mexico territorial and state law.  
25 This includes the vested rights that I have mentioned as well

1 as supplemental wells that were permitted by the state engineer  
2 and replacement wells also permitted by the state engineer as  
3 well as improvements to the municipal supply system, also  
4 permitted; all of this culminating in the consent order that  
5 was given to the city in the state adjudication, which is  
6 adjudicating the relative rights to water in the  
7 Lower Rio Grande basin in 2002. The city is entirely dependent  
8 upon this supply of water to supply its existing and its  
9 growing population.

10 The second issue: Despite the clear language of  
11 the compact, which requires in Article IV that deliveries of  
12 surface water be made into Elephant Butte Reservoir, and  
13 despite decades of compact administration under which  
14 deliveries have been made into Elephant Butte Reservoir, both  
15 the United States and Texas would seek to move the delivery  
16 point some 60 to 70 miles downstream to the New Mexico-Texas  
17 border.

18 In its complaint the United States then asserts  
19 that the intervening area between the release point at  
20 Elephant Butte Reservoir and the state border, which is  
21 underlain with the aquifer that the city diverts and obtains  
22 its water supply from -- the United States then asserts that  
23 this aquifer is not public water of the State of New Mexico  
24 that others have a right to but, in fact, is something that  
25 they call project water or project supply that is reserved only

1 for irrigators within the Rio Grande Project.

2 Your Honor, this is set forth at paragraphs 12  
3 and 13 of the complaint in intervention where the United States  
4 asserts that: "Only persons having contracts with the  
5 secretary may receive deliveries of water, including seepage  
6 and return flow, from a reclamation project. Accordingly, the  
7 only entity in New Mexico that is permitted to receive delivery  
8 of project water is EBID, pursuant to its contract with the  
9 secretary."

10 Then in paragraph 13: "New Mexico has allowed  
11 the diversion of surface water and the pumping of groundwater  
12 that is hydrologically connected to the Rio Grande downstream  
13 of Elephant Butte Reservoir by water users who either do not  
14 have contracts with the secretary or are using water in excess  
15 of contractual amounts."

16 The key phrase is "hydrologically connected"  
17 because they consider all of the groundwater to be  
18 hydrologically connected in some way, to some extent to the  
19 surface water.

20 **THE SPECIAL MASTER:** Who does, Mr. Stein?

21 **MR. STEIN:** The United States.

22 **THE SPECIAL MASTER:** Thank you.

23 **MR. STEIN:** Your Honor, these contentions are  
24 completely contrary, literally, to decades of United States  
25 Supreme Court precedent which vests administrative authority

1 and jurisdiction over the water resources and the territories  
2 and states of the West with territorial and state authority.

3           Following the Civil War, the principal objective  
4 of the federal government was the settlement of the public  
5 domain of the western United States, west of the Mississippi.  
6 Three congressional acts facilitated this: the Mining Act of  
7 1866, the Homestead Act of 1870 and, most particularly, the  
8 Desert Land Act of 1877.

9           What these laws did was to completely terminate  
10 or sever the United States' ownership interests in the public  
11 waters of the West and vest them, vest that ownership and that  
12 regulatory authority in the emerging territories and states of  
13 the western domain.

14           This is clearly set forth in the United States  
15 Supreme Court precedent beginning in 1935 with the case of  
16 *California Oregon Power Company v. Beaver Portland Cement*  
17 *Company*, which the Court will find in the *U.S. Reporter* at  
18 Volume 295. In that case the United States Supreme Court wrote  
19 that: "Following the Desert Land Act of 1877, if not before,  
20 all nonnavigable waters then a part of the public domain become  
21 *publici juris*, subject to the plenary control of the designated  
22 states, including those since created out of the territories  
23 named, with the right in each to determine for itself to what  
24 extent the rule of appropriation or the common law rule in  
25 respect to riparian rights should obtain."



1           The allegations in the United States' complaint  
2 of intervention are completely contrary to that tradition of  
3 law, which has been affirmed time and again, most recently in  
4 1978 with the companion cases of *California v. United States*  
5 and *United States v. New Mexico*.

6           The United States' assertions would completely  
7 upend and contravene that law and do not present a basis upon  
8 which relief can be granted. Moreover, they would have the  
9 effect of upending decades of New Mexico's administration and  
10 granting and permitting of water rights in the Lower Rio Grande  
11 underground water basin to the City of Las Cruces as well as to  
12 others.

13           My third point: The complaint that has been  
14 filed by the State of Texas does not contain allegations of  
15 compact violations that rise to the level which give Texas a  
16 ground for relief. The core allegations are set forth in  
17 paragraphs 18, 19, and 20. Your Honor referenced in his  
18 questioning of Ms. Bond paragraph 19. I would respectfully  
19 back the Court up to paragraph 18.

20           In paragraph 18 Texas alleges the Rio Grande  
21 Compact is predicated --

22           **THE SPECIAL MASTER:** It's a long paragraph, Counsel.  
23 Where are you?

24           **MR. STEIN:** I'm in paragraph 18.

25           **THE SPECIAL MASTER:** It's a long paragraph. What

10:29 1 page?

10:29 2 MR. STEIN: Paragraph 18 at page 9 of the Texas  
10:29 3 complaint.

10:29 4 THE SPECIAL MASTER: Gotcha.

10:29 5 MR. STEIN: The section I'm reading is: "The  
10:29 6 Rio Grande Compact is predicated on the understanding that  
10:29 7 delivery of water at the New Mexico-Texas state line would not  
10:30 8 be subject to additional depletions beyond those that were  
10:30 9 occurring at the time the Rio Grande Compact was executed."

10:30 10 Your Honor, New Mexico has three express  
10:30 11 obligations in the Rio Grande Compact. Under Article IV  
10:30 12 New Mexico has the obligation to deliver a certain amount of  
10:30 13 water into Elephant Butte Reservoir. Under Article VI  
10:30 14 New Mexico is obligated not to accrue debits beyond  
10:30 15 200,000 acre feet. Under Article VII certain restrictions are  
10:30 16 placed on New Mexico storage and upstream reservoirs.

10:30 17 Texas is alleging violations to none of those.  
10:30 18 Instead, they are alleging a violation to an understanding  
10:30 19 which they purport to find in a region below Elephant Butte  
10:30 20 Reservoir, in other words, below the point of delivery, to  
10:30 21 which New Mexico does not share.

10:30 22 That does not state a cause of action, because  
10:31 23 it is contrary to the express provisions of Article IV in that  
10:31 24 moving the point of delivery to the state line would constitute  
10:31 25 a modification of the compact.

1           That said, there are interests from the State of  
2 Texas that have an interest in water administration in  
3 New Mexico and are participating in the adjudication of water  
4 rights in the City of Las Cruces. They include the City of  
5 El Paso, El Paso Water Improvement District No. 1, which is an  
6 amicus curiae in that case, and the United States. Their  
7 rights and their obligations are being determined in that  
8 forum. Any shortages that they believe they are experiencing  
9 to their water rights can be adjusted and can be addressed by  
10 the decree that is issued in that case.

11           The purpose of a water rights adjudication is to  
12 determine for each party the five elements of the water right:  
13 the amount that it is entitled to, the purpose and place of  
14 use, the point of diversion, and the priority date. And the  
15 objective of that exercise is the decree. The decree is to be  
16 administered, and one of the purposes of the administration of  
17 that decree is to respond to a priority of calls -- which, in  
18 effect, this is -- on behalf of certain Texas interests.

19           That process is being addressed now in the state  
20 court, in the adjudication, with respect to the parties that  
21 are directly interested in that. Moreover, the process is one  
22 that is affording due process to others with an interest in the  
23 resource, which include the City of Las Cruces.

24           **THE SPECIAL MASTER:** Mr. Stein, we are near the end  
25 of your time, and I have a question I would like to ask you,

1 please.

2 In your brief you allege a possible due process  
3 claim on behalf of Las Cruces. What you state is: "If the  
4 United States and Texas force the removal of the United States'  
5 Rio Grande Project water right and prevent it from being  
6 adjudicated, they will deny Las Cruces and all other LRG  
7 adjudication defendants due process to challenge the  
8 United States Rio Grande Project water right obtained under  
9 state law and destroy the possibility of a unified adjudication  
10 decree." That's in your brief at page 25.

11 Didn't this Court in *Hinderlider* reject a  
12 similar due process claim from the plaintiff?

13 **MR. STEIN:** No, Your Honor. The *Hinderlider* Court, I  
14 believe, dealt with the administration of rights once they had  
15 been determined. Here we are in the process of determining  
16 what those rights are so that we can then administer them. The  
17 point is to allow the City of Las Cruces to participate in the  
18 adjudication process so that we can state and have a role in  
19 presenting what we believe our water rights to be as well as  
20 challenging elements of others' water rights, and that includes  
21 the United States.

22 Once the decree is entered, the remedy for any  
23 shortages, as I have mentioned, is to seek enforcement of that  
24 decree. That could be done by any party that has a senior  
25 priority and that believes it is being shorted. *Hinderlider*

1 would not apply, because the compact obligation for New Mexico  
2 ends at the reservoir.

3 **THE SPECIAL MASTER:** Thank you.

4 **MR. STEIN:** Thank you, Your Honor.

5 **THE SPECIAL MASTER:** We will take a 10-minute recess.

6 **THE DEPUTY CLERK:** All rise.

7 (Recess.)

8 **THE SPECIAL MASTER:** Please be seated.

9 Mr. Somach.

10 **MR. SOMACH:** Stuart Somach, Your Honor, on behalf of  
11 the State of Texas. I have a couple of initial things I want  
12 to say.

13 First of all, I was dilatory and I did not  
14 introduce to you the Texas Rio Grande commissioner. Mr. Pat  
15 Gordon, who is here, perhaps could stand up. I apologize for  
16 doing that in the rush of our initial introductions.

17 Secondly, I just wanted to note that I do have a  
18 status conference type of issue I would like to raise at the  
19 end of today.

20 Finally, I was curious. I know that the State  
21 of Colorado has time to address the Special Master. The State  
22 of Colorado didn't file a brief, and so I have no idea what  
23 they are going to say, one way or another. I'm wondering  
24 whether or not either they could go first so that the  
25 United States and I could respond or whether or not additional

1 time might be allocated. I don't know how you want to handle  
2 that, but I didn't want to leave that issue unmentioned to you.

3 **THE SPECIAL MASTER:** I have no objection.

4 Mr. Wallace, were you prepared to offer oral  
5 argument this morning?

6 **MR. WALLACE:** Your Honor, I was going to offer the  
7 Court a few words. I can sort of preface that with the state  
8 is not taking a position on the determinative outcome of the  
9 motion to dismiss through our remarks. I certainly have no  
10 objection if any of the parties wish to have rebuttal time if  
11 something I say they need to respond to.

12 **THE SPECIAL MASTER:** Well, how about we take  
13 Mr. Somach's suggestion and let you go first. Does that work?

14 **MR. WALLACE:** Thank you, Your Honor. You caught me  
15 completely off guard now, getting me out of order here.

16 **THE SPECIAL MASTER:** I expect you will do fine.

17 **MR. WALLACE:** I'm Chad Wallace, representing the  
18 State of Colorado, and thank you for allowing us time to speak  
19 in this proceeding.

