

1 No. 141, Original

2
3
4 In the

5
6 SUPREME COURT OF THE UNITED STATES
7

8
9 STATE OF TEXAS,

10 Plaintiff,

11
12 v.

13
14 STATE OF NEW MEXICO and

15 STATE OF COLORADO,

16 Defendants.
17

18 TRANSCRIPT OF IN-PERSON SCHEDULING CONFERENCE BEFORE
19 THE HONORABLE MICHAEL J. MELLOY
SPECIAL MASTER

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25

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1 litigation.

2 Priscilla Hubenak, who is behind me, she is
3 the chief of the Environmental Section of the State
4 Attorney General's Office.

5 Also at counsel table is Theresa Barfield
6 with my office, Francis Goldsberry, also with my
7 office. Behind them is Robert Hoffman and Sarah Cline
8 of my office and of record in this case.

9 I also wanted to introduce Mr. Pat Gordon,
10 who is the Texas Rio Grande commissioner, who is in
11 attendance today, along with Suzy Valentine, who is the
12 engineer advisor of Mr. Gordon, and also Brooke Paup,
13 who is a commissioner on the Texas Water Development
14 Program.

15 Thank you.

16 THE SPECIAL MASTER: New Mexico?

17 MR. ROMAN: Good morning, Your Honor. David
18 Roman on behalf of the State of New Mexico. With me at
19 counsel table is Lisa Thompson, and behind me is
20 Michael Kopp as well.

21 I would also like to take the time to
22 introduce Deputy Attorney General Tania Maestas, and
23 our brand-new state engineer, John D'Antonio, and his
24 general counsel, Greg Ridgley.

25 THE SPECIAL MASTER: Colorado?

1 MR. WALLACE: Good morning, Your Honor. Chad
2 Wallace for the State of Colorado.

3 THE SPECIAL MASTER: All right. Let me go
4 through the amici. Anyone here from the Albuquerque
5 Renewal County Water Authority?

6 MR. BROCKMANN: Yes, Your Honor. Jim
7 Brockmann from the Albuquerque Bernalillo County Water
8 Utility Authority. And with me is Mr. John Stomp, the
9 chief operating officer; and Mr. Peter Auh, the general
10 counsel for the Water Authority.

11 THE SPECIAL MASTER: How about the City of El
12 Paso?

13 MR. CAROOM: Doug Caroom, Your Honor, with
14 the City of El Paso. With me is my counsel, Susan
15 Maxwell; John Balliew, general manager of El Paso Water
16 Utilities; and Daniel Ortiz.

17 THE SPECIAL MASTER: City of Las Cruces?

18 MR. STEIN: Good morning, Your Honor. This
19 is Jay Stein representing the amicus curiae City of Las
20 Cruces.

21 Let me introduce the utilities director for
22 Las Cruces joint utilities, Dr. Jorge Garcia, who is in
23 court with me today.

24 THE SPECIAL MASTER: Thank you.

25 Elephant Butte Irrigation District?

1 MS. BARNCASTLE: Good morning, Your Honor.
2 Samantha Barncastle for the Elephant Butte Irrigation
3 District. And my client sends their regards. They
4 were not able to attend today due to our annual spring
5 trip to D.C.

6 THE SPECIAL MASTER: I'm sorry, who cannot
7 attend?

8 MS. BARNCASTLE: My client.

9 THE SPECIAL MASTER: Okay. I'm sure you'll
10 report back.

11 Let's see, El Paso County Water Improvement
12 District?

13 MS. O'BRIEN: Yes. Good morning, Your Honor.
14 Maria O'Brien on behalf of El Paso County Water
15 Improvement District No. 1. And in the courtroom today
16 is the district's engineer, Al Blair.

17 THE SPECIAL MASTER: Hudspeth County
18 Conservation and Reclamation District?

19 MR. MILLER: Good morning, Your Honor. I'm
20 Drew Miller on behalf of the Hudspeth County
21 Conservation and Reclamation District No. 1.

22 THE SPECIAL MASTER: Okay. I assume nobody
23 is here for the State of Kansas.

24 New Mexico Pecan Growers?

25 MS. DAVIDSON: Good morning, Your Honor.

1 Tessa Davidson on behalf of New Mexico Pecan Growers.

2 THE SPECIAL MASTER: Anyone here from New
3 Mexico State University?

4 MR. UTTON: Good morning, Your Honor. John
5 Utton representing NMSU.

6 THE SPECIAL MASTER: And I think that's it.
7 Before I -- well, I'm sorry.

8 MR. JONES: Good morning, Your Honor. My
9 name is Alvin Jones. I am appearing on behalf of the
10 petitioning Southern Rio Grande Diversified Crop
11 Farmers Association. We filed a petition to --

12 THE SPECIAL MASTER: I'm sorry. You're
13 representing who?

14 MR. JONES: Southern Rio Grande Diversified
15 Crop Farmers Association. We filed a motion for me to
16 appear as amicus in this matter, and I believe that's
17 up for consideration this morning.

18 THE SPECIAL MASTER: You filed a motion for
19 leave to do what, appear as amicus or intervenor?

20 MR. JONES: Amicus, Your Honor.

21 THE SPECIAL MASTER: I don't think I have
22 that motion. When did you file it?

23 MR. JONES: Six, eight weeks ago, Your Honor.

24 THE SPECIAL MASTER: Okay. Let me -- we'll
25 take that up after, don't let me forget. We'll take

1 that up at the end. But I don't recall seeing that
2 motion, but maybe I'm -- it's possible it got
3 overlooked.

4 Go ahead.

5 MS. DAVIDSON: Your Honor, his motion was
6 filed in conjunction with our joint brief with New
7 Mexico Pecan Growers and the amicus brief.

8 So the brief was filed jointly by Southern
9 Rio Grande Diversified Crop Farmers Association and New
10 Mexico Pecan Growers, and his motion was filed at that
11 time.

12 THE SPECIAL MASTER: So it's in the brief?

13 MS. DAVIDSON: It was a separate motion, but
14 they did file jointly in a brief with New Mexico Pecan
15 Growers.

16 THE SPECIAL MASTER: All right. Anybody else
17 in the courtroom before I turn to the folks who are on
18 the phone?

19 (No verbal response.)

20 THE SPECIAL MASTER: Okay. All right. Could
21 I get appearances then of who is on the phone, please.

22 MR. SIMON: Your Honor, it's Robert Simon,
23 attorney for Pre-Federal Claimants, monitoring the
24 hearing.

25 THE SPECIAL MASTER: Anyone else on the

1 phone?

2 (No verbal response.)

3 THE SPECIAL MASTER: All right. Thank you.

4 All right. Before we get into the arguments
5 on the motions, I want to bring up a couple preliminary
6 matters.

7 First of all, on the motion to intervene by
8 the Pre-Federal Claimants, the essence, as far as I
9 understand it, is strictly with the Supreme Court at
10 this point, and there's nothing we need to do on that
11 today or I really have no jurisdiction over that.

12 I checked the docket, I think on Friday,
13 maybe yesterday. Has the extension to respond been
14 granted?

15 MR. ROMAN: It has, Your Honor. My
16 understanding is that it was granted essentially orally
17 by the clerk of the Supreme Court, and I'm not aware
18 whether they have entered an actual order granting that
19 because there was some delay in receiving the paper
20 copy, they only received it electronically, but it has
21 been granted.

22 THE SPECIAL MASTER: The only thing I will
23 say about that particular matter is I would appreciate
24 receiving courtesy copies of whatever's filed because I
25 had not known that there had been a petition for

1 interventions filed because it had been filed with the
2 Supreme Court.

3 So when you file your pleadings in connection
4 with anything, if you'd send a copy, and then if you
5 can just put it in our docket, it will be helpful.

6 MR. ROMAN: Of course.

7 THE SPECIAL MASTER: Then the other issue I
8 wanted to mention was we got -- I received an e-mail
9 yesterday from our clerk in Saint Louis who was -- said
10 she had received a call from the Hudspeth County
11 Conservation folks and asking if we had received a
12 letter that you sent last April, which we did not.

13 MR. MILLER: Your Honor, if I may speak very
14 briefly to that?

15 THE SPECIAL MASTER: Could you come up? I'm
16 having a little trouble hearing in the back of the
17 courtroom.

18 MR. MILLER: Your Honor, I'm Drew Miller
19 representing the Hudspeth County Conservation and
20 Reclamation District No. 1.

21 Your Honor, I apologize, when I had -- when I
22 asked the secretary of my firm to call the clerk
23 yesterday, I did not -- there's no request, there's no
24 intention to bring this to your attention or to take up
25 the parties' time with this.

1 This is a letter that we filed about a year
2 ago, and the matters are actually moot, and so I
3 don't -- it doesn't -- in my opinion, doesn't need to
4 be considered at this point.

5 THE SPECIAL MASTER: Okay. All right. We'll
6 get it filed in this case. I think the problem was it
7 was actually served on Mr. -- on the prior Special
8 Master.

9 MR. MILLER: It could be. My assistant at
10 the time is no longer with my firm so I can't even ask
11 him what he did.

12 THE SPECIAL MASTER: Well, the service list
13 indicates that so that's probably what happened.

14 MR. MILLER: Okay. Thank you.

15 THE SPECIAL MASTER: All right. All right.
16 Before we get into the motions and argument -- and let
17 me say, the time limits I set out in the order are more
18 aspirational. We're not going to put the clock on you
19 like some appellate courts would, but this is more of a
20 -- while I hope we can keep it to a certain general
21 time frame, if we run over, we run over. It's not
22 going to be the end of the world, but -- so you can
23 keep that in mind.

24 A couple sort of preliminary observations
25 that you might want to think about is also when you

1 talk about your motions, both Texas and United States
2 have moved to strike the equitable defenses. And this
3 may apply to other claims as well.

4 I think at this stage of the proceeding, some
5 of these motions may be hard to rule on as a matter of
6 fact. Texas may be correct in its assessment that
7 laches and equitable estoppel and defenses such as that
8 don't apply to compact violations going forward.

9 But I don't know what Texas is asking for at
10 this point. If you're asking for 60 years of damages
11 and saying that they've been in -- New Mexico has been
12 in noncompliance since 1938 and that you're asking for
13 X hundreds of millions of dollars of damages, then
14 laches may become a defense. I just don't know. I
15 don't think all these motions can be decided as a
16 matter of law without some factual context within which
17 to decide them.

18 The other -- the other thing I'm concerned
19 about is what about cities that have been using water
20 with acquiescence for 40 or 50 years, you know, are we
21 going to -- I don't know where those fit into this
22 whole issue of -- of the affirmative defenses that
23 Texas -- I mean that Kansas -- excuse me, the
24 affirmative defenses that New Mexico has raised.

25 And then finally, on this issue of whether or

1 not Supreme Court permission is required to file
2 counterclaims, it's a -- that's a bit of a tricky
3 issue, and I don't know if that should be the subject
4 of a motion to strike at the Supreme Court level or
5 whether that's something I should rule on.

6 I will note that in our research, we found
7 one case that directly discussed this issue, and that's
8 *Kansas v. Nebraska*, Original Number 126. And in that
9 case, this very issue was raised, that -- that
10 Nebraska's counterclaim should be struck because
11 Nebraska had not sought leave of the Supreme Court to
12 file the counterclaims.

13 All the Supreme Court said is the motion is
14 denied. Now, they didn't do any analysis; they didn't
15 say anything about it. Whether that's present for this
16 issue or not, I don't know. But anyway, that's
17 something we need to think about.

18 So having said that, I guess we'll get
19 started and let Texas go first.

20 MR. SOMACH: Good morning, Your Honor.
21 Stuart Somach. We have three motions that are before
22 you right now. The first deals with exactly what is
23 the status of the case and whether or not -- what
24 happened before the Special Master, the first Special
25 Master and the Court prior to the remand back down has

1 any relevance to how we move forward.

2 Second one is the 12(c) motions in which we
3 have argued two things: We've argued, number one, that
4 New Mexico was obligated to seek leave, and I'll
5 address that in more detail, and then we've also
6 substantively taken a look at the 12(c) motion,
7 particularly the one cause of action under the
8 Miscellaneous Purposes Act that refers to Texas.

9 We also have a Rule 56 motion with respect to
10 the affirmative defenses. I'm not sure exactly how
11 to -- how to deal with that one because the law is what
12 we believe the law is, and then the factual question
13 that you raise is an interesting one, and I have no
14 objection to deferring final resolution of that issue
15 until there is further factual development on what
16 Texas intends specifically to ask for in terms of a
17 remedy. That may alleviate the concern that you have.

18 Although I am cognizant of the damage issue
19 with respect to reliance by cities, I am not
20 particularly of the mind that that's a reason to -- to
21 delay a ruling mainly because it's within New Mexico's
22 power to decide -- assuming you and the Court decide
23 that they enacted inappropriately under the compact,
24 it's up to New Mexico to figure out how they're going
25 to rearrange the resources they have in order to ensure

1 that cities, vis-à-vis farmers, vis-à-vis whomever else
2 is relying upon water, is to be supplied water; that
3 utilizing a violation of the compact as a rationale for
4 New Mexico to get out of this obligation and take water
5 that was otherwise apportioned to Texas runs right into
6 the case law that we cited associated with those
7 equitable defenses in terms of rewriting in terms of
8 the compact.

9 THE SPECIAL MASTER: Can I ask you a
10 question, sort of at the outset, and this is sort of an
11 overarching issue on many of these motions. You have
12 just made the statement that water is allocated to
13 Texas, and you use that phrase throughout your
14 pleadings, but you say the water's not allocated to New
15 Mexico. Why is there a difference?

16 MR. SOMACH: Actually, this goes to the
17 question -- since I've started inartfully in terms of
18 utilizing terms, let me correct myself immediately.

19 THE SPECIAL MASTER: No, but you used
20 that -- I mean, this is isn't the first -- that's one
21 of the questions I've had from the very beginning when
22 I was reading your motions is that you repeatedly refer
23 to water allocated to Texas and that you're standing in
24 the shoes of the Texas citizens who are being deprived
25 of their rightful allocation of water, but you say New

1 Mexico has no water allocation and they have no right
2 to stand in the shoes of their citizens who may be
3 rightfully depriving them of water. So, again, why
4 is -- where is the distinction?

5 MR. SOMACH: Well, let me begin with this
6 question, and I believe it became a big issue with the
7 briefing and what I had written, what we had written,
8 was that states get apportionments under the compact
9 and that the water that is then divvied up is allocated
10 pursuant to the apportionment.

11 THE SPECIAL MASTER: So are you saying New
12 Mexico gets 57 percent under the apportionment, Texas
13 gets 43 percent under apportionment, and then it gets
14 into the allocation?

15 MR. SOMACH: Actually, I'm saying something
16 quite different, and I think this really impresses your
17 question, perhaps.

18 The compact apportions water between -- you
19 know, there's a requirement that Colorado deliver X
20 amount of water at the Colorado-New Mexico state line.
21 Then New Mexico has the Article IV obligation to
22 deposit water into Elephant Butte Reservoir for Texas.
23 And then it gets all the -- it gets all the rest of the
24 water as its apportionment.

25 The question then becomes does New Mexico

1 also have an apportionment too, and I'll use -- these
2 phrases are just more sophisticated than just cutting
3 it up 57 and 43 percent because of the return flows and
4 the issue that we're really dealing with is actually
5 more than a hundred percent of the water.

6 In order for everybody to get their water,
7 you'd actually have to have 120 percent of water
8 because you've got to reuse the water over and over
9 again in order to make everything -- everything work.

10 The question then is, what does New Mexico
11 get within the reservoir? What amount of water is
12 apportioned under the compact to them?

13 Texas has taken the position, and it is still
14 our position, that essentially all the water in the
15 reservoir is water apportioned to Texas. And we cited
16 for those propositions the fact that it's the Texas Rio
17 Grande commissioner that can order certain things to
18 happen with respect to debts, credits, and other
19 requirements associated with the operation of the
20 reservoir, that New Mexico doesn't have that power.
21 That power is vested solely in the State of Texas, the
22 Texas Rio Grande commissioner, by the compact.

23 And so that essentially our view is that all
24 the water in the reservoir belongs to Texas subject to
25 EBID's preexisting contract, which clearly was

1 recognized in the compact with the United States, which
2 is the 57 percent you're talking about, and the 60,000
3 acre-feet that's subject to the treaty the United
4 States has with Mexico.

5 Now, that's what the compact set up. Now,
6 there's language in the Special Master's report that
7 there is an apportionment to New Mexico. And what
8 we've said about that is, you know, as a practical
9 matter, it doesn't make any difference because what the
10 Special Master also said was New Mexico had
11 relinquished all dominion and control over that
12 57 percent of the water and that it also had agreed to
13 the arrangement by which the United States would
14 deliver that water to EBID subject to the contract that
15 the United States has with EBID.

16 And the reason why you have to look at it as
17 a unity like that is because it is essentially a closed
18 system; that unless you are controlling sort of
19 reclamation utilization of the contracts to 57 percent,
20 you can't ensure that New Mexico -- that Texas gets its
21 43 percent, because you have to take a look at
22 depletions within EBID, and you have to take a look at
23 return flows and other issues.

24 And if it's not a closed system that looks at
25 those things, then exactly what has happened does

1 happen when New Mexico comes in and authorizes non-EBID
2 water uses to pump groundwater to a degree where the
3 river is no longer in contact with the groundwater
4 basin, and all the return flows drop into the
5 groundwater basin or are acclaimed by New Mexico
6 separate and apart from the compact, then Texas gets
7 shorted, and there's no way to fix that until you
8 create the unity again.

9 THE SPECIAL MASTER: To what extent is there
10 water in the Lower Rio Grande, if any, that is not
11 project water? You talk about --

12 MR. SOMACH: It's all project water.

13 THE SPECIAL MASTER: You talk about return
14 flow. There are no major tributaries that would flow
15 into the Rio Grande within that area that would be
16 nonproject water?

17 MR. SOMACH: Well, there are no tributaries.
18 There are, however, weather flows and other, what I
19 would call and what the experts will call, accretions
20 into the river, that's additions. There are also
21 depletions, natural losses during that period of
22 time -- or during that stretch of the river.

23 And then historically, in 1938 there was a
24 tributary flow from the groundwater basin, which
25 doesn't exist anymore. All of that was accounted for

1 in the compact, and it also belonged to the unity that
2 I just described; that there was no -- in fact, and
3 these are factual issues which we'll bring to bear, in
4 the 1937 and 1938 engineer reports, that supported the
5 compact, the engineers concluded that there was no
6 available water below Elephant Butte, at all, that if
7 you were going to have any more development post 1938,
8 you were going to have to bring in and augment supplies
9 from bringing water in from outside.

10 So the direct answer to your question is no,
11 there is no water below Elephant Butte Reservoir that
12 isn't accounted for.

13 Now, the groundwater issue is interesting
14 because we've never said that New Mexico doesn't have
15 some right to the groundwater. But what we've said is
16 you can't operate the groundwater basin, you can't
17 allow pumping of the groundwater basin to be so large
18 that you draw down that basin so that the system, the
19 closed system that I talked about, no longer works.
20 And those are hard and factual issues that we'll put
21 before you as we move forward.

22 THE SPECIAL MASTER: Okay. Well, I got you
23 offtrack. I'll let you go back.

24 MR. SOMACH: Actually, I -- we started, I
25 think, in the context of talking a little bit about the

1 affirmative defenses, which I actually didn't want to
2 spend much time with at all in my argument.

3 I'd like to focus most of what I want to say
4 affirmatively with respect to the motion that we have,
5 I'll call it the law of the case motion, but it's much
6 more sophisticated than that, and it involves a lot of
7 issues, and I wanted to provide some context to that
8 motion.

9 I don't want to repeat everything that we
10 wrote in the brief other than responding to questions
11 you have about that. But the discussion needs to be
12 grounded in New Mexico's motion to dismiss. After all,
13 that was what was before the Special Master and the
14 Court.

15 Now, the motion was based upon two basic
16 arguments: One was that there were no express
17 provisions in the 1938 compact that it violated. That
18 is, at that point in time, they were arguing no state
19 line delivery obligation and that New Mexico's compact
20 obligation ended when they deposited or delivered water
21 into Elephant Butte Reservoir.

22 There already was a plain rank in the
23 compact, this was delivered to the Elephant Butte
24 Reservoir, not to the Texas state line. They also
25 argued in that context that the compact does not

1 require New Mexico to maintain depletions within the
2 Rio Grande Basin and New Mexico below Elephant Butte
3 Reservoir at the levels that existed in 1938. Those
4 are -- that's the first argument that they made, that
5 argument.

6 The second argument they made was that below
7 Elephant Butte Reservoir the use of water is controlled
8 by New Mexico state law. They cited *California v.*
9 *United States*, Section 8 of the 1902 Reclamation Act,
10 and then they argued that there were alternative forms,
11 that the New Mexico adjudication court was a perfect
12 place to argue -- to argue these cases, and they argued
13 that the -- that the district court in Albuquerque had
14 a case dealing with the operating agreement and that
15 was the place to argue those things.

16 Now, I noticed in their briefs on our motion
17 here, they now argue that their position was that the
18 compact ended at Elephant Butte Reservoir and did not
19 apply below the reservoir. That's -- that's what they
20 say. That's all they say that they argued for. But
21 that's not what the motion to dismiss dealt with, and
22 that's not what -- the way Special Master Grimsal
23 understood their argument.

24 What I just articulated to you as their two
25 positions comes right out of both their briefs and the

1 Special Master -- first Special Master's articulation
2 of their position.

3 That was the second time they made every one
4 of those arguments. Because if you go back and look at
5 their opposition to the State of Texas's petition to
6 file the complaint in this case, those were exactly the
7 same issues they put before the Court there and which
8 were rejected in that context by the Court when the
9 Court allowed us to file our -- our complaint. All
10 parties agreed that the compact was unamended.

11 THE SPECIAL MASTER: Well, I'm not sure I
12 agree with that.

13 MR. SOMACH: I'm sorry, which --

14 THE SPECIAL MASTER: That -- you may be
15 reading too much into what the Supreme Court decided
16 when they allowed you to file the complaint. Because
17 they specifically also said, and we invite New Mexico
18 to file a motion to dismiss. I think -- I think the
19 Supreme Court did nothing more than say based on the
20 face of the complaint, there's enough here to go
21 forward. We'll decide the issues that you're talking
22 about in the context of a motion to dismiss.

23 MR. SOMACH: And just to be clear, I don't
24 disagree with what you said. All I'm saying is that
25 was the second time we had briefed all of those issues

1 in this case.

2 The Court -- what the Court did, I agree with
3 you, is allow them to file and gave them leave to file
4 the motion to dismiss. In the context, however, of
5 their motion to dismiss, and in the context of the
6 arguments they made before the Court in terms of their
7 opposition, they said that the compact was unambiguous,
8 that there was no ambiguity in the compact.

9 The United States, when it intervened in the
10 case and subsequently has said the compact was
11 unambiguous, Texas has always said the compact was
12 unambiguous.

13 When the Special Master took up this case,
14 there were no factual issues before the Special Master.
15 He made a point of saying that several times. I have
16 remarked that there is a lot of discussion that is not
17 a legal discussion in the Special Master's report, but
18 he explains that that's appropriate because it -- he
19 provides context.

20 If you take a look at New Mexico's motion to
21 dismiss, take a look at their opposition to Texas's
22 leave to file, and if you look at the Supreme Court's
23 March decision, all use background information to set
24 it up so that the fact the Special Master did that is
25 not remarkable, but what he said was: I haven't relied

1 upon any of this because I don't need to, because the
2 compact is unambiguous.

3 The question of ambiguity is a question of
4 law. That's a legal question. And the resolution of
5 whether -- of what an ambiguous compact means is also a
6 legal question. And when the Special Master found that
7 the text and structure of the 1938 compact was
8 unambiguous, he went through and he specifically
9 articulated the legal determinations which were
10 necessary for him to reach that conclusion upon which
11 he recommended that the motion to dismiss be denied.

12 THE SPECIAL MASTER: Can I ask you a question
13 about this ambiguity? One of the things that I was
14 thinking about as I was reviewing this last week and
15 over the weekend was at the time the compact was
16 negotiated, I assume that both Texas and New Mexico
17 anticipated the possibility that there would be further
18 development on both sides of the border, certainly El
19 Paso is a lot bigger than it was 60 years ago, and you
20 have Las Cruces and so on that are -- that have grown,
21 what was -- was there any thought given to where they'd
22 get water, I mean, and how this compact would play into
23 both the economic development that might occur on
24 either side of the border and the possibility that as
25 time goes on acres that are within both of the

1 irrigation districts may go out of production and they
2 don't -- and they don't need the water? Was it always
3 thought that you'd have to contract with the irrigation
4 districts to get water?

5 MR. SOMACH: The short answer --

6 THE SPECIAL MASTER: Is there a historical
7 context?

8 MR. SOMACH: Yes, there is a historical
9 context, and as we talk about municipal use, because
10 that is an issue that's been raised in the case that
11 we'll have to deal with, the answer to that question is
12 yes. El Paso, not so much Las Cruces, but El Paso was
13 certainly involved around -- in 1938 and concerned
14 about water supply with the knowledge that it would
15 have to obtain some water supply through the project in
16 order to meet its needs, which is exactly what it did
17 years ago entering into the contracts with both the
18 United States and -- and the district in order to
19 obtain part of its -- its water supply.

20 THE SPECIAL MASTER: Well, was it always
21 anticipated that there would be surplus water available
22 for contracting with municipalities?

23 MR. SOMACH: No. As I indicated earlier,
24 there was no surplus water. It was all accounted for.

25 THE SPECIAL MASTER: I mean, it's not that

1 it's not accounted for, but what I mean is, do the
2 irrigation districts need all the water that they were
3 going to get, or was it anticipated that out of the,
4 what is it, 790,000 acre-feet that's released every
5 year, that it was always anticipated there would be
6 some available for municipalities?

7 MR. SOMACH: No, no. No. Remember, 70/90 is
8 a full supply of that. But using that -- that -- it
9 was assumed that all that water was going to be for
10 irrigation. That was the assumption. And so even now,
11 if the municipal -- Las Cruces just pumps, and that's
12 part of our complaint. But El Paso, in fact, did what
13 the compact negotiators anticipated, and that was that
14 they entered into the contracts with the district and
15 with -- with the United States, and we'll put on --
16 evidence of this in, among other things, they return
17 water through their wastewater and other treatment
18 facilities so that it's not a one-for-one net loss,
19 they return water, plus they pay for other water that
20 they take. So it's all wrapped up in those contracts
21 and will be part of the factual case.

22 But the fundamental answers that the question
23 poses, as I said before, it was all appropriate. There
24 was no surplus water involved. And so to the extent
25 that the cities were going to have to get water, it was

1 known they were going to have to get it from the
2 available supply.

3 I suspect there was some belief that for a
4 while you could pump groundwater. There certainly is
5 the ability to pump some groundwater, which is
6 additional water, at least to the point where you
7 haven't had an adverse impact on the way the system
8 operates.

9 Returning to what I was -- what I was saying
10 is the five points that we put before you as the five
11 issues are -- they track exactly what the Special
12 Master found in his report.

13 Now, New Mexico took exception to what the
14 Special Master's conclusion and recommendations were,
15 and -- not the recommendation but the conclusions, the
16 legal conclusions the Special Master made in order to
17 support his recommendation, and then they filed
18 exceptions.

19 Now, those exceptions, if you look at them,
20 track -- same argument was made -- you know, in terms
21 of opposition of our filing of the case, same arguments
22 that were made in opposition to the motion to dismiss,
23 they never withdrew their motion to dismiss. Moreover,
24 they never withdrew these exceptions. And so that
25 actually was the one, two, third time we briefed the

1 same issues.

2 We know that the Court both denied New
3 Mexico's motion to dismiss and also denied New Mexico's
4 exceptions, and we cited the *Raddatz* case, and the
5 *Raddatz* case was also cited, I believe, by New Mexico.

6 It's interesting that in the *Raddatz* case
7 discussion, which is the applicable discussion of the
8 Supreme Court Special Masters, it talks about the fact
9 that, yeah, there -- you know, those reports are
10 advisory only, yet the Court regularly acts on the
11 basis of the master's report, but then it says "and
12 exceptions thereto," which indicates that the Court
13 does look at the exceptions, that they're just not, you
14 know, set aside and ignored by the Court.

15 But with all of what I've said in mind, I
16 think that the real question is, is what is going to
17 govern this case as we move forward before you? It is
18 not, in a sense, where the Supreme Court might, after
19 considering the Special Master's report exceptions,
20 rule in a manner which is at odds either with the
21 report or the exceptions.

22 The first report, as it addresses the issues
23 that Texas is involved within the case, it exists.
24 It's there. It's never been rejected by the Court. It
25 exists as a -- as a pillar of some sort in this

1 litigation. That would have been the case if no
2 exceptions had been filed in that hypothetical
3 situation. It would have been there.

4 THE SPECIAL MASTER: Can I ask you about two
5 of your specific determinations?

6 MR. SOMACH: Yes.

7 THE SPECIAL MASTER: Two and five. Two says
8 the text of the 1938 compact requires New Mexico to
9 relinquish control over the water, and 5 says that New
10 Mexico law plays no role in the dispute.

11 I'm not sure that the United States entirely
12 agrees with that assessment, but I'll let
13 Mr. MacFarlane speak to that. But at least to the
14 extent that they need to protect your interest,
15 don't -- doesn't Texas law --

16 MR. SOMACH: New Mexico.

17 THE SPECIAL MASTER: -- New Mexico law, and
18 don't they have to control the water below the damn at
19 least so that they protect your interest, if for no
20 other reason.

21 MR. SOMACH: Yes, those articulations that
22 I've just made come from the Special Master's report.
23 So I pulled them right out of the Special Master's
24 report.

25 I believe that it was always our -- and it

1 has been our belief, and we briefed it in the context
2 of the motions to dismiss themselves, that the proper
3 exercise of New Mexico state law is to support the
4 compact, which includes not exercising law that would
5 allow them to allow others to take and to exercise
6 their power to preclude that from occurring.

7 In fact, in our briefs we cited not only
8 provisions of state law, but we also cited those
9 provisions of state law which adopted the compact which
10 bound them to that situation.

11 THE SPECIAL MASTER: So then that
12 articulation is not correct. I mean, what you really
13 are saying is that New Mexico law applies, but it must
14 be applied in such a way as to protect the interests of
15 Texas.

16 MR. SOMACH: Yes. The statement itself is a
17 response to the New Mexico -- and this is the context
18 for that. The statement itself is a response to
19 Texas -- to New Mexico's argument that it only had to
20 deliver water to Elephant Butte and that everything
21 below Elephant Butte was governed by New Mexico state
22 law including the appropriation and application of the
23 law.

24 That's how you get into the adjudication
25 court, which finds -- you know, which doesn't give the

1 same priority to the compact that -- that we believe
2 that the Special Master provided for in that first
3 report.

4 So contextually, the statement is while New
5 Mexico state law has nothing to do with the
6 appropriation and utilization and allocation of water
7 below Elephant Butte, it certainly applies to preclude
8 interference with deliveries that otherwise go to
9 Texas. So that's the context that the Special Master
10 wrote on.

11 What I -- the point I was making in the
12 context of the existing Special Master's report is the
13 fact that if there had been no exceptions, it would be
14 there. In fact, there were exceptions, and the Court
15 rejected those exceptions.

16 That's got to mean something in the context
17 of -- and here's the critical issue -- where do we go
18 from here? Do we ignore that report and those legal
19 findings in terms of compact interpretation, or are we
20 forced to, for a fourth time, ignore the Special
21 Master's first report and move forward and relitigate
22 essentially what we've done for the last six years?

23 If the first Special Master was still the
24 Special Master, there's no question that we would pick
25 up where from where he left off. I recognize that's

1 not the actual situation we have here, but looking at
2 every kind of concept of judicial efficiency and
3 resource development to go do this, whether it's a
4 third or a fourth time, depending upon our earlier
5 discussion, we've been around this. We have a report.
6 That report is there. It's never been rejected. The
7 exceptions to that report, however, have clearly been
8 rejected.

9 Let me touch quickly on the 12(c) motion
10 record because I know --

11 THE SPECIAL MASTER: I've taken up quite a
12 bit of your time.

13 MR. SOMACH: Well, no, it's fine. It
14 is -- our motion is pretty simple. It basically says,
15 look, filing what are essentially complaints to Supreme
16 Court is serious business.

17 The Court -- you know, certainly if this was
18 the complaint in the first instance, the Court clearly
19 gets to approve that. We cited a whole bunch of orders
20 from the Court where counterclaims were -- in fact,
21 sought leave, and the Court in some of those denied it,
22 and in some of those granted leave to file those.

23 THE SPECIAL MASTER: Although several of
24 those involved amendment to counterclaims, some of
25 those cases.

1 MR. SOMACH: They did, but that's --

2 THE SPECIAL MASTER: And that's exactly the
3 argument that they made in *Texas v. Colorado*, to strike
4 counterclaims. They said -- Colorado said, I guess it
5 was -- yeah, it was Kansas, and Nebraska was on it.
6 Colorado basically said -- or, no, it was Kansas.

7 Kansas basically said, Listen, you have to go
8 through all of these hoops to file a complaint, and
9 it's a very serious matter, exactly what you just said,
10 and the Supreme Court takes its gatekeeping
11 responsibility very seriously. So you ought to have to
12 go through the same hoops to file a counterclaim that
13 may raise even more issues. And like I said, Supreme
14 Court just said motion to strike is denied. And I
15 don't know if that -- there's not much analysis there,
16 but --

17 MR. SOMACH: No, there's not. But, again,
18 there is a whole list of cases that we provided where
19 the Court clearly acted on that. You know, it is
20 interesting, you know, in fact, you point out that --
21 New Mexico makes a big deal out of this and says
22 somehow we were writing off on Kansas's template, which
23 I didn't -- I can assure you we didn't write off
24 anybody's template.

25 But the point being, they're weaving a lot

1 into a summary denial when it comes to the issue you've
2 raised, yet they had written off the overruling of
3 those exceptions as a -- what did they use? They used
4 a housekeeping instruction. I mean, if anything could
5 be a housekeeping instruction from the United States
6 Supreme Court on exceptions that have been filed, I
7 don't think that's it.

8 But they write that off as a housekeeping
9 instruction, and then they pile all of this in, in
10 terms of an explanation of the only case that they cite
11 that makes that point. I'm not going to argue that it
12 is a summary denial, but it is, nonetheless, a denial.
13 And I think that that, in and of itself, is significant
14 when you put it together with all of the other
15 issues that -- all the other cases that we've cited
16 there.

17 A couple of other points in regard to that is
18 these weren't just -- there are two causes of action
19 that they've added as counterclaims which are basically
20 mirror causes of action to ours, but also they're
21 affirmative defenses, and so those issues are going to
22 get litigated anyway one way or the other because
23 they're part and parcel of our claim.

24 But what they've done is gone much further
25 afield, even though they said they can't go further

1 afield, by adding issues that have nothing to do with
2 the compact. They are the -- for example, the water
3 supply, the Miscellaneous Purposes Act, the operating
4 agreement.

5 THE SPECIAL MASTER: The what?

6 MR. SOMACH: The operating agreement. I
7 mean, they've got --

8 THE SPECIAL MASTER: Well, I -- let's talk
9 about the operating agreement for a minute. I'm having
10 trouble getting my head around how you can say the
11 operating agreement doesn't have anything to do with
12 the compact. Because if you say the compact requires
13 that 57 percent of the water go to Elephant Butte and
14 43 percent go to El Paso Water District and would have
15 signed all the contracts that they've entered into, and
16 now you have an allocation that totally flips that, how
17 can you say that doesn't affect the compact?

18 MR. SOMACH: Because notwithstanding what
19 they said, I don't think the operating agreement does
20 that.

21 THE SPECIAL MASTER: Well, it doesn't make
22 any difference. Whatever the operating agreement says,
23 it says. But if it doesn't allocate the water
24 according to the compact, then what -- how can you say
25 it doesn't affect the compact?

1 MR. SOMACH: Well, because I'm not sure that
2 I concur that it doesn't allocate the water according
3 to the compact.

4 With that assumption in mind, my answer to
5 that question is the same answer we gave to the Court
6 when they raised the issue of alternative forms.
7 Because, remember, this operating agreement is
8 currently the subject of a piece of litigation in
9 federal district court that's been stayed, and it's
10 been stayed in order for you and the Court to tell us
11 what are the compact apportionments.

12 Once that is known, then you can take that,
13 in Judge Browning's courtroom or elsewhere, and make a
14 determination in putting the operating agreement up
15 against the compact interpretation as provided by this
16 Court and determine whether or not the operating
17 agreement violates the compact.

18 To add it to this case encumbers this case
19 and, quite frankly, overly complicates this case with
20 issues that belong elsewhere. They belong elsewhere as
21 a determination of whether or not the operating
22 agreement is consistent or inconsistent with the
23 compact.

24 It's the same argument, essentially, that
25 says, how did we get sued under the Miscellaneous

1 Purposes Act, which is a very specific act that talks
2 about who can actually bring suit, you know.

3 We don't have a miscellaneous purposes
4 contract. New Mexico doesn't have one either so that
5 will really be outstanding under the law, but we're an
6 absolute stranger to those contracts. You
7 have -- they've thrown that in as a cause of action in
8 attempting to, you know, inappropriately bootstrap the
9 compact in here.

10 You could almost argue that any argument they
11 can concoct becomes a compact argument just by -- just
12 by barely alleging that it would somehow have an
13 adverse effect upon the compact.

14 THE SPECIAL MASTER: I thought the operating
15 agreement was not so much a compact interpretation, if
16 we want to put it that way, but rather, a remedy, that
17 the operating agreement almost assumed that New Mexico
18 was in violation and that, as a remedy, we're going to
19 do this, we're going to enter into this operating
20 agreement that's going to govern going forward in order
21 to remedy the overpumping of groundwater. Am I wrong
22 about what the operating agreement says?

23 MR. SOMACH: I think I said to Your Honor --

24 THE SPECIAL MASTER: So we may get into the
25 operating -- even if we don't get into the operating

1 agreement on contract interpretation, as I understand
2 it, you want a remedy. You don't want just -- I think
3 you're saying you want more than just -- we want to
4 make sure we get our allocation going forward. You
5 want a remedy for past violations. And that's what the
6 operating agreement, as I understood it, was intended
7 to effectuate.

8 MR. SOMACH: Right. And I think in one of
9 the status conferences I described it as a potential
10 remedy. In its current configuration, I'm not certain
11 that we would agree with it because it uses a different
12 baseline than the one that we think is appropriate.

13 THE SPECIAL MASTER: Well, I mean, a couple
14 of the amici, I think it was pecan growers or somebody
15 said, you know, it's not perfect, but it might be a
16 framework for a remedy.

17 MR. SOMACH: And quite frankly, I'm not sure
18 that we wouldn't be there. But looking at it as a
19 remedy is quite different than having it as a cause of
20 action in a complaint.

21 I firmly believe that these are the exact
22 questions that you're pondering now that the Supreme
23 Court ought to ponder to determine whether it wants to
24 expand this litigation.

25 One of the clear things of the Supreme Court

1 opinion was to say the United States gets in, and one
2 of the reasons was is because they're not expanding the
3 litigation. And then with that in mind, you find --
4 you find out that New Mexico just files a complaint
5 that expands the litigation far beyond.

6 Now, it might be appropriate, but what we've
7 said is, that's a decision for the Court to make as to
8 whether or not -- as in all cases we cited to, some of
9 them they said yeah, some of them they said no. And
10 that's what we're suggesting, issues of sovereign
11 immunity, issues of standard.

12 Some of those issues might get sorted out in
13 the context of a briefing with respect to whether these
14 are ever appropriate original action types of issues.

15 THE SPECIAL MASTER: Is there any question in
16 your mind that New Mexico has standing to counterclaim
17 on what you say are basically mirror claims of the
18 compact?

19 MR. SOMACH: If that's -- believe me, if
20 that's all they had done, I -- notwithstanding the fact
21 that I do think there's a jurisdictional issue here, we
22 would never have -- we would have just moved forward in
23 litigating those issues.

24 The problem with what they've done is they
25 will have exponentially expanded the scope of this

1 litigation into Water Supply Act issues, Miscellaneous
2 Purposes Act issues. I mean, it just goes on in terms
3 of all those issues. That's inappropriate. That is
4 going to -- to expand this litigation far beyond where
5 we thought we were when we came back from the Supreme
6 Court.

7 They want to relitigate all the issues that
8 were before the Supreme Court, and now they want to
9 expand the issues well beyond what is in the existing
10 piece of original action.

11 I'm not saying that they are not entitled to
12 try. I'm just saying they have to go and get
13 permission from the Supreme Court to do -- to try. And
14 we will, you know, certainly oppose, but we'll take our
15 position there. That's the right way to do it.

16 In the meantime, we've got to be moving along
17 with this case so that at least their mirror images and
18 our complaint get resolved in a reasonably --
19 certainly, you know -- I think I told you when I took
20 this case, I knew it might take up the rest of my
21 professional life. I never intended that it would take
22 up my actual life.

23 This case, we've been at this for six years,
24 and they're suggesting we go back to go, plus we have
25 all kinds of issues that have never been in this case

1 before.

2 THE SPECIAL MASTER: Thank you.

3 MR. SOMACH: Thank you.

4 THE SPECIAL MASTER: I think you're about --

5 MR. SOMACH: I've exhausted the time.

6 THE SPECIAL MASTER: All right.

7 Mr. MacFarlane, I'll let you speak. I want -- I
8 decided rather than press Mr. Somach on the standing
9 issue, I'll talk to you about it. So I'm not going
10 to --

11 MR. MACFARLANE: Thank you, Your Honor.
12 Steven MacFarlane from the United States. Good
13 morning.

14 I want to start off by one minor, if I may,
15 one minor correction. The United States did not move
16 for summary, or part of summary judgment, on New
17 Mexico's affirmative defenses. Our 12(c) motion was
18 focused just on New Mexico's counterclaims against the
19 United States.

20 I agree with Mr. Somach that New Mexico's
21 first and fourth counterclaims against Texas, assuming
22 that Your Honor concludes that New Mexico's
23 counterclaims are properly in front of you, that those
24 can proceed, and together with Texas's claim, the
25 United States's claim, that really defines the core of

1 this litigation.

2 And that gets me to my starting point here,
3 which from the United States's perspective, this
4 lawsuit is about the relative apportionments of Texas
5 and New Mexico under the Rio Grande compact with
6 respect to the waters that New Mexico delivers to the
7 Elephant Butte Reservoir, what the compact defines as
8 usable water in project storage available for release
9 by the project in accordance with the irrigation
10 demands including deliveries to New Mexico.

11 Now, contrary to New Mexico's response and
12 reply briefs, the United States does not contend or
13 take the position that New Mexico has no apportionment
14 below Elephant Butte Reservoir, only that its
15 apportionment is undefined by the compact itself.

16 And this is where I would disagree with Your
17 Honor that the compact provides New Mexico with
18 57 percent apportionment and Texas with a 43 percent
19 apportionment. That remains to be determined.

20 The apportionment also would need to account
21 for depletions due to groundwater development, which we
22 contend impair the project, the Rio Grande project's
23 ability to deliver water according to these contracts.

24 So our position, we agree with the compact
25 analysis in the first Special Master's report regarding

1 the role of the project as the vehicle for guaranteeing
2 delivery of Texas's and a part of New Mexico's
3 equitable apportionment of the stream. But we also
4 agree with the first Special Master's conclusion that
5 the delivery obligation on New Mexico under Article IV
6 of the compact requires New Mexico to relinquish
7 dominion and control over the water that goes to
8 Elephant Butte Reservoir and to protect the water
9 released by the project from being captured, interfered
10 with or appropriated after it moves downstream.

11 THE SPECIAL MASTER: So is it your position,
12 and this is the way I read the Supreme Court decision,
13 that if New Mexico loses dominion and control of the
14 water, it becomes under the jurisdiction of the United
15 States?

16 MR. MACFARLANE: It is water that the project
17 administers and distributes or releases and then
18 delivers pursuant to the contracts with EBID and EP
19 No. 1 and also the deliveries to Mexico.

20 THE SPECIAL MASTER: Well, does that mean,
21 then, that you are a proper party for any violations of
22 your duty to administer and release water?

23 MR. MACFARLANE: We could be potentially, but
24 here's the key: New Mexico's apportionment below
25 Elephant Butte Reservoir -- and the same is true of

1 Texas. It's our position that it applies to both --
2 remains to be defined.

3 There needs to be a decree that allocates
4 what each state is specifically entitled to out of the
5 water that the project administers. Once that decree
6 is entered, and we know with greater certainty what
7 each state has -- and this really gets to the key of
8 our standing argument, which I'll get to in a moment
9 when we review our specialty compacts, but once we have
10 a decree that defines what each state has, then we can
11 look to project operations and determine whether those
12 operations are consistent with that decree.

13 So if you anticipate a point I expect to make
14 a little later, our position, for example, with regard
15 to New Mexico's counterclaim against the involved
16 operating agreement is -- which we believe is not
17 properly pled and has many flaws, is not that New
18 Mexico can't bring a claim against the United States
19 based on the operating agreement but that the time to
20 do so hasn't ripened up because New Mexico doesn't know
21 what it has by way an apportionment. So we need to get
22 that issue resolved, and that's what we think this case
23 is about.

24 THE SPECIAL MASTER: Do you agree, though,
25 that at the end of the day, whether I actually get into

1 the operating agreement or not, once we do -- make
2 those determinations about apportionment and so on,
3 that there's -- to the extent the operating agreement
4 is inconsistent, it will have to be changed?

5 MR. MACFARLANE: Absolutely I agree with
6 that, Your Honor, and I think, frankly --

7 THE SPECIAL MASTER: I mean, to me the
8 operating agreement is sort of a total side issue to
9 this in the sense that once we know what the compact
10 requires, then the operating agreement is going to have
11 to be brought into conformance unless the operating
12 agreement becomes a remedy.

13 MR. MACFARLANE: I would agree with that
14 assessment, frankly. I think the operating agreement
15 defines how a project in the river currently operates.
16 The Court will say whether the current operation is
17 consistent with an apportionment, and so that's an
18 issue I think for another day, possibly even another
19 forum, but I don't think it means that New Mexico can
20 counterclaim against the United States seeking damages
21 and injunctive relief based upon an alleged nexus
22 between the operating agreement and the compact, which
23 is most vague and attenuated, quite frankly.

24 THE SPECIAL MASTER: Well, you've raised the
25 issue of sovereign immunity, and I guess I want some

1 clarification on that. Are you -- I understand that
2 you're arguing that you have not waived sovereign
3 immunity for purposes of money damages; is that right?

4 MR. MACFARLANE: We have not waived sovereign
5 immunity for money damages. Only Congress can do that.
6 And there is no -- we're not aware of any waiver that
7 will allow claims for money damages, even in an
8 original action, be asserted against the United States.

9 THE SPECIAL MASTER: Have you waived
10 sovereign immunity for purposes of arguing that you are
11 not operating the project in conformance with the
12 compact?

13 MR. MACFARLANE: We have not waived sovereign
14 immunity for those purposes either, Your Honor.

15 THE SPECIAL MASTER: Why not?

16 MR. MACFARLANE: Because there is -- we don't
17 see that there is an applicable waiver of sovereign
18 immunity, at least that New Mexico has pled, that -- it
19 hasn't pled it, but that would give the Court, in this
20 proceeding, or that would waive the immunity of the
21 United States in this proceeding, to claims that
22 somehow the operating agreement violates the compact.
23 Hypothetically --

24 THE SPECIAL MASTER: I'm not talking about
25 the operating agreement here. I'm just talking about

1 how you're doing it, I mean. And as far as what -- New
2 Mexico's plan, I think really what is important is what
3 you have pled in your complaint of intervention, what
4 you are saying to the Supreme Court, why you need to
5 intervene.

6 And I think Justice Gorsuch basically said
7 you're the agent for New Mexico and Texas. He used the
8 word "agent." So if you're violating your agency
9 agreement, so to speak, are you then subject to suit?

10 MR. MACFARLANE: I think that is -- let me
11 answer that question this way, Your Honor. I think
12 that is an issue that will have to be adjudicated in
13 the context of Texas's claim, our claim, and
14 counterclaims 1 and 4 by New Mexico if this case
15 proceeds, if those counterclaims are allowed to
16 proceed.

17 THE SPECIAL MASTER: So you have waived
18 sovereignty for counterclaims 1 and 4?

19 MR. MACFARLANE: Those are not pled against
20 us. They are pled against Texas. But they raise
21 issues, Counterclaim Number 4 raises the operating
22 agreement. And I think for purposes of determining
23 whether the operating agreement is consistent with an
24 apportionment, you know, we've said that we will be --
25 if we're in this case, we will be bound by a decree

1 that the Court enters on those issues.

2 And so I think in a way -- you could look at
3 this way, in a way New Mexico doesn't really need to
4 assert its counterclaim against the United States. It
5 can get at the whole question of whether the operation
6 of the project is consistent with an apportionment, as
7 the Court will come to define it, just simply through
8 the litigation over Texas's complaint and the United
9 States's complaint and the two counterclaims that New
10 Mexico has pled against Texas which, as Mr. Somach, I
11 think, correctly notes, more or less mirror the claims
12 in Texas's complaint.

13 THE SPECIAL MASTER: And I guess that's the
14 point I was getting to earlier. Really the operating
15 agreement, while it's obviously important to the case,
16 it's not something I really need to resolve, as I see
17 it, because once we adjudicate the apportionment and
18 then we adjudicate whether you're operating the system
19 in accordance with that apportionment, that really
20 answers the abrogating agreement question.

21 MR. MACFARLANE: I think it does, frankly.

22 THE SPECIAL MASTER: If you're doing it
23 because of the operating agreement, and you say you're
24 doing it wrong, then the operating agreement has got to
25 be changed.

1 MR. MACFARLANE: We would have -- if the
2 appportionment is such that the operating agreement, as
3 it is currently configured, is inconsistent with what
4 the Court says New Mexico or Texas are appportioned
5 below Elephant Butte Reservoir, then obviously the
6 operating agreement will have to be reassessed and
7 possibly revised or eliminated altogether.

8 I mean, it's a potential remedy if we get
9 into settlement discussions or other discussions. It
10 is based upon how the project operated as a factual
11 matter in the 19 -- between 1938 and 1978. But
12 conditions have changed, and so those are issues which
13 I think will possibly come up during the major part
14 of -- what I would consider to be the core of relating
15 to this litigation.

16 I do want to address the sovereign immunity
17 issue very briefly unless Your Honor has more questions
18 about that.

19 THE SPECIAL MASTER: Okay.

20 MR. MACFARLANE: It seems to me that
21 there's -- first of all, there's no dispute that New
22 Mexico did not plead a waiver of sovereign immunity
23 here. Instead, New Mexico is arguing that the U.S.'s
24 participation in this action or intervention impliedly
25 waived its immunity to counterclaims, and that by

1 merely intervening in this action we opened ourselves
2 up to New Mexico's counterclaim.

3 There's no authority to support that
4 proposition. And it's hard to see why New Mexico
5 hasn't found any authority. The best it can come up
6 with is *Nebraska v. Wyoming*, a 1995 Supreme Court
7 decision, but that decision did not address questions
8 of sovereign immunity.

9 The U.S. did not raise it. Again, I have no
10 idea why we didn't, but we didn't. The United States,
11 however, was already bound by the terms of the decree
12 that the Supreme Court had entered in the *Nebraska v.*
13 *Wyoming* litigation in 1945.

14 That decree, which decree -- which was an
15 equitable apportionment decree of the actual flow of
16 the North Platte River, included as a predicate to that
17 decree, the government's operation of certain
18 reservoirs.

19 So in 1994, when the case was reopened,
20 Wyoming came back in and sought to assert a
21 counterclaim, its fourth counterclaim, against the
22 United States in connection with the operation of those
23 reservoirs alleging that that was inconsistent with the
24 predicate that the Court had addressed in its 1945
25 opinion and the decree.

1 In other words, the United States was bound
2 by the earlier decree. The -- when Nebraska and
3 Wyoming sought leave of the Court to amend their -- to
4 amend counterclaims, and in the case of Nebraska, to
5 assert a cross-claim in the case of Wyoming, it was
6 working within the framework of the decree to which the
7 United States was already bound, and we think that that
8 is a distinguishing feature here.

9 In any event, the Court's silence on the
10 question of sovereign immunity should not be taken as
11 authority that when the U.S. intervenes in an original
12 action, it waives immunity to counterclaims.

13 We've cited in our brief *California v.*
14 *Arizona* for the proposition that claims against the
15 United States should require a waiver even in an
16 original action.

17 THE SPECIAL MASTER: Well, what do you think
18 you have waived your sovereign immunity to?

19 MR. MACFARLANE: Sorry, repeat that?

20 THE SPECIAL MASTER: What have you waived
21 sovereign immunity to?

22 MR. MACFARLANE: Well, we haven't waived
23 sovereign immunity to anything. We are participating
24 in the case as a plaintiff. And when we intervened in
25 this case and when we appeared before the Supreme Court

1 and argued that we should be allowed to proceed as a
2 plaintiff, that -- that did not implicate questions of
3 sovereign immunity because we were not subjecting
4 ourselves to counterclaims coming back at us and, in
5 fact, being sued or countersued by an opposing party,
6 which would implicate that the United States had
7 consented to that.

8 THE SPECIAL MASTER: Are you making any
9 argument that you would not be bound by a decree in
10 this case?

11 MR. MACFARLANE: No, no, no. Quite the
12 contrary. We are. We would be bound by a decree. And
13 we acknowledge that. In fact, we expressly told the
14 Court that we would be.

15 THE SPECIAL MASTER: So what difference does
16 it make, as a practical matter, if all these issues get
17 litigated between Texas and New Mexico as to operation
18 of the project, who -- the proper allocation of water,
19 whether or not the groundwater pumping is depriving
20 Texas of their rightful share?

21 If all these issues get litigated and there's
22 an ultimate decree, whether you're a counterclaim
23 defendant or not, you're going to be bound by to that
24 decree?

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

1 But that then raises the question why are New Mexico's
2 counterclaims against the United States raising all of
3 these additional issues.

4 I agree with Mr. Somach, frankly, these
5 counterclaims do potentially expand the issues that
6 would be before Your Honor quite extensively. They've
7 gone into not just the operating agreement, but the
8 Water Supply Act, questions of project accounting, the
9 Miscellaneous Purposes Act, questions related to
10 channeling this on the -- of the Rio Grande and
11 questions regarding the implementation of the 1906
12 convention with Mexico.

13 As far as we're concerned, these issues have
14 nothing to do with what New Mexico and Texas are
15 apportioned under the compact. That needs to be
16 decided, and then we can address questions of whether
17 the operating agreement or other project operations are
18 consistent with that apportionment.

19 THE SPECIAL MASTER: Well, you keep saying
20 the only thing this case involves is what's the
21 apportionment. As I understand Texas is saying, we
22 want to know what the apportionment is, but we also
23 want to know if New Mexico is violating that
24 apportionment, and if they are, we may be asking for
25 money damages and we may be asking for water credit, we

1 may be asking for all kinds of relief. So, I mean,
2 it's more than just apportionment.

3 MR. MACFARLANE: I understand that, Your
4 Honor, and this is one point --

5 THE SPECIAL MASTER: Let me just follow that
6 up real quick. You say, well, accounting has nothing
7 to do with this. Isn't this all about accounting?

8 MR. MACFARLANE: Your Honor, it's important
9 to go back and look at New Mexico's counterclaims
10 against the United States as New Mexico actually pled.

11 New Mexico is positing an obligation under
12 the compact to engage in an accounting, which you will
13 search the compact high and low, and you will not find
14 language that imposes such a duty.

15 This is one of our -- it's like a theme that
16 runs through our objections to New Mexico's
17 counterclaims. They're positing duties that do not
18 exist or have not been established with regard to the
19 compact. And therefore --

20 THE SPECIAL MASTER: Well, whether there's a
21 counterclaim or not, aren't we going to get into
22 accounting? I mean, isn't that one of bottom line
23 issues in this case is we need to account for the
24 water?

25 MR. MACFARLANE: That is correct. Whether

1 New Mexico's --

2 THE SPECIAL MASTER: Well, we can strike the
3 counterclaim, but we're still going to be into
4 accounting, right?

5 MR. MACFARLANE: I don't disagree with that.
6 It seems to me you should strike the counterclaim, but
7 these are issues which will get litigated in the course
8 of the case.

9 THE SPECIAL MASTER: So we're talking
10 semantics.

11 MR. MACFARLANE: Well, I think they're more
12 than semantics because, you know, to the extent that
13 New Mexico is asserting counterclaims that go off in
14 these various directions -- I mean, for the life of me,
15 I don't understand what the miscellaneous purposes --
16 or how New Mexico can establish that -- the United
17 States is compliant with the Miscellaneous Purposes
18 Act.

19 The issuance of a contract with El Paso
20 violates the compact. But that's what they allege.
21 And so, you know, I don't see that as an issue that is
22 central. If New Mexico -- if the Court ultimately
23 concludes that New Mexico's apportionment is such that
24 those contracts are problematic, then we -- those can
25 be addressed at that time.

1 I want to just underscore that the
2 principle -- and I know Your Honor is familiar with
3 this because back when you were a district judge and
4 decided a case, you held that counterclaims against the
5 United States require a waiver of sovereign immunity,
6 this was a tax case, *United States v. Engels*, but I
7 want to underscore that the principle has been
8 reaffirmed by Court of Appeals, by the Supreme Court
9 itself in *Shaw*.

10 New Mexico doesn't really address this case
11 law. We believe it is controlling here and Your Honor
12 should dismiss New Mexico's counterclaims against the
13 United States on that basis alone.

14 Now, I can turn to the question of injury and
15 standing. It really -- it really arises in connection
16 with the fact that what New Mexico has as an
17 apportionment under the compact below Elephant Butte
18 Reservoir remains undefined.

19 I know that New Mexico thinks it's entitled
20 to something like 57 percent, although they backed away
21 from that in their reply brief, they qualified that to
22 some degree. But the key here to our standing argument
23 is that the -- New Mexico has not established a nexus
24 between what it -- between specific project operations
25 which it complains of, and what it's entitled to under

1 the compact.

2 It pleads interest over the compact in the
3 most generalized, vague ways, you know, we have an
4 interest in the compact, without saying anything more
5 than about that interest consists of.

6 We would argue that New Mexico rest its
7 standing against the United States on two bases. The
8 first is its status as *Parens patriae*. But it's pretty
9 well established that that is not a basis alone to
10 obtain standing to assert a claim against the United
11 States.

12 It works when -- if New Mexico is suing a
13 state or asserting counterclaims against a state, it
14 can be a basis for standing. But under *Massachusetts*
15 *v. Mellon* and the *Alfred L. Snapp* case, it's not a
16 basis for standing against the United States.

17 And then to the extent that New Mexico is
18 claiming a sovereign interest in the compact as the
19 basis for its standing, it has not articulated, as I
20 said, a nexus between its compact apportionment and the
21 specific violations it's alleging that the United
22 States is engaged in.

23 So the cases that New Mexico particularly
24 relies on to establish its allegations of injury are,
25 in fact, equitable apportionment -- involve equitable

1 appportionment decrees where the decrees specifically or
2 fairly concretely define what each state was entitled
3 to.

4 THE SPECIAL MASTER: Let me ask you this:
5 Why has the Special Master not already decided this
6 issue? Specifically in the context of the motion to
7 intervene by Elephant Butte, one of the problems that
8 the Special Master used to recommend denial of that
9 motion was that New Mexico can adequately represent
10 Elephant Butte's interest and specifically says
11 compact -- the 1938 -- let me go back.

12 It says compact enforcement actions such as
13 this one means that the signatory state to the compact
14 are proper plaintiffs. And it goes specifically on to
15 say that pursuant to parens patriae and Supreme Court
16 precedent, New Mexico, as a proper party in interest to
17 this original action, is presumed to represent the
18 interests of the Elephant Butte Irrigation District.

19 MR. MACFARLANE: That may be true with regard
20 to Texas, but we don't believe that those statements
21 were intended to apply to the United States'
22 involvement.

23 And at that point, remember, the Special
24 Master, in his report, recommended that the United
25 States not be allowed to assert a compact claim. So

1 our position is the Special Master's recommendation had
2 been accepted by the Supreme Court.

3 THE SPECIAL MASTER: You disagree -- you
4 agree with that statement?

5 MR. MACFARLANE: Well, I disagree with that
6 statement as it applies to the United States. I mean,
7 New Mexico can represent its citizens in the *parens*
8 *patriae* capacity, but that cannot be the sole basis of
9 its standing if it's going to assert counterclaims
10 against the federal government.

11 THE SPECIAL MASTER: Let me ask you this: In
12 the district court action in which New Mexico sued the
13 United States and the two water districts, I don't know
14 who the other defendants were, over the operating
15 district, was standing raised as a defense?

16 MR. MACFARLANE: I believe it was.

17 THE SPECIAL MASTER: Was it ever adjudicated?

18 MR. MACFARLANE: It was not.

19 So I don't want to take up too much more of
20 Your Honor's time, and perhaps moving on to the failure
21 to state a claim issue. Unless Your Honor has more
22 questions regarding standing and injury, I think I've
23 pretty much covered what I wanted to say about that.

24 THE SPECIAL MASTER: Just to be clear, I want
25 to complete the circle. You don't dispute New Mexico

1 has standing to argue apportionment?

2 MR. MACFARLANE: I think -- I --

3 THE SPECIAL MASTER: That how the water is to
4 be apportioned is something New Mexico has standing to
5 argue.

6 MR. MACFARLANE: Yes, I don't think we can
7 dispute that.

8 THE SPECIAL MASTER: And they would not have
9 any -- there would not be any question about their
10 standing to assert violations of the compact, would
11 there?

12 MR. MACFARLANE: I don't believe so.
13 Although, you know, whether you can assert a violation
14 of a compact I think depends upon knowing what your
15 rights are under that compact, and that's --

16 THE SPECIAL MASTER: I mean, that's exactly
17 what Texas has done. They're asserting a violation of
18 the compact, aren't they?

19 MR. MACFARLANE: Well, they are.

20 THE SPECIAL MASTER: Isn't that what this
21 whole case is about?

22 MR. MACFARLANE: I think that is what this
23 case is about. But the issue here is -- and we're only
24 raising the standing issue with regard to New Mexico's
25 counterclaims against the United States. And we're

1 saying that, you know, where New Mexico claims it has
2 an interest under the compact that some particular
3 project action is interfering with or impairing, New
4 Mexico has not sufficiently established a nexus between
5 that compact interest and the alleged actions of which
6 it complains on the part of the United States.

7 THE SPECIAL MASTER: Well, but at the end of
8 the day, without oversimplifying, this is a very
9 high-level breach of contract case, isn't it? I mean,
10 that's what we're -- I mean, that's what we're really
11 talking about is Texas says, "New Mexico, we believe
12 the contract means X, and you're violating it." New
13 Mexico says, "No. The contract means Y, and not only
14 are we not violating, you're violating it, Texas."

15 MR. MACFARLANE: And the United States is in
16 the middle because we're the ones who deliver the
17 water.

18 THE SPECIAL MASTER: And the United States is
19 the agent for everybody.

20 MR. MACFARLANE: Right.

21 THE SPECIAL MASTER: And you're violating
22 your agency agreement.

23 MR. MACFARLANE: Well, that's one way of
24 looking at it.

25 THE SPECIAL MASTER: You may regret that

1 language by suggesting choices before.

2 MR. MACFARLANE: I noticed where it came from
3 too.

4 So we've also argued that New Mexico's
5 counterclaims -- that most of the New Mexico's
6 counterclaims against United States fail to state
7 claims under a Rule 12(b)(6) standard. I want to touch
8 on three points in that connection.

9 First, New Mexico's counterclaims against the
10 United States really do expand the scope of the
11 litigation. I agree with Mr. Somach on that point.
12 They issue -- they raised issues of compact -- of
13 project operations that were never briefed to the
14 Supreme Court when leave was granted for the filing of
15 the United States' or Texas's complaint.

16 Secondly, we think the counterclaims against
17 the United States as pled by New Mexico are full of
18 vague and conclusory allegations and really don't meet
19 the *Iqbal* standard. And I think the clearest evidence
20 for this is New Mexico's response brief in which New
21 Mexico tries to explain what it meant by what it pled.

22 If, you know, New Mexico believed that there
23 was specific statutory obligations or duties, it was
24 obligated in its counterclaim itself to cite them
25 instead of just general -- you know, making very broad,

1 conclusory allegations that such a duty existed.

2 And third, New Mexico appears to argue that
3 the compact's incorporation under the project in the
4 downstream contracts imposes constraints on or
5 overrides revisions of reclamation law by which the
6 project has long operated.

7 And, again, New Mexico, it's hard to tease
8 that out of the counterclaims it's pled because this is
9 something, again, that New Mexico has tried to explain
10 or expand upon in its response brief.

11 We've cited in our reply, Your Honor, that
12 quite a few cases that stand for the proposition that a
13 party cannot amend a pleading in an opposition brief to
14 a motion to dismiss. If New Mexico wanted to amend its
15 counterclaims, it should have sought leave to do so.
16 It did not, although there's a part of it, just toward
17 the end of its -- its response brief where it raises
18 that as an alternative solution, if you will, to some
19 of the issues that its counterclaims appear to address.

20 THE SPECIAL MASTER: Let me ask you this:
21 The reclamation statutes predate the compact, right?

22 MR. MACFARLANE: That is correct.

23 THE SPECIAL MASTER: And, presumably, if you
24 read the Supreme Court decision, what the Supreme Court
25 was saying is that there were these -- all these other

1 agreements and other laws in place that were sort of
2 incorporated into the compact. I'm oversimplifying it,
3 but that's sort of what you're saying.

4 So unless there was an explicit rejection of
5 reclamation law in the compact, that -- I think what
6 you're saying, or this is the way I'm seeing it, is
7 that then the reclamation gets incorporated into the
8 compact. Would that be fair?

9 MR. MACFARLANE: I would maybe rephrase it
10 slightly to say that the project was in existence
11 before the compact was ratified. The project was
12 delivering water, was making releases from storage and
13 delivering that water to EBID, EP No. 1, and also to
14 New Mexico. It was doing so pursuant to provisions of
15 reclamation law.

16 The Miscellaneous Purposes Act, for example,
17 is one such provision of reclamation law that
18 specifically authorizes the Secretary of the Interior
19 to enter into contracts with -- for the municipal use
20 of water from the irrigation project with the consent
21 of the water district in question.

22 So this is just one example of the panoply of
23 reclamation law that -- under which the project was
24 operating. It's our view, and I think this is
25 consistent with Justice Gorsuch's opinion, it's our

1 view that the expectations of the -- of New Mexico and
2 Texas when they signed the compact, was that
3 that -- those operations under reclamation law would
4 continue.

5 And it was out of the those operations that
6 Texas would receive its apportionment and that New
7 Mexico would receive a portion of some of its
8 apportionment within the compact.

9 In fact, once New Mexico delivers water to
10 the Elephant Butte Reservoir, the project takes over.
11 And I think the compact is quite express about that.

12 THE SPECIAL MASTER: I think one of the
13 issues that I think is going to have to be resolved in
14 this case seems to be whether or not anything was
15 frozen as of 1938, and would that include -- I don't
16 know if there have been any substantive changes to the
17 reclamation law since 1938, and if there are, do we use
18 the 1938 law or do we --

19 MR. MACFARLANE: Well, reclamation law is
20 fairly frequently amended, and so it is -- you know,
21 it's constantly evolving. I think the critical -- I
22 think really the answer to that question, and let me
23 just say, we don't -- and this is, again, where we may
24 be parting a little company with Texas, we
25 don't -- we're not seeking injunctive relief based upon

1 the 1938 condition. Our position, as far as remedies
2 is concerned, is informed by the *Hinderlider* decision
3 of the Supreme Court.

4 We want New Mexico to administer its state
5 law in a way that protects the project and is
6 consistent with the text of the compact and what New
7 Mexico agreed to. That's our position.

8 If it turns out, as we've discussed, Your
9 Honor, that their -- the apportionment decree that
10 ultimately comes out of this litigation suggests that
11 there may be provisions of reclamation law which are no
12 longer consistent with the decree, then we'll have to
13 deal with that at that time.

14 I want to touch on one last issue, and that
15 is to circle back to the law of the case issue, because
16 we did opine upon that somewhat. And as we see it, the
17 law of the case in question boils down to what Your
18 Honor should do with the first interim report and
19 recommendation of Special Master Grimsal.

20 Whether you consider this as a classic law of
21 the case, application of the law of the case documents
22 or principles, or whether the underlying principles
23 behind it, and this discussion comes from *Arizona v.*
24 *California*, which we've cited in our brief, that courts
25 will accord a degree of finality and repose to

1 decisions that are made along the line of the course of
2 litigation.

3 We think that Your Honor should treat the
4 compact issues that were addressed, and the compact
5 interpretation issues that were addressed in the first
6 interim report recommendation, as subject -- as worthy
7 of a degree of finality, at least with regard to the
8 litigation as it proceeds from here.

9 Now, ultimately the Supreme Court will have
10 the final say about that, and then the Court can
11 overrule, the Court can modify, and the -- you know,
12 there's no question that it -- that that's certainly
13 within the Court's purview.

14 But the first Special Master's interpretation
15 of the compact addressed questions of law and compact
16 interpretation that arose from issues that New Mexico
17 put in the file.

18 New Mexico interjected issues into the case
19 of compact interpretation in its motion to dismiss, and
20 as Mr. Somach has traced out, the -- how that was dealt
21 with, the Court, when it denied or overruled New
22 Mexico's exceptions -- and New Mexico's exceptions were
23 not to the recommendation that its motion to dismiss be
24 denied. New Mexico conceded that.

25 New Mexico's exceptions were focused on the

1 reasoning in the first Special Master's report, his
2 compact interpretation based upon issues that New
3 Mexico had raised in its motion to dismiss. When the
4 Court overruled New Mexico's exceptions, it did not
5 overrule that report. It let it stand.

6 So the report is there. It's not a nothing.
7 And I think it's -- given the attention the first
8 Special Master devoted to questions of compact
9 interpretation -- as Your Honor points out, you know,
10 this is a high-level contract dispute. He applied
11 contract principles in interpreting the compact, that
12 that is worthy of some degree of respect and finality
13 as -- at least for purposes of moving this case forward
14 and structuring the issues that naturally have to be
15 litigated. If Your Honor -- does Your Honor have other
16 questions?

17 THE SPECIAL MASTER: Not right now, but I may
18 have when you come back. So we'll -- we've been going
19 for about an hour and a half. Let's take about a 10-
20 or 15-minute break.

21 MR. MACFARLANE: Thank you, Your Honor.

22 THE SPECIAL MASTER: We'll come back and hear
23 from New Mexico.

24 (Recess taken from 10:32 a.m. to 10:45 a.m.)

25 THE SPECIAL MASTER: Please be seated. I

1 think you're up, Mr. Roman.

2 MR. ROMAN: Good morning, Your Honor. David
3 Roman on behalf of the State of New Mexico.

4 You know, sitting here listening this morning
5 to some of these arguments, you could be forgiven for
6 wondering if we're all even arguing the same case.

7 I think you could also be forgiven for
8 wondering is this the same case as we were before you
9 in August for the status conference, because we've seen
10 arguments shifting radically even throughout the course
11 of just the briefing on this one set of motions, let
12 alone the way that these arguments have changed since
13 the beginning of this case.

14 The U.S. has said over and over in its
15 briefing that the apportionment is 57/43 and that it is
16 carried out through the allocation of the project. And
17 then now they're saying, and I know that they said we
18 never said that it was -- that it was not an
19 apportionment to New Mexico below Elephant Butte.

20 I think if you look closely at the briefing,
21 they did in their response brief, and then in their
22 reply brief they certainly pulled back on that and
23 said, okay, there is some apportionment, but we don't
24 know yet what it is, despite having argued for many
25 rounds of briefing that we know exactly what it is and

1 here's what it is.

2 So we're seeing positions that are being
3 taken that are not only contrary to prior positions
4 taken earlier in this litigation, but that are also
5 directly contrary to the words of the Supreme Court's
6 March ruling and Justice Gorsuch's opinion.

7 We're being accused in a briefing of ignoring
8 the consequences of the Supreme Court's ruling or our
9 prior, what they call, concessions on the applicability
10 of the compact below Elephant Butte.

11 Yet we're the only ones, as you've seen in
12 the list of principles that we've submitted as part of
13 the law of the case, that are tracking what the Court
14 actually said as opposed to you can glean this
15 principle from what the first Special Master's report
16 said or that principle, even though those were not
17 before the Supreme Court as far as when they were
18 making the ruling.

19 But as complex as this case is in some ways,
20 and I like the way you put it is it's basically a very
21 high-level contract dispute, as complex as it is in
22 some ways, there's one part that is pretty simple in
23 that Texas and the U.S. can't have it both ways.

24 Either an alleged interference with receiving
25 the project allocation is a compact violation, in which

1 case changes to project operations that affect New
2 Mexico's project allocation are also compact
3 violations, or else you have a complete separation
4 between project allocations and compact apportionment,
5 which is what they're arguing now. But if that's the
6 case, we wouldn't be before you on a compact case.

7 So it can't be that Texas receiving its
8 compact apportionment through the project and any
9 shortage that way is a compact case but us not
10 receiving ours is not a compact case. It just doesn't
11 work that way.

12 And Texas and the U.S. are now essentially
13 taking the position that while New Mexico has the
14 responsibility to ensure that Texas receive its project
15 allocation pursuant to the compact, we have no right to
16 protect our compact apportionment through suing to
17 bring to light actions going on in Texas or outside of
18 New Mexico's control that affect the amount of our
19 allocation and therefore our compact apportionment.

20 The U.S. just now is saying -- and taking a
21 step back, saying, well, okay, we don't know what the
22 apportionment actually is; therefore, New Mexico
23 doesn't have yet standing to sue because they can't
24 show an injury because there's not a -- we don't know
25 what the apportionment is.

1 Well, if that's the case, they're trying
2 to -- the U.S. and Texas are both trying to hold us
3 liable for violating an unknown standard at the same
4 time that we can't assert a violation of that same
5 unknown standard.

6 Again, it doesn't make sense that all we're
7 seeking is that the two sides can make the same
8 argument. I think you hit it on the head when you
9 said, we need to decide if, in fact, the apportionment
10 is not 57/43, and I think that the Supreme Court
11 essentially said that it is, and I don't think we
12 should go back and relitigate that. But if we do have
13 to go and litigate what the apportionment is, then it
14 becomes very, very relevant what actions are going on
15 in terms of project operation that affect the amount of
16 water that is going to both sides.

17 Is Texas being shorted its apportionment due
18 to the actions of New Mexico? Is New Mexico being
19 shorted part of its apportionment either due to the
20 actions of Texas or due to the manner in which the
21 operating agreement has reallocated apportionment or
22 due to other events that are outside of our control?

23 One of the --

24 THE SPECIAL MASTER: Do you acknowledge -- is
25 it your position it is 57/43?

1 MR. ROMAN: That is our position, yes, Your
2 Honor.

3 THE SPECIAL MASTER: How can Texas affect
4 your allocation since it's downstream?

5 MR. ROMAN: That's a very good question. I
6 know that they've tried to focus throughout on the fact
7 we think only what's going on in New Mexico matters,
8 but the fact is that this project is operated as a
9 whole unit, and there are several ways in which it can
10 be affected even though it's happening in a downstream
11 state.

12 One is through very, very significant
13 groundwater pumping just across the border in the Texas
14 region which has the same alleged hydrological effect
15 on reducing surface flows and capturing return flows
16 that would otherwise either be able to be used in New
17 Mexico or would flow to Texas.

18 THE SPECIAL MASTER: Now, is this groundwater
19 pumping -- and I don't want to read too much into the
20 weeds and facts at this point, but is this groundwater
21 pumping by the El Paso Irrigation District or is it by
22 third parties that therefore is shorting El Paso its
23 share?

24 MR. ROMAN: It's primarily by the irrigation
25 district, not by the -- it's by the utility, which is

1 separate from the irrigation district.

2 And, Your Honor, I think at this point you're
3 right, we don't necessarily need to get into the facts
4 of what the actual effect is because we are at the
5 12(b)(6) stage, essentially, and whether we can raise a
6 claim on this.

7 But it's not simply pumping that matters. We
8 heard over and over again talk about how we're trying
9 to expand the litigation greatly by bringing in these
10 ideas of Miscellaneous Purposes Act contracts or
11 municipal water between the City of El Paso, EP No. 1
12 and the United States, or that we're expanding the
13 litigation by talking about the potential violation of
14 the Water Supply Act through the incorporation of
15 individual carryover storage accounts that have been
16 put into place in the operating agreement for the first
17 time that have no basis in the compact, have no basis
18 in where the project has been operating.

19 I want to make very clear those claims really
20 aren't about trying to invalidate those contracts or
21 anything like that. It's about having the effect on
22 the project recognized. Because right now
23 inefficiencies in project delivery, whether they're
24 caused by the actions of New Mexico, the actions going
25 on in Texas, even pumping by Mexico, are all being

1 charged under the current operating agreement against
2 Mexico.

3 And the reason I say that is because you've
4 probably heard discussion about a DT curve, which is
5 basically a way of saying for a given amount of project
6 releases, how much -- how can we allocate the water
7 such that deliveries to each state are going to be
8 along the historical basis, which is, again, how can we
9 make it so that we're supposed to be allocating it at
10 57/43 because it's incurred, the amount of water that
11 is released is different from the amount that's
12 delivered to the project because of that multiplier
13 that comes from return flows.

14 So right now we have a situation in the
15 operating agreement where deviations from that historic
16 curve are all assessed against New Mexico as if they
17 are solely responsible for any changes in project
18 efficiency. Even if those deviations are caused in
19 part by, as I say, inefficient river conveyances
20 because of a lack of maintenance or these contracts
21 that we talk about for municipal water.

22 El Paso said in their amicus brief they get
23 approximately 50 percent of municipal supply through
24 Rio Grande project water, water that was initially set
25 aside for irrigation projects, they're getting pretty

1 much half of their supply, their municipal supply,
2 sometimes up to 70,000 acre-feet a year from project
3 supply.

4 If you're changing the use of water from
5 irrigation to municipal use, you're going to
6 necessarily have a change in the amount of return
7 flows. If you're using it for irrigation, you're going
8 to have more water flow back into the system after the
9 irrigation which will continue flowing down throughout
10 the district and replenish supplies that way.

11 If you're going to be using it for municipal
12 purposes, that's going to change the way that the
13 flows -- that you're going to have much fewer return
14 flows, which in turn causes you to call for more water
15 in order to be able to make the same type of
16 deliveries.

17 And so the reason we bring up issues like
18 that is not to invalidate those contracts. We don't
19 want to see the municipal water supply threatened. But
20 we also don't want to have to pay the price in New
21 Mexico for short -- for systemic inefficiencies caused
22 by a change in type of use.

23 THE SPECIAL MASTER: That gets back to my
24 question though. I can understand how you're arguing
25 that there could be groundwater pumping right out of

1 the water that could impact New Mexico, but how does
2 the fact that New Mexico water district sells its water
3 to El Paso, how does that affect you?

4 I mean, as long -- if they're getting their
5 water -- if whatever water they're getting, they're not
6 using appropriately under your theory, how does that
7 affect you?

8 MR. ROMAN: And I'm glad you're asking for
9 clarification because it's a very, very important point
10 here. If we weren't being either sued for alleged
11 underdelivery, or if the way that the operating
12 agreement right now is trying to, again, charge New
13 Mexico for any deviations from its historic curve which
14 are allegedly caused by systemic inefficiencies, then
15 maybe we wouldn't have a problem.

16 It's not that we're getting less water, it's
17 that we are having to -- well, it is that we're getting
18 less water. Because the way that the diversion ratio
19 under the new operating agreement changes is, again, it
20 charges us for any deviations, even those deviations
21 that are caused by differences in systemic efficiency
22 caused in Texas or, again, caused by pumping in Mexico.

23 You say, how can pumping in Mexico affect us?
24 Well, it affects us because we're essentially paying
25 the price for pumping in Mexico. It's not being shared

1 equally among the states or even in the same ratio as
2 we should be putting this water out there, and so --

3 THE SPECIAL MASTER: How can you
4 realistically say that asking me to intervene in the
5 treaty negotiations between Mexico and the United
6 States is not a huge expansion of this litigation? I
7 mean, that, to me, is like -- that's pretty out
8 there --

9 MR. ROMAN: No question about that, Your
10 Honor.

11 THE SPECIAL MASTER: -- in terms -- and I
12 don't think the Supreme Court would approve of that
13 type of expansion.

14 MR. ROMAN: I agree. And that's why these
15 are not claims to seek Your Honor to try to intervene
16 in that. This is, I agree, if we have a justiciability
17 issue here, this is a political question.

18 It's not a matter of trying to fix the
19 problem, if you will, of Mexico pumping. It's a matter
20 of saying, we need to figure out, based on this
21 apportionment, how much is Texas supposed to be
22 getting. If they're not getting what they are supposed
23 to be getting, how much of it is due to actions going
24 on in New Mexico versus actions elsewhere that are
25 causing them to get less water.

1 All we're saying is you need to look at the
2 system operating as a whole across the border in both
3 states to understand what impact New Mexico groundwater
4 pumping is having versus all of these other issues that
5 do affect the systemic efficiency, and just don't
6 charge us for all of them.

7 It's essentially more of a defense than it is
8 an attempt to, as I say, fix things. The same way with
9 those municipal contracts. Again, we're not trying
10 to --

11 THE SPECIAL MASTER: Why do you need to do it
12 as a counter -- I mean, Mr. Somach calls it a -- I
13 think he used the word closed-loop system. And if -- I
14 can understand their argument that if Texas isn't
15 getting what it is suppose to get, well, maybe New
16 Mexico -- maybe because of global warming, the
17 average -- there is double the rate of evaporation, I
18 don't know, but --

19 MR. ROMAN: Sure.

20 THE SPECIAL MASTER: There may be other
21 reasons other than what New Mexico is doing. And I
22 understand that argument that -- or that maybe that
23 Mexico somehow is taking all the water. But why do you
24 need a counterclaim on that? That's not really Texas's
25 fault. It's not really the United States' fault. Now,

1 it may be the way the United States administers the
2 project. That could be an issue.

3 MR. ROMAN: Right. And it's not Texas's
4 fault, but at the same time, if they are getting more
5 water than they are otherwise entitled to because --
6 either calling --

7 THE SPECIAL MASTER: Why isn't that just a
8 defense for the lawsuit? I mean, Texas says we're
9 getting less; you say no, you're not, here's the data,
10 and isn't that the end of your case then?

11 MR. ROMAN: And Your Honor, in large part it
12 is. Not the end of the case, but as far as we can --

13 THE SPECIAL MASTER: I mean, if Texas is
14 getting all the water it's entitled to under the
15 compact, isn't that the end of the case?

16 MR. ROMAN: If Texas is getting everything
17 they are entitled to under the compact, we would still
18 want to make sure that New Mexico hasn't been getting
19 less than it was entitled to under the compact.

20 But if it came out that we're getting what
21 we've been entitled to historically and they have as
22 well, sure, that's the end of case. Of course, we're
23 still going to have to figure out going forward how to
24 make that happen. But as far as past damages, as long
25 as both sides were whole, then sure, that's the end of

1 the case.

2 We could have filed one overarching
3 counterclaim the same way other states have done in
4 similar compact enforcement cases that basically just
5 said, we're meeting -- we're meeting our compact
6 obligations but other actions are interfering with our
7 compact apportionment and then laid them out, rather
8 than specific comment on them, simply as subparts of
9 explaining why we were being shorted or having too much
10 taken from us as a result.

11 It probably makes sense to think of it in
12 that way rather than truly expanding the scope of the
13 litigation. Because if we can quantify the effect of
14 some of these other issues we brought up, then that's
15 what's important, the quantification of it, not the
16 actual practical impact of going after those various
17 claims.

18 Because, as you've touched on, Your Honor,
19 this morning, because the Court has ruled that the
20 project is incorporated within the compact and the
21 compact apportionment is basically carried out through
22 the downstream contracts with the U.S. as an agent,
23 that's exactly why we've said that if the operating
24 agreement affects that apportionment, which it does, it
25 becomes a compact issue. It's not expanding the

1 litigation to point out that this affects the amount of
2 the apportionment that we get.

3 The U.S. at least -- we have the monolithic
4 U.S., and I know there's multiple different agencies,
5 but the Bureau of Reclamation's final environmental
6 impact statement on the 2008 operating agreement and
7 whether it should continue or not was very clear that
8 it significantly reduces New Mexico's 57 percent of
9 project supply and therefore necessarily results in a
10 corresponding increase to Texas.

11 It actually understated the final effect as
12 to what it's been so far, but it certainly recognized
13 the fact that there was a substantial effect on New
14 Mexico's apportionment based on the implementation of
15 the operating agreement.

16 But I want to make clear that by
17 going -- trying to say that the operating agreement is
18 invalid because it changes New Mexico's compact
19 apportionment without New Mexico's participation in it,
20 it's essentially a unilateral change in apportionment
21 by the U.S. with the two districts.

22 And you can call it self-help if you want to,
23 you can say the intent was to try to account for the
24 effect of groundwater pumping in New Mexico, but it
25 nonetheless can't be done without a compact in states

1 being part of it because of the change in compact
2 apportionment.

3 But I want to be very clear about it, because
4 I think there's been some confusion, I'm not saying
5 that the concept of an operating agreement, somewhat
6 along the lines of what's currently in place, would be
7 invalid provided that it doesn't unfairly charge New
8 Mexico for project inefficiencies that are out of its
9 control, and that it recognizes the loss of project
10 efficiency caused by actions in Texas or other actors
11 that are outside of the United States' control, and
12 that it's ratified by the compacting states. We're not
13 trying to blow up this operating agreement and have a
14 void.

15 THE SPECIAL MASTER: That's what I thought --
16 that's exactly what you're doing. You filed a lawsuit
17 to blow it up.

18 MR. ROMAN: I'm sorry?

19 THE SPECIAL MASTER: I thought that's exactly
20 what you were doing. I thought you filed a lawsuit and
21 said it was gone right now. I mean, if you could live
22 with the operating agreement, as I understand it, we
23 wouldn't have this litigation.

24 MR. ROMAN: Just because it's invalid as a
25 matter of law because it was adopted without the

1 states' agreement to it doesn't mean that the concept
2 of it itself is something that we couldn't work with.

3 Again, I want to be specific. There would
4 have to be changes to it that removed the inequities
5 that we see in it, and it would have to be something
6 that was put together with the states' involvement,
7 because it is a compact issue.

8 Even if we were a hundred percent okay with
9 it, it would still, in our view, be invalid as a matter
10 of law because it requires ratification because it
11 changes the compact apportionment.

12 But I don't want to leave the impression that
13 we're seeking to have some sort of vacuum to be filled
14 and no way to operate the project. We just want to
15 make sure that if it's going to be operated pursuant to
16 an agreement like this, that it is actually getting the
17 two states what they are entitled to under the compact
18 apportionment and not what's happening, in our view,
19 which is giving Texas too much.

20 But in no way are we saying that the effects
21 on project efficiency of the groundwater pumping in New
22 Mexico are not something that can be -- that are
23 validly recognized as part of an agreement like this.

24 THE SPECIAL MASTER: So you're not disputing
25 anymore that you can't -- you can't take so much water

1 out of the ground while reducing the flow from Texas?

2 MR. ROMAN: I take issue with one word that
3 you used, Your Honor, respectfully, and that's
4 "anymore." There's been a lot of misconception, I
5 think, about what the arguments were on the motion to
6 dismiss, and that's part of why it's important to focus
7 on those arguments in understanding what was actually
8 decided in denying the motion to dismiss.

9 THE SPECIAL MASTER: Well, part of the
10 problem is, both what was decided but also what you
11 argued. And, I mean, you can't run away from the
12 motion to dismiss.

13 MR. ROMAN: Correct. No, I know we can't.

14 THE SPECIAL MASTER: And you made the
15 arguments, and they were rejected, and so you're kind
16 of stuck with that.

17 MR. ROMAN: And we are not trying to run away
18 from the motion to dismiss, or at least the --

19 THE SPECIAL MASTER: Well, you won't. Well,
20 it sounds like you are getting to a point, go ahead.

21 MR. ROMAN: The reason I say that is because
22 I view the motion to dismiss as really more of a kind
23 of choice of law issue: Does the state law and
24 reclamation law apply below Elephant Butte or does the
25 compact apply below the Elephant Butte?

1 In making our motion to dismiss, it was never
2 the intent to say New Mexico can intercept project
3 water after it leaves Elephant Butte as much as it
4 wants or that we don't have to let the water flow to
5 Texas.

6 It was more a matter of, there are state
7 administrative -- there's a state administrative
8 framework in here to deal with this. Does that state
9 administrative framework apply or, instead, is this a
10 compact issue? Because, frankly, until the Supreme
11 Court's decision in this case, the case law had -- it
12 was sparse, but it universally held that there is
13 not -- that the compact does not apply below Elephant
14 Butte.

15 So we raised that issue as a defense, it was
16 rejected, and we gave up and we moved on and we didn't
17 even take an exception to that part of the argument.

18 THE SPECIAL MASTER: Well, I mean, maybe you
19 disagree with Special Master Grimsal, but as I read his
20 report, that's exactly what he thought you were saying.

21 MR. ROMAN: It is what he thought we were
22 saying.

23 THE SPECIAL MASTER: And you say in your
24 motion to dismiss that the project -- the project and
25 the compact have no impact upon groundwater. You can

1 pump groundwater to your heart's content. I mean, I
2 think that's what you said.

3 MR. ROMAN: I think -- I think what was said
4 was potentially inartfully said, but I can tell you
5 that the intention was not to suggest that unlimited
6 groundwater pumping of hydrologically connected
7 groundwater to a river that affects system efficiency
8 does not need to be accounted for.

9 THE SPECIAL MASTER: But you also say you
10 have no duty to protect the water.

11 MR. ROMAN: Under the compact. Under the
12 compact. Because we took the position, consistent with
13 prior court rulings, that the compact itself did not
14 apply below Elephant Butte. But it would be far too
15 wide of a --

16 THE SPECIAL MASTER: How could the compact
17 not apply below Elephant Butte?

18 MR. ROMAN: Because --

19 THE SPECIAL MASTER: I mean, if you've got a
20 compact that says Texas was supposed to get 43 percent
21 of the water, and you say it doesn't apply below the
22 compact, you have no restrictions on groundwater
23 pumping, and you don't have to protect Texas's rights,
24 then what's the compact -- then the compact might as
25 well be -- you know, it's a worthless piece of paper.

1 MR. ROMAN: Your Honor, first of all, until
2 the Court's decision that the project and the
3 downstream contracts were incorporated in the compact
4 as the means of distributing the compact apportionment,
5 that had not been held before and --

6 THE SPECIAL MASTER: But your position was,
7 as I understand it, in the motion to dismiss, was that
8 you had no obligation to protect Texas. Let's assume
9 it's 43 percent, 43 percent of the project water,
10 you've got no restrictions on your groundwater pumping,
11 and that the compact does not apply below the Elephant
12 Butte Reservoir, and that therefore if you take all of
13 the water in the groundwater pumping, there's nothing
14 to prevent you from doing that.

15 MR. ROMAN: Respectfully, Your Honor, that
16 was not what we said. It truly has to do with is there
17 a compact obligation to protect the water versus a
18 reclamation law obligation to protect the water.

19 I don't think that we were running away from
20 the reclamation law obligation. And with that said,
21 there are remedies --

22 THE SPECIAL MASTER: You said no federal law
23 applies. I thought that was your position, that it's
24 only New Mexico law, and New Mexico law imposes no
25 obligation upon you to do anything basically.

1 MR. ROMAN: So under Section 8 of the
2 Reclamation Act, with a reclamation project state law
3 governs the administrative framework of water law
4 within the state. That's a far cry from saying there's
5 no obligation to protect water to the project.

6 Instead it's saying if Texas is being shorted
7 water, there is an administrative framework within New
8 Mexico under the state law that it can take advantage
9 of to say we're being shorted water. That is not
10 saying we have no obligation; we can pump whatever.
11 And, again, certain things may not have been said as
12 artfully as they could have been, but it is not a
13 change in position to say that pumping of
14 hydrologically connected groundwater in New Mexico
15 contributes to a loss of efficiency and therefore lower
16 deliveries to Texas.

17 It's something that can absolutely -- that
18 must be accounted for and that can be the basis for a
19 suit. It's just a question is it a suit under New
20 Mexico law or is it suit under the compact.

21 THE SPECIAL MASTER: Well, I don't want to
22 beat a dead horse, so let's just say is there any
23 question today that New Mexico must administer its laws
24 and administer its water allocation, if that's the
25 right word, in such a way as to protect Texas's

1 allocation?

2 MR. ROMAN: None whatsoever, Your Honor. I
3 would even go so far as to say under *Hinderlider*, the
4 compact and the compact duties supersede whatever New
5 Mexico law is.

6 I should say it a better way. New Mexico
7 state law applies to the extent it is not inconsistent
8 with the compact such that if -- and we've seen this in
9 other cases too. You have parties who have specific
10 contractual rights to certain amounts of water. If
11 that interferes with compact apportionment -- and that
12 was *Hinderlider* -- if that interferes with compact
13 apportionment getting to the other state, it's the
14 compact apportionment that supersedes even though it's
15 prior contract rights that are brought under state law.

16 So we may disagree about whether that's a
17 change in position, but it certainly -- whether or not
18 it is, going forward that is -- absolutely, we're
19 acknowledging that.

20 THE SPECIAL MASTER: Thank you.

21 MR. ROMAN: I'd like to turn real briefly to
22 the sovereign immunity issue, if I could. The U.S. is
23 contending that we can't bring a counterclaim against
24 it in this case because it hasn't waived sovereign
25 immunity. But once again, that really kind of flies in

1 the face of the positions that it's taken throughout
2 the history of the case and also ignores one of the
3 specific reasons the Supreme Court granted it leave to
4 intervene as a compact plaintiff in this case.

5 Of course they've been given leave to
6 intervene either -- to pursue a claim under reclamation
7 law by the Special Master. The Supreme Court said yes,
8 you can participate in this case as a plaintiff stating
9 a compact claim because the U.S. sought out the Court's
10 jurisdiction here and intervened in this preexisting
11 dispute not only to protect its own interests and to
12 raise claims against New Mexico, but also, it said, to
13 permit full resolution of all of the issues in this
14 case.

15 Even in its argument before the Supreme Court
16 it said, We are an indispensable party to allow a full
17 resolution of the issues in this case. And now to say,
18 But we can't be sued for deviating from our duties as
19 an agent of the compact wouldn't permit full resolution
20 of the issues in this case.

21 I looked at *Florida v. Georgia*, where the
22 U.S. did not intervene in the case and assert its
23 sovereign immunity, and the Court found that we can't
24 afford full relief to the -- both states to figure out
25 this whole resolution because the U.S. isn't

1 participating in it. And that's a different situation
2 since it chose not to intervene.

3 THE SPECIAL MASTER: Well, I was
4 thinking -- I read *Florida v. --* or *Georgia v. Florida*,
5 and I think you cannot separate the fact that if you're
6 a judge or, I presume, a Justice of the Supreme Court,
7 they can't forget the argument they just heard an hour
8 before Wednesday morning, and they were obviously very
9 frustrated with the inability to effectuate the
10 complete relief and the Corps of Engineers refusal to
11 intervene in that case, and I'm sure that had to be in
12 their mind when they were thinking about this case.

13 MR. ROMAN: Quite possibly. But once again,
14 I want to make clear, we're not saying that anytime the
15 U.S. intervenes in a compact case it automatically
16 means that they're open to counterclaims absent a
17 waiver, that there's some sort of implicit waiver
18 simply by intervening in the case.

19 THE SPECIAL MASTER: I think they
20 acknowledge, and certainly Mr. MacFarlane can correct
21 me if I'm wrong, that they will be bound by any decree
22 that's entered in this case and will be subject to that
23 decree. But I don't know that you can sue them for
24 damages, which is what you're trying to do.

25 MR. ROMAN: What we want is a recognition of

1 the past overdelivery to Texas as a result of the
2 actions of the United States. And to me, that's a
3 separate issue from monetary damages.

4 I don't think we're going to dispute that
5 sovereign immunity has not been waived in monetary
6 damages in this case. And I think it's a separate
7 issue, though, from whether they can be sued for a
8 dereliction of duty, if you will, in the administration
9 of the project that leads to a change in compact
10 apportionment.

11 Mr. MacFarlane talked about *Nebraska v.*
12 *Wyoming* and said it's not really applicable to this
13 case, and yet that's one of the only other cases where
14 you have a compact apportionment or, in this case, a
15 decree that is carried out by means of a United
16 States-run project, and they used the term that it's a
17 necessary predicate in establishing the apportionment.

18 Well, the U.S. cited this case and sought the
19 right to intervene in this particular case on the basis
20 that if a state can sue the United States under an
21 interstate compact to which the U.S. is not a party for
22 operating a project in a way that undermines an
23 equitable apportionment, then the U.S. should be
24 permitted to state a claim arising under the compact.

25 THE SPECIAL MASTER: Well, let's assume that

1 at the end of the day it's determined that Texas was
2 getting shorted, as they say they are, and maybe even
3 New Mexico is getting shorted, and it's all because of
4 mismanagement by the United States on the project.
5 Instead of delivering 60,000 acre-feet a year to New
6 Mexico, they deliver 20,000 acre-feet a year. Would I
7 have the authority to tell the United States you've got
8 to manage this project differently?

9 MR. ROMAN: The U.S. has said that it would
10 be bound by any decree that's entered, and presumably a
11 decree that's entered that sets out the apportionment,
12 whether it's what we believe it already is or that
13 changes it somewhat, the U.S. would have to operate
14 within the bounds of that decree because they are
15 recognized as an agent of the compact that not only has
16 rights but that does have specific duties as the Court
17 has ruled. And --

18 THE SPECIAL MASTER: So I may be able to say
19 you're violating those duties but now, United States,
20 you've got to figure out how to come into compliance.
21 I may not be able to tell them how to do it, but I can
22 tell them they're doing it wrong right now?

23 MR. ROMAN: This shows exactly why it's so
24 important to have the U.S. as a defendant, not simply a
25 matter of, well, this issue is simply going to be

1 decided either way just through litigation against
2 Texas, and you can use as a defense that we aren't
3 operating the project correctly, but you can't sue us
4 for operating it incorrectly.

5 And I think there's a difference between
6 saying you're not doing it right, you need to figure
7 out how to do it, and saying you are actually held to
8 this standard of being able to meet this apportionment.

9 As a defendant, they would be in a position
10 of having what their actual duties and rights are fully
11 adjudicated as opposed to being almost a bystander
12 despite the fact that they have this very central role
13 as recognized by the Court in making these
14 apportionments recognized.

15 THE SPECIAL MASTER: What's your argument
16 about your right to attack, the standing to attack the
17 operating agreement?

18 MR. ROMAN: Standing to attack the operating
19 agreement is based on the fact, as I said before, that
20 if the apportionment between the states is carried out
21 through the downstream contracts which require
22 allocation of the water in a 57/43 split, which the
23 Court has held it is inextricably intertwined, and that
24 is the means by which the compact apportionment is
25 carried out, that any project operation that

1 meaningfully changes that compact allocation is, by
2 definition, a compact issue. If --

3 THE SPECIAL MASTER: But I guess the point
4 is, and maybe it's a difference without a distinction,
5 that if the federal government is operating the project
6 pursuant to the operating agreement, and that results
7 in a violation of the compact, almost ipso facto that
8 means the operating agreement is invalid.

9 We don't really need to get to that point, do
10 we? Does it really make a difference why, if
11 it's -- if they're operating it incorrectly?

12 MR. ROMAN: I'm not sure I understand your
13 question, Your Honor.

14 THE SPECIAL MASTER: Well, if the federal
15 government comes in and says -- or the evidence at the
16 end of the case shows that you're not getting your fair
17 share or you're not getting -- not your fair share,
18 you're not getting your share you're entitled to under
19 the compact, that's a violation, presumably, of the
20 compact, right?

21 MR. ROMAN: Correct.

22 THE SPECIAL MASTER: And if the United States
23 says, well, the reason for that is because we're doing
24 it pursuant to this operating agreement, that almost,
25 by necessity, means that the operating agreement has to

1 be changed or invalidated.

2 MR. ROMAN: Absolutely, that would follow,
3 but part of --

4 THE SPECIAL MASTER: I don't know if you need
5 to attack the operating agreement directly.

6 MR. ROMAN: Well, part of problem is that by
7 adopting an operating agreement that changes the
8 compact apportionment unilaterally, we've set up a
9 system here where states are having their apportionment
10 changed without input.

11 It could just as easily go the other way. If
12 the U.S. were to implement a different operating
13 agreement that changed the ratio very much in New
14 Mexico's favor and changed Texas's apportionment as a
15 result of doing that, then Texas should certainly have
16 the opportunity to say the adoption of this by itself,
17 because of the effect of changing the apportionment, is
18 something that you do not have the authority to do.

19 And part of what this case is about, you
20 know, we -- anybody who's been involved in this case
21 for a long time, I think would admit we probably
22 wouldn't be here today, Your Honor, had there not been
23 a lawsuit filed in the district court on the operating
24 agreement.

25 So this idea that it's somehow extraneous or

1 adding to this litigation is -- not only doesn't make a
2 whole lot of sense, but it's also belied by the
3 position that at least the United States and Elephant
4 Butte Irrigation District took in that district court
5 case where Judge Browning, by the time that Texas filed
6 its motion for leave to file in the Supreme Court,
7 asked the parties: Should I stay this case? Are the
8 issues the same or not?

9 The U.S. took the position that the case
10 should be stayed because Texas's claims in the Supreme
11 Court appear to directly relate to the claims New
12 Mexico has raised in this district court action, which
13 was largely about the operating agreement. It said the
14 original action would join many of the same issues
15 presented in New Mexico's First Amendment -- amended
16 complaint, which went after the operating agreement,
17 including the interpretation and enforcement of the
18 compact.

19 Elephant Butte -- I mean EP No. 1 also took
20 the position, in addressing the issues involved in
21 Texas's proposed complaint. The Supreme Court will
22 address all of the underlying issues of law and fact
23 present in this case, the one about the operating
24 agreement, including the Rio Grande project, the
25 operating agreement, and the accounting and

1 administration of the project.

2 I think it was understood from an early stage
3 that the operating agreement, and the way in which it
4 changed the allocation of water, was going to be at the
5 heart of this case and would have to be resolved as
6 part of resolving any of Texas's complaints because, as
7 you say, in the end it's a matter of who's apportioned
8 what, is that being met or not.

9 But it's also a matter of what rights and
10 responsibilities do actors other than the states have
11 to effect compact apportionment. I think it's very
12 important to deal with in this case because we also
13 have to have a system that goes forward. And if
14 there's the ability to change allocations unilaterally,
15 we've got a real problem at that point.

16 THE SPECIAL MASTER: Well, but I think the
17 argument that, at least the United States makes, and
18 I'm not sure if Texas is in total agreement with this,
19 is that really you're a stranger to this issue once the
20 water gets delivered to Elephant Butte because at that
21 point the allegation -- allocation of -- the allotment
22 is not to New Mexico, but it's to the Elephant Butte
23 Irrigation District. And if they want to give away
24 some of their water, that's their right to do.

25 And the problem I'm having a little trouble

1 getting my head around is then where does that give
2 Texas standing to sue for Texas water, but that's
3 another issue. But really, then, it's the two water
4 districts that control the water, and if they want to
5 enter into an agreement with the United States to say
6 instead of 57/43 it's going to be 50/50, so what?

7 MR. ROMAN: And that, Your Honor, would
8 certainly be the case if this was simply about project
9 allocation and we had what I was talking about at the
10 very beginning of my argument, a distinction between
11 what's allocated for the project and compact issues.

12 I think the Supreme Court has been very clear
13 that the means by which the states get their compact
14 apportionment is through project deliveries. So once
15 you're changing the project allocation, you are, by
16 definition, changing compact apportionment. And that's
17 the part that can't be done unilaterally without the
18 compacting states being part of it, but --

19 THE SPECIAL MASTER: But Justice Gorsuch also
20 said the contracts are incorporated into the compact.

21 MR. ROMAN: Right.

22 THE SPECIAL MASTER: So if the compact
23 allocating -- or apportions 57 percent to the Elephant
24 Butte Irrigation District and they want to sell their
25 water to Las Cruces for drinking water or they want to

1 give Texas a little more than 57 percent, what
2 prohibits them from doing that?

3 MR. ROMAN: Because the compact apportionment
4 is to the state, not to Elephant Butte Irrigation
5 District. That's the distinction between an allocation
6 and an apportionment. If -- because they're not the
7 only ones who are affected by how much of that water is
8 delivered to the State of New Mexico.

9 The district is a creature of the state, it's
10 created by state statute, and they would not have the
11 authority to give away, in essence, compact apportioned
12 water that is apportioned to the State of New Mexico.

13 THE SPECIAL MASTER: Is that not -- is that
14 one of key issues that I have to decide in this case,
15 whether they do, in fact, have that right?

16 Do they have the right to enter into a
17 contract with municipalities, as El Paso has done with
18 the suit -- El Paso water district has done with the
19 City of El Paso, to allocate some of their water for
20 municipal purposes? Could Elephant Butte enter into a
21 contract with Las Cruces?

22 MR. ROMAN: Under the correct circumstances.
23 And, again, I think what we're trying to say when we
24 bring up those contracts that are entered into between
25 EP No. 1 and the City of El Paso is not that under no

1 circumstances can these types of contracts ever be
2 valid, it's a matter of the effect that those contracts
3 are having on the project as a whole just has to be
4 recognized and accounted for.

5 And so similarly, if those contracts were to
6 be entered into under the correct circumstances
7 following meeting all the correct requirements and
8 there was an accounting for a reduction in efficiency,
9 that's something that could happen.

10 I'd like to touch briefly --

11 THE SPECIAL MASTER: Go ahead.

12 MR. ROMAN: -- on this idea of what's been
13 decided, what the impact is of the first report.

14 The Court was very, very clear in what it was
15 deciding at the time that it issued its opinion. It
16 made extremely clear it was deciding only whether the
17 U.S. could intervene in this case as a compact
18 plaintiff and stake a claim under the compact.

19 Texas said, well, the Special Master report
20 was not rejected. That's absolutely correct. Texas
21 asked it to be -- asked the Court to adopt it in full.
22 The Court did not do that either.

23 I view -- basically it seems like Texas is
24 trying to hold the -- first, the Court out as kind of
25 almost in the nature of a district court decision that

1 is the law of the case until -- unless and until it's
2 overturned by an appellate court.

3 And I think that isn't the way that it's
4 meant to -- it should be considered because the brief,
5 as you well know, respectfully, Special Masters'
6 reports are advisory in nature, and until the Court
7 adopts them or makes a ruling based on the reasoning in
8 the report, they are in an advisory capacity.

9 So I would actually analogize it to be
10 something that's much more akin to report and
11 recommendation issued by a federal magistrate judge to
12 a district court judge. At the time that the report
13 recommendation is given to the district court judge,
14 the parties have the ability to file objections to
15 that.

16 The district court judge can issue his or her
17 own opinion, either taking into consideration what the
18 report and recommendation has said, or parts of it, or
19 none of it. It doesn't have to rule on all of the
20 objections.

21 And once that actual operative decision has
22 been issued, that is what is the law of the case going
23 forward. And the report and recommendation doesn't
24 take on a life of its own or doesn't govern the case.
25 Yes, there are --

1 THE SPECIAL MASTER: Do you agree, though,
2 that for purposes of the law of the case, that
3 what -- I think, and I can't remember which amicus it
4 was, but one of the amicus that was supporting your
5 general position, has indicated that everything the
6 Supreme Court said beyond, "United States, you can
7 intervene," should be ignored. Do you go that far?

8 MR. ROMAN: Everything -- I'm sorry, Your
9 Honor. Everything, you said?

10 THE SPECIAL MASTER: In other words, that is
11 what the Supreme Court said in the opinion by the
12 incorporation of the contracts and how -- I mean, they
13 did more than just say, "Objection overruled. United
14 States, you can intervene." They could have done that,
15 I suppose, but they actually discussed how the compact
16 works. That's all in the case, isn't it?

17 MR. ROMAN: I agree completely, and that is
18 exactly why when we put forward our ten positions, we
19 tried to track exactly what the Supreme Court said.

20 You'll notice in the Supreme Court decision
21 they did not quote the first report, they did not cite
22 to the first report, they did not incorporate anything
23 explicitly that was -- any of the reasoning of the
24 first report, and they also did not formally adopt the
25 first report, as certainly they know how to do, as they

1 have done in many other situations.

2 So I would not agree with the -- I believe it
3 was actually a party who stated that everything else is
4 basically dicta.

5 I think that they -- there are some very
6 significant consequences to this case that were
7 determined by that Supreme Court decision, but we need
8 to focus on what those particular rulings were and not
9 try to extrapolate from, well, maybe they took it from
10 this part of the Special Master's report or maybe by
11 not rejecting the Special Master's report, basically
12 everything that was in there is now part of what the
13 Supreme Court decided.

14 They did not look at the vast majority of
15 these issues when they were issuing their opinion, but
16 certainly everything that's in the opinion that we can
17 distill in the principles is something that they should
18 have done in this case and we take that position.

19 If you have no other questions --

20 THE SPECIAL MASTER: I think we'll bring that
21 to a close and I'll -- I'm going to give the amici a
22 chance to speak now for a few minutes if any of them
23 want to, and then I'll allow Texas and New Mexico and
24 United States -- oh, I'm sorry. I apologize. I forgot
25 Colorado, the state we're sitting in.

1 Mr. Wallace?

2 MR. WALLACE: Thank you, Your Honor.

3 I suppose in this case it might be a
4 privilege to be forgotten for large portions of it.
5 Chad Wallace, I'm here representing the State of
6 Colorado.

7 THE SPECIAL MASTER: Sometimes as a
8 litigation strategy, just kind of duck below the table
9 and hope everyone forgets you.

10 MR. WALLACE: As long as it works.

11 Along those lines, along with the response
12 raised that Colorado filed and the arguments today, I
13 will keep it short and, more importantly, very narrowly
14 focus on the issues.

15 Colorado has made a concerted effort to not
16 weigh on the merits of the claims and defenses,
17 counterclaims and deferring to the parties directly
18 involved to try and resolve those.

19 However, as you mentioned in the August
20 conference with Your Honor, issues especially of
21 general compact juris prudence are raised, and Colorado
22 may at least be adversely affected, we will reserve
23 that right to speak up and raise those issues.

24 So then I've got three points that I would
25 like to raise in these comments, the first being that

1 the holding of the Supreme Court regarding the meaning
2 of any compact are expressed within the Court's
3 opinions. Rather a simple concept.

4 The second is if the United States intervenes
5 as a plaintiff to bring a compact claim against a
6 state, it's waiving sovereign immunity for compact
7 counterclaims based on the same transaction occurrence.

8 Thirdly, the Supreme Court has itself not
9 categorically excluded equitable defenses in an
10 interstate compact dispute.

11 So as to the first issue, the Supreme Court's
12 holdings on the Rio Grande compact are expressed in the
13 Court's orders. Now, this topic deals just with what
14 the Supreme Court itself has held with regard to the
15 compact and the law of the case on that issue.

16 So this is not a -- this is a question solely
17 of what has the Supreme Court itself done and not a
18 question about whether any of the parties have correct
19 legal interpretations about the compact itself.

20 It's a very narrow question. What is the
21 opinion? There were a number of them. The main one
22 the parties talked about is the March 5, 2018, opinion
23 by Justice Gorsuch. That opinion expressly states it
24 is addressing the single narrow issue of whether the
25 United States may intervene during the compact claim

1 against a state using essentially the same claims as
2 Texas has already asserted.

3 And in that regard, that is the only issue
4 that Colorado believes the Court addressed in that
5 opinion. And it was addressing a series of motions by
6 New Mexico as to the nature of the motion to dismiss.
7 In doing so, it accepted the allegations by the parties
8 as true. And in part, that's where we get a number of
9 descriptions, contextual descriptions in the case
10 regarding the compact, treaties with Mexico, and
11 upstream contracts. Those were providing context
12 specifically for the interest of the federal government
13 in this case and justifying its intervention in the
14 compact claim.

15 These are the federal -- this is the basis of
16 the complaint, it's what justifies the United States
17 coming in, and it forms the backbone, and the Court
18 laid out four factors for applying that allowed in this
19 case, under these circumstances, the United States to
20 advance its compact claim against New Mexico.

21 The Court laid out in a very simple manner
22 the four different analyses that it actually made, the
23 first being the project and compact are inextricably
24 intertwined; and second, that New Mexico had made
25 various concessions and briefed an argument about

1 indispensability of the United States, the United
2 States' necessary status in carrying out portions of
3 the compact; the third being treaty obligations owned
4 by the United States to the Republic of Mexico in the
5 1906 convention; and the fourth is that claims brought
6 by the United States essentially a year ago was already
7 in existence when it was brought by Texas.

8 So this is really all that this March 5th
9 opinion dealt with. Why the United States would come
10 in, all the background allegations which were accepted
11 as true, this supported that. This was the federal
12 interest that justified this information.

13 This Court could beg the question of, well,
14 what are Texas's claims under the compact, and the
15 Special Master, arguably, spent -- quite a lengthy
16 report, nearly 300 pages, exploring some of those
17 issues: What did the compact do, what are the various
18 obligations.

19 However, those issues were not addressed in
20 the March 5th report. Indeed, the motion to dismiss
21 Texas's complaint was not a subject at all in the
22 March 5th opinion. In fact, it was in the October 10th
23 opinion of 2017 the Court simply said there the motion
24 to dismiss is denied without any other explanation.

25 So I think we're not left with the Court

1 giving us a lot of analysis, if any at all, about what
2 these claims actually are about.

3 And one of the reasons Colorado wants to
4 point this issue out is to not argue what the correct
5 interpretation of the compact is, but to try and avoid
6 a precedent interstate compact jurisprudence that
7 allows the implication of Supreme Court opinions when
8 no actual analysis is made of those opinions.

9 And some of the parties have already pointed
10 out the interim report takes a number of factual issues
11 under -- under Rule 12 procedures and it conducts its
12 analysis on the compact itself. So the report has
13 quite a bit in it; the Supreme Court opinions do not.

14 So what we're left with, the question of
15 whether we try to imply from that report analysis that
16 would not exist. And in this case, it may be difficult
17 because not all of the opinions in the report were
18 excepted to, so then the Supreme Court had no occasion
19 to rule on them.

20 It might also create some uncertainty going
21 forward if we try to imply analyses of the Supreme
22 Court opinion that do not exist and creates uncertainty
23 for the parties of what source of law meant.

24 And we've had in this briefing already
25 references to the Supreme Court orders, to Special

1 Master reports, and even to the Special Master
2 memoranda that were not submitted as reports to the
3 Supreme Court, and this, of course, creates a very
4 confusing collection of analyses for the parties.

5 I simply hope that when we're talking about
6 the Supreme Court opinion, we're able to stick to the
7 expressed opinions of the Supreme Court and let the
8 parties know that we're necessarily looking at the
9 Supreme Court's expressed opinions.

10 So I would ask that the Special Master find
11 on this issue that when discussing what the Supreme
12 Court itself did in analyzing compact, that analysis
13 would come through the express language of the Court's
14 orders.

15 The second item I want to get to is the
16 sovereign immunity. I know that Your Honor has asked a
17 number of questions on that already, and I know parties
18 have talked about that.

19 Colorado's position is a relatively narrow
20 one, and we're not asserting whether any of the
21 counterclaims should continue, whether they had to be
22 pled or any other factual support of.

23 Quite simply, Colorado is supporting the
24 legal principle that if the United States should
25 intervene in an interstate compact dispute to sue the

1 state under a compact, then it has waived the sovereign
2 immunity for counterclaims based on that compact and
3 arising out of the same transaction or occurrence.

4 In fact, the United States, in making the
5 successful arguments to intervene, stated it was
6 subjecting itself to the Court's jurisdiction.

7 In its reply brief to the exceptions, it said
8 the United States has intervened and subjected itself
9 to this Court's jurisdiction to permit a full
10 resolution of the dispute among all the parties over
11 the interpretation of the compact.

12 It's a fairly broad statement, and I think it
13 still leaves a question about whether the counterclaims
14 meet that standard and whether they're within the scope
15 of where the case sat before the extra counterclaims
16 were brought.

17 So in that regard, Special Master, we ask you
18 to evaluate whether the counterclaims meet that
19 standard by defining the scope of this dispute and not
20 to issue a blanket ruling that the United States is
21 subject to sovereign immunity for all purposes.

22 Colorado's third argument was regarding
23 equitable affirmative defenses. Our position is that
24 the Supreme Court has not definitively ruled that
25 equitable defenses are not available in interstate

1 compact disputes.

2 And part of the reason is, while compacts are
3 essentially contracts between states, the Supreme Court
4 has recognized that its forum is essentially an
5 equitable one, and that it can form the process and
6 procedure of that -- of that dispute resolution however
7 it sees fit. This, by definition, allows consideration
8 of equitable defenses.

9 As Your Honor has pointed out, perhaps some
10 things need further factual development before ruling
11 in the abstract on whether these defenses should be
12 allowed.

13 In a reading you pointed out a number of
14 instances in which the Supreme Court allowed
15 consideration of those defenses. Arguably, none of the
16 parties, at least in the case of Colorado's side,
17 prevailed in utilizing those defenses, but I think it's
18 important to point out that the Court allowed the
19 parties to explore those defenses, to put on a case,
20 and allowed the Special Master to determine, in the
21 first instance, whether those parties asserting the
22 defenses have met that.

23 So in unclean hands, this is another
24 situation in which we don't have a ruling from the
25 Supreme Court itself but, rather, from the Special

1 Master, in *Kansas v. Nebraska*.

2 Nebraska had asserted an unclean hands
3 defense against Kansas regarding the apportionment and
4 use of the Republican River. And the Special Master in
5 that case essentially determined that the unclean hands
6 defense was nothing more than a mirror image of
7 Nebraska's counterclaims against Kansas for overuse,
8 and rather than proceed with that under the unclean
9 hands defense, simply allowing all of the parties to
10 fully explore what their allocations were and what the
11 use might be would be the more useful way to proceed in
12 that case.

13 That was issued in a memorandum rather than
14 in a report to the Court and was not accepted to, so
15 the Supreme Court simply did not have a chance to rule
16 on that issue. So there hasn't been a definitive
17 ruling from the Court on the unclean hands defense.

18 Under defenses, acceptance, waiver, estoppel,
19 Colorado pointed out two cases with which parties,
20 albeit unsuccessfully, were still, nonetheless, allowed
21 to present those cases on those issues.

22 One was *New Jersey v. New York*. It was an
23 interesting compact case regarding the ownership of
24 Ellis Island. The Court in that case allowed New York
25 to proceed in the case with essentially an acquiescence

1 affirmative defense, and it ultimately found that New
2 York's acquiescence defense was really a laches defense
3 and it hadn't met its burden of proof.

4 Likewise, in *Kansas v. Colorado*, Colorado
5 raised, I believe, an estoppel type of defense. It was
6 allowed to present it. It did not meet its burden of
7 proof at trial.

8 And thirdly, the laches defense. Although
9 there's quite a bit of case law regarding the use of
10 laches against sovereigns, including states, perhaps
11 because of the unique equitable proceedings of original
12 jurisdiction actions, the Supreme Court has not yet
13 closed the door on the application of that defense.

14 It left it open again in *Kansas v. Colorado*.
15 The laches defense was not successfully used but was
16 allowed. Again, it was a situation where the burden of
17 proof was not met on that.

18 And likewise in *New Jersey v. New York*, the
19 Supreme Court and Special Master allowed that defense
20 to proceed. And I think it's rather prescient that
21 there are a number of factual questions, in lieu of the
22 types of remedies sought by the various parties, and
23 perhaps that can better inform the Special Master as to
24 whether these defenses will be useful and whether they
25 can actually be met, and Colorado asks that the Court

1 not outright rule that such equitable defenses are not
2 available as a general matter of law in interstate
3 compact, and instead case-by-case determination should
4 be made depending on the situation at hand.

5 Unless Your Honor has questions, that's all
6 Colorado has in this matter.

7 THE SPECIAL MASTER: Thank you very much,
8 Mr. Wallace.

9 Let me start with the two irrigation
10 districts, Elephant Butte and El Paso Water
11 Improvement. Do either of you wish to be heard?

12 MS. BARNCASTLE: Thank you, Your Honor.
13 Samantha Barncastle for the Elephant Butte Irrigation
14 District.

15 The New Mexico Enabling Act provides that
16 there be an autoreserve to the United States, with full
17 acquiescence by the state of all rights and powers for
18 carrying out the provisions of the United States of the
19 Reclamation Act, and acts amendatory thereof,
20 supplementary thereto, to the same extent as if the
21 State had remained a territory.

22 That's exceptionally important here because
23 what that says is New Mexico long ago gave up its
24 ability to interfere with the Rio Grande project.

25 Even beyond that, though, state law provides

1 EBID with the authority to deal in all project
2 operations within New Mexico, statutes providing set
3 forth "may enter into any obligation or contract with
4 the United States for the construction, operation and
5 maintenance of and necessary work for the delivery and
6 distribution of water therefrom."

7 Unlike most other water users in New Mexico,
8 this type of water use is not subject to the New Mexico
9 water code. It is specifically exempted, the Rio
10 Grande project is specifically exempted by New Mexico
11 statute from state engineer authority. So that's
12 really important because what New Mexico is arguing is
13 that New Mexico has now an allocation or an -- let's
14 see, an apportionment under the compact, which I'll get
15 to, and we disagree with, but it's such that they would
16 need to approve any contracts that change that
17 apportionment.

18 What they're really saying is their compact
19 commissioner, which is the state engineer, would have
20 to weigh in on those contracts. That's contrary to
21 state law. It's contrary to the Enabling Act. It's
22 contrary to over a hundred years of how the project has
23 operated.

24 Even more important, consider the example of
25 the Elephant Butte Irrigation District under a

1 situation where the operating agreement is not in
2 place, deciding not to make an allocation to its
3 farmers in a given year. The EBID board has that
4 authority, and New Mexico nor any of the farmers within
5 the district could be heard to complain about that.
6 That's because of a case called *Brantley Farms v. CID*
7 that's cited in my brief.

8 So essentially what that says is the EBID
9 board is in control of the allocation, and if New
10 Mexico has apportionment, which they don't, EBID's
11 board would be in control of that.

12 Those are all examples of how the New Mexico
13 legislature and the New Mexico courts have long
14 recognized the autonomy of EBID and this reclamation
15 project within New Mexico.

16 THE SPECIAL MASTER: You say they don't have
17 a right to interfere, but do they also have an
18 obligation not to let anybody else interfere?

19 MS. BARNCASTLE: Absolutely. That's been
20 EBID's longstanding position. That's the issue in this
21 case, Your Honor.

22 THE SPECIAL MASTER: It does seem to me
23 though the real issue is are they allowing uncontrolled
24 drilling of water that has the hydrological effect of
25 reducing the flow of the Rio Grande?

1 MS. BARNCASTLE: All the way back to 1986
2 EBID filed the adjudication, the stream adjudication,
3 in state court making that exact claim, the project is
4 not being protected by all of this uncontrolled
5 development.

6 Granted, most of our farmers are part of that
7 development of groundwater. In fact, EBID has its own
8 groundwater right, and throughout the history of the
9 adjudication we have claimed through cases like *Ide v.*
10 *The U.S.*, the *Templeton* Doctrine under New Mexico law,
11 that the Rio Grande project, that EBID has its own
12 claim to a portion of water that -- we aren't calling
13 it groundwater, but it's the flow of water that
14 otherwise would appear in our drains to be delivered as
15 surface water.

16 So that's the exact issue is that New Mexico
17 has not applied its own state law to prevent an
18 improper interference with the project. Where, you
19 know, they're now claiming instead that it's the
20 operating agreement that's the problem.

21 That's not the case. The operating agreement
22 was meant to solve the interstate problem and make it
23 an intrastate problem that we then resolved with the
24 New Mexico administration that New Mexico has failed to
25 administer altogether.

1 But the reason the authority has been
2 provided to EBID makes sense for multiple reasons:
3 First, EBID is an entity that's seceded an interest to
4 the private water users association that was formed and
5 that was comprised of the members that actually paid
6 for this project.

7 The water and the situation that we have in
8 Lower Rio Grande would not be what it is today had the
9 farmers not invested in that project. They paid for
10 this, they -- not the State of New Mexico, not public
11 funds. The State does not supplement EBID's public --
12 or EBID's budget in any way with public funds. It's a
13 totally farmer-led system.

14 And the second and related issue is that the
15 water that's part of this system was appropriated a
16 long time ago, first under land grants before we were
17 even the United States in that area. We got water
18 appropriated under Mexican and Spanish land grants
19 before we came into the U.S.

20 Once we came in, and the United States came
21 into this area and started the Rio Grande project,
22 those rights were rolled into the project, and the
23 United States filed two notices with the territorial
24 engineer saying all other water is hereby appropriated
25 for our project and nobody else can touch it.

1 So all of that water has been taken out of
2 the public domain a long time ago. Some of it was
3 never even part of the public domain as far as what New
4 Mexico had the authority to control.

5 The U.S. did that because they needed
6 assurance that New Mexico would not interfere with its
7 project and the water needed to help the farmers pay
8 back the debt to the United States.

9 Upon paying off its construction obligations
10 to the U.S., EBID received a quitclaim deed to the
11 canals, laterals and drains that are at issue in this
12 case. It's EBID, EBID's facilities that capture those
13 drain flows and return flows that we then use to
14 reallocate to deliver water to our own farmers, and
15 then further downstream to EP No. 1.

16 EBID controls those rights and
17 responsibilities under New Mexico law. And we haven't
18 gotten there in the adjudication yet, but we will be
19 going there. It's the whole reason the adjudication
20 was filed by EBID.

21 Acting under our statutory authority and our
22 contractual authority with the United States, we have
23 entered into a broad range of contracts that New Mexico
24 is now calling into question unnecessarily here. The
25 whole crux of their case is that they think that we

1 gave away too much water, EBID gave away too much water
2 to its sister district to try and repair the problem of
3 groundwater depletions.

4 That doesn't have to invalidate contracts
5 with the City of El Paso, all of EBID's operation and
6 maintenance contracts up until now. They do not need
7 to attack our authority to continue to operate the
8 project to get out what they're trying to get out in
9 this case.

10 A good example is look at the Rio Grande
11 compact and how it works. The compact is set up in a
12 way that it only discusses the upstream states'
13 delivery obligations to the downstream states. The
14 upstream state delivers water to the downstream states
15 in discrete delivery points, Colorado to New Mexico at
16 Labatos Gage, New Mexico to Texas at Elephant Butte
17 Dam. That was changed from San Marcial.

18 Both Colorado and New Mexico's compact in
19 regard to their delivery obligation starts the exact
20 same, "the obligation of Colorado to deliver water in
21 the Rio Grande at Colorado and New Mexico state lines,
22 or the obligation of New Mexico was to deliver water in
23 the Rio Grande at San Marcial."

24 The delivery obligation for the upstream
25 state is based on index flows indicating a certain

1 supply level. The compact doesn't specify how the
2 upstream state is to manage in order to get water to
3 the downstream state. It says just do it. It sets up
4 a zero-sum game basically: Just deliver water, and
5 each additional acre-foot sent to the delivery point
6 requires a reduced depletion or storage in the upstream
7 state.

8 New Mexico never bargained for anything below
9 Elephant Butte Reservoir. The whole reason the compact
10 came into existence was because the senior Rio Grande
11 project was being shorted by development in upstream
12 Colorado and upstream New Mexico, namely, Albuquerque.

13 And so what New Mexico wanted out of the
14 compact was the right to deplete upstream and have
15 their delivery obligation fixed to the project and not
16 have to worry about it from there. They didn't bargain
17 for anything in our area. The farmers were left to do
18 that on their own through the United States and the
19 State of Texas.

20 The compact is intended to ensure equitable
21 delivery of water from the upstream state to the
22 downstream state, and downstream states have
23 protections from water supply manipulation by the
24 upstream state, but except for credit water stored in
25 Elephant Butte Reservoir, the upstream state maintains

1 no interest in water once it's delivered. There's no
2 other interest below the Elephant Butte Reservoir that
3 the State of New Mexico has.

4 So, you know, their argument now seeking to
5 invalidate the operating agreement is in complete
6 contrast with its own state law and with compact law
7 and the legislature of New Mexico and the Court's
8 longstanding understanding of where the State of New
9 Mexico stood versus where the project stands.

10 For the first time ever now, New Mexico is
11 coming in and saying, farmers, we don't think you got a
12 good enough deal so we're going to go back and do a
13 hundred years' worth of your authority to operate
14 yourself. Despite the fact that you paid for this,
15 this is your separate right, we're going to come in and
16 tell you how to do this now because we think you gave
17 away too much.

18 We have that right, Your Honor. Quite
19 frankly, we have that right and there's no
20 apportionment that New Mexico can base its rights on to
21 come in and tell us that we're doing it wrong.

22 They argue this *parens patriae* doctrine that
23 says, you know, EBID is a creature of the state, and so
24 we represent the state.

25 What they're really saying is: We think we

1 should give this obligation to run the project from one
2 state entity to another state entity. It would not be
3 the lawyers in this room on behalf of the State of New
4 Mexico.

5 They argue this fictitious State of New
6 Mexico idea, but what they're really saying is under
7 the water code, the entity that would be involved in
8 water rights administration in the project if New
9 Mexico had their way, is just another entity set up
10 under state law, the office of the state engineer
11 instead of EBID, and the farmers who paid for this
12 project.

13 You know, there were a lot of questions in
14 your opening questions to New Mexico and Texas about
15 how all this should work and whether the operating
16 agreement should play a role. At the end of day, this
17 is a zero-sum game between the project and upstream New
18 Mexico. And if upstream New Mexico is allowed to
19 deliver to the reservoir and then come down and take
20 control of our project, what have the farmers really
21 paid for? What did they really invest in?

22 If the operating agreement is to come into
23 this case, we think that we should be a party.
24 We -- going back to our initial motion to intervene. I
25 don't know how you get beyond the cases that New Mexico

1 itself cited in the federal district court to bring us
2 into the operating agreement case.

3 Interestingly enough, New Mexico in that case
4 argued that these claims were not compact claims. But
5 now they're arguing, contrary to in that case, that we
6 don't need to be made a party because they can make
7 these decisions for us.

8 Contrary to *Enterprise Management Consultants*
9 *v. U.S.* and the Jicarilla Tribe case, those were both
10 cited in my brief, we believe these are fundamental
11 issues of due process; that if you are going to get to
12 the operating agreement itself, and thereby all of our
13 other contracts running the project operations, you
14 have to involve the actual contracting parties.

15 We don't think that you need to do that as
16 part of this case, but if you feel like you need to, we
17 need to be a part of this case, and I believe EP No. 1
18 would agree.

19 THE SPECIAL MASTER: Thank you. Any other
20 amici want to be heard?

21 MS. O'BRIEN: Good morning, Your Honor -- or
22 afternoon. Marie O'Brien on behalf of El Paso County
23 Water Improvement District No. 1.

24 I'll try not to be long. I know I'm
25 impinging on the lunch hour. It's kind of in the

1 nature of being a downstream irrigation district of the
2 project. We're used to being in that position.

3 Your Honor, I want to just focus on U.S. and
4 Texas requests to dismiss the counterclaims 2, 5, 6 and
5 7. To the extent those are direct challenges, and
6 despite what Mr. Roman says, the counterclaims seek to
7 void, as a matter of law, contracts to which EP No. 1
8 is a part of the operating agreement and really
9 decades' worth of Miscellaneous Purposes Acts contracts
10 that the district has with City of El Paso and the
11 United States.

12 New Mexico has no legal basis upon which to
13 prosecute these challenges as counterclaims, and really
14 for two overarching legal reasons: First, New Mexico
15 does not have, as many have touched on today, an
16 apportionment below Elephant Butte as a legal matter.

17 Moreover, New Mexico does not have a full
18 in-project operation under either the compact or
19 reclamation law, which would serve as a basis for New
20 Mexico to, in fact, seek to dictate or interfere with
21 the terms of reclamation contract between the United
22 States and the two districts.

23 I think it is worthy of note, and lots of
24 people have talked about shifting positions, but if you
25 look at really the hundred years of project operations

1 and 80 years of compact operations, New Mexico's
2 position that it now has an apportionment as opposed to
3 water allocated to EBID below Elephant Butte, that it
4 has a compact apportionment for water supply below
5 Elephant Butte, that is a novel argument that has been
6 inserted into this case. In fact, in New Mexico's
7 motion to dismiss, that was not posed or argued.

8 Also, as Ms. Barncastle referenced in the
9 2011 case in front of Judge Browning in federal
10 district court in New Mexico, New Mexico disavowed that
11 the claims it brought were compact claims claiming an
12 apportionment.

13 And Your Honor, just to be clear, you asked a
14 question earlier, yes, standing was raised in that
15 case. It was briefed, it was fully argued in front of
16 Judge Browning. In fact, at oral argument before he
17 stayed the matter, Judge Browning said he was very
18 troubled by the New Mexico's claims against the United
19 States.

20 And, yes, Mr. Roman is correct. EP No. 1 in
21 the United States argued that the underlying basis and
22 issues New Mexico was raising in that case were issues
23 that will be addressed in this case.

24 We certainly did not argue that New Mexico
25 should simply super copy its claims in that case and

1 bring them into this original action as counterclaims.
2 It did not have standing in front of Judge Browning; it
3 does not have standing in front of Your Honor or the
4 Supreme Court to argue those counterclaims.

5 Your Honor --

6 THE SPECIAL MASTER: One of the arguments or
7 affirmative defenses that New Mexico raised is
8 acquiescence, and sometimes it's how we label things.

9 One of the things that I have thought about
10 is the fact that in contract interpretation, if we
11 assume a compact is a contract, is how the contract has
12 been performed off of -- you mentioned compact for
13 80 years, these contracts for 100. I assume that's
14 going to be relevant.

15 And I don't know if that gets into
16 acquiescence and how you -- if a party can come back
17 now and say, well, we've done it this way for 80 years,
18 but we have been wrong for 80 years?

19 MS. O'BRIEN: Your Honor, what I'm talking
20 about, I think our position is really going to relate
21 to factual issues, right?

22 What I am talking about, in terms of the two
23 legal things that New Mexico would have to demonstrate
24 to be able to come in and bring counterclaims with
25 regard to the operating agreement or the -- let's call

1 them the MPA claims -- would be that it has a compact
2 apportionment below Elephant Butte and that it has a
3 role in project operations as a legal matter. It does
4 not.

5 And so it is not whether, you know, there's a
6 record of somebody complaining about New Mexico
7 groundwater pumping, but it is, as a legal matter, how
8 have the parties through the course of dealing
9 conducted themselves and what did the compact
10 contemplate?

11 What the compact contemplated is that the
12 states, as Ms. Barncastle was describing, have delivery
13 obligations. What does it mean to have delivery
14 obligations? Well, it means that you have taken, in
15 this case New Mexico, your compact apportionment before
16 you deliver. And so New Mexico's compact apportionment
17 is above the reservoir. It's between the Colorado
18 state line up until delivery into the reservoir.

19 Certainly the compact applies below the
20 reservoir, but it does not apply to allocate/apportion
21 additional water supply to New Mexico's compact
22 apportionment.

23 THE SPECIAL MASTER: Do you agree that what
24 this case is really about is at the end of the day, is
25 Texas and New Mexico getting their allocations of

1 water? Or apportions of water, excuse me. And if they
2 are not, who's at fault?

3 In other words, if Texas isn't getting what
4 it's entitled to under the compact, is it because New
5 Mexico's allowing groundwater pumping or is it because
6 the Republic of Mexico is somehow siphoning off water
7 or is it because the United States is mismanaging the
8 project or is it something that Texas has done or a
9 combination of all four?

10 I mean, is that what we're really going to be
11 talking about in this case?

12 MS. O'BRIEN: Your Honor, I would agree the
13 case that Texas brought to this court is for -- to
14 determine New Mexico's -- their allegations, of which
15 we support, EP No. 1 supports, is that New Mexico has
16 interfered with, and -- Texas's apportionment under the
17 compact by allowing upstream development of
18 groundwater.

19 That is actually not a novel claim in an
20 interstate compact case. In fact, in every instance
21 where a downstream state has brought an allegation that
22 groundwater development upstream is depleting the
23 surface flows entitled to the downstream state, the
24 upstream state has lost. So, yes, that is
25 absolutely -- what is the measure of Texas's

1 apportionment, and to what extent is New Mexico's
2 further groundwater development in New Mexico affecting
3 Texas's compact apportionment.

4 And, Your Honor, yes, in this case that is
5 going to bring in questions related to the project to
6 the extent that Texas's water runs the gauntlet of the
7 project. It is delivered through the project to Texas.

8 I would disagree that the United States is an
9 agent of Texas and New Mexico. The United States
10 is -- has a relationship and an agency relationship
11 with the two districts.

12 But New Mexico and Texas do not play a role
13 in reclamation law or reclamation contracts. If there
14 is an issue with regard to project operations or
15 mismanagement of the project, that is as between the
16 districts and the United States.

17 And, of course, there always needs to be
18 compliance with any decree that the Supreme Court might
19 enter to finding apportionments.

20 THE SPECIAL MASTER: Well, are you saying
21 then that neither state has standing?

22 MS. O'BRIEN: In this case, Texas has not
23 challenged, under reclamation law, contracts entered
24 into as between the districts and the United States.
25 So I would believe, yeah, that neither state has

1 standing to come in and direct or interfere with
2 project operations.

3 Again, that is not saying that project
4 operations need not be compliant with a compact or a
5 decree. But we don't -- we don't have that here at
6 this point. We have vague allegations by New Mexico,
7 first, that they have a compact apportionment below
8 Elephant Butte. They do not.

9 Even if they were ultimately determined to
10 have that compact -- some kind of compact apportionment
11 as opposed to the benefit of an allocation of EBID,
12 they do not have standing, as they have alleged in this
13 case, or before Judge Browning, to come in and
14 challenge the reclamation contracts.

15 And that is because while the compact may
16 have incorporated projects, the compact didn't usurp or
17 replace reclamation law or the rights and respective
18 obligations of the districts and the United States
19 under reclamation law.

20 So under reclamation law, it is the districts
21 that are empowered and authorized to enter into
22 contracts with the United States. What Mr. Roman
23 argued here today is quite extreme in that the compact
24 commission somehow should be a party to and approve or
25 the individual states should come in and approve

1 individual reclamation contracts.

2 This simply is not relied on. It does not
3 apply to the operating agreement. It does not apply to
4 miscellaneous purposes, that contract entered into
5 since 1941 between the City of El Paso, EP No. 1, and
6 the United States.

7 In fact, here, Your Honor, what New Mexico
8 seeks to do with groundwater development in New Mexico
9 is skirt around the requirement to have a Miscellaneous
10 Purposes Act contract to allow use or depletions of
11 project supply under reclamation law.

12 Yet they are now coming in and saying we get
13 to actually, you know, have standing under reclamation
14 law to approve Miscellaneous Purposes Act contracts,
15 which have been authorized since 1920 under reclamation
16 law, and the compact did not change that.

17 So, yes, this is about figuring out what
18 Texas -- Texas is clearly entitled to their compact
19 apportionment. It is delivered through the project.

20 What exactly is that and what harm is New
21 Mexico causing to that compact apportionment? Texas
22 has argued in its complaint that it's entitled to the
23 1938 condition vis-à-vis the project and water capable
24 of being delivered to Texas under the 1938 condition,
25 and EP No. 1 supports that.

1 The operating agreement is a compromise
2 amongst the operating agreement parties to try to
3 ameliorate those violations without going to, you know,
4 the more extreme position of saying we're going to look
5 at what went on in 1938.

6 And, Your Honor, I just want to really
7 correct something that has been just presumed to be the
8 case by both Mr. Roman and repeatedly in Mr. -- in New
9 Mexico's pleadings, and that's first that New Mexico
10 has an apportionment of 57.43 percent.

11 That 57.43 percent, and we endeavored to set
12 this out clearly in our briefs, as I believe the United
13 States does, is an allocation of acreage as between the
14 two districts, what's the role in these two districts?
15 What are the districts entitled to irrigate?

16 That does not translate into year in, year
17 out that the water is -- has to be, per the compact, or
18 otherwise, a 57.43 percent allocation. Regardless, the
19 operating agreement does not change the 57.43 percent
20 allocation. Again, it does not mess with this compact
21 apportionment. They do not have one below Elephant
22 Butte.

23 But that 57.43 percent is not changed by the
24 operating agreement. It's what the United States and
25 the two districts agreed would be done with those

1 allocations to address what is going on on the ground
2 versus water supply.

3 So there's now carryover, there's accounting
4 of how are we going to account for depletions in both
5 New Mexico and in Texas. The operating agreement
6 incorporates and addresses both. And that is a task
7 that is left to the districts and the United States,
8 it's in their purview to determine how to operate the
9 project.

10 Again, the compact, while incorporating the
11 project, does not direct or dictate project operations.
12 That is as among the United States and the district.
13 And New Mexico simply does not have standing under
14 either apportionment claim because it doesn't have one
15 below Elephant Butte.

16 They got enormous benefit under the compact
17 with regard to its apportionment above. And, again, it
18 does get a benefit by allocation of water to EBID, but
19 that is not the same thing as a compact apportionment.

20 And, Your Honor, I would just echo what
21 Ms. Barncastle stated with regard to the districts'
22 need to be parties to this litigation in these
23 counterclaims. The motions to intervene that were
24 denied are not dispositive vis-à-vis the posture of the
25 case as it's presented to you at this point in the

1 case.

2 At that point in time, while the district
3 certainly feared that the operating agreement and
4 various reclamation contracts were going to be
5 challenged or were physically challenged, there were
6 not pending counterclaims as seeking to void or
7 invalidate contracts which provide the districts,
8 really, the reason for being: The water supply that
9 they distribute to their constituents.

10 And we believe that this case should
11 not -- not only should not but could not proceed with
12 the counterclaims challenging the operating agreement
13 and the Miscellaneous Purposes Act contracts without
14 both districts being parties so that they can
15 appropriately defend those interests.

16 THE SPECIAL MASTER: Thank you. Any of other
17 amici wish to be heard?

18 Hearing none, I'm going to turn to
19 the -- give each of the parties a few minutes for
20 rebuttal.

21 Mr. Somach, anything you want to say?

22 MR. SOMACH: Just a few things, Your Honor.

23 THE SPECIAL MASTER: I'm sorry.

24 MR. STEIN: Thank you, Your Honor.

25 For the record, my name is Jay Stein, counsel

1 of record for amicus curiae City of Las Cruces, New
2 Mexico.

3 What I want to do with my time, Your Honor,
4 is to address one issue, and that is an issue that Your
5 Honor raised at the beginning of this proceeding, and
6 that is Texas's effort to dismiss four equitable
7 defenses that were raised by the State of New Mexico.

8 And these are the defenses of laches and
9 estoppel and waiver and acquiescence and failure to
10 exhaust administrative remedies that are contained in
11 New Mexico's affirmative defense number 4.

12 What Texas says is that these -- these
13 defenses fail as a matter of law. And the reason that
14 they give is, quote, traditionally equitable
15 apportionment or equitable considerations have played
16 no role in determining violations in compact
17 enforcements of proceedings.

18 And they cite two cases in this regard. The
19 first is the *Texas v. New Mexico* series. It was filed
20 in the 1980s. And the second is the *Nebraska v.*
21 *Wyoming* series that was filed in 1986. And that was to
22 enforce the provisions of the North Platte decree. And
23 our firm was counsel of record for the State of
24 Nebraska in that case.

25 What Texas is stating is that as a matter of

1 law, a summary judgment of New Mexico's affirmative
2 defense number 4 should be dismissed. And we propose,
3 Your Honor, that this be denied for three reasons.

4 The first is that the precedent cited in
5 *Texas v. New Mexico* series, and particularly the
6 *Nebraska v. Wyoming* series does not support the
7 proposition that they are arguing for. In fact, the
8 *Nebraska v. Wyoming* case is a precedent against them.

9 Secondly, the City of Las Cruces asks for the
10 allocation of these equitable doctrines for the
11 protection of its principal well field, the LRG-430
12 well field, which it relies upon and supplies 21,000
13 acre-feet of the water to the city, and which has been
14 under development since 1905.

15 Thirdly, the City has submitted a copy of its
16 adjudication decree for LRG-430 from the state
17 adjudication which displays the uninterrupted
18 development of that well field since 1905, and which,
19 we submit, creates a disputed issue of material fact
20 that requires denial of Texas's motion for partial
21 summary judgment on these issues.

22 Let me turn first to the Pecos case. The
23 Pecos case was filed in the actions filed in 1974 by
24 the State of Texas alleging violations of the Pecos
25 compact by the State of New Mexico.

1 The Pecos compact was a 1949 instrument which
2 provided water from the Pecos between New Mexico and
3 Texas. The -- in the second phase of that case, an
4 issue arose with respect to Article V(a) in the Pecos
5 compact, and that was a provision that created the
6 Pecos River Compact Commission, and it created a voting
7 structure on that commission, a one vote each state.
8 In other words, one vote to Texas and one vote to New
9 Mexico but no vote to the United States. And that's
10 unusual because the United States has a voting role
11 under compacts like the Upper Colorado River Basin
12 compact.

13 As part of the remedy going forward, a
14 prospective remedy going forward in this second phase,
15 Texas proposed that the Court amend the compact, that
16 the Court change the compact and alter, rewrite
17 paragraph or Article V(a) by giving the United States a
18 vote. And the Court decided, well, we can't do that.
19 That's beyond our jurisdiction. This is an enforcement
20 case. And the Court could well have reserved that also
21 the ratification process would have to be undertaken
22 under Article I, Section 10 of the Constitution, which
23 would require state ratifications.

24 But in any event, that process is an entirely
25 different -- the process proposed as a prospective

1 remedy by the plaintiff state is entirely different
2 than equitable defenses being allowed to be raised by
3 defendants here.

4 The *Nebraska v. Wyoming* case is directly on
5 point. In the first phase of that case, summary
6 judgment motions were heard by the Special Master, who
7 was an attorney from Los Angeles. One of these
8 involved four off-stream reservoirs in Wheatland,
9 Wyoming. These reservoirs, known as the inland lakes,
10 stored water in Wyoming, but for use by irrigators
11 downstream in the State of Nebraska.

12 Now, in the state these were operated by the
13 Bureau of Reclamation. The bureau had not applied for
14 a permit to operate these reservoirs in the early part
15 of the 20th century under Wyoming law. Nevertheless,
16 they had always been operated together with the rest of
17 the North Platte project with priority of 1904.

18 Wyoming sought to change that, because of the
19 omission of the United States in applying for a permit,
20 to a later date of 1988. This would have freed up
21 water that would enable them to apply to other -- other
22 purposes.

23 In Nebraska we argued, no, you can't do that.
24 There's been -- this has gone on for too long. This
25 has gone on for 80 years. There's been a considerable

1 period of reliance by the downstream irrigators in the
2 State of Nebraska. There is complete acquiescence on
3 the part of Wyoming after raising them.

4 The special master agreed with us and, more
5 importantly, the Court also agreed. The Court noted
6 that this was an enforcement action but nevertheless
7 recognized that Wyoming's claims would be barred by
8 acquiescence.

9 And let me quote the passage from the opinion
10 507 in the U.S. Reporter. The Court wrote: "And even
11 if the issue was not previously determined, we would
12 agree with the special master that Wyoming's arguments
13 were foreclosed by post-decree acquiescence."

14 Your Honor, the City of Las Cruces seeks the
15 application of that principle and others in the
16 affirmative defense number 24 to its major well field,
17 LRG-430 well field. That well field was under
18 development since 1905. It's been the subject of
19 numerous supplemental replacement wells, all of which
20 have been noticed and have gone to publication.

21 State of Texas has never appeared as a
22 contestant to contest the grounding of those
23 applications nor has the United States.

24 There have been two previous lawsuits on the
25 Rio Grande filed by the State of Texas in the original

1 jurisdiction of this Court, one in 1953 and one in
2 1969. Neither of them referenced any water usage by
3 the City of Las Cruces as creating a compact violation
4 problem. The City's NPDES permit was regularly renewed
5 on a ten-year basis.

6 And the second comment, Texas and the United
7 States have never appeared to question or to raise any
8 issues related to the City's water use and the NPDES
9 permit.

10 So it's our view that the City can avail
11 itself of these equitable defenses and that they are
12 properly before the Court and can be considered by the
13 Court as this matter goes to trial with respect to the
14 City of Las Cruces and perhaps other interests in the
15 State of New Mexico as well.

16 And as I have indicated earlier, we attached
17 or applied -- we attached a copy of the City's
18 adjudication order from the state adjudication which
19 displays the development of this, and we submit that
20 that creates a disputed issue of a material fact
21 sufficient to the United States' claims in this regard.

22 THE SPECIAL MASTER: Thank you, Mr. Stein.

23 Anyone else?

24 MR. BROCKMANN: Thank you, Your Honor. Jim
25 Brockmann for the Albuquerque Bernalillo County Water

1 Utility Authority.

2 With my time, I would like to focus on two
3 points, both of which you've raised again with other
4 attorneys. One has to do with the 1938 condition and
5 one with the operating agreement. And both of these do
6 have an effect, or potentially have an effect upstream
7 of Elephant Butte, and that I want to make sure that we
8 bring that to the master's attention.

9 As you know, Article III and Article IV of
10 the Rio Grande Compact are responsible for shuttling
11 water down the Rio Grande. Under Article III, Colorado
12 has the particular obligation to Labatos gage to the
13 state line, which is a variable flow based upon
14 upstream gauges.

15 New Mexico has an obligation under
16 paragraph 4 to deliver certain water into Elephant
17 Butte. And, again, it's engaged in that on an annual
18 basis. So there's nothing of a set delivery.

19 Both of those articles in the compact give
20 each state an apportionment or a right to deplete the
21 river to a certain extent in each of those reaches, and
22 they are all administered separately.

23 The Water Authority believes that the Court
24 did, in fact, adopt Texas and the United States'
25 argument and said these -- the Rio Grande contract is,

1 in fact, incorporated into the Rio Grande compact.

2 There's three places in its opinion at 138
3 Supreme Court 959 where they make references to that.
4 One has to do with the compact being inextricably
5 intertwined with the Rio Grande project and the
6 downstream compacts.

7 Another reference within the opinion is that,
8 by way of rough analogy, the compact would be thought
9 to implicitly incorporate the downstream compacts'
10 contracts by reference.

11 THE SPECIAL MASTER: I don't know, is there a
12 disagreement about that? That's Texas's point No. 1, I
13 believe.

14 MR. BROCKMANN: Well, I heard the United
15 States say they didn't know that an apportionment had
16 been made or had been defined yet in the litigation.

17 More importantly, and there's a quote in
18 between those two, that states that the United
19 States -- and you made reference to this -- should be
20 thought of -- as an agent of the compact, importantly,
21 charged with assuring that a compact's equitable
22 apportionment to Texas and part of New Mexico is, in
23 fact, made.

24 So we believe that 57.43 is an apportionment
25 that is made through the compact. 57 percent of the

1 project water supply for irrigation is New Mexico's
2 apportionment, 43 percent of the project water supply
3 for irrigation is Texas's apportionment, below Elephant
4 Butte reservoir.

5 Texas goes beyond this in asking for legal
6 determination number 4 indicating that there should be
7 allowed essentially an injunction of -- of depletions
8 beyond the 1938 condition. And you touched on this
9 earlier today.

10 Texas goes a step further. There's a
11 footnote 10 in its reply brief where it indicates that
12 if New Mexico were to exceed depletions beyond the '38
13 condition, that water would have to come above Elephant
14 Butte, okay? That is the argument that the Water
15 Authority has been fearing is going to come out is that
16 somehow this was implicating water supplies upstream of
17 Elephant Butte down.

18 I don't think there's anything in the Court
19 opinion that indicates there's a 1938 condition.
20 There's nothing in the compact that indicates there's
21 an 1938 condition; there's nothing in compact
22 administration that has been held to a 1938 condition.

23 When the compact was negotiated in '38, the
24 Rio Grande project was in place, and there was a
25 project water supply, and the Court has told us now its

1 opinion that probably water supply is an apportionment
2 between the two states that's to be protected.

3 I disagree completely with Mr. Somach that
4 all of the water in the Lower Rio Grande was
5 apportioned as a result of the project being
6 incorporated into the compact.

7 There are other water supplies in the Lower
8 Rio Grande. There are groundwaters that can be
9 depleted without affecting the project supply. There
10 are groundwaters that can be depleted that affect the
11 river at times of the year other than when the project
12 is taking water. There can be surface influence and
13 accretions in the Lower Rio Grande.

14 In my opinion, the Court set out a way to
15 solve the case in which what we do is we -- what we do
16 now is we define the project supply, which is going to
17 be variable on an annual basis that's not tied to a '38
18 condition, but rather, we've got an annual project
19 supply that Texas and New Mexico have an apportionment
20 in, 57 to 43.

21 New Mexico's job is to protect that as --
22 under *Hinderlider* the case is very clear, New Mexico
23 has an obligation to administer other water users in
24 the Lower Rio Grande, whether they're surface or
25 groundwater users, to protect an interstate obligation.

1 New Mexico, I believe, has to be able to have a say in
2 how that project allocation goes because it can affect
3 the 57/43.

4 But I don't think New Mexico is arguing to be
5 involved in the day-to-day delivery of that water but
6 on a larger level to make sure they have the necessary
7 protection of its 57 percent.

8 If we have to go and try one of these issues,
9 I think it will be very obvious that all of the
10 equities were not considered in 1938 when the compact
11 was developed. Rather, it was an irrigation
12 apportionment of the Rio Grande project. Nobody looked
13 at the City of Las Cruces or whether it was going to
14 grow or not. And certainly they expected the upstream
15 obligation under Article IV would continue.

16 And that really wraps up the argument on the
17 '38 condition. It is really inconsistent to have that
18 set '38 condition with the project being the
19 apportionment and with the flexibility that the compact
20 allows under Articles III and IV.

21 Now, with respect to the operating agreement
22 itself, and The Water Authority's lead, we have taken
23 the position that the operating agreement is invalid,
24 it's null and void. And the reason is it -- both the
25 United States and Texas have acknowledged that it

1 changes the allocation or the states' apportionment
2 that is now 57 percent to New Mexico project water
3 supply, 43 percent to Texas. It has changed that
4 allocation.

5 I'm not sure if it's been mentioned today,
6 but the operating agreement has other elements that
7 also affect other New Mexico water users, and one of
8 these is the Water Authority. It creates separate
9 storage accounts in the Elephant Butte Reservoir which
10 causes the project water supply to be managed much
11 differently.

12 It had changes in evaporation formula that is
13 different than what was done historically, and that
14 also can affect the Water Authority.

15 In Colorado's brief, they mentioned the
16 possibilities of changes in project operations
17 affecting Colorado upstream because it affects the
18 amount of water in storage. And based upon the amount
19 of water in storage, it can affect whether or not the
20 water can be stored upstream under Article VI.

21 So the Water Authority has that same concern
22 about how the project is managed and how that change in
23 New Mexico's apportionment kind of ripples downstream.

24 At the end of the day, and in Justice
25 Gorsuch's decision, he talked about how the Court had a

1 certain amount of flexibility, in the compact case, to
2 manage them in the pursuit of justice. And there's
3 been a lot of detailed arguments today about law of the
4 case and whether a particular counterclaim can go
5 forward or not.

6 The Water Authority would encourage the
7 Special Master to define this case going forward with
8 the necessary sort of bedrock principles, and one of
9 those is going to probably be a 57/43 apportionment of
10 the project supply between the two states; and then, as
11 you indicated in possibly how you might rule on
12 equitable defenses, some of these theories of the
13 parties are going to have to play out and allow
14 evidence to be developed to allow you to recommend to
15 the Court a resolution of the case that will serve all
16 of the parties' interests.

17 We agree that something -- not this operating
18 agreement, but a different agreement between the states
19 as to how that allegation is made where the State of
20 New Mexico can protect its interest in its 57 percent
21 apportionment and make sure that the reservoir
22 operations are carried out in a way that don't affect
23 downstream is something that the parties can work
24 toward. And if it can be settled, that's something we
25 encourage the Master to consider, a resolution of the

1 case.

2 Thank you for allowing the amici time to
3 argue today.

4 THE SPECIAL MASTER: Thank you.

5 MR. CAROOM: Your Honor, Doug Caroom for El
6 Paso, and I will be very brief. I have three points I
7 want to make to the Court.

8 THE SPECIAL MASTER: For whom? You're
9 representing who, City of El Paso?

10 MR. CAROOM: City of El Paso, yeah.

11 First, and these all relate to the motions
12 that are pending before the Court today as opposed to
13 arguments about what will go on later in the case and
14 what the rights of upstream pumpers might be.

15 The purpose of the motion to dismiss, as
16 invited by solicitors' amicus brief before the Court
17 even accepted the case was to allow New Mexico to
18 present potentially decisive issues of compact
19 construction earlier in the case to simplify its
20 pleading -- its trial.

21 The New Mexico motion to dismiss presented
22 three issues, the motion itself: One, that New
23 Mexico's obligation to deliver water didn't impact in
24 Elephant Butte.

25 Two, that there was no requirement to

1 maintain depletions below Elephant Butte at 1938
2 levels. And three, that there was no affirmative duty
3 on New Mexico to prevent interference with Rio Grande
4 project deliveries.

5 Those were the three points of the motion to
6 dismiss. They don't involve disputed facts, and they
7 were all overruled, all for naught. So we would submit
8 that the law of the case, for those three issues
9 certainly, is exactly the opposite of what New Mexico
10 was arguing on the motions to dismiss.

11 Regarding the counterclaims pending before
12 the Court, I would submit that not expanding the scope
13 of the case is the key for dealing with counterclaims.
14 You have some of the counterclaims that ask for voiding
15 the contracts and prior agreements you know of, well,
16 both the 2008 operating agreement and the water supply
17 agreements under the Miscