

No. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF AUGUST 20, 2015
ORAL ARGUMENT BEFORE
A. GREGORY GRIMSAL, ESQ.
SPECIAL MASTER

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PROCEEDINGS

(August 20, 2015)

THE SPECIAL MASTER: Good morning. Please be seated.

This morning we are hearing oral argument in a motion to intervene filed by Elephant Butte Irrigation District in Original No. 141 of the docket of the United States Supreme Court. I would like to start with a few housekeeping matters.

Again, I would like to express my gratitude to Judge Jay Zainey of this Court and the staff of the Eastern District of Louisiana, who have been extremely helpful and supportive of our work. I would like the record to reflect my gratitude to all of them.

I ask that you turn off all cell phones, iPads, similar electronic devices. No cameras. Please turn off such devices and put them away. If you are seen to be using any such device, our security officer will escort you out of the courtroom. I hope I make myself clear on that point.

The only exception to that rule, of course, is for counsel who are actually presenting argument. As to counsel, they, of course, can use such devices in connection with the presentation of their argument.

If anyone needs a break for any reason, please let me know, and such leave will be liberally granted.

The order of argument and the times that each

09:31 1 party will have for argument was set forth in a case management
09:32 2 order. Ms. Grabill will be keeping time today. She will give
09:32 3 you a five-minute warning before your time runs out, although I
09:32 4 will exercise some flexibility as to when you are actually cut
09:32 5 off.

09:32 6 My approach to the argument this morning is I
09:32 7 know that you all have arguments to make, information to
09:32 8 impart, a story to tell. I'm very interested in hearing what
09:32 9 you have to say and giving you an opportunity to say it, so I
09:32 10 am going to try to exercise some discipline and self-restraint
09:32 11 and keep my questions till the end of your argument. Again, I
09:32 12 emphasize I will try to do that.

09:32 13 If there's any need for a status conference
09:32 14 after we conclude the oral argument today, I can stay and do
09:33 15 that. Just let me know.

09:33 16 At this point I would like counsel to make their
09:33 17 appearances for the record. I know several of the parties have
09:33 18 several lawyers here. Please do make your appearances, but
09:33 19 when you do, please identify yourself, if you are the person
09:33 20 who is actually going to be presenting oral argument, for the
09:33 21 benefit of Ms. Tusa so she knows who you are.

09:33 22 **MR. HERNANDEZ:** Good morning, Your Honor. Steven L.
09:33 23 Hernandez for proposed intervenor Elephant Butte Irrigation
09:33 24 District. Sitting with me at counsel table is my associate
09:33 25 Dr. Lisa Henne, Lee Peters, and Roderick Walston. At counsel

09:33 1 table is our declarant, Mr. Gary Esslinger. His daughter,
09:33 2 Tiffany Dudley, is in the audience today, seated next to
09:34 3 Mr. Salopek, our chairman of the board. One of our farmers,
09:34 4 Mr. Robert Fabian, is also here.

09:34 5 **THE SPECIAL MASTER:** Good morning.

09:34 6 **MR. HERNANDEZ:** I will be doing rebuttal today,
09:34 7 Your Honor. I will let Mr. Walston lead off this morning and
09:34 8 then I will do the rebuttal. 30 minutes and 15, I believe, is
09:34 9 what the Court has allowed us.

09:34 10 **THE SPECIAL MASTER:** That's correct.

09:34 11 **MR. SOMACH:** Stuart Somach, Your Honor, for the State
09:34 12 of Texas. With me are Andrew Hitchings, Francis Goldsberry,
09:34 13 and Robert Hoffman. I will be doing the argument for the State
09:34 14 of Texas this morning.

09:34 15 **THE SPECIAL MASTER:** Thank you, Mr. Somach.

09:34 16 **MS. BOND:** Good morning, Your Honor. Sarah Bond for
09:34 17 the State of New Mexico. With me at counsel table are Jeff
09:34 18 Wechsler and Lisa Thompson. We have the same attendees as we
09:34 19 did yesterday, so I will save the time by not repeating that.
09:34 20 Thank you.

09:34 21 **THE SPECIAL MASTER:** Thank you.

09:34 22 **MR. WALLACE:** Good morning, Your Honor. Chad Wallace
09:35 23 arguing for the State of Colorado today.

09:35 24 **THE SPECIAL MASTER:** Thank you, Mr. Wallace.

09:35 25 **MR. DUBOIS:** Good morning, Your Honor. James DuBois

09:35 1 for the United States. I'll be arguing. With me at counsel
09:35 2 table are Mr. Macfarlane and Mr. Leininger.

09:35 3 **THE SPECIAL MASTER:** Thank you. Good morning.

09:35 4 **MR. WALSTON:** Good morning, Your Honor.

09:35 5 **THE SPECIAL MASTER:** Good morning.

09:35 6 **MR. WALSTON:** I'm Roderick Walston. I represent
09:35 7 Elephant Butte Irrigation District, the intervenor in this
09:35 8 case.

09:35 9 This morning what I would like to do is make
09:35 10 four arguments to the Court. First, I would like to describe
09:35 11 the standard for intervention that has been established by the
09:35 12 Supreme Court. Secondly, I would then like to argue that
09:35 13 Elephant Butte meets the standard for intervention because,
09:35 14 first, it has a compelling interest in this case apart from its
09:35 15 membership in a class of similarly situated entities in
09:35 16 New Mexico and, secondly, its interest is not represented by
09:36 17 any of the parties in this litigation. Then finally, I would
09:36 18 like to argue that Elephant Butte should be allowed to
09:36 19 intervene even though it did not file a complaint or answer in
09:36 20 intervention.

09:36 21 So let me start with the first argument, the
09:36 22 standard for intervention. The Supreme Court has spelled out
09:36 23 the standard for intervention in *South Carolina v.*
09:36 24 *North Carolina* and also the 1953 case of *New Jersey v.*
09:36 25 *New York*. The standard is that the intervenor, that is to say

0 9 : 3 6 1 Elephant Butte, has the "burden of showing some compelling
0 9 : 3 6 2 interest in its own right, apart from its interest in a class
0 9 : 3 6 3 with all other citizens and creatures of the state, which
0 9 : 3 6 4 interest is not properly represented by the state."

0 9 : 3 6 5 So Elephant Butte candidly acknowledges that it
0 9 : 3 6 6 has a burden in this case and that its burden is to
0 9 : 3 6 7 demonstrate, to the satisfaction of the Special Master and the
0 9 : 3 6 8 Supreme Court, that it has a compelling interest that is not
0 9 : 3 7 9 represented by any state in this litigation.

0 9 : 3 7 10 The opposing parties in this case have all
0 9 : 3 7 11 argued that an intervenor who is a creature of the state cannot
0 9 : 3 7 12 intervene in an action in which the home state is a party,
0 9 : 3 7 13 because they say the home state represents all of its citizens
0 9 : 3 7 14 *parens patriae*. In addition, to allow intervention would be to
0 9 : 3 7 15 allow the intervenor to impeach the judgment of its home state.

0 9 : 3 7 16 The opposing party's argument, in our view, is
0 9 : 3 7 17 quite inconsistent with the Supreme Court's most recent
0 9 : 3 7 18 pronouncement of the standard of intervention in
0 9 : 3 7 19 *South Carolina*, because the Court in that case adopted a
0 9 : 3 7 20 flexible fact-specific standard for determining whether an
0 9 : 3 7 21 intervenor has the right to intervene and rejected the argument
0 9 : 3 7 22 that there is a categorical preclusion by creatures of a state
0 9 : 3 7 23 from intervening in original actions.

0 9 : 3 8 24 In *South Carolina* the Supreme Court cited
0 9 : 3 8 25 several cases in which nonstate entities had been allowed to

09:38 1 intervene in original actions before the Supreme Court,
09:38 2 including some entities that were actually created by one of
09:38 3 the states that was in the litigation. Indeed, in
09:38 4 *South Carolina* itself, the Supreme Court allowed an entity to
09:38 5 intervene, the Catawba River Water Supply Project, even though
09:38 6 that water project was a creature of the state. It was a
09:38 7 municipality of both states. Nonetheless, the Supreme Court
09:38 8 allowed intervention.

09:38 9 It's equally significant that the Supreme Court
09:38 10 in *South Carolina* denied intervention by the City of Charlotte,
09:38 11 North Carolina, not because Charlotte was a creature of
09:38 12 North Carolina, but because the magnitude of Charlotte's
09:38 13 interests did not separate it from other similarly situated
09:38 14 water users in North Carolina.

09:38 15 In the case of *Texas v. Louisiana*, decided in
09:39 16 1976, the Supreme Court granted intervention by the City of
09:39 17 Port Arthur, Texas, even though Texas was one of the parties in
09:39 18 the litigation before the Supreme Court.

09:39 19 In *Arizona v. California*, decided in 1983, the
09:39 20 Supreme Court granted intervention by various Indian tribes
09:39 21 even though the tribes' interests were already represented in
09:39 22 that litigation by the United States, which had intervened in
09:39 23 the case.

09:39 24 The Supreme Court then, looking at all these
09:39 25 cases, and in particular citing *Arizona v. California* and the

0 9 : 3 9 1 *Texas v. Louisiana* case, made the following statement, which
0 9 : 3 9 2 appears on page 268 of the Court's decision. The Court said
0 9 : 3 9 3 that the Court in that case had "found compelling interests
0 9 : 3 9 4 that warranted allowing nonstate entities to intervene in
0 9 : 3 9 5 original actions in which the intervenors were nominally
0 9 : 4 0 6 represented by sovereign entities."

0 9 : 4 0 7 To me, the statement by the Supreme Court
0 9 : 4 0 8 establishes very clearly a fact-specific standard rather than a
0 9 : 4 0 9 categorical standard for determining intervention, and it
0 9 : 4 0 10 supports Elephant Butte's right to intervene because
0 9 : 4 0 11 Elephant Butte is nominally represented by the State of
0 9 : 4 0 12 New Mexico but, for reasons I will mention later, New Mexico
0 9 : 4 0 13 does not properly represent Elephant Butte's interests.

0 9 : 4 0 14 Texas has argued in this case that a nonstate
0 9 : 4 0 15 intervenor should not be granted intervention in a dispute over
0 9 : 4 0 16 interstate waters, but the Supreme Court in *South Carolina* and
0 9 : 4 0 17 other cases has adopted and applied the same standard of
0 9 : 4 0 18 intervention in interstate water disputes that it has applied
0 9 : 4 1 19 in other types of disputes as well.

0 9 : 4 1 20 According to Texas, Elephant Butte should not be
0 9 : 4 1 21 allowed to intervene because it is not a bistate interest like
0 9 : 4 1 22 the parties that were allowed to intervene in *South Carolina*.
0 9 : 4 1 23 But, in fact, as I will explain later, Elephant Butte does
0 9 : 4 1 24 actually represent bistate interests, because Elephant Butte
0 9 : 4 1 25 actually monitors the water of the Rio Grande Project as it

0 9 : 4 1 1 flows down the river, in order to make sure that the water is
0 9 : 4 1 2 available not only for use in New Mexico but also for use in
0 9 : 4 1 3 Texas and Mexico. And in addition to that, Elephant Butte
0 9 : 4 1 4 actually physically delivers a portion of the Rio Grande
0 9 : 4 1 5 Project water to users in Texas itself.

0 9 : 4 1 6 Now let me go to the second argument, that
0 9 : 4 1 7 Elephant Butte has a compelling interest in this case in its
0 9 : 4 1 8 own right, apart from its interest in a class with other
0 9 : 4 1 9 citizens and creatures of New Mexico. We believe that
0 9 : 4 2 10 Elephant Butte has a compelling interest for two reasons.
0 9 : 4 2 11 First, Elephant Butte is responsible for administering the
0 9 : 4 2 12 Rio Grande Project in New Mexico. Second, Elephant Butte is a
0 9 : 4 2 13 signatory to the contract, the 1938 contract that apportioned
0 9 : 4 2 14 Rio Grande Project water between Texas and New Mexico and that
0 9 : 4 2 15 all the interested parties have followed ever since the
0 9 : 4 2 16 contract was executed.

0 9 : 4 2 17 So the first point: Elephant Butte administers
0 9 : 4 2 18 the Rio Grande Project in New Mexico. Elephant Butte, of
0 9 : 4 2 19 course, was created under the laws of New Mexico for the
0 9 : 4 2 20 purpose of cooperating with the United States in developing
0 9 : 4 2 21 water supplies for the Rio Grande Project under the federal
0 9 : 4 2 22 reclamation laws. So Elephant Butte is kind of a hybrid entity
0 9 : 4 2 23 in the sense that it was created under New Mexico law but is
0 9 : 4 2 24 created for the purpose of assisting and facilitating the
0 9 : 4 2 25 development of a federal reclamation project authorized by

0 9 : 4 3 1 Congress under the federal reclamation laws.

0 9 : 4 3 2 In addition to that, and perhaps far more
0 9 : 4 3 3 important, the United States has transferred the project
0 9 : 4 3 4 facilities from itself to Elephant Butte after Elephant Butte
0 9 : 4 3 5 repaid the costs of the project.

0 9 : 4 3 6 The United States, first of all, in 1980 adopted
0 9 : 4 3 7 or issued the takeover contract or signed a takeover contract
0 9 : 4 3 8 with Elephant Butte, as a result of which the project
0 9 : 4 3 9 facilities -- the entire drainage and distribution facilities
0 9 : 4 3 10 of the project have been transferred from the United States to
0 9 : 4 3 11 Elephant Butte. So as a result of this, Elephant Butte
0 9 : 4 3 12 actually operates the laterals and the canals that actually
0 9 : 4 3 13 distribute the water to farmlands in New Mexico, and it
0 9 : 4 3 14 operates the drainage facilities that then return the project
0 9 : 4 4 15 return flows to the project itself.

0 9 : 4 4 16 Then in 1989 the United States signed another
0 9 : 4 4 17 contract with Elephant Butte that transferred the authority to
0 9 : 4 4 18 operate the three most upstream diversion dams in New Mexico to
0 9 : 4 4 19 Elephant Butte. These three diversion dams are the Percha,
0 9 : 4 4 20 Leasburg, and Mesilla dams. So as a result of that, now
0 9 : 4 4 21 Elephant Butte operates those diversion dams that divert water
0 9 : 4 4 22 out of the river for use in New Mexico and later Texas.

0 9 : 4 4 23 Then in 1992 Congress took the additional step
0 9 : 4 4 24 of authorizing the Secretary of the Interior to transfer the
0 9 : 4 4 25 title -- the title -- to the project facilities to

0 9 : 4 4 1 Elephant Butte. Then in 1996 the Secretary of the Interior
0 9 : 4 4 2 actually issued deeds to Elephant Butte that transferred the
0 9 : 4 4 3 title to all of these project facilities to Elephant Butte.

0 9 : 4 5 4 In exercising its authority over these project
0 9 : 4 5 5 facilities, Elephant Butte exercises its own independent
0 9 : 4 5 6 judgment and authority. It is not beholden to the
0 9 : 4 5 7 United States to do that. It is not beholden to the State of
0 9 : 4 5 8 New Mexico. As a matter of fact, when the United States
0 9 : 4 5 9 transferred the facilities to Elephant Butte, a number of
0 9 : 4 5 10 federal employees ceased to be federal employees and became
0 9 : 4 5 11 Elephant Butte employees, performing the same functions that
0 9 : 4 5 12 they had previously performed as employees of the
0 9 : 4 5 13 United States.

0 9 : 4 5 14 So as a result of the transfer of these project
0 9 : 4 5 15 facilities from the United States to Elephant Butte, here's how
0 9 : 4 5 16 the project system actually operates on a day-by-day basis.

0 9 : 4 5 17 First, Elephant Butte, in conjunction with the
0 9 : 4 5 18 Texas water district El Paso County No. 1, determines when and
0 9 : 4 5 19 how much water is released from the upstream reservoirs, the
0 9 : 4 5 20 Elephant Butte and Caballo reservoirs.

0 9 : 4 6 21 Second, once the water is released, then
0 9 : 4 6 22 Elephant Butte operates the three upstream diversion dams in
0 9 : 4 6 23 New Mexico that actually divert the water out of the river for
0 9 : 4 6 24 use in New Mexico.

0 9 : 4 6 25 Third, Elephant Butte operates the laterals and

09:46 1 canals that actually deliver the water to the farmlands in
09:46 2 New Mexico.

09:46 3 Fourth, Elephant Butte also owns and operates
09:46 4 the drainage facilities that return the water that's -- after
09:46 5 it's been used, return the water back to the Rio Grande for
09:46 6 later use downstream.

09:46 7 Fifth, Elephant Butte monitors the project water
09:46 8 as it flows downstream to make sure that enough water is
09:46 9 available for use later in Texas and also for later use in
09:46 10 Mexico, pursuant to the United States' treaty obligation with
09:46 11 Mexico.

09:46 12 Sixth, Elephant Butte operates the third
09:47 13 upstream diversion dam, the Mesilla dam, not only to put water
09:47 14 into farmlands into New Mexico, but also to make water
09:47 15 available for use in Texas as well.

09:47 16 Then seventh and finally, as I mentioned
09:47 17 earlier, Elephant Butte actually physically delivers a portion
09:47 18 of Rio Grande Project water to users in Texas who cannot be
09:47 19 reached or serviced by El Paso County No. 1's own facilities.
09:47 20 As a matter of fact, the way Elephant Butte does that is it
09:47 21 takes its vehicles, drives them across the state line into
09:47 22 Texas so they can operate the turn-outs -- turn the valves, in
09:47 23 effect -- to allow water to then be used by the Texas users.

09:47 24 So basically, as you can see, Elephant Butte has
09:47 25 bistate interests in this case. And, of course, that is

0 9 : 4 7 1 significant because the Supreme Court in *South Carolina* held
0 9 : 4 7 2 that those two entities, Duke Energy and the Catawba River
0 9 : 4 8 3 Water Supply Project, should be allowed to intervene because
0 9 : 4 8 4 they had bistate interests.

0 9 : 4 8 5 Since Elephant Butte administers the project in
0 9 : 4 8 6 New Mexico and distributes the water to users in both
0 9 : 4 8 7 New Mexico and Texas, Elephant Butte is not a simple water user
0 9 : 4 8 8 similarly situated to other water users, contrary to the
0 9 : 4 8 9 arguments of all three opposing parties. For the same reason,
10 because Elephant Butte administers the Rio Grande Project in
11 New Mexico, Elephant Butte -- there is no class in New Mexico
12 to which any other entity like Elephant Butte belongs. It's
13 unique. It performs a unique role and function in
14 administering the project and serving project needs in
15 New Mexico. Nobody else in New Mexico does that or is
16 responsible for doing that.

0 9 : 4 9 17 The second reason that Elephant Butte has a
0 9 : 4 9 18 compelling interest, in our view, is that Elephant Butte is a
0 9 : 4 9 19 signatory to the 1938 contract that has historically
20 apportioned Rio Grande Project water between New Mexico and
21 Texas. In the 1938 contract, the United States and two water
22 districts, Elephant Butte and the one in Texas, agreed that
23 water would be apportioned between Texas and New Mexico in
24 relation to the proportion of project lands located in both
25 states. Since 57 percent of project lands are located in

09:49 1 New Mexico and 43 percent are located in Texas, the
09:49 2 distribution of project water between users in Texas and
09:49 3 New Mexico follows that same percentage.

09:49 4 Historically -- and this cannot be
09:49 5 overemphasized, in our view, Your Honor. Historically the
09:49 6 United States, the water districts, and all the water users
09:49 7 have followed the apportionment of water that was established
09:50 8 in the 1938 contract to which Elephant Butte was a signatory.

09:50 9 In 2008 the United States and the two water
09:50 10 districts signed an operating agreement, of course, that
09:50 11 essentially modified the 1938 contract. Now, the operating
09:50 12 agreement did not change that 57/43 percent distribution of
09:50 13 water between the two states, but it did allow the water
09:50 14 districts to carry over storage from one year to the next
09:50 15 rather than requiring them to use their entire storage
09:50 16 allocation in one year. It also changed the basis for
09:50 17 groundwater pumping in New Mexico from 1938, the year the
09:50 18 contract was signed, to the drought years of 1951 through 1978.
09:50 19 In this respect the operating agreement provided benefits to
09:50 20 both sides, but it did modify the 1938 contract.

09:51 21 And, of course, New Mexico strongly disagrees
09:51 22 that the operating agreement provides a valid allocation of
09:51 23 water between the two states and has actually brought an action
09:51 24 in federal district court in New Mexico challenging the
09:51 25 validity of the agreement. Elephant Butte, on the other hand,

09:51 1 which signed the contract, believes the contract provides a
09:51 2 fair and equitable distribution of the water of the Rio Grande
09:51 3 based on current conditions.

09:51 4 The third argument: Elephant Butte's interests
09:51 5 are not represented by any party. First, Elephant Butte's
09:51 6 interests are not represented by New Mexico. Elephant Butte,
09:51 7 as I have said, has major responsibilities in administering the
09:51 8 Rio Grande Project in New Mexico. It distributes the water to
09:51 9 users in New Mexico, provides for project return flows, ensures
09:51 10 water deliveries to Texas and Mexico, and actually physically
09:51 11 delivers a portion of project water to users in Texas.

09:52 12 New Mexico itself does not have any of these
09:52 13 statutory responsibilities, has no authority or responsibility
09:52 14 whatsoever for doing any of the functions that I just
09:52 15 described. In fact, in its motion to dismiss, New Mexico
09:52 16 disclaims any authority or responsibility whatsoever for
09:52 17 Rio Grande Project water once New Mexico has delivered the
09:52 18 water to the project.

09:52 19 Once it's delivered to the project, New Mexico
09:52 20 says it has no authority or responsibility for whatever happens
09:52 21 next as the water flows down the river towards Texas. But it's
09:52 22 Elephant Butte that exercises all of those functions,
09:52 23 administers the entire project system as the water flows
09:52 24 between those two points. And, of course, yesterday the
09:52 25 New Mexico attorney repeated that same argument. They disclaim

09:52 1 any authority or responsibility for the project functions or
09:52 2 what happens to the water once they actually deliver the water
09:52 3 to the project at Elephant Butte Reservoir.

09:53 4 Also, it bears mentioning that Elephant Butte
09:53 5 signed the 1938 contract, along with the United States and the
09:53 6 Texas district, that actually apportioned project water between
09:53 7 New Mexico and Texas and that has been followed by everybody
09:53 8 ever since that time. It was Elephant Butte that signed that
09:53 9 contract. The State of New Mexico was not a signatory to the
10 10 contract.

09:53 11 So to summarize that point, it is Elephant Butte
09:53 12 that has participated with the United States and the Texas
09:53 13 district in apportioning the project water as it goes
09:53 14 downstream, and the State of New Mexico itself has had no hand
09:53 15 in that decision-making process. Therefore, New Mexico does
16 16 not represent Elephant Butte's interests.

09:53 17 Also, Elephant Butte's interests are not
09:53 18 represented by the United States. The United States exercises
09:53 19 no authority or control whatsoever over Elephant Butte when it
09:54 20 exercises all these functions that I have just described,
09:54 21 monitoring project water, releasing water for use in
09:54 22 New Mexico, returning the water to the river, delivering water
23 23 to Texas users, and so forth.

09:54 24 Also, while the United States and the two water
09:54 25 districts jointly signed the 1938 contract that apportioned the

0 9 : 5 4 1 water, the United States did not control Elephant Butte's
0 9 : 5 4 2 decision to sign that contract. Elephant Butte exercised its
0 9 : 5 4 3 own independent judgment and authority in signing that
0 9 : 5 4 4 contract. Therefore, I think it's fair to say that not only is
0 9 : 5 4 5 Elephant Butte not a functionary of the United States in
0 9 : 5 4 6 administering the project, as the United States has claimed,
0 9 : 5 4 7 but in actuality the functionary is much more the United States
0 9 : 5 4 8 than Elephant Butte.

0 9 : 5 4 9 Now, the last argument -- oh, one more point
0 9 : 5 5 10 before I leave that. Elephant Butte does assert a different
0 9 : 5 5 11 legal argument for this Court than all the other parties
0 9 : 5 5 12 asserted, which we think further indicates that our interest is
0 9 : 5 5 13 not represented by any of the parties in this litigation.

0 9 : 5 5 14 We argue that the compact itself does not
0 9 : 5 5 15 apportion Rio Grande Project water or Rio Grande water itself
0 9 : 5 5 16 between New Mexico and Texas. In fact, the compact makes no
0 9 : 5 5 17 mention of any apportionment of water to Texas. It simply
0 9 : 5 5 18 requires New Mexico to deliver water to the project, as
0 9 : 5 5 19 New Mexico has pointed out, but does not require New Mexico to
0 9 : 5 5 20 deliver a quantity of water to Texas at the Texas-New Mexico
0 9 : 5 5 21 state line.

0 9 : 5 5 22 In our view, the apportionment is governed not
0 9 : 5 5 23 by the compact but, rather, by the contracts that have been
0 9 : 5 5 24 signed by the United States and the two water districts,
0 9 : 5 6 25 particularly the 1938 contract that has historically

09:56 1 appORTIONED the water.

09:56 2 Actually, the 1938 contract was signed shortly
09:56 3 before the compact was signed. So the compact commissioners,
09:56 4 the people who negotiated the compact, were fully aware that
09:56 5 that 1938 contract I mentioned had already been executed when
09:56 6 they were negotiating and signing the contract -- the compact.
09:56 7 I'm sorry.

09:56 8 In fact, the Texas compact commissioner
09:56 9 contemporaneously stated as follows: "The question of the
09:56 10 division of water released from Elephant Butte Reservoir is
09:56 11 taken care of by contracts between the districts under the
09:56 12 Rio Grande Project and the Bureau of Reclamation." That quote
09:56 13 appears on page 33 of our opening brief.

09:56 14 So the compact did not apportion the water
09:56 15 between the two states, because the contract had already done
09:57 16 that; there was thus no need for the compact to even address
09:57 17 the subject.

09:57 18 Therefore, we think Texas' cause of action is
09:57 19 insufficient and at some point Texas should be allowed to amend
09:57 20 its complaint to state a valid cause of action. We are not
09:57 21 unconvinced that they can state a valid cause of action, but we
09:57 22 believe the theory they have pled in their complaint does not
09:57 23 state a valid claim. This is not to say, however, that this
09:57 24 Court should necessarily grant dismissal of New Mexico's
09:57 25 motion, because as Mr. Somach pointed out yesterday, this is a

09:57 1 very complex case involving a lot of fact. And, therefore,
09:57 2 Texas has, in our view, pled sufficient facts to allow the case
09:57 3 to proceed forward and, therefore, not to warrant dismissal of
09:57 4 Texas' complaint at this juncture.

09:57 5 The final argument: Elephant Butte should be
09:58 6 allowed to intervene even though it didn't file a complaint or
09:58 7 answer in intervention. Texas alone makes the argument. It
09:58 8 argues that Elephant Butte should not be allowed to intervene
09:58 9 because it didn't file a complaint or answer in intervention.

09:58 10 Supreme Court Rule 17.2 provides that the form
09:58 11 of pleadings and motions in original actions follows the
09:58 12 Federal Rules of Civil Procedure. Rule 24(c) of the Federal
09:58 13 Rules of Civil Procedure provides that a motion to intervene
09:58 14 must be accompanied "by a pleading" setting forth the "claim or
09:58 15 defense." It doesn't mention a complaint or answer, but it
09:58 16 does say there has to be a pleading that sets forth the claim
09:58 17 or defense.

09:58 18 Well, first, the Supreme Court has held that
09:58 19 Rule 17.2 is simply a guide in original actions and, therefore,
09:58 20 it does not establish an inflexible rule.

09:58 21 Secondly, Rule 24(c) itself does not strictly
09:59 22 require that a complaint or answer in intervention be filed as
09:59 23 part of a motion to intervene. In fact, the Ninth Circuit in
09:59 24 two cases and the Fourth Circuit in one case, all cited in our
09:59 25 briefs, held that an intervention motion without a pleading is

09:59 1 sufficient "if the Court is otherwise apprised of the grounds
09:59 2 for the motion."

09:59 3 We have fully demonstrated, I'm sure to the
09:59 4 Court's satisfaction, what our view on these various issues is,
09:59 5 and none of the parties opposing our intervention has claimed
09:59 6 that they are befuddled or unclear as to what Elephant Butte is
09:59 7 contending in this case.

09:59 8 Finally, even if we have somehow not complied
09:59 9 with Rule 24(c), the remedy for noncompliance is to allow the
10 would-be intervenor to file a complaint or answer in
09:59 11 intervention. Therefore, if the Court feels that we have not
10:00 12 complied with Rule 24(c), the Court should allow us to file a
10:00 13 complaint or answer in intervention, and we will do so.

10:00 14 Thank you, Your Honor.

10:00 15 **THE SPECIAL MASTER:** Thank you, Mr. Walston. I have
10:00 16 a couple questions for you.

10:00 17 Let me follow up on your remarks about the
10:00 18 Rule 24(c) issue. As you mentioned, your client did not attach
10:00 19 a complaint in intervention to its motion for leave to
10:00 20 intervene. Let me ask you this question: Does your client
10:00 21 plan to assert claims against either New Mexico or Texas; and
10:00 22 if so, what are the nature of those claims?

10:00 23 **MR. WALSTON:** We are not planning to file any such
10:00 24 claims.

10:00 25 **THE SPECIAL MASTER:** In your motion you state that

1 Elephant Butte Irrigation District "represents New Mexico water
2 users." What is the nature of that representation? Do you
3 seek to intervene on behalf of those water users, or are you
4 intervening on behalf of the entity as an irrigation district
5 administrator for the United States?

6 **MR. WALSTON:** We are seeking to intervene as an
7 entity and not on behalf of the individual users.

8 **THE SPECIAL MASTER:** How many Texas water users are
9 served by Elephant Butte Irrigation District, if you know?
10 This is not a quiz.

11 **MR. WALSTON:** I'm glad because I would flunk this
12 part of it. I, frankly, don't know the answer. We can
13 obviously provide the answer to you, Your Honor.

14 **THE SPECIAL MASTER:** One last question.
15 Section 73-10-16 of New Mexico Statutes Annotated grants
16 Elephant Butte Irrigation District, its board of directors, the
17 right to enter into any obligation or contract with the
18 United States for the construction, operation, and maintenance
19 of the necessary work for the delivery and distribution of
20 water from federal reclamation projects, or the board may
21 contract with the United States for water supply under any act
22 of Congress providing for or permitting such contract.
23 However, in your reply brief, at 33 you state:

24 "Elephant Butte Irrigation District was a party
25 to the 1938 contract that apportioned Rio Grande water in the

1 2008 operating agreement that modified the apportionment, and
2 New Mexico is not a party to either of these agreements.
3 Elephant Butte Irrigation District exercised its independent
4 authority and judgment in signing the agreements, and
5 New Mexico did not exercise any authority or control over
6 Elephant Butte Irrigation District in its decision to sign the
7 agreements."

8 I had a little trouble reconciling those two
9 statements, so let me ask you: Does Elephant Butte Irrigation
10 District exist or operate outside of the control of the State
11 of New Mexico?

12 **MR. WALSTON:** Elephant Butte operates within the
13 control of the State of New Mexico. New Mexico passed a
14 statute some time ago, obviously, that authorized
15 Elephant Butte to participate with the United States and
16 cooperate with the United States in operating the project for
17 various functions.

18 Certainly the New Mexico legislature would have
19 the right, I suppose -- I may stand corrected by my co-counsel,
20 Mr. Hernandez, but I assume the New Mexico legislature would
21 have the right to step in and terminate Elephant Butte
22 Irrigation District and provide that it no longer exists and
23 then to take over those functions.

24 But the point is that the New Mexico legislature
25 has not done that. In the passage you just quoted, Your Honor,

1 the New Mexico legislature granted this very carte blanche
2 authority to Elephant Butte to administer the project. So
3 Elephant Butte does administer the project independently, but
4 it is always subject to the ultimate control and responsibility
5 of the legislature.

6 **THE SPECIAL MASTER:** That's all I have, Mr. Walston.
7 Thank you very much.

8 Mr. Somach.

9 **MR. SOMACH:** Good morning.

10 **THE SPECIAL MASTER:** Good morning.

11 **MR. SOMACH:** Let me grab this water.

12 **THE SPECIAL MASTER:** Sure. Make yourself at home.

13 **MR. SOMACH:** I have a vocal cord problem. So when it
14 gets dry, it does this. I can talk okay. I'm just not sure
15 you can hear me.

16 I want to start simply by making a statement
17 that there's really no need to argue about whether or not EBID
18 is important, whether we care about them, whether we love them,
19 whether we don't love them. We do. We think that they are
20 important. We think that the El Paso district, that's also
21 filed a motion to intervene, is important.

22 But the question that's posed in intervention
23 motions and in intervention is not one of importance. Even in
24 a normal intervention in a district court case or a case,
25 intervention is not one of importance. It's one that requires

1 the proposed intervenors to meet certain standards, legal
2 standards that have been employed in order to make certain that
3 folks that want to intervene in a case really have a stake and
4 really can contribute to the litigation or could be affected
5 directly by the litigation.

6 The question that's posed in an original action
7 are standards but at an elevated level, much greater than that
8 that exists in a normal case. The standard is the one that was
9 articulated by Mr. Walston. It essentially comes out of the
10 *New Jersey* case. It wasn't modified at all by the
11 *South Carolina* case. It is one that allows one to go through a
12 series of inquiries, from whether or not the proposed
13 intervenor has a compelling interest in its own right, whether
14 that interest is different from the class that it belongs to,
15 and whether or not the interest is not properly represented by
16 the state.

17 Keep in mind that the state, as a sovereign, has
18 a lot of control and that the whole notion of having a creature
19 of the state, having a citizen of the state come in and
20 contradict or take positions contrary to what the state has
21 provided for is a very dangerous slope and it's one that the
22 constitution doesn't allow. And it's, of course, why the
23 Supreme Court has created a standard that is very limiting in
24 terms of who can intervene in an original action.

25 The fact that no complaint or answer was filed

1 by the proposed intervenor EBID is troubling. As I sit here, I
2 cannot understand exactly what they are arguing vis-à-vis the
3 case. I understand what they said about what they do and how
4 they are important and all, but I actually don't understand
5 what their position is with respect to the case. In fact, when
6 they responded to you by saying they had no claims, I wonder,
7 how could you ever be part of a lawsuit where you don't have a
8 claim one way or another?

9 So the fact that they haven't filed any
10 pleadings is material. It leaves those of us that are parties
11 to the litigation at a loose end in terms of knowing exactly
12 what it is and why it is that they are intervening, what they
13 are asking for, what they will be doing as part of the
14 litigation. It sounds to me more like what an amicus does, you
15 know. "We have an interest. We have our point of view," as
16 they have said throughout their briefs. "Don't got no claims
17 particularly, but we want to be heard."

18 We don't have any problems with that. If they
19 want to be heard, they can be heard. They can be heard as
20 amicus. They haven't said anything, done anything here that
21 would lead me to believe that they have anything that a party
22 to a litigation would normally have, including some kind of
23 claim for relief one way or another as a defendant, as a
24 plaintiff, or as an anybody.

25 I also thought that Mr. Walston's last what I

1 would call "admission" to you that says that the State of
2 New Mexico has complete control over them, the State of
3 New Mexico, if it wanted to, could just simply do away with
4 them and take over all of those functions, that's telling, I
5 believe, in the context of what we know about Supreme Court
6 jurisprudence on intervention in original actions.

7 I'm not going to get into whether or not the
8 United States or New Mexico can adequately represent their
9 interests. They are perfectly capable of doing that, and I
10 assume that they will do that when they get up here.

11 What I do want to say is that under *New Jersey*
12 and under *South Carolina*, we had some real things to look at,
13 what the Court actually did and actually said in factual
14 situations. We have never pled, as Mr. Walston indicated, that
15 there was some categorical exclusion or categorical rule that
16 is applied. We have never said that. What we have done is
17 take a look at exactly what the Supreme Court has done in
18 original actions dealing with water.

19 Until *South Carolina* you can find not one
20 original action in which a nontribal interest or the
21 United States -- you can't find any action where anyone but the
22 United States or tribal interests, sovereigns in their own
23 right, have been allowed to intervene. That's not a
24 categorical -- that's just simply an observation of fact. No
25 Supreme Court case in an original action in water cases has

1 allowed anybody except for the United States and Indian tribes
2 to intervene.

3 In *South Carolina* you had some very unique
4 situations that don't exist here. You had a multistate
5 district authorized in the laws of both of the states so that
6 not one state had control over that entity who operated in both
7 states, had interests in both states. That's not what EBID is,
8 and I am befuddled by the notion that they say they "operate"
9 in Texas. They have absolutely no legal recognition in the
10 State of Texas. The fact that they may physically turn a knob
11 or a headgate or drive their trucks across the state line
12 doesn't give them a legal presence as an entity of the State of
13 Texas, as did the multistate district that was dealt with in
14 *South Carolina*.

15 Moreover, Duke, which was also allowed to
16 intervene in the *South Carolina* case, was not at all like EBID.
17 Duke operated, again, hydroelectric facilities on both sides of
18 the state and on the state line. But the significance of Duke,
19 which is articulated by the Court in *South Carolina*, was it was
20 operating under a FERC license, Federal Energy Regulatory
21 Commission license. That means it was actually licensed and
22 operating those facilities by federal FEA. The Federal Power
23 Act, under which those licenses were granted, preempts state
24 law; and it is occupation of the field preemption, not just
25 issue preclusion preemption.

1 Remember that the Court notes the fact that
2 among the things they wanted to intervene with was to protect
3 an agreement, a relicensing agreement that would have
4 relicensed the facilities that were at issue before FERC and
5 that one of the parties, North Carolina, actually was going to
6 oppose that agreement and the relicensing of those facilities.
7 Those are unique facts. Those are facts that, in fact,
8 according to the Supreme Court, allowed for intervention.
9 Those facts don't exist here. There is nothing that is
10 parallel to those facts here.

11 Keep in mind also in both *New Jersey* and in
12 *South Carolina*, proposed intervenors were denied intervention.
13 The interests of the City of Philadelphia, the interests of the
14 City of Charlotte were important interests. No question that
15 they were important, but they didn't rise to the level or the
16 dignity of something that would allow for intervention, and
17 their intervention was denied.

18 You know, a fundamental proposition that I've
19 always learned about intervenors in intervention is that you
20 take the case as it is. That's one of the things. You come
21 in, you take the case as it is, and you move forward. In this
22 case EBID refuses to take the case as it is.

23 And I find the most egregious aspect of their
24 pleadings paper the notion that somehow Texas got no
25 apportionment under the compact, which was an equitable

10:15 1 apporportionment, by its very terms, between Colorado, New Mexico,
10:15 2 and the State of Texas. The way EBID spins it is somehow the
10:15 3 1938 contract apporportioned water to the two districts, one in
10:15 4 New Mexico, one in Texas. We are irrelevant. We should
10:15 5 actually -- this is the contrary of taking the case as it is.
10:15 6 We should take their case in that our complaint should somehow
10:15 7 be dismissed and should be made to comport with their absurd
10:15 8 view of exactly how all this works.

10:15 9 Contracts don't apporportion water. Compacts
10:15 10 apporportion water. And the only apporportionment of the waters of
10:15 11 the Rio Grande is the 1938 compact's apporportionment between
10:16 12 Colorado, New Mexico, and Texas.

10:16 13 And this theory that they have established
10:16 14 underscores exactly why they should not be allowed to
10:16 15 intervene. If allowed to intervene, they will inject into what
10:16 16 is already a very complex and serious piece of litigation
10:16 17 extraneous issues that have little direct relevance to the
10:16 18 compact. The extraneous issues associated with the 1938
10:16 19 contract, an important issue, but not the compact. The
10:16 20 operating agreement, which is a whole different ball of worms
10:16 21 that is being litigated, quite frankly, in another courtroom,
10:16 22 those things will get injected into this lawsuit. And all of a
10:16 23 sudden Texas' compact litigation will become something that is
10:16 24 much less, much inferior in terms of what's being looked at.

10:16 25 And those are among the issues one looks at as

1 to whether or not to grant intervention, what impact will it
2 have on the parties to the litigation. And in this case EBID's
3 intervention will have a pernicious impact and it will, if
4 nothing else, cause great damage to the ability to resolve the
5 litigation. It will increase the time, expenses, and costs of
6 moving through what is already a complex piece of litigation.

7 I think I'll stop there. I do want to say one
8 thing, though. We have opposed not only EBID's intervention,
9 but also the El Paso district's intervention. As we said in
10 our papers, if for whatever reason the Special Master decides
11 to allow EBID to intervene, then in that situation we believe
12 EP No. 1 should also be allowed to intervene, notwithstanding
13 the fact that we oppose both of their interventions.

14 **THE SPECIAL MASTER:** Thank you. That's all I have.

15 Ms. Bond.

16 **MS. BOND:** Good morning, Your Honor.

17 **THE SPECIAL MASTER:** Good morning, Ms. Bond.

18 **MS. BOND:** New Mexico is pleased to note that we
19 actually agree with Mr. Somach on a number of issues, and we
20 hope this is the start of additional agreements in the future,
21 that this litigation may be ultimately more amicable than it
22 has been to date.

23 First, of course, we agree on the most
24 fundamental point of this argument today, that EBID does not
25 meet this Court's high standard for intervention in an

1 interstate compact enforcement case. It is a creature of the
2 State of New Mexico, bound and authorized by the statutes of
3 New Mexico. Its legal authority is highly constrained by the
4 statutes of New Mexico as well as reclamation law in an area of
5 law which, as Justice Rehnquist pointed out, has been marked by
6 the continued deference to state law for over a hundred years.

7 It has no legal authority from the State of
8 Texas. By law it has and cannot have any Texas board members,
9 distinguishing it from the entities that were allowed to
10 intervene in the *South Carolina v. North Carolina* case.
11 Indeed, by statute of New Mexico all of its board members must
12 be landowners within the irrigation district.

13 It is legally authorized to deliver water to
14 landowners in New Mexico. As we indicated in our brief, we too
15 are unaware of any original action for compact enforcement in
16 which the Court has allowed an intervenor citizen of a party to
17 intervene over the objection of that state. To quote
18 Justice Roberts in his eloquent dissent, it has happened
19 exactly "never."

20 We agree with Mr. Somach that the word
21 *apportionment* is a term of art in water law, that it refers to
22 an agreement, either by compact or judicial decree, which
23 assigns rights to interstate streams to the various states or,
24 rather, recognizes the rights to the various states in
25 interstate rivers. Of course, as was noted many years ago by

1 Justice Holmes, one state cannot monopolize the precious
2 resource of a river that would flow to a downstream state. And
3 so apportionments have been the means by which these agreements
4 may either be settled or litigated. A contract cannot
5 apportion water; a contract can allocate water that is within
6 the apportionment of that state. So, of course, under
7 *Hinderlider* whatever allocation EBID has would be constrained,
8 again, by the compact rights of New Mexico.

9 Indeed, we agree with Mr. Somach that EBID's
10 entire argument has actually been directed as if they were
11 asking to be an amicus, because one of their strongest
12 arguments has been that they have a disagreement with their
13 state of New Mexico over the interpretation of the compact.
14 This is exactly why this Court has said that parties should not
15 be allowed to intervene, because while we may have
16 disagreements over matters of policies, citizens of one state
17 should not be allowed to intervene to impeach their states on
18 matters of policy, and this Court should not be drawn into an
19 intramural dispute over the distribution of water. A state
20 must be deemed to represent all of its citizens, not just those
21 who agree with our position before this Court.

22 Mr. Walston suggested that New Mexico yesterday
23 disclaimed any responsibility for water after it is delivered
24 to Elephant Butte. This is absolutely not the case.
25 New Mexico administers all water rights below Elephant Butte,

1 including those of the farmers of Elephant Butte Irrigation
2 District.

3 As we discussed yesterday, New Mexico does not,
4 quote/unquote, control the allocation between the districts
5 under the reclamation contracts. But as in *Klamath* and in
6 *Nebraska v. Wyoming*, under that judicial decree, New Mexico
7 retains jurisdiction to administer the water rights once they
8 are decreed, as required by the Reclamation Act, Section 372.

9 Again, the decreed water rights within Elephant
10 Butte Irrigation District go to the farmers, under *Ickes*, not
11 to EBID. Although I believe they have a right to deliver water
12 to their farmers, the beneficial use water right, which is the
13 water right recognized both by reclamation and by New Mexico
14 law, which is consonant with reclamation law, invests in the
15 farmers.

16 And indeed, those farmers in Stream System 101
17 in the New Mexico adjudication have signed a binding settlement
18 determining the amounts of the water rights that they may use
19 conjunctively. Most of them have perfected groundwater rights
20 under state law. They use those groundwater rights in
21 conjunction with their project water rights so that when
22 project water, which is surface water, is scarce, they pump
23 additional groundwater. That settlement has been entered into,
24 and the State of New Mexico is administering that settlement to
25 assure that those farmers do not exceed their decreed limit for

1 their water rights.

2 As they apply them, they are beneficial use
3 water rights. So, of course, all the other prior appropriation
4 doctrine rules would apply. They can't waste, they can't
5 exceed historic use, which has now been set by the decree, and
6 so forth. The state engineer has been sending out routinely
7 letters warning if they are becoming close to their limit and
8 so forth.

9 It is the state, then, not EBID, that exercises
10 jurisdiction over their uses. EBID delivers, under reclamation
11 law and state law, project water to farmers. Under reclamation
12 law they have to deliver an equal amount of surface water to
13 each acre. Their elections are constrained by state law.
14 Their board members' qualifications are constrained by state
15 law. Their ability to deliver water to their members are
16 constrained by their federal contracts. There is very little
17 discretion that EBID may exercise in the course of conducting
18 their job.

19 Again, as we noted in our brief, the compact
20 assigns no rights or responsibilities to EBID, and the
21 apportionment is, by the terms of the congressional statute, to
22 the states. As discussed yesterday, this Court must start with
23 the plain language of the compact; and if the compact is clear,
24 the interpretation task is done. Here the compact states quite
25 clearly that it is an equitable apportionment among the states,

1 and that settles the matter.

2 Again, this case is a compact enforcement case
3 in which the Court's task is to interpret the parties' intent
4 of the compact and enforce the compact which was entered into
5 by the sovereign states, not the irrigation districts. In such
6 a case, allowing a citizen of one state to impeach its state on
7 matters of important state policy has not been done and should
8 not be done for the first time here.

9 Again, EBID's interest is neither compelling nor
10 unique, the only infrastructure that delivers water to their
11 members, which distinguishes it not at all from the City of
12 Philadelphia, which did not get in in the *South Carolina* case.

13 I can check my notes. I think I might be done,
14 Your Honor, if you have any questions.

15 **THE SPECIAL MASTER:** Let me know when you are done.
16 Take your time.

17 **MS. BOND:** That means I have to know when I'm done.

18 Again, I would note that the cases cited in the
19 EBID brief, none of them are apposite here. The cases either
20 involved an equitable apportionment -- I think they cited to
21 *Illinois v. Milwaukee*, which was an interstate compact nuisance
22 case about sewage -- which, of course, now that the Clean Water
23 Act has preempted that, that case is no longer valid authority
24 for anything.

25 *South Carolina* was an apportionment case. The

1 next case in their list, on page 4 of their brief, was a
2 boundary dispute case. The third was an equitable
3 apportionment. The fourth was an equitable apportionment. And
4 as noted, *Illinois v. Milwaukee* was a water quality case which
5 is no longer good law because of *Oklahoma v. Arkansas*.

6 So in summary, there's simply no legal authority
7 for EBID to be granted intervention. The State of New Mexico
8 would not oppose their entering into the case as -- not into
9 the case but their participation as an amicus. We think their
10 briefs establish their interest as an amicus because they have
11 a different viewpoint, a different story to tell, and different
12 specific interests. But as a legal matter, New Mexico
13 represents all of New Mexico for purposes of -- sorry, I got
14 too fast -- interpreting a compact that it entered into with a
15 sovereign sister state. EBID's intervention should be denied.

16 **THE SPECIAL MASTER:** Ms. Bond, I have one question
17 for you. Is the State of New Mexico able and does it have the
18 right to represent the interests of the Elephant Butte
19 Irrigation District in these original proceedings?

20 **MS. BOND:** Yes, Your Honor. New Mexico asserts that
21 as the party to the compact and under *Hinderlider*, of course,
22 it binds all of its citizens, including its creatures, such as
23 EBID, which deliver water to its citizens.

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

25 Mr. Wallace.

10:30 1 **MR. WALLACE:** Thank you, Your Honor. Chad Wallace
10:30 2 for the State of Colorado.

10:30 3 Consistent with our briefs on the matter, my
10:30 4 comments will be extremely short, really more an opportunity
10:30 5 for you to ask questions, should you have any.

10:30 6 In the brief we stated that Colorado could not
10:30 7 at this time take a position on intervention because of our
10:30 8 lack of understanding of the nature of the case and the issues
10:30 9 that were exactly in dispute. We had suggested in that brief,
10:30 10 additionally, that we be allowed to brief the issue upon
10:30 11 determination of the motion to dismiss which was argued
10:30 12 yesterday. We stated that with the belief that the resolution
10:30 13 of the motion to dismiss might better bring into focus what
10:30 14 this Court was going to finally decide. Until that time we are
10:31 15 unable to take a position on the intervention matter. It's as
10:31 16 simple as that.

10:31 17 **THE SPECIAL MASTER:** Thank you, Mr. Wallace.

10:31 18 **MR. WALLACE:** Thank you.

10:31 19 **THE SPECIAL MASTER:** Good morning, Mr. DuBois.

10:31 20 **MR. DUBOIS:** Good morning, Your Honor. James DuBois
10:31 21 for the United States.

10:31 22 Your Honor, this case is simply litigation
10:31 23 between sovereigns to enforce and define their rights under the
10:31 24 compact and to determine whether New Mexico has violated any of
10:31 25 Texas' rights under the compact. Interestingly enough, of

1 course, neither of the sovereigns that are involved favor
2 intervention in this case, and the state to which EBID is a
3 citizen specifically opposes because EBID wants to contravene
4 them.

5 And as far as I know, it's utterly unique that
6 EBID is here arguing that it has a right to intervene because
7 it wants to impeach the State of New Mexico. In addition, EBID
8 wants to expand the litigation well beyond its current
9 boundaries, and it wants to address questions that do not need
10 to be resolved in order to resolve the dispute between the
11 states and with the United States.

12 Everyone is agreeing, I think, that the standard
13 applying here today is *New Jersey v. New York* and
14 *South Carolina v. North Carolina*, and EBID has the burden of
15 showing that they have a compelling interest. At this point
16 people skip over: Compelling interest in what? It's got to be
17 in the outcome of the litigation that's currently before the
18 Court, and in that respect they don't have a compelling
19 interest in the outcome of this litigation.

20 As sort of a preliminary matter, I would also
21 like to address an issue that's been addressed. There's been
22 sort of a strawman constructed that the parties, the states and
23 the United States, have said that there's a -- we have argued
24 for a categorical exclusion of parties that are a citizen of a
25 state sovereign. That's really not right. It's confusing, I

1 think, the general rule laid down by the Court with an argument
2 that that's somehow a categorical exclusion from intervention,
3 and it's not.

4 It's true that the default position laid out by
5 the Supreme Court in *New Jersey v. New York* and
6 *South Carolina v. North Carolina* is that for citizens of a
7 state, they have to show -- whose state is already a party,
8 that they have to show a compelling interest in the outcome of
9 the litigation that's not represented by the sovereign.
10 There's a sound reason for that, because the first principle, I
11 think, that the Court lays out is that in matters of sovereign
12 interests, it's the state that must be deemed to represent all
13 of the parties, and that prevents a state from being judicially
14 impeached in matters of sovereign interests by its own subject.
15 That is a necessary recognition of sovereign dignity.

16 Second, I think that the general rule is laid
17 down because the Court recognizes that the Supreme Court is
18 sort of uncomfortable in a trier of fact position, and one of
19 the things they do not want to do is allow the litigation to
20 expand beyond the narrow interests of the interstate dispute,
21 and that's exactly what is being advocated here.

22 So it's also relevant that EBID is a citizen of
23 New Mexico, and I think they have conceded that they operate
24 strictly under state law. And so thus you are pretty clearly
25 within the general rule laid out by the Supreme Court in

1 *New Jersey v. New York*. Their sovereign is here. They don't
2 need to be a party. They shouldn't be a party.

3 In addition, EBID fails to show a compelling
4 interest or that its interests are not represented by the
5 sovereign. There is no compelling interest in the outcome of
6 this litigation as it's been pleaded. EBID does not have a
7 compelling interest in the subject matter of the case, which is
8 what water ultimately should be coming or should be apportioned
9 to, effectively, Texas and New Mexico below Elephant Butte
10 Reservoir through the Rio Grande Project, which is ultimately a
11 question of: So, at the end of the day, what water supply is
12 available to the Rio Grande Project?

13 Once that is established, their role in
14 administration has some meaning, but it's not central to the
15 actual question, because the central question is how much water
16 is available to the project. Their interest only comes in
17 after that, and their interest is only in saying: Okay, now
18 that we know what the pot looks like, how is it managed? And
19 that is not what's in front of the Court at all.

20 So there's no compelling interest in the outcome
21 of the litigation, which is going to be to determine the supply
22 that ultimately is available and in which EBID has a role in
23 distributing water in conjunction with El Paso No. 1 and the
24 United States, which actually makes the releases of water from
25 the reservoir and makes the determination of annually what

1 supply is available to the districts. After that, then there
2 is a role, but it's well down the road from what the issues are
3 in the case.

4 So the other thing that is different than the
5 cases in which intervention has been allowed is that, unlike
6 all of the other cases cited by EBID that have been discussed,
7 there's no compelling property interest of any sort that EBID
8 has in the ultimate litigation in this case. They have
9 conceded they have no ownership interest in the project water
10 rights. They just manage what they get.

11 Unlike Port Arthur, Texas, to which Mr. Walston
12 referred to, Port Arthur had a claim to an ownership interest
13 in a piece of land on the border that was subject to the fight
14 and in which the United States also claimed a property
15 interest. So in that case, yes, you had a nonstate entity in
16 because they had a direct property interest at issue in the
17 case.

18 The same thing with the tribes in *Arizona v.*
19 *California*. They had a direct property -- not only that, a
20 direct sovereign property interest. In the Catawba water
21 conservancy district -- the Catawba district. I can't remember
22 what it was called. It was a bistate entity that had
23 diversionary rights in each state, paid taxes in each state,
24 served customers in each state with water they diverted as a
25 permittee in each state.

1 Duke Energy, as Mr. Somach said, they were
2 operating under a FERC license and had permits as well, both
3 state and federal permits in both states. They are the water
4 users. They had a direct property interest involved. That
5 isn't here.

6 Finally, it should also be noted that EBID is
7 not sort of directly in the line of the conflict in this case.
8 Texas has made no claim against EBID. Texas has made no claim
9 that the project is being misdiverted or the project operation,
10 diversions by the project, is a violation of the compact. That
11 is not what they are talking about. They have alleged
12 nonproject diversions and nonproject pumping as the culprit
13 that is allegedly injuring them, but there's no allegation here
14 that the project has been mismanaged and that the project is
15 causing them an injury.

16 Finally, the interests of EBID are represented
17 by the current parties. To the extent that EBID has an
18 interest in correctly having the amount of water available to
19 the project that then goes to their distribution or their role
20 in the distribution, that interest is being represented by the
21 United States, which is here representing the interests of the
22 project in reacquiring the appropriate amount of project water
23 supply. And it's also represented in some measure by Texas,
24 which has an interest in optimizing the project water supply,
25 if you will. So that interest is fully protected, and it's

1 very separate from the management of that volume of water,
2 whatever that is, which EBID is involved in.

3 To the extent that EBID asserts any interest in
4 groundwater pumping on behalf of the members of EBID, again,
5 they don't have -- EBID does not have a separate interest. But
6 to the extent that that is the interest that they are trying to
7 defend, again, the State of New Mexico is here. So there's no
8 independent interest. Instead, EBID seeks to hijack this case
9 and make it about contracts to which neither state is a party,
10 and that's simply inappropriate.

11 I think that both of the states have
12 sufficiently distinguished *South Carolina v. North Carolina*.
13 That was a very different kind of case. I think Ms. Bond said
14 there's no cases in which -- compact enforcement cases -- a
15 citizen of a state has been allowed to intervene, much less
16 intervene to contradict their sovereign on the policy issues.
17 And as I have noted in respect to the parties that were allowed
18 to intervene in *South Carolina v. North Carolina*, both of them
19 had essentially property interests, water right interests in
20 each state.

21 And as a final matter, I note that one huge
22 distinguishing factor against *South Carolina v. North Carolina*
23 is, although those entities had water resource interests in
24 each state, neither of them made any claim that they were --
25 there was nothing apparent, there was no obvious effort to

1 contradict their sovereign, either sovereign. They had an
2 interest in water, but they were not there to contradict the
3 sovereign on policy matters. Here we have the opposite. We
4 have a party that says we get in because we want to do that,
5 and that is very unique and very different from *South Carolina*
6 *v. North Carolina*.

7 Anyway, for all of those reasons, I think that
8 EBID has not shown the sort of compelling interest that's
9 necessary to establish intervention in a case of this sort, and
10 their motion for intervention should be denied.

11 **THE SPECIAL MASTER:** Thank you, Mr. DuBois. I don't
12 have any questions for you.

13 **MR. DUBOIS:** Thank you.

14 **THE SPECIAL MASTER:** Mr. Hernandez.

15 **MR. HERNANDEZ:** May it please the Court. Your Honor,
16 Steven Hernandez for Elephant Butte Irrigation District.

17 Well, I appreciate the bones, Your Honor, that
18 we can come in as amicus, but we think we have a lot more
19 interest than an amicus could share with this Court.

20 Your Honor, you will recognize this diagram as
21 being attached to our declarant manager, Mr. Esslinger. In
22 your opening remarks you talked about listening to a story we
23 had to tell. Mr. Esslinger's affidavit was exactly that. It
24 was a story of a family that goes back in our valley till 1912,
25 and then personally Mr. Esslinger going through all of these

1 contractual changes in the project that amounts to what we
2 believe is an interest that allows us to intervene in this
3 case.

4 Let me address some of the points made by the
5 United States and some of the others about expanding the
6 litigation. I couldn't count how many times the 1938 contract
7 came up yesterday or came up today. It's key to this issue,
8 and we are one of the signatures to that 1938 contract.

9 Everybody agrees that we don't know how the
10 water was apportioned between Texas and New Mexico. We have
11 thrown something at you and said, "Well, we think the contract
12 did it." It was a little mini compact that adjudicated the
13 water between the only entities that received water out of the
14 project, the beneficiaries in Texas, the El Paso County Water
15 Improvement District and Elephant Butte Irrigation District.
16 Mexico's water is set aside. That's the United States'
17 obligation to oversee.

18 Back in 1905 our predecessors in interest, the
19 Elephant Butte Waters Users Association, formed up. If the
20 State of New Mexico wants to take us out, even though we have
21 been in existence till 1905, that, of course, is their
22 prerogative. There would be a lot of damages to pay because we
23 now own the system. As we have illustrated in our brief,
24 Congress has granted to us title to all the drainage and
25 distribution system, which is essential to the operation of the

1 project. So it would be very interesting if the state were to
2 all of a sudden decide, "We're going to take you out, and we're
3 going to run things." It would be interesting how they are
4 going to pay us for all of the land that we now have. We
5 certainly have a property interest.

6 How much water is available to the project, and
7 how will it be delivered to Texas? The United States mentioned
8 those. That's where we think we are the key, Your Honor.

9 I know that the diagram is extremely complex
10 because we tried to tie in the contracts and how things work,
11 but there is something glaring that I want to point out to you,
12 Your Honor. If you look at the black line that we have to the
13 left that says "Compact Texas," New Mexico hates to see this
14 term up there. They always hate to see this term.

15 You know, we have these annual compact meetings.
16 Up until the litigation, Elephant Butte Irrigation District, at
17 these compact meetings, was introduced by both New Mexico and
18 Texas, because they both claimed to represent us at the time.
19 So we would be introduced twice. We would stand up twice at
20 these meetings. Since the litigation, nobody wants to
21 introduce us because they are not sure whose side we are on
22 anymore.

23 But what I point out to the Court is that water
24 is delivered to Elephant Butte Reservoir. What is below that
25 state red dotted line is "Compact Texas." That is "Compact

1 Texas." Elephant Butte Irrigation District, as a political
2 subdivision in New Mexico, is in "Compact Texas." We have no
3 say -- the Texas compact commissioner, as recited today, is
4 responsible to make sure in Texas -- through the AG is
5 responsible to get water to Elephant Butte Reservoir. We have
6 no say in that representation being in New Mexico. We do not
7 elect the governor of Texas. We do not help appoint our
8 compact commissioner that is supposed to represent our
9 interests.

10 New Mexico is trying to keep as much water above
11 that state line as they absolutely can for use in New Mexico.
12 So how in the world New Mexico can sit here and say that they
13 represent our interests when we are really represented by the
14 Texas compact commissioner, Texas attorney general, where we
15 have no say in that representation -- assume that the compact
16 commissioner will do the right thing for us as well as the
17 Texas district -- and New Mexico, on the other hand, is trying
18 to make sure that they deliver the minimal amount of water that
19 they have to to meet compact requirements, I do not see how
20 New Mexico can say with a straight face that they represent us.

21 We are unique in any compact that we have ever
22 seen. We, in effect, Your Honor, have been disfranchised by
23 our own state and sit at the mercy of hoping that everybody
24 does the right thing so we get our water supply.

25 It was brought up by the United States that we

1 have no property interest. The United States should know
2 better than that. We have had an adjudication of the Carlsbad
3 reclamation project. In that litigation the United States and
4 the state have agreed the districts and the United States have
5 a diversion and storage interest in project supply. As the
6 Court found in that case, reclamation projects aren't a simple
7 matter of, oh, the beneficial user or the farmer is the only
8 person who has a property interest in this water right.

9 Commission projects are unique because it is, as
10 that judge described, a bundle of sticks. There's a storage
11 right. There's a diversion right. There's the farmer who puts
12 it to beneficial use. There are multiple property interests in
13 a right emanating from a reclamation project. We have
14 precedent in New Mexico that gives that property right to an
15 irrigation district.

16 We are in the middle of adjudicating that
17 interest of the Elephant Butte Irrigation District in our
18 stream adjudication today. We expect to get a diversion right.
19 How else could we divert water from those three diversion dams
20 to our individuals without the state recognizing that we have
21 the right to do that? That is a property interest in the
22 project supply which we deliver in New Mexico. So we have a
23 property interest.

24 We represent the interests of our members in
25 surface water. Don't be confused by the State of New Mexico

1 coming in here trying to say, "Oh, but we have jurisdiction
2 over groundwater." Our district is not a groundwater district;
3 we are a surface water district. Our members do have
4 groundwater rights that they use in conjunction with surface
5 water. That is a separate issue dealing with a separate
6 property right that our individuals use.

7 Our allocations are our allocations. We deliver
8 what we have available only limited by the compact. We make
9 that determination of how much the individual farmer gets as a
10 member of the district.

11 The State of New Mexico cannot come in there and
12 represent that interest, because they have a contrary interest.
13 They represent upstream New Mexico, not downstream New Mexico.
14 And Texas isn't going to come into the adjudication and say,
15 "Oh, we are going to help you with your issues in New Mexico in
16 terms of keeping project supply whole."

17 We operate in Texas, Your Honor, pursuant to
18 statutory authority both in New Mexico and Texas. The way that
19 came about, Your Honor, is when we took over the operations,
20 maintenance, and started to assume more responsibility in
21 shepherding the water through to make sure Texas and Mexico got
22 that water, we took the next step. We went to Congress and my
23 board, made up of the Greatest Generation, two fighter pilots,
24 somebody who escaped from a concentration camp in Germany,
25 these were my board members when I started on Cinco de Mayo in

1 1980. I'll never forget that day when I first went to work for
2 the district. These men were men of their words, where a
3 handshake was a contract.

4 "We paid the United States off. What happens
5 now?"

6 "I don't know. This has never happened before
7 in history. What are we going to do?"

8 "Well, we want our property. We paid for that
9 project. The farmers paid for that. Do something."

10 Well, we went to Congress. My board members --
11 I'll never forget this. Mr. Esslinger testified in front of
12 Bill Bradley's committee. It was one of the highlights of my
13 career to watch my board members go toe-to-toe with Mr. Bradley
14 about why we should get these facilities back; why should the
15 district government sell; why do you think, as farmers, you can
16 do that.

17 We convinced Congress. We got our bill through.
18 We became the first entity in the country to receive its
19 facilities back, which was the original contemplation of the
20 Reclamation Act. You come in. The U.S. helps you up front.
21 You get the facilities back. You run the project.

22 That's what we have done here. We traded places
23 with the United States over who shepherds the water through.
24 That's what we do, and that's at the core of Mr. Somach's
25 complaint. Our water isn't getting to Texas. It's being

10 : 5 3 1 interfered with. Well, it was until 2008, when we entered an
10 : 5 3 2 operating agreement with the Texas district and the
10 : 5 3 3 United States and said, "We will guarantee you get your water.
10 : 5 3 4 We will *shepherdize* it. We will get it through. We will look
10 : 5 3 5 at the diversion dams. We will track it. If you are about to
10 : 5 4 6 be short, we will give you your supply."

10 : 5 4 7 Am I out of time, Your Honor?

10 : 5 4 8 **THE SPECIAL MASTER:** No. Five minutes.

10 : 5 4 9 **MR. HERNANDEZ:** So out of everybody here today, EBID
10 : 5 4 10 is the one that is key to the complaints brought by Mr. Somach.

10 : 5 4 11 How does Texas get their water? How do we
10 : 5 4 12 ensure that Texas gets their water? We are the key player in
10 : 5 4 13 that. We are, in fact, the de facto water master on this
10 : 5 4 14 system through contract, conveyances from Congress. We are the
10 : 5 4 15 one that takes the water from the initial release, take it down
10 : 5 4 16 through.

10 : 5 4 17 The point I was going to make with respect to us
10 : 5 4 18 operating in Texas is Texas also has statutory authority to
10 : 5 4 19 enter into contracts with districts in New Mexico. We have the
10 : 5 4 20 mere statute in New Mexico. When we received title back, we
10 : 5 5 21 realized that there were lands in Texas that they could not
10 : 5 5 22 irrigate and there were lands in New Mexico that we could not
10 : 5 5 23 irrigate. So we entered into a contract before the final deed
10 : 5 5 24 was signed that would allow us to go back and forth between
10 : 5 5 25 Texas and New Mexico, the El Paso district also coming up into

1 New Mexico to deliver where we couldn't do that. That's been
2 in operation just prior to the deed being signed by the
3 United States, because the United States wanted something in
4 place that would make sure that that water would be able to be
5 delivered out of state by each irrigation district. I don't
6 know how much more bistate we can become than that.

7 In answer to your question, I turned to my
8 manager. We deliver to X thousand acres, and the size of those
9 constituents can vary from one-acre tracts to 20-acre farms or
10 50-acre farms. So it's hard for us to know how many
11 individuals, because we track by the thousands of acres. And I
12 think in our brief we told you the six-unit -- that we irrigate
13 to approximately 6,000 acres in Texas. That number goes up and
14 down depending upon the orders year by year.

15 Your Honor, I think we have proven that we have
16 a substantial interest in what happens here. We are not
17 represented by the State of New Mexico, we are not represented
18 by the State of Texas, and we are not represented by the
19 United States. And I think that if anybody meets the standards
20 of *South Carolina* in terms of what we do, how we will be
21 affected by the outcome of this litigation, it's Elephant Butte
22 Irrigation District.

23 **THE SPECIAL MASTER:** Thank you, Mr. Hernandez. Could
24 you tell me: What is the Joint Powers Agreement between
25 Elephant Butte Irrigation District and El Paso Consolidated

1 Water Improvement District No. 1? I believe you referenced
2 that towards the conclusion of your remarks.

3 **MR. HERNANDEZ:** Yes, Your Honor. As I told you, at
4 the time that the title transfer -- in between Congress giving
5 the United States authority to transfer the facilities back to
6 both districts, the United States was concerned about how
7 certain isolated areas in each state were going to be watered,
8 because the state line goes like this (indicating).

9 We actually have a board member who has a farm
10 on both sides of the state line, owns land in Texas and
11 New Mexico, and is an EBID board member; and the state line
12 splits his farm, and he literally gets watered by a Texas
13 entity. But what it is, it's a statute in Texas and New Mexico
14 that allows irrigation districts to cooperate with each other
15 and operate facilities in either state.

16 **THE SPECIAL MASTER:** Is there an agreement? Is there
17 a contract?

18 **MR. HERNANDEZ:** There is an agreement. It was
19 attached to our reply brief, I believe. In fact, what's
20 telling about that agreement is it had to be signed off by the
21 State of New Mexico. They approved the contract, and they are
22 signatories to the approval of that contract.

23 **THE SPECIAL MASTER:** Thank you, Mr. Hernandez.

24 **MR. HERNANDEZ:** Thank you, Your Honor.

25 **THE SPECIAL MASTER:** Counsel, that's all we have for

1 today. The proceedings will be in recess. If there's no
2 request for a status conference, the proceedings are closed.

3 I want to thank each and every counsel who
4 participated in these proceedings, and I want to wish all of
5 you a safe trip home. Thank you.

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

7 * * *

8 **CERTIFICATE**

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

14
15
16 s/ Toni Doyle Tusa
17 Toni Doyle Tusa, CCR, FCRR
18 Official Court Reporter
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