20 **THE SPECIAL MASTER:** It's a pleasure to have you.

21 **MR. WALLACE:** As Mr. Somach pointed out, the State of  
22 Colorado did not file substantive briefs on these motions.  
23 Partially as a result we are not going to be advocating an  
24 outcome on these motions. But we do feel it is very important  
25 to allow the Special Master to ask us questions and to let you

1 know what our interest in this case is or could be.

2 As you know, there are no claims for relief  
3 asserted against the State of Colorado; however, we are a party  
4 to the Rio Grande Compact. We are particularly concerned that  
5 the outcome of this proceeding and the larger adjudication  
6 could affect our compact rights and, in fact, could affect  
7 Colorado's relationship within its other interstate water  
8 compacts and equitable apportionment decrees.

9 We have nine interstate compacts, two equitable  
10 apportionment decrees. Even though each of those decrees and  
11 compacts are prefaced with something to the effect of "this is  
12 unique and applies only to this document," of course, rulings  
13 tend to get legs and apply elsewhere. That's why we are a bit  
14 concerned.

15 What is our interest in this compact generally?  
16 We are an upstream state. Water flows -- largely it's created  
17 within Colorado. The snowmelt on the mountains surrounding the  
18 San Luis Valley flows downhill. But that's not really where it  
19 all ends.

20 Of course, Colorado has an obligation to make  
21 deliveries to the Colorado-New Mexico state line based on a  
22 table of relationships from stream gaging stations. Simply the  
23 fact that we have been making those obligated deliveries does  
24 not end our interest in the compact or the outcome of this  
25 case. In fact, what happens downstream does impact us as a

1 state.

2 The operation of Elephant Butte Reservoir is  
3 particularly important. We are allowed to store credit water  
4 within Elephant Butte Reservoir. That's not part of the usable  
5 water supply but is a credit against Colorado's future delivery  
6 obligations. Likewise, Colorado has restrictions on its  
7 ability to store water in reservoirs within our own state based  
8 on the storage level within Elephant Butte Reservoir. That's  
9 400,000 acre feet of storage in project storage. So once we  
10 get below that amount, should something happen to trigger that,  
11 it impairs our ability to store water within the state.

12 Likewise, the compact, as you pointed out in  
13 questions earlier, mentions 790,000 acre feet as an average  
14 annual project delivery. You can think of that as a ceiling.  
15 That's our operational limit within which Colorado's  
16 obligations and, in fact, our benefits under the compact are  
17 realized. Once we fall below 400,000 we are not able to  
18 operate within our state normally. And then we also have an  
19 expected 790,000 acre-foot ceiling, which we can expect the  
20 project not to release more than that.

21 I would like also to point out -- I think you're  
22 very well aware of this. Each of the compacts that the various  
23 states have negotiated and have been ratified by Congress are  
24 unique.

25 I think some of the questions you were asking



1 earlier this morning, one, what is an equitable apportionment,  
2 it's a very large question. It's very global yet really gets  
3 to the nub of solving each of these problems.

4 If I could use a metaphor of a pie, what is the  
5 pie? If you are apportioning waters, you are looking at: what  
6 is the amount, basically, what is the river basin that you are  
7 looking at, what's included; what is the area that's being  
8 apportioned within that basin; and what entities are being  
9 apportioned water.

10 Compacts do it in various ways. So even though  
11 we may be saying, first of all, what is the pie, the pie  
12 doesn't even necessarily need to include the entire river  
13 basin. So the pie can be of various sizes.

14 What is the area being apportioned? How big are  
15 the slices of that pie? Do you, in fact, need to cut up that  
16 entire pie? Not necessarily. Do you need to apportion it to  
17 everybody sitting at the table? Again, not necessarily.

18 I would like to walk through really briefly a  
19 few key compacts that Colorado is a party to as a way of  
20 showing the various different ways we can split these issues  
21 up. I do this because I will say this about the motions to  
22 dismiss. What Colorado wants or would like as a result is that  
23 any ruling be small in scope and refer only to whether there is  
24 a claim for relief or not a claim for relief, because our  
25 concern is delving into the substance of the compact, the

1 intent of the compact, things that aren't necessary to  
2 determine whether a claim for relief has been stated could have  
3 a great deal of impact on us.

4 So to start with, the Colorado River Compact, as  
5 Your Honor may be familiar with, you mentioned earlier divides  
6 it into the upper and the lower basins. It does not, in fact,  
7 apportion water to states at all but to basins. Some of the  
8 states -- Arizona, New Mexico, and Utah -- are within both the  
9 upper and lower basins. Moreover, the lower basin, because of  
10 the Boulder Canyon Project Act, can only take water through  
11 reclamation contracts, owing to the way the water is captured  
12 and delivered to the lower basin.

13 Conversely, the upper basin entered into the  
14 Upper Colorado River Basin Compact and apportioned water  
15 amongst the various states. Arizona gets a set consumptive use  
16 figure. The remaining upper basin states divide up the  
17 remaining percentage.

18 Does this divide up everything the river has?  
19 No. It's simply a percentage of available water. So, again,  
20 the size of that pie can vary.

21 The South Platte River Compact is another one  
22 for Colorado. This, in fact, establishes only a season of  
23 compact compliance. So during the compact season, roughly the  
24 irrigation season, flows from Colorado into Nebraska must be a  
25 certain rate. It does not condition anything on winter flows

1 or winter development. Moreover, what Colorado needs to do to  
2 guarantee that flow delivery is only curtail waters within the  
3 lower section of the South Platte River within Colorado that  
4 are junior to a certain date. So the states there concede that  
5 there could be a time when curtailment wouldn't bring flows up  
6 to the guaranteed rate.

7           The Rio Grande Compact here, of course, Colorado  
8 has an obligation to deliver to the New Mexico state line.  
9 New Mexico has an obligation to deliver now into Elephant Butte  
10 Reservoir according to the table of relationships established.  
11 It's unclear in the actual words of that compact what the  
12 apportionments to the various compacting states are. It simply  
13 says "to effect an equitable apportionment."

14           The Arkansas River Compact likewise does not, in  
15 fact, apportion water to all the states within the Arkansas  
16 basin. The State of New Mexico has a tributary to the Arkansas  
17 River. It is not allocated any water under that compact. The  
18 states of Kansas and Colorado are not allocated specific  
19 amounts of water. They simply must not allow water to be  
20 materially depleted in usable quantity to the water users in  
21 either Colorado or Kansas.

22           One interesting equitable apportionment decree  
23 apportions the North Platte River among Colorado, Wyoming, and  
24 Nebraska, while Colorado has set amounts as far as irrigable  
25 acreage and storage and amount of water it can take out of that

1 basin in northern Colorado to other areas, primarily the front  
2 range area of Colorado, which is where most of the people live.

3 It's interesting to note that the Court, in  
4 allocating water between Wyoming and Nebraska in that decree,  
5 only allocated direct surface flows. It did not apportion  
6 water stored in federal projects even though that water made up  
7 a significant amount of deliveries to both states. Again, it's  
8 an issue where what the pie consists of is not the whole river.  
9 The Court specifically left out federal project allocations,  
10 which were done by contract but weren't a part of the  
11 interstate equitable apportionment decree.

12 So this is all to say that each compact is  
13 negotiated with specific terms, and even though they each  
14 effect an equitable apportionment -- I think I might have to  
15 take issue with Ms. Bond's conclusion that it's not necessary  
16 for compacts in general to allocate all the water of an entire  
17 river system to each of the compacting states. They can, in  
18 fact, allocate less of it and not allocate any of it to a state  
19 in particular.

20 So that's my roundabout answer. What is an  
21 equitable apportionment can be quite a few different things.

22 Now, in making the result of this motions  
23 hearing small -- Your Honor is well aware of what the standards  
24 on a Rule 12 motion to dismiss are for failure to state a  
25 claim. I would simply say this. If Your Honor is going to

1 evaluate the complaints on whether they state a claim for  
2 relief based on the four corners of the compact document  
3 itself -- either a claim exists or it does not, based on the  
4 language within the compact -- that should result in a fairly  
5 simple order.

6           If, on the other hand, this Court deems it  
7 necessary to look outside the four corners of that compact,  
8 even though it may result in a legal determination, I would  
9 offer that would require factual investigation into the history  
10 of negotiations, the intent of the compacting parties, the  
11 historical background and factual predicate that led to  
12 negotiating the compact. If that's the avenue that this Court  
13 takes, I would suggest that resolution of those issues be saved  
14 for later proceedings. We are a bit early to be getting into  
15 all of that. That is simply what Colorado would advocate if we  
16 are going down that road, that we not prematurely set the  
17 course, that we allow the parties to fully develop their  
18 arguments and their discovery and their research on that issue.

19           Now, to that end, should the parties be  
20 advocating claims under the compact, it would be helpful to  
21 Colorado to understand clearly what the compact nexus of all  
22 those claims are and the ability to clearly separate that out  
23 from claims that are not grounded in the compact or in  
24 interstate water allocation. For example, if they happen to be  
25 purely contracting claims, can those be identified separately

1 from claims that have to deal with interstate water  
2 apportionment, compacted or otherwise?

3 That is Colorado's position. I hope that was  
4 helpful to Your Honor to understand why we are here and our  
5 position on these motions.

6 **THE SPECIAL MASTER:** Thank you, Mr. Wallace.

7 **MR. WALLACE:** Thank you.

8 **MR. SOMACH:** The briefs that have been filed in this  
9 case are replete with factual allegations. The argument that  
10 we heard this morning, both from Ms. Bond and from Mr. Stein,  
11 are replete with factual allegations. So I start with the  
12 simple concept somewhat similar to the one that Mr. Wallace  
13 just gave, and that is this is a 12(b)(6) motion; it's not a  
14 Rule 56 motion. That fact was impressed upon me, obviously, as  
15 I was preparing for this argument just simply because I had to  
16 read and reread all of the briefs and realized how much factual  
17 material there is within that.

18 **THE SPECIAL MASTER:** Tell me about it.

19 **MR. SOMACH:** I'm well aware of the fact that you're  
20 aware of that. So what I want to start with is just simply a  
21 grounding in the fact that, heck, this is just a 12(b)(6)  
22 motion. We know that the facts alleged in the Texas and  
23 United States complaints must be taken as true and that they  
24 must be taken in the light most favorable to the plaintiff, but  
25 that's just normal 12(b)(6) law. Now, when you are an original

1 action, the Court is actually imposing an even higher standard,  
2 and that standard says that the complaint ought to be construed  
3 liberally in favor of the plaintiffs.

4 The Court has also stated on a number of  
5 occasions that summary procedures represent a treacherous  
6 record for deciding issues of far-flung importance and that the  
7 Court allows full development of facts in original actions. Of  
8 course, that was not commented on anywhere in the context of a  
9 recognition that what we have alleged has to be taken as true,  
10 but it's much more than that. That's a very high standard.

11 I would be the last one to tell you that this  
12 compact and how it works and the facts in this case, in terms  
13 of impact and injury, are easy. It's complex. This is a  
14 complex system.

15 As Mr. Wallace also said, all these compacts are  
16 different. They stem out of certain core physical realities  
17 that are on the ground. One of the physical realities in 1938  
18 was the fact that all of the area we are talking about below  
19 Elephant Butte was fully developed. It was not a virgin stream  
20 system. It was not a stream system where you would have a  
21 provision in it that said you have to look at what's happening  
22 as if it was unmarked by man, because it was fully developed at  
23 that point in time. That was part of the complexity of trying  
24 to figure out how to do this apportionment.

25 Now, the facts that we have alleged obviously

1 are articulated in the complaint. In particular I would focus  
2 the Special Master on paragraphs 18, 19, and 24. Certainly the  
3 Special Master has mentioned some of them, and there are  
4 factual allegations elsewhere, but the core facts are contained  
5 in those three paragraphs. And as you have noted, I think it  
6 was paragraph 18 goes on for several pages. So there's a lot  
7 of stuff there.

8 We will have lots of time. And I know that  
9 New Mexico disagrees with a lot of those facts. We will have  
10 lots of time in this case to fully develop those facts, take a  
11 look at the truth of those allegations in trial. But, again,  
12 most of what I see pled in those pleadings are just  
13 disagreements over facts.

14 The second thing that happens in the New Mexico  
15 moving papers is actually to reargue issues that we believe  
16 were decided by the Supreme Court when it granted our motion  
17 for leave to file a complaint. One of the fundamental issues  
18 that the Court had to grapple with in making that decision was  
19 whether or not there were alternative forums. That's one of  
20 the standards that one has to meet in order for the Court to  
21 accept an original jurisdiction case.

22 New Mexico argued strenuously in that briefing  
23 that there were alternative forums that were available and,  
24 therefore, the Court shouldn't take this case at all. They are  
25 the exact same proceedings they are talking about here.



1 There's the federal district court case dealing with the  
2 operating agreement. Then, of course, there is this  
3 interesting adjudication basically of rights that, from Texas'  
4 perspective, we feel are our rights that are being adjudicated  
5 in many respects in that state court adjudication.

6 **THE SPECIAL MASTER:** Mr. Somach, can any inference be  
7 drawn from the fact that the Court on the one hand granted the  
8 motion to file the complaint but on the other hand invited a  
9 Rule 12 motion?

10 **MR. SOMACH:** I don't think so, certainly not on the  
11 alternative forums argument. The other alternative argument  
12 that was being made there was the one that is at the core of  
13 the 12(b)(6) motion, and that's that there was a failure to  
14 state a cause of action under the compact. I think that that's  
15 exactly what the Court was talking about. The decision to do  
16 that and to grant the leave to file a 12(b)(6) motion didn't  
17 come out of whole cloth. It actually came out of a suggestion  
18 made by the United States, and that suggestion was very  
19 specific to the core question of whether there was a violation  
20 of the compact, not the issue of whether there are alternative  
21 forums, whether there was a significant and serious dispute,  
22 and all the other factors that go into whether or not the Court  
23 will accept a case as an original jurisdiction case.

24 So we believe that rearguing all of those issues  
25 in an alternative forum is just inappropriate in this motion to

1 dismiss already looked at by the Court and that it's a bit of a  
2 distraction because we keep arguing and rearguing the exact  
3 same thing that we have argued.

4 Now, New Mexico concedes that the compact is an  
5 equitable apportionment of the waters of the Rio Grande among  
6 Colorado, New Mexico, and Texas, and today even went somewhat  
7 further to say we actually got something in that equitable  
8 apportionment, but they just can't tell us what we got out of  
9 that equitable apportionment.

10 I want to actually just digress for a minute,  
11 although it's not really a digression. The Court asked about  
12 equitable apportionments. I think that the most instructive  
13 response to that question of what is an equitable apportionment  
14 can actually be found in the very last case the Supreme Court  
15 decided associated with an original action, and that's the  
16 *Kansas v. Nebraska* case. Now, that case was decided in  
17 February of this year. It was decided after all the briefs in  
18 this case were filed, but it is of fundamental importance in  
19 terms of articulating what the Court does in an equitable  
20 apportionment.

21 It also describes the fact that an equitable  
22 apportionment or the Court's ability to do an equitable  
23 apportionment overshadows compacts and compact negotiations and  
24 that the parties, because they are aware of the fact that the  
25 Court can equitably apportion waters among states -- compacts

1 have got to be understood. They have to be interpreted based  
2 upon the concept that absent a compact there will be an  
3 equitable apportionment.

4 That case is particularly relevant here because,  
5 as we have pointed out, there was an original action before the  
6 Supreme Court that was being litigated. There was testimony  
7 being introduced before the special master when the compact was  
8 entered into in 1938. That was the *Texas v. New Mexico* case.  
9 It focused on the very issues, quite frankly, that we are going  
10 to be talking about as we litigate this case. This compact  
11 clearly was entered into with the shadow of the Court's  
12 equitable apportionment in mind.

13 I want to come back to that case in a moment,  
14 but I did want to say it describes chapter and verse what the  
15 Court does in an equitable apportionment.

16 **THE SPECIAL MASTER:** You are referring to  
17 Justice Kagan's language.

18 **MR. SOMACH:** Yes, absolutely.

19 Now, it's interesting. I believe both Mr. Stein  
20 and Ms. Bond said somehow Texas is trying to redo the bargain;  
21 didn't like what it got, trying to rewrite it. We liked it  
22 then. It worked. We like it now. We think the compact works.

23 The problem is we do not believe that New Mexico  
24 is upholding its obligations under the compact. We believe  
25 that the delivery obligation that New Mexico has to put water

1 into Elephant Butte is that; it's a delivery. It's no  
2 different than the delivery obligation that Colorado has, in  
3 Article III, to the state line. It's no different at all. In  
4 fact, if you look at the language of Article III and  
5 Article IV, it's identical in terms of the phraseology and that  
6 delivery means relinquishment. And no one is up here arguing  
7 or could credibly argue that once Colorado delivers water at  
8 the New Mexico state line, it has residual control over that  
9 water at all.

10 I just don't understand -- actually, I  
11 understand, but from a legal perspective I don't understand the  
12 argument that when there's a delivery of water, an obligation  
13 to deliver water by New Mexico, it feels that it cannot  
14 relinquish that water, that it can have residual control over  
15 all of that water. It befuddles me.

16 I have looked at every definition of *delivery*  
17 one could find. That word includes a relinquishment;  
18 otherwise, it's not a delivery. Otherwise, it's just I'm  
19 putting it here and I'm going to take it out there. That's not  
20 a delivery. That's not a delivery that the law would ever  
21 recognize. And it would make no sense, in any event.

22 Now, at various places New Mexico has argued --  
23 and so I just want to say we are not saying there's a state  
24 line delivery requirement. We are saying there's a delivery  
25 requirement, it's at Elephant Butte, and that New Mexico has

1 relinquished control.

2 I don't think *Tarrant* has one thing to do with  
3 that delivery requirement at all. I think those are totally  
4 different cases. If anything, I could argue -- you know,  
5 *Tarrant* was critical. Remember, the State of Texas wasn't a  
6 party in the *Tarrant* case. But in observing, what the Court  
7 said was, look, Texas got an allocation, an apportionment of  
8 water under that Red River Compact, and you have to wait until  
9 it gets to Texas to take it.

10 So what are we doing? We are waiting, you know,  
11 until it gets to Texas to actually take the water. We haven't  
12 gone in and taken the water physically at Elephant Butte.  
13 New Mexico is impeding our ability to get what we bargained  
14 for.

15 Now, the beauty of the compact was that it  
16 utilized what existed at the time to facilitate all of this  
17 stuff. So rather than having Texas come into New Mexico and  
18 take physical control over the water, it used the agency of the  
19 United States and the reclamation project that was there in  
20 order to facilitate that. Now, it did that for two reasons,  
21 and now I'm going to veer off into facts myself just in order  
22 to articulate an understanding of the fact that there's nothing  
23 mysterious about this delivery into Elephant Butte.

24 The reality was that the area below  
25 Elephant Butte, both in New Mexico and Texas, was fully

1 developed. The joint investigation report, which has been  
2 appended to briefs, the engineers' reports all talk about the  
3 fact that the river was fully appropriated at that point in  
4 time, that if you wanted to develop anything else, you had to  
5 augment supplies by bringing it in from elsewhere.

6 But actually there wasn't even enough water to  
7 meet the existing needs if you only counted the water once.  
8 You essentially had to have 120 percent efficiency in order to  
9 meet all the obligations in New Mexico and also meet the  
10 demands in Texas. That is why return flows are so critical.  
11 In fact, at the time the compact was entered into, as I  
12 mentioned, there was testimony being taken before the  
13 special master in the Supreme Court case, and it was all  
14 focused on this very issue, return flow, how it would operate.

15 Quality was an important issue because you can't  
16 just rely upon return flow without some direct water;  
17 otherwise, water gets too salty and it can't serve its purposes  
18 in Texas. There was a lot of testimony at that time being  
19 taken on about the quality of water, the amount of direct water  
20 that needed to be released, and the amount of return flow that  
21 would be factored into all that stuff.

22 So when you take a look at the fact that you  
23 have got this unitary understanding of how things operate  
24 before Elephant Butte and that you could not rely merely upon  
25 the water that was being released from the reservoir, because

1 that would only give you 100 percent of supply and you needed  
2 120 percent of supply, the depletion issue comes into play.

3 Now, there was no need to write in depletion  
4 requirements below Elephant Butte, because the project took  
5 that into account, number one; and number two, New Mexico  
6 relinquished control. Under the way it was supposed to work,  
7 there was no one that could grant additional rights downstream  
8 of Elephant Butte to take the very water that had been  
9 apportioned into the reservoir.

10 Now, we will get into all of that stuff as we  
11 litigate the case. It's all very interesting, it's all very  
12 complicated, but it's all very clear, as one moves into the  
13 factual analysis that needs to be done and the analysis of how  
14 what is occurring there today is affecting what the compact  
15 intended in terms of the way things operate.

16 There's been some discussion of Texas' --  
17 exactly what is the nature, scope, ownership, whatever of the  
18 water in Elephant Butte. We have argued in our briefs that we  
19 believe that all the water in Elephant Butte Reservoir is  
20 apportioned to the State of Texas, subject to the treaty  
21 obligation, and subject to the United States' contractual  
22 obligation to the Elephant Butte Irrigation District.

23 I think the United States has argued that a  
24 little differently in terms of how one conceptually would look  
25 at all of that, but the net result, I think, is exactly the

1 same, that there is no room for the State of New Mexico to  
2 exercise control once that water is placed into the reservoir.

3 Now, at various places New Mexico has argued  
4 either that it has no obligation below Elephant Butte or that  
5 that obligation is defined by reclamation law, then they talk  
6 about Section 8 of the 1902 act, then they talk about the state  
7 adjudication, and so forth.

8 The fallacy in that argument is at least  
9 twofold. Number one, we have never pled nor do we believe that  
10 the compact merely adopted reclamation law. If it had done  
11 that, Texas would have been exactly where it was the day after  
12 they entered into the compact as they were the day before.  
13 After all, the project was authorized in 1905, operating in  
14 1915. So under this notion that all you get after is what you  
15 had before means not only would you have agreed to that as a  
16 compact requirement, but you also would have dismissed the  
17 United States Supreme Court original action on these issues  
18 just to get what you already had. That can't be the situation.  
19 It can't be that all you got was the reclamation project,  
20 because you had that already. It has to be something more.

21 What we have argued is basically what the  
22 compact did was use the reclamation project, that is, the  
23 physical facilities and the way it operated, as a tool for the  
24 implementation of the compact. That's quite a different thing  
25 than just simply saying that you bodily picked up and just



1 adopted reclamation or reclamation law as the compact.

2 Now, that doesn't mean aspects of reclamation  
3 law like contracts -- I mean, it's clear that contracts are  
4 important because in 1938 the project wasn't paid for. Someone  
5 had to pay for it. So you had to have reclamation contracts,  
6 and you had to have some mechanism through contracting to  
7 protect the water in order to ensure that the project was going  
8 to be repaid, particularly since you were using it for this  
9 additional purpose of compact administration.

10 These are issues, of course, that we can talk  
11 about, that we will put testimony on, and that we will look  
12 upon, but one of the fundamental issues is Section 8 of the  
13 1902 Reclamation Act -- which I don't think is relevant, quite  
14 frankly, at all. But to the extent it is relevant, it's not an  
15 absolute. It is only a reliance upon state law if that state  
16 law is not inconsistent with specific directives of Congress.  
17 And, of course, as we have articulated in our papers, a compact  
18 is a federal law. It is an articulation of Congress' intent  
19 just as much as anything else is.

20 But as importantly -- and here I come back kind  
21 of to where I started -- it's a 12(b)(6) motion. Consistency  
22 and inconsistency is a factual issue. It's absolutely a  
23 factual issue.

24 On remand of *California v. United States* -- in a  
25 case that was *California State Water Resources Control Board v.*

1 *United States* that was a remand of the case that New Mexico  
2 relies upon, Justice Kennedy, who was on the Ninth Circuit  
3 panel at that point in time, was very clear, actually quite  
4 critical of the United States because the United States  
5 proceeded on that remand with summary judgment.

6           So the Court begins with a discussion of the  
7 fact that Section 8 is -- what you have got is a preemption  
8 issue. It's an issues preclusion preemption that requires a  
9 factual determination. So the analysis in that case of the  
10 conditions that were attached to the New Melones Reservoir was  
11 an analysis of worst-case scenarios, you know, is there any  
12 possible set of facts that would create an inconsistency. The  
13 United States had failed to put on a factual case, and so the  
14 Court felt it was required, because of the fact that it was a  
15 factual analysis, to go through that effort.

16           Well, if there is an argument here of  
17 inconsistency, you can't just willy-nilly say Section 8  
18 applies, therefore, we are stuck in a state adjudication. You  
19 have to go through a consistency argument, which is a factual  
20 determination. We are not there. This is a 12(b)(6) motion.  
21 If that becomes an issue, there will be plenty of time to put  
22 on evidence and testimony with respect to that.

23           Finally, in that regard -- you have already  
24 referred to this, and that is the fact that the Supreme Court  
25 has already said that a state cannot be the judge and jury of

1 the rights of a sister state.

2 I want to close my comments here again coming  
3 back to *Kansas v. Nebraska*, because *Kansas v. Nebraska* really  
4 is significant. It was almost as if the Court had this case  
5 half in mind when it said these cases are consequences of  
6 geography and that an upstream state can take all the water in  
7 a stream system, thereby depriving a downstream state of water  
8 that would otherwise flow into its territory. Because of  
9 constitutional constraints -- you can't go to war with your  
10 sister state -- it leaves the state as a sovereign absolutely  
11 defenseless against that upstream activity.

12 This comes back to this equitable apportionment  
13 idea. It says the Court's job is to prevent one state from  
14 taking advantage of another state, and it's difficult to  
15 conceive that a downstream state would trade away its rights of  
16 our equitable apportionment under an agreement -- I would argue  
17 as New Mexico would have the Court interpret this compact --  
18 where an upstream state, New Mexico, could avoid its  
19 obligations or otherwise continue overreaching. Here I say  
20 overreaching is arguing that somehow what Texas got under the  
21 compact is purely a matter of New Mexico state law.

22 I will end there, but I hopefully will be able  
23 to respond to whatever questions --

24 **THE SPECIAL MASTER:** I do have a couple questions  
25 regarding your brief and your complaint. On page 10 of your

1 brief in opposition to New Mexico's motion to dismiss you say,  
2 "No water below Elephant Butte is apportioned to New Mexico,"  
3 but you add in Footnote 6 that "Rio Grande Project water is, of  
4 course, delivered from the Rio Grande Project to lands within  
5 New Mexico pursuant to Elephant Butte Irrigation District's  
6 contract with the United States."

7 The complaint, however, in paragraph 4, says:  
8 "Once delivered to Elephant Butte Reservoir, that water is  
9 allocated and belongs to Rio Grande Project beneficiaries in  
10 southern New Mexico and Texas based upon allocations derived  
11 from the Rio Grande Project authorization and relevant  
12 contractual arrangements."

13 So does the 1938 compact apportion water below  
14 the Elephant Butte Reservoir between the signatory states of  
15 New Mexico and Texas, or only one of those, or to the project?

16 **MR. SOMACH:** That was a statement I made a little bit  
17 earlier. I think we actually articulated that in response to  
18 the motion to dismiss to clarify exactly what you have asked.  
19 It's really kind of an interesting question.

20 What we have articulated in response to the  
21 motion to dismiss is we believe that the water that's delivered  
22 into Elephant Butte -- and part of this is because this is a  
23 compact that equitably apportions water among three states, not  
24 the United States. So conceptually I believe that the proper  
25 analysis is that the water is delivered into Elephant Butte

1 Reservoir to Texas and that Texas' right to that water  
2 apportioned to it is subject to two things: the preexisting  
3 project contracts, particularly for water delivered into  
4 southern New Mexico; and the treaty obligations,  
5 60,000-acre-foot treaty obligation. Now, what makes me say  
6 that --

7 **THE SPECIAL MASTER:** Neither of those are in the  
8 compact.

9 **MR. SOMACH:** No, but they are subject to that because  
10 they were preexisting, nonpreempted, non-*Hinderlider* types of  
11 reservations or issues.

12 But what makes me believe that the delivery is  
13 to Texas is the fact that -- this goes to other provisions of  
14 the compact, ones that you have talked about already, for  
15 example, those dealing with debits and credits -- it's Texas  
16 that can demand releases upstream. It's not the United States.  
17 It's not New Mexico in this case. So as a consequence there  
18 must be something more that Texas has than just simply a  
19 delivery to the project, that is, the reclamation project.

20 **THE SPECIAL MASTER:** Let me ask you the same question  
21 I asked Ms. Bond. Do you believe that the compact is ambiguous  
22 with respect to -- I think I know the answer to this, but I  
23 want to ask it. Is the compact ambiguous with respect to the  
24 equitable apportionment?

25 **MR. SOMACH:** No, I don't think it's ambiguous at all.

1 It's clear that certain quantities of water are to be delivered  
2 into Elephant Butte Reservoir. *Delivery* means delivery, which  
3 includes relinquishment, and there are specific quantities  
4 based upon gaging and indices that are upstream. So I don't  
5 think it's ambiguous at all. I think there's a clear  
6 obligation. Of course, we have alleged that they have violated  
7 that obligation. But for the purposes of 12(b)(6), even if it  
8 was ambiguous, that becomes a factual question. The motion  
9 ought to be denied; we move on to litigate this case.

10 **THE SPECIAL MASTER:** On page 11 of your brief  
11 opposing New Mexico's motion to dismiss, you state: "The plain  
12 language of the compact assumes that water equitably  
13 apportioned to Texas will actually reach Texas' irrigatable  
14 lands unencumbered by the actions of New Mexico. Nothing in  
15 the compact allows New Mexico to deliver water into  
16 Elephant Butte and then take it back once the water is released  
17 from Elephant Butte."

18 Can you point to the express compact provisions  
19 that support that statement.

20 **MR. SOMACH:** Article IV. It says New Mexico delivers  
21 into Elephant Butte. If *delivery* means relinquishment and if  
22 I'm correct that Texas takes essentially possession of the  
23 water at Elephant Butte, then there's no room for New Mexico to  
24 do anything, and anything they do below the reservoir becomes a  
25 violation of the compact, particularly if it impedes Texas from

1 obtaining the water apportioned to it under Article IV of the  
2 compact.

3 **THE SPECIAL MASTER:** Thank you, Mr. Somach. That's  
4 all I have.

5 **MR. SOMACH:** You're very welcome.

6 **THE SPECIAL MASTER:** Thank you.

7 Mr. DuBois.

8 **MR. DUBOIS:** Thank you, Your Honor. May it please  
9 the Court. James DuBois for the United States.

10 Several parties have hit on it, and the  
11 Special Master has hit on it as well. The compact on its face  
12 apportions the water of the Rio Grande from the headwaters in  
13 Colorado all the way down to Fort Quitman in Texas, which is  
14 about 80 miles south of the Texas-New Mexico border.

15 The project had been in place for decades prior  
16 to the compact. The United States filed notices in 1906. As  
17 Mr. Somach alluded to, the project came on line in 1916. The  
18 contracts with the predecessors of the current district  
19 essentially allocated water in the same way the 1938 contracts  
20 did, 57/43 roughly percentages. It was based on acres. The  
21 New Mexico territorial laws, in 1905 and 1907, stated that the  
22 water described in the notices filed by the United States would  
23 not be subject to further appropriations.

24 All of these things -- the fact that the project  
25 constructed drains in 1925 to start recollecting the return

1 flows and making those available as part of the project, all of  
2 that background goes into -- and the fact, the uniquely federal  
3 interest that the project also delivers water to Mexico as part  
4 of a treaty obligation, all that goes into the congressional  
5 natural resources committee's 1937 report which, as you say,  
6 has been appended. And that report concludes that virtually  
7 all of the water of the Rio Grande below Elephant Butte  
8 Reservoir is derived from the Rio Grande Project.

9           It also shows that the project itself relies on  
10 the returns to the river. The return flows are recognized to  
11 be a material and significant portion of the project supply.  
12 And as we note in our briefing, the report states that the flow  
13 agreement on how much water needed to be delivered at  
14 San Marcial to the project was derived in part from that system  
15 of operation and knowledge that those return flows were, in  
16 fact, important to the utility of the project.

17           So the project is central to the compact.  
18 Obviously, it's the only specific diversion works or water use  
19 that's specified in the compact. So all of that goes into the  
20 background that the Court needs to keep in mind in looking at  
21 this thing.

22           The parties have brought up -- and I think  
23 everyone is in agreement that the standards to be applied for  
24 purposes of deciding this motion, the narrow motion that's in  
25 front of you, is the *Ashcroft v. Iqbal* and the *Twombly* cases.



1 So the issue is whether New Mexico can show that neither Texas  
2 nor the U.S. have stated a claim for relief that can be granted  
3 that's plausible on its face. In making that determination as  
4 to whether there's a plausible claim, it's a context-specific  
5 determination that you have to make that draws on common sense  
6 and judicial knowledge as well as the language of the compact.

7           There really isn't much fundamental dispute  
8 about the physical facts on the ground. The water is delivered  
9 to the project. Everything in the project, everything that  
10 makes it to Elephant Butte, with limited exceptions, including  
11 a spill, all becomes project water.

12           New Mexico concedes that once the water of the  
13 Rio Grande is stored, it all becomes project water and no other  
14 water user can legally impair that right and that reclamation  
15 controls the releases from the project.

16           The Court has to take as true the allegations in  
17 the complaints that the pumping and diversions in New Mexico,  
18 nonproject diversions, impact not only the project but the  
19 flows of the Rio Grande itself, and that is critical.

20           So taking all of that, really the only dispute  
21 in front of you is whether or not -- this actually is a basic  
22 interpretation of the compact. We think that Texas is  
23 basically correct, that the plain meaning of the compact, the  
24 plain language of the compact supports the claims of the  
25 United States and Texas. But at the end of the day, unless you

1 completely agree with New Mexico that neither Texas nor the  
2 United States have any right to water or any enforceable right  
3 under the compact to water -- no matter what New Mexico does to  
4 claw water back below Elephant Butte, unless you completely buy  
5 into that, the motion to dismiss has to be denied. At the end  
6 of the day, if there's an ambiguity, then, as Mr. Somach  
7 stated, the motion to dismiss has to be denied because any  
8 ambiguity presents a question of fact for this Court.

9 There are any number of cases out there that  
10 talk about the fact that when there's a question of fact, such  
11 as the ambiguity of a compact, that it's construed in favor of  
12 the plaintiffs. I cite the Court to -- which we didn't cite in  
13 our papers -- *Olympus Insurance v. AON Benfield*, 711 F.3d 898,  
14 an Eighth Circuit case from 2013, or *Eternity Global Master v.*  
15 *Morgan Guaranty*, which is 375 F.3d 178. That's a 2004 case out  
16 of the Second Circuit.

17 So the complaint on its face -- I think, in  
18 fact, they do state a claim under the compact. The compact is  
19 clear from its language and context. As a starting matter, in  
20 a scheme of apportionment, you have to understand what the  
21 states and Congress, in adopting the compact, wanted to  
22 accomplish, what did they want to apportion, and this ties back  
23 to the facts that we were talking about before.

24 One of the major issues that drove the creation  
25 of the compact, of course, was depletions to the project in

1 Texas. As Mr. Somach said, litigation was already under way  
2 about that sort of thing. So what they were looking at is  
3 apportioning it not just between Colorado and New Mexico but  
4 also an apportionment to Texas. That's pretty central. That's  
5 also in the plain language of the preamble.

6 So any argument that Texas got no apportionment  
7 below Elephant Butte Reservoir -- and I will use Elephant Butte  
8 instead of San Marcial because it all got changed -- it flies  
9 in the face of the compact, is the problem. Texas did receive  
10 an equitable apportionment, and it is delivered through the  
11 auspices of the project.

12 To anticipate a question, New Mexico would also,  
13 by the same token, have an apportionment, again, delivered  
14 through the auspices of the compact.

15 So all flows at Elephant Butte are delivered not  
16 merely to the river, but they are delivered to project storage.  
17 Again, the project is central here. So in delivering it to the  
18 project storage, the Special Master has to interpret it that  
19 New Mexico simply doesn't have the authority to claw it back.  
20 The delivery means something. It's transferring. It's putting  
21 it in the possession and control of the project for  
22 effectuating the apportionment. If this was a commercial good,  
23 it would be a transfer in a manner that can't be recalled by  
24 the grantor.

25 But here New Mexico is arguing exactly the

1 opposite, that having relinquished control, having transferred,  
2 having delivered that water, they can immediately start clawing  
3 it back before the usable water, which is usable for the  
4 project, for irrigation -- before it can even get to the first  
5 headgate, they can start clawing it back because, they assert,  
6 there's no ground rules below Elephant Butte. That doesn't  
7 make sense. Below Elephant Butte Reservoir the Rio Grande is  
8 the project until it gets out of complete control.

9 I guess, in relation to that, I point out again  
10 that the 1937 report to the congressional natural resources  
11 committee shows that there are basically no inflows below  
12 Elephant Butte. There are some limited. That may be a factual  
13 issue we get into later as well. But basically everything  
14 coming into the Rio Grande and all the surface water rights all  
15 the way down to Fort Quitman, all the water rights, are driven  
16 by those return flows. The question ultimately in the compact  
17 is, in delivering all of that water, is it now basically  
18 allocated, and anything that interferes with that is a  
19 potential compact violation.

20 I think, in looking at that, it's critical to  
21 note that the waters of the Rio Grande are defined as extending  
22 to all waters that drain to the Rio Grande. So the compact  
23 affects groundwater pumping because, as has been recognized by  
24 the State of New Mexico, both in the Middle Rio Grande and the  
25 Lower Rio Grande, the waters that are a tributary to the

1 Rio Grande affect the flows of the Rio Grande.

2           What we are talking about here is not a claim  
3 that the project has groundwater rights. We have not claimed  
4 that. What we are talking about here is, in delivering that  
5 water to the Rio Grande, waters that intercept -- flows that  
6 would be coming in that would affect the flow of the Rio Grande  
7 are, in fact, governed by the compact, and any use of that is a  
8 potential violation.

9           This is similar, frankly, Your Honor, to, say,  
10 the Republican River, where there's an allocation of the virgin  
11 water supply, but Nebraska was sued because they were allowing  
12 too much groundwater production. They were impacting the  
13 surface flows more than they were allowed. So there's a  
14 similar aspect there.

15           So, in fact, it's really a matter of water has  
16 been delivered to the project, the project is the Rio Grande  
17 below Elephant Butte, and the allegation is that actions by the  
18 State of New Mexico that are intercepting and decreasing that  
19 project water supply are a violation of the compact and have  
20 the potential to violate the United States' treaty obligations  
21 with Mexico as well.

22           One aspect would be potentially as Mr. Wallace  
23 alluded to. If the depletions in New Mexico forced the  
24 United States to release more water, you start hitting those  
25 triggers in reservoir storage that affect not only Texas and

1 Colorado but the delivery obligations to Mexico. So all of  
2 these things are interrelated.

3 Now, it's been suggested that Texas can enforce  
4 its rights -- let me take one other issue first. New Mexico  
5 has suggested this is a challenge to its sovereignty over water  
6 below Elephant Butte. That's wrong. The reliance on *Tarrant*  
7 is misplaced. The United States is not arguing that New Mexico  
8 does not have sovereignty over water below Elephant Butte.

9 As a matter of consistency, I point out that  
10 Judge Bratton, in the *City of El Paso* case, pointed out that  
11 even if the compact did effect an apportionment, New Mexico's  
12 arguments in that case failed because the state could allow  
13 groundwater development subject to offset to prevent injury to  
14 the project and the compact allocations. So it's not a  
15 question of lack of sovereignty. The question is what deal did  
16 they cut, and are they breaching that deal in exercising that  
17 sovereignty. And the deal that they cut was to deliver water,  
18 to relinquish that water to the project for distribution, and  
19 actions that interfere with the use of that water, as it was  
20 intended in the compact, have the potential to violate the  
21 compact.

22 Now, as to whether or not all groundwater below  
23 Elephant Butte is hydrologically connected, I don't know. We  
24 will debate that, I'm sure, over the coming months or years.  
25 But I don't think that the kind of statements that are being

11:46 1 made about the breadth of some of this is accurate at this  
11:47 2 point.

11:47 3 So the question before the Court is whether or  
11:47 4 not -- I think that Mr. Somach is correct in saying, to a large  
11:47 5 measure, the issue of the alternate fora has been addressed by  
11:47 6 the Supreme Court. They have relegated this now to you for the  
11:47 7 motion to dismiss.

11:47 8 Specifically, in dealing with the claim that all  
11:47 9 this should be in the adjudication, that also is incorrect. As  
11:47 10 the Court has pointed out in the *Hinderlider* case, the state  
11:47 11 had the authority to adjudicate lots of rights. It adjudicated  
11:47 12 a number of rights that were precompact, but the state had made  
11:48 13 an agreement to deliver a certain amount of water. And the  
11:48 14 fact that there were other water rights that may have been  
11:48 15 senior to the compact was, frankly, irrelevant. The deal was  
11:48 16 cut with the state, and the state then has to administer to  
11:48 17 deliver the water that was agreed upon.

11:48 18 In this case there may be some internal  
11:48 19 conflicts, I suppose, possible in the state, within the  
11:48 20 adjudication, but that doesn't solve New Mexico's issue of  
11:48 21 whether or not they have an obligation to make certain water  
11:48 22 available to the project, whether it becomes project water, and  
11:48 23 whether or not they can interfere with that. That is really  
11:48 24 the fundamental issue.

11:48 25 The notion that you can try and resolve these

1 fundamental compact questions in a variety of conflicting state  
2 or federal district court proceedings is simply wrong. All of  
3 those have ultimately bumped into the fundamental question  
4 that's being asked of you, what does this compact mean and what  
5 does it allocate to the states, what are the rights and  
6 obligations.

7 We have had a quiet title action, which ended  
8 up -- all of them hit the same roadblock, what does the compact  
9 mean, so that is what needs to be addressed. That is why this  
10 is the appropriate forum for any of that.

11 As has been alluded to, the Supreme Court, in  
12 *State v. Sims*, has made it very clear that you simply can't  
13 allow state interests in an interstate allocation to be  
14 resolved by the courts of one state. To quote the Court, it  
15 says: "It requires no elaborate argument to reject the  
16 suggestion that an agreement solemnly entered into between  
17 states by those who alone have political authority to speak for  
18 a state can be unilaterally nullified or given final meaning by  
19 an organ of one of the constructing states. A state cannot be  
20 its own ultimate judge in a controversy with a sister state."

21 It's a function of this Court to make those  
22 decisions; not federal district court, not state adjudicatory  
23 courts, but this Court to decide what those interstate  
24 obligations are. So what all of this comes down to is a  
25 question of the scope of the compact. It's the only question



1 in front of you today. Whether it's clear or not is the first  
2 threshold question you have to reach.

3 If you agree that there's only one possible  
4 interpretation an intelligent person can make and that is  
5 New Mexico's, then the case would have to be dismissed. If you  
6 make a determination that the United States and Texas are  
7 correct in their interpretation, then the motion to dismiss is  
8 denied. If you determine there is ambiguity, it is denied and  
9 we move forward to further phases of litigation.

10 But I think that it's clear, from the language  
11 and from the meaning, the fact that the water is being  
12 delivered and that the scope of the compact is all of the  
13 waters that drain to the Rio Grande. It broadly covers the  
14 delivery of water, and that affects the entire Lower Rio Grande  
15 basin. It is clear that there's an obligation that is ripe for  
16 adjudication, and the motion to dismiss needs to be denied.

17 **THE SPECIAL MASTER:** Thank you, Mr. DuBois. I have a  
18 couple questions for you.

19 What is the United States' theory of liability?

20 **MR. DUBOIS:** Liability to the United States?

21 **THE SPECIAL MASTER:** Yes.

22 **MR. DUBOIS:** The State of New Mexico is interfering  
23 with the water supply to the project. That water supply is  
24 guaranteed, if you will, through the compact, and the  
25 interfering with the water that is due the project also has the

1 potential impact to interfere with the obligations that we have  
2 with the country of Mexico.

3 **THE SPECIAL MASTER:** If Texas' complaint fails for  
4 failure to state a claim under the 1938 compact, does this  
5 Court continue to have jurisdiction over your case in  
6 intervention?

7 **MR. DUBOIS:** I think it does, Your Honor. I think  
8 that it's a question of whether it has jurisdiction versus  
9 original jurisdiction -- exclusive jurisdiction. I think that  
10 the claims stated under § 1251(b) still are appropriately  
11 before this Court.

12 I'd note, Your Honor, that because the project  
13 operates as a whole and has interstate obligations, this would  
14 be the most appropriate Court to continue that case because of  
15 the interstate nature of the project and the unique aspect of  
16 it being dual state.

17 **THE SPECIAL MASTER:** In your opposition to  
18 New Mexico's motion to dismiss, you state that since 1902 and  
19 consistently through subsequent amendments and supplements to  
20 reclamation law, Congress has required a contract with the  
21 secretary as a prerequisite to obtaining water from a  
22 reclamation project in that the United States has applied that  
23 prerequisite to the Rio Grande Project even after the 1938  
24 compact was ratified by the signatory states and Congress.  
25 That's your opposition at pages 19 and 20. Have you had to

1 enforce that requirement to date?

2 **MR. DUBOIS:** Have we enforced it in New Mexico?

3 **THE SPECIAL MASTER:** Yes.

4 **MR. DUBOIS:** I do not know. I will find out for you  
5 at the break.

6 **THE SPECIAL MASTER:** New Mexico reports that the  
7 United States recently made a priority call in the Klamath  
8 River basin, the apportionment of which is the subject of an  
9 interstate compact to regulate other water users for the  
10 benefit of the Klamath reclamation project. Why can't the  
11 United States do the same here?

12 **MR. DUBOIS:** Although it may be able to do that, that  
13 would not allow Texas to vindicate its interests, of course, in  
14 interstate.

15 **THE SPECIAL MASTER:** Right.

16 **MR. DUBOIS:** But could that be done? It may be  
17 possible. But again, you would still have to come back to the  
18 fundamental question of what the compact does and what is  
19 allocated to the project by the compact. So I think you still  
20 have the same fundamental problem.

21 This Court would be the place to make the  
22 determinations of the interpretation of the meaning of the  
23 compact. Once you have that determination, is it possible that  
24 the United States could take a different avenue? Possibly. I  
25 haven't really looked at it in that respect.

1           **THE SPECIAL MASTER:** In *City of El Paso v. Reynolds*,  
2 the district court observed: "There is simply no basis for the  
3 argument that the Secretary's contracts with the project water  
4 users effected an equitable apportionment binding on Texas and  
5 New Mexico."

6           Do you agree with that?

7           **MR. DUBOIS:** No -- well, let me give that a  
8 qualifier. The contracts effectuate the intended apportionment  
9 that is made in the compact.

10           Do I think that contracts signed by the two  
11 districts and the United States can make an equitable  
12 apportionment binding on the states? I think that would be --  
13 you would be hard-pressed to do that without a compact. The  
14 contracts alone cannot bind the states because the states are  
15 not a party. But the compact can make that agreement to  
16 protect the project's water supply, and then the contracts  
17 would be effectuating the apportionment. But the contracts in  
18 this case are not at issue.

19           **THE SPECIAL MASTER:** That's all I have, Mr. DuBois.  
20 Thank you.

21           Mr. Caroom.

22           **MR. CAROOM:** Your Honor, I seem to be having  
23 technical difficulties. Would this be a good time for the  
24 lunch break?

25           **THE SPECIAL MASTER:** Well, I wanted to go straight

1 through. I'm amenable to taking a lunch break, but how serious  
2 is your --

3 **MR. CAROOM:** Well, the PowerPoint is showing on my  
4 laptop, but it's not showing here.

5 **MS. BOND:** Maybe a 15-minute break might be long  
6 enough.

7 **THE SPECIAL MASTER:** We'll take a break.

8 **THE DEPUTY CLERK:** All rise.

9 (Recess.)

10 **THE SPECIAL MASTER:** Be seated, please.

11 **MR. DUBOIS:** Your Honor, if I might, just to follow  
12 up on one of your questions on timing.

13 **THE SPECIAL MASTER:** Sure.

14 **MR. DUBOIS:** I've been brought up to speed on that.

15 **THE SPECIAL MASTER:** Sorry for the curveball.

16 **MR. DUBOIS:** That's all right. That actually was an  
17 intrastate call. It was strictly a call in Oregon to other  
18 users in Oregon. It had nothing to do really with the compact  
19 or interstate obligations.

20 **THE SPECIAL MASTER:** Thank you.

21 Mr. Caroom.

22 **MR. CAROOM:** Your Honor, I apologize for the  
23 technical difficulties. It was an operator error.

24 **THE SPECIAL MASTER:** That's all right. I take full  
25 responsibility.

1           **MR. CAROOM:** Doug Caroom for the City of El Paso,  
2 Your Honor.

3           El Paso, like Las Cruces, is a municipal user  
4 dependent on the Rio Grande, dependent upon the project for a  
5 major part of its water supply. El Paso supplies 750,000  
6 people with its water supply, and it relies upon groundwater,  
7 reclaimed, reused water, desalinated water, as well as surface  
8 water. In order to avoid depleting the groundwater resources  
9 around El Paso, it is extremely important for El Paso to make  
10 full use of all the surface water that's available. So that's  
11 El Paso's interest in the case.

12           Now, there is one difference between El Paso and  
13 Las Cruces, as Mr. Stein described. El Paso pays for the  
14 project water that it uses. It has entered a contract with the  
15 irrigation district and the Bureau of Reclamation in order to  
16 purchase the water, and it pays a pretty high price for that  
17 water. We end up subsidizing the irrigation district about  
18 half of their operating expenses with what we purchase.

19           Las Cruces is getting the water from the  
20 project, according to the allegations of the United States,  
21 without paying for it because it pumps it as groundwater, but  
22 it's coming from the project nonetheless.

23           So the points I would like to make, Your Honor,  
24 are three today:

25           First, this is a problem of New Mexico's own

1 making. They knowingly allowed it to develop and, in my mind,  
2 it does raise genuine questions of good faith.

3 Second, New Mexico's position on compact  
4 interpretation is inconsistent with prior positions that it has  
5 taken. It has previously recognized an obligation to get this  
6 water to Texas.

7 Third, there's not an adequate remedy otherwise  
8 available.

9 In addressing these points I intend to rely upon  
10 documents that we have previously offered to lodge with the  
11 Court, without objection from the other parties, and I would  
12 again renew that offer to lodge these documents with the  
13 Master, if you wish.

14 So turning to the first point, a problem of  
15 New Mexico's own making, this is an excerpt from the state  
16 engineer's office memorandum in 1956 that was done in  
17 connection with designating the Middle Rio Grande underground  
18 basin. In New Mexico, until a basin is designated, there's no  
19 need to get a permit, there's no state approval for your wells;  
20 you just drill it.

21 So in 1956, with regard to the Rio Grande above  
22 Elephant Butte, the state engineer is saying that the surface  
23 waters of the Rio Grande are fully appropriated. Surface water  
24 and groundwaters are intimately interrelated. It's a  
25 single-supply system, and groundwater withdrawals ultimately

1 result in an equivalent diminution of surface water flows. As  
2 a result, what the state engineer is requiring is that future  
3 groundwater appropriations have to be offset by equivalent  
4 reductions in surface water rights.

5 That was done in 1956 for the Middle Rio Grande.  
6 Fast-forward. It wasn't until 1980 that a comparable order was  
7 entered designating a basin for the Lower Rio Grande. What  
8 triggered this order was the actions of El Paso described in  
9 *El Paso v. Reynolds*, the case Your Honor just referred to.  
10 El Paso had announced plans to take water from New Mexico,  
11 import it into Texas, and challenge the constitutionality of  
12 El Paso's export ban statute.

13 In response to that, the state engineer  
14 designated the basin so that El Paso would have to get permits  
15 to pump groundwater out of New Mexico. And, in fact, the state  
16 engineer ultimately turned those permit applications down, and  
17 the project died.

18 Now, going forward a few more years, about 20,  
19 we get to instances of the State of New Mexico taking contrary  
20 positions to the ones that they are taking now. We get to  
21 instances where they recognize a potential obligation to get  
22 the water to Texas.

23 This is from a state engineer memorandum in  
24 connection with an emergency well application by Elephant Butte  
25 Irrigation District during the drought in 2003. Mr. Fuchs, the



1 engineer who wrote the memorandum evaluating it, is basically  
2 saying that if drought conditions persist, the manner in which  
3 Texas will receive its proportionate share of the Rio Grande  
4 Project water and the quality in future years remains largely  
5 uncertain. He says, "It must be assumed that the State of  
6 New Mexico could eventually be met with a challenge under the  
7 Rio Grande Compact." He notes that 90 percent of the farms in  
8 EBID have wells to pump groundwater so that if they can't get a  
9 sufficient water supply from the project, they pump the  
10 groundwater to supplement it.

11 Now, the second excerpt from this memo offers an  
12 insight into what's driving the state engineer's office.  
13 Basically, he is saying if we take efforts to discontinue these  
14 current activities, there are going to be big political  
15 problems, and that's a situation New Mexico finds itself in.

16 There is one other portion of the memorandum,  
17 which I thought was interesting, that's not on this slide. The  
18 same paragraph at the top of this page, which comes from a  
19 summary at the beginning of the memorandum, is repeated on  
20 page 12 except there is a phrase before the first sentence here  
21 that says "despite the popular belief that New Mexico's  
22 obligations to Texas under the Rio Grande Compact essentially  
23 end at Elephant Butte Reservoir," then it goes on to say  
24 "should popular drought conditions persist." So at this time  
25 the engineer writing the memo is saying that's the popular

1 belief, but he is not saying that is the legal requirement.

2           So what we have had, by the time we get to 2003,  
3 is development of supplemental wells throughout Elephant Butte  
4 Irrigation District, for that hundred miles below the  
5 Elephant Butte Reservoir, to take groundwater and throw off  
6 that 120 percent project delivery ratio.

7           In 2003 the New Mexico legislature passed a  
8 statute for active water resources management. This was to  
9 allow the state engineer to manage water resources before the  
10 adjudication is complete. Without this statute the New Mexico  
11 state engineer couldn't really honor a priority call, because  
12 the water rights were undefined until the adjudication is  
13 finished, and the adjudication in New Mexico is not going to  
14 finish any time soon. So the legislature passed this statute  
15 saying that "the need for administration of water is urgent"  
16 and "compliance with interstate compacts is imperative,"  
17 legislative recognition, in my view, that there are compact  
18 obligations here to deal with.

19           After the statute was passed, the state engineer  
20 in 2005 went around the Rio Grande to the Lower Rio Grande  
21 water users association and did a PowerPoint presentation about  
22 the statute and what he was anticipating doing. These are  
23 excerpts from that PowerPoint.

24           He recognizes, first, the drought has shown us  
25 we have a problem, and it's too late to deal with once the

1 drought starts. You need the active water resources management  
2 program.

3 Demand continues to grow, both the irrigation  
4 demand and the municipal and industrial demand. And at the  
5 same time he is recognizing the surface water is fully  
6 depleted, and the surface and groundwater are connected.

7 So the facts that he has to deal with, in  
8 implementation of this program, are the continuing increase in  
9 groundwater in the Lower Rio Grande and the fact that pumping  
10 is 50,000 to 100,000 acre feet per year in a normal year and up  
11 to 300,000 acre feet in a drought year. It's the heavy  
12 reliance on groundwater, without controls, that is causing the  
13 problem.

14 So he is alluding here to the compact dispute.  
15 Texas is saying New Mexico should be using 50 percent of the  
16 water and that New Mexico is actually using more like  
17 70 percent of the water because of the groundwater pumping.

18 This is the take-home slide for me from his  
19 presentation. He is looking at the risk of Supreme Court  
20 litigation of an interstate compact. The second bullet seems  
21 to be saying that the relief Texas is requesting in this case  
22 is something that he is afraid of, that all postcompact  
23 groundwater pumping could be shut off. That would result in  
24 the loss of the aquifer as a backup supply during droughts.  
25 The state engineer is concerned with the compact compliance

1 issue. He is not happily saying our delivery obligations end  
2 at Elephant Butte.

3 He also quotes the legislative provision and  
4 advises that the legislature has admonished the state engineer  
5 not to let the Pecos River history repeat itself. The  
6 Pecos River history, from that *Texas v. New Mexico* case, is  
7 that New Mexico allowed excessive groundwater production in the  
8 upper part of the basin in New Mexico to prevent it from  
9 achieving compact compliance and ended up paying damages for  
10 that and being under a court order with an appointed master to  
11 ensure deliveries going forward.

12 Regarding the active water resources management  
13 program, New Mexico was held up for a while in terms of  
14 implementing that, but in 2012 the New Mexico Supreme Court  
15 affirmed the constitutionality of the statute; and since then  
16 New Mexico has not adopted the rules that would be required to  
17 implement that program.

18 Another inconsistent position which the Court  
19 has noted is the *El Paso v. Reynolds* case where New Mexico was  
20 arguing that the compact allotted groundwater in the area  
21 because of the interconnected nature with the surface water.

22 The other point I wanted to make is one I guess  
23 is not too seriously disputed now, that New Mexico enforcement  
24 really is not an option. Not only is Texas' compact right  
25 superior to New Mexico law, the Supreme Court's acceptance,

1 1 2 : 2 6 1 allowing the filing of this case, does seem to indicate that  
2 1 2 : 2 6 2 the alternative forum is not available.

3 1 2 : 2 6 3 In terms of the adjudication recognizing the  
4 1 2 : 2 6 4 rights of the project, I would suggest that this is not  
5 1 2 : 2 6 5 necessarily assured. Irrigators in the Elephant Butte  
6 1 2 : 2 6 6 Irrigation District are seeking recognition of water rights for  
7 1 2 : 2 6 7 those wells and are seeking it on the same priority basis as  
8 1 2 : 2 6 8 the project water. So if that's the case, a priority call --  
9 1 2 : 2 6 9 if that right is recognized, the priority call really wouldn't  
10 1 2 : 2 6 10 seem to do any good.

11 1 2 : 2 6 11 So the bottom line, Your Honor, from our point  
12 1 2 : 2 6 12 of view is that the integrity of the Rio Grande Project is an  
13 1 2 : 2 7 13 assumption upon which the compact was based, and it doesn't  
14 1 2 : 2 7 14 need to have a provision that says after delivery New Mexico  
15 1 2 : 2 7 15 can't take it back. That's, I think, self-evident. So we  
16 1 2 : 2 7 16 would urge the Court to deny the 12(b)(6) motion.

17 1 2 : 2 7 17 Your Honor, I would be happy to answer any  
18 1 2 : 2 7 18 questions.

19 1 2 : 2 7 19 **THE SPECIAL MASTER:** You anticipated my question.  
20 1 2 : 2 7 20 Thank you.

21 1 2 : 2 7 21 Mr. Speer.

22 1 2 : 2 7 22 **MR. SPEER:** Your Honor, I would mention, in light of  
23 1 2 : 2 7 23 Mr. Caroom's comments, that the Rio Grande Project was  
24 1 2 : 2 7 24 authorized exclusively as an irrigation project by Congress in  
25 1 2 : 2 8 25 1905. In 1920 an act was passed which said that where

1 irrigation projects could supply water for other uses than  
2 irrigation and the Secretary of Interior approved that usage,  
3 you could have contracts for various miscellaneous purposes,  
4 including municipal. It is pursuant to that 1920 act that the  
5 City of El Paso has been allowed by the Secretary of Interior  
6 to enter into a series of contracts with the El Paso district,  
7 which enables the City of El Paso to get water and put it to  
8 municipal use.

9           Next, Your Honor, I think you asked a question  
10 earlier as to what legal regimen controls the use of project  
11 water below Elephant Butte, and I don't think anyone quite  
12 answered it. The answer is that we have a so-called operating  
13 agreement entered into by the Elephant Butte district, the  
14 El Paso district, and the United States as a result of  
15 litigation in 2007 in district court. Actually both in  
16 Las Cruces and in El Paso, a settlement agreement was reached  
17 which produced the operating agreement. So that controls what  
18 happens to all the water released from Elephant Butte.

19           The other thing I would quickly mention,  
20 Your Honor, is that the two districts, the El Paso district and  
21 the Elephant Butte district, are like heads and tails of the  
22 same coin. We operate very closely and generally in full  
23 cooperation.

24           Under a contract that was required by the  
25 United States before they deeded lands to the two districts in

1 1996, we entered into a so-called joint powers agreement with  
2 the Elephant Butte district, as a result of which both  
3 districts in the irrigation season are constantly operating in  
4 the other state. So Elephant Butte is down in El Paso, in  
5 Texas, and the El Paso district is operating far up into  
6 New Mexico.

7           What caused that to come about was the U.S.  
8 originally had not recognized the state boundary as being of  
9 any significance and they had divided the irrigation system  
10 into divisions that crossed the state lines. For the districts  
11 who were taking over the operations, partially in 1980 and  
12 completely in '96, it was necessary that the two districts have  
13 these agreements.

14           So you have a Texas political subdivision, for  
15 example, operating all the way up really to Elephant Butte Dam  
16 in New Mexico with Texas employees of that political  
17 subdivision, and essentially the opposite happens with  
18 Elephant Butte because they come down into El Paso. So we are  
19 very closely united, and the project could not proceed without  
20 that cooperation between the districts.

21           Any other questions you might have, Your Honor?

22           **THE SPECIAL MASTER:** I do have one, Mr. Speer. In  
23 your brief on page 21, you argued that the enabling act for  
24 New Mexico of 1910, which has been incorporated into  
25 New Mexico's constitution, reserves to the United States, with

1 full acquiescence of the state, all rights and powers for the  
2 carrying out of the provisions by the United States of the  
3 Reclamation Act of 1902 to the same extent as if said state had  
4 remained a territory.

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

6 **THE SPECIAL MASTER:** You conclude that the  
7 United States retained and still holds, for the benefit of the  
8 project beneficiaries, all of the Rio Grande water which the  
9 United States acquired in 1848 and 1853, pursuant to the Treaty  
10 of Guadalupe Hidalgo, which was legally unappropriated by the  
11 date of the 1908 notice.

12 So is it your position that the United States  
13 has rights to Rio Grande water in New Mexico wholly apart from  
14 the compact?

15 **MR. SPEER:** Absolutely. Your Honor has got that dead  
16 right on all points.

17 **THE SPECIAL MASTER:** That's all I have.

18 **MR. SPEER:** Thank you, sir.

19 **THE SPECIAL MASTER:** Thank you.

20 **MS. O'BRIEN:** Your Honor, if I may. Maria O'Brien  
21 for EPCWID. We had asked that we be allowed to split our time.  
22 If Your Honor would prefer we not at this point in time -- I  
23 know it's been a long morning, now afternoon.

24 **THE SPECIAL MASTER:** Well, there are a few moments  
25 left to your time.



1           **MS. O'BRIEN:** Yes. Your Honor, I'm going to  
2 reiterate a few points others have made just because I think  
3 they are absolutely critical.

4           I think you know from our brief and others'  
5 remarks that El Paso County Water Improvement District No. 1 is  
6 the Rio Grande Project beneficiary in Texas. That makes it the  
7 beneficiary of the Texas apportionment under the compact.  
8 Texas absolutely got an apportionment below Elephant Butte.  
9 The fact that there are contracts that exist to divide that  
10 apportionment that Texas has as between project users does not  
11 mean that there is not an apportionment. New Mexico cannot say  
12 that its obligations end at the point that it delivers said  
13 apportionment to Texas at Elephant Butte.

14           Your Honor, Ms. Bond made reference earlier to  
15 the fact that this seems to be a new question. Can New Mexico  
16 take water that has been apportioned to Texas after it delivers  
17 it? No, indeed, this is not a new question. This is a  
18 question that has plagued the parties for decades, and parties  
19 have worked to try to resolve this issue.

20           Now Texas has come and brought before this  
21 Court, as well as the United States, the fundamental compact  
22 question: Can New Mexico deliver into Elephant Butte Texas'  
23 compact water, and then upon release into the project merely  
24 take that back as it's on its way to be delivered to Texas?  
25 The answer is no.

1           Indeed, EPCWID, as Mr. Speer mentioned, entered  
2 into the 2008 operating agreement with the United States and  
3 EBID in an effort to solve this issue, in essence, to give  
4 New Mexico a "get out of jail free" card. That was working  
5 well. That operating agreement was working well. It continues  
6 to work well.

7           New Mexico challenged that operating agreement  
8 in federal district court in New Mexico, alleging, among other  
9 things, that it violated the compact. So we are damned if we  
10 do; we are damned if we don't.

11           Now it is up to this Court to interpret and  
12 enforce the compact as the parties agreed to in 1938. We fully  
13 agree with Mr. Somach and the State of Texas that Texas is not  
14 seeking to rewrite the compact; rather, it is seeking to  
15 effectuate the apportionment that occurred.

16           I would like to make just one other point with  
17 regard to the notion of the U.S. making a priority call to  
18 somehow allow Texas to get its compact apportionment.  
19 Your Honor, if you look at the other cases that this Court has  
20 decided with regard to downstream states that are being  
21 deprived by an upstream state of their compact apportionment  
22 due to groundwater pumping, those states weren't required to go  
23 into state court under a priority call. They were allowed to  
24 come to this Court to get enforcement of their compact right.  
25 You cannot go into a state court adjudication and get

1 enforcement of your compact right. I think this is exactly  
2 where *Hinderlider* comes in too. A state cannot allocate water  
3 that it has not had apportioned to it. So we are talking about  
4 the wrongful depletion by New Mexico users of a compact  
5 enforcement. That is not a priority enforcement question.

6 All these questions, Your Honor, as I think that  
7 able counsel prior to me have pointed out, require full  
8 development of a record with the relevant history, the facts,  
9 and all the parties before this Court so this Court can  
10 interpret and enforce and, as Justice Kagan recently  
11 articulated in *Kansas v. Nebraska*, effectuate the appropriate  
12 equitable resolution of this complex dispute. Thank you,  
13 Your Honor.

14 **THE SPECIAL MASTER:** Thank you.

15 Ms. Bond.

16 **MS. BOND:** Thank you for allowing us such an extended  
17 period of time to argue, Your Honor. I would just like to  
18 raise a couple of points in rebuttal to some things that have  
19 been said this morning by adverse parties.

20 Firstly, Mr. Somach referred to the recent case  
21 of *Kansas v. Nebraska* in which Justice Kagan addressed and held  
22 with respect to the Court's authority to interpret a settlement  
23 agreement that had been entered into under a compact. I would  
24 remind the Court that that case did not involve a compact  
25 interpretation but, rather, a mistake of fact. All the parties

1 1 2 : 3 8 agreed that without the five-run solution on the settlement,  
2 1 2 : 3 8 transbasin diversion waters had actually been wrongfully  
3 1 2 : 3 9 included in Nebraska's apportionment under that settlement  
4 1 2 : 3 9 agreement. Thus we assert it is not a precedent for anything  
5 1 2 : 3 9 here because we are interpreting a compact here, not a  
6 1 2 : 3 9 settlement agreement, not the 2008 operating agreement, not  
7 1 2 : 3 9 reservoir operating principles as in the 1995 case of *Kansas v.*  
8 1 2 : 3 9 *Colorado*.

9 1 2 : 3 9 Also, it is our position that the compact is not  
10 1 2 : 3 9 ambiguous and that this Court may interpret the compact as a  
11 1 2 : 3 9 matter of law. The fact that we attached extrinsic evidence of  
12 1 2 : 3 9 the kind the Court approved in *Oklahoma v. New Mexico*, in  
13 1 2 : 3 9 Footnote 5, that constitute legislative history does not  
14 1 2 : 3 9 convert that issue to a matter of fact. It still remains a  
15 1 2 : 3 9 matter of law for this Court to rule upon and, therefore, is  
16 1 2 : 3 9 appropriate for a 12(b)(6) motion, in fact, as had been  
17 1 2 : 3 9 suggested by the United States in their amicus brief filed in  
18 1 2 : 4 0 December of 2013.

19 1 2 : 4 0 As I believe I said in the direct argument,  
20 1 2 : 4 0 New Mexico does not assert that it can be the final judge of  
21 1 2 : 4 0 another state's rights. But, rather, as the Court noted -- and  
22 1 2 : 4 0 we referred to this in our brief -- in the 2004 version of  
23 1 2 : 4 0 *Kansas v. Colorado*, the Colorado water court there was held to  
24 1 2 : 4 0 be the appropriate place for the first ruling on an  
25 1 2 : 4 0 augmentation plan that was critical to the question of

1 Colorado's compact compliance with Kansas. The Court affirmed  
2 that ruling of the special master in 2004.

3 I believe Mr. Somach said that as a matter of  
4 law that Section 8 didn't apply here or was irrelevant here.  
5 In fact, in the *U.S. v. City of Las Cruces* case, the  
6 Tenth Circuit held directly to the contrary, that Section 8 did  
7 govern reclamation actions in the Rio Grande. That ruling was  
8 also similarly in accord with the *Jicarilla Apache* case, which  
9 also ruled that the beneficial use doctrine of New Mexico is  
10 not inconsistent with reclamation law and, therefore, governed  
11 the rights in the project.

12 Texas also claimed that if what they bargained  
13 for in 1938 was protection of reclamation law, it got nothing  
14 more than it had before the compact. That also is not true.  
15 What Texas bargained for is New Mexico's guarantee of a  
16 delivery to Elephant Butte. As referenced in some of the  
17 materials that Mr. Caroom showed, New Mexico has limited its  
18 depletions above Elephant Butte in order to make that  
19 guaranteed supply to Texas. That's what Texas bargained for.  
20 That's what Texas wanted. That's the deal that Texas got.

21 This Court is not empowered to change that deal  
22 now because, with the hindsight of climate change and so forth,  
23 Texas thinks it didn't get as good a deal as it wanted, looking  
24 back at it over this long period of time. Again, the plain  
25 language of the compact is not ambiguous. That's why we

1 believe the Court must rule in New Mexico's favor.

2           The question of the analogy of the Klamath is a  
3 good question, and we believe the United States answered that  
4 wrongly. The priority call that would occur here is also  
5 intrastate because it would be the priority call of the  
6 United States against junior users in the basin.

7           If the United States claims that New Mexico  
8 water users are interfering with project water, it should avail  
9 itself of the New Mexico remedies. It was required to do that  
10 in *Nebraska v. Kansas*, where the Court noted also -- there,  
11 there was a reservoir in Wyoming that was intended to deliver  
12 water that had been apportioned in that case by a judicial  
13 decree, not by compact, but had been apportioned for use in  
14 Nebraska. The Court noted specifically that it was a  
15 reclamation project and that reclamation needed to get in line  
16 with the other prior appropriators under Wyoming law because  
17 even though it was destined for use in Nebraska, it was stored  
18 in Wyoming and therefore subject to those priorities.

19           Again, we don't believe that the United States'  
20 bald allegation that resort to state remedies would be futile  
21 is entitled to *Twombly* and *Iqbal* presumption, because it's both  
22 mixed law and fact and it has no support. We don't disagree  
23 that *Hinderlider* restricts New Mexico from granting water  
24 rights in excess of those which could be granted to  
25 New Mexicans, to the extent that they interfere with the

1 compact rights below New Mexico. We agree with that point.

2 The question is has that happened.

3 That is relevant also to one of the issues that  
4 Mr. Caroom was pointing out, that New Mexico was granting  
5 additional groundwater permits up until 1980. Of course, we  
6 noted in our briefs Texas yet has to apply any limitations to  
7 its rule of capture, and it has yet to restrict any of the  
8 groundwater developments in Texas.

9 The other point is that the nature of the  
10 usufruct, that is, the right that is at the core of the prior  
11 appropriation system, which has been discussed at great length  
12 by Justice Rehnquist in a number of cases, and very  
13 eloquently -- the unusual part of that doctrine is that it is  
14 so geared to life in the arid West. It recognizes inherently  
15 that in the spring there is typically more water than people  
16 can use. So it is true throughout the West that there are more  
17 rights in any river system that can be used in any one year if  
18 it's a dry year.

19 So the doctrine itself understands that my  
20 usufructuary right to the use of water ends at somebody else's  
21 priority date, and it intends that administration occur in  
22 order to effect the property right that is in the water right,  
23 which is why the U.S. is complying with the Klamath decree and  
24 why it was required to follow these remedies in the *Nebraska v.*  
25 *Wyoming* case and why it should be required to do the same thing

1 here.

2 That is the scheme that Congress has enacted.  
3 And as a matter of federalism and separation of powers, this  
4 Court should defer to that, relying on its appellate authority  
5 to provide ultimate relief, because New Mexico also agrees  
6 that, no, it cannot be the court of last resort for a  
7 determination of another state's rights.

8 **THE SPECIAL MASTER:** Well, let me pick up on that  
9 point. You mentioned *Kansas v. Colorado*. In your brief you  
10 actually cited that case and *Montana v. Wyoming* as perhaps  
11 examples where the Supreme Court was prepared to permit state  
12 adjudication of rights that had originated with a compact. I  
13 think those may not fit as well as you suggest.

14 In *Montana v. Wyoming*, the Yellowstone River  
15 Compact expressly incorporated and grandfathered all rights  
16 existing in each signatory state as of January 1950 and only  
17 allocated water left over after those rights had been  
18 satisfied. That compact expressly incorporated the doctrine of  
19 prior appropriation, which I don't think you have here.

20 **MS. BOND:** Your Honor, you were asking about the  
21 Clayton letters.

22 **THE SPECIAL MASTER:** Right.

23 **MS. BOND:** While this compact doesn't have the direct  
24 prior appropriation language in the compact, as was the case in  
25 Yellowstone, because it refers to the project, to the extent



1 there is any ambiguity there, the project can only be operated  
2 under reclamation law.

3 I would also suggest that it's New Mexico's  
4 position that there is no compact water right. The compact  
5 apportions the water among the states, and each state then must  
6 regulate its water users within its own apportionment, as the  
7 Texas certificate of decree did in 2006 for the project right.

8 The other point I would like to make is that  
9 Mr. DuBois referred to the definition in Article II(c) of the  
10 compact, referring to the tributaries of the Rio Grande basin  
11 as if that was support for an argument that the compact was a  
12 very expansive definition of what was apportioned. I would  
13 like to point the Court to the fact that that was a definition  
14 of the Rio Grande basin, which is, in fact, not what is  
15 apportioned in the compact. What is apportioned in the  
16 compact, what the parties are required to deliver is,  
17 quote/unquote, the waters of the Rio Grande.

18 The basin definition is used in this compact  
19 only because of the fact that, as referenced in the joint  
20 investigation, there were numerous transbasin diversion  
21 supplies projected to be bringing water into this basin; and as  
22 in the Republican, in order to apportion the waters of the  
23 Rio Grande, one had to exclude any waters that had originated  
24 in another basin. So the basin definition isn't what's  
25 apportioned. The basin definition is there simply to

1 distinguish water brought in from a transbasin diversion.

2 I think that the 2004 version of *Kansas v.*  
3 *Colorado* we cited because we assert that it's authority for the  
4 proposition that adjudicatory determinations of existing rights  
5 in an upstream state can be relevant to compact compliance and  
6 that such determinations may properly be made by the  
7 adjudication court in the first instance, subject to later  
8 review by the Supreme Court, as the Court did in *U.S. v.*  
9 *New Mexico* with the U.S. claim of reserve rights in the Gila.

10 Again, our argument, despite the complexity of  
11 this case, is relatively simple. The plain language of the  
12 compact provides that New Mexico's delivery obligation is to  
13 Elephant Butte Reservoir, not the state line. Again, this is a  
14 delivery compact, not a depletion compact, because each compact  
15 protects the downstream states in a unique way, as agreed to by  
16 the states at the time of the compact.

17 The parties do not dispute that New Mexico has  
18 made all of her compact deliveries to Elephant Butte and,  
19 therefore, Texas' complaint should be dismissed. The compact  
20 also does not require New Mexico to maintain depletions within  
21 the basin, as the 1929 compact did. In fact, the joint  
22 investigation and the proceedings make quite clear that the  
23 whole point of the '38 compact was to free the upstream states  
24 for additional development so long as those deliveries are made  
25 at the project.

1 So it remains our position that the compact  
2 imposes no affirmative duty on New Mexico to prevent  
3 interference with deliveries of project water by the  
4 United States, as alleged in the United States' complaint; nor  
5 can the United States, which is not a party to the compact,  
6 assert claims based on the compact. To the extent that the  
7 United States seeks to raise claims, based on state or federal  
8 law, asserting injury to its project rights, resolution of  
9 those claims can occur in lower courts and then be brought back  
10 to this Court for review.

11 We again would request that the Court dismiss  
12 both complaints in their entirety. I think that's all I have.

13 **THE SPECIAL MASTER:** I don't have any questions.  
14 Thank you, Ms. Bond.

15 The proceedings are in recess.

16 (Proceedings adjourned.)

17 \* \* \*

18 **CERTIFICATE**

19 I, Toni Doyle Tusa, CCR, FCRR, Official Court  
20 Reporter for the United States District Court, Eastern District  
21 of Louisiana, certify that the foregoing is a true and correct  
22 transcript, to the best of my ability and understanding, from  
23 the record of proceedings in the above-entitled matter.

24 s/ Toni Doyle Tusa  
25 Toni Doyle Tusa, CCR, FCRR  
Official Court Reporter



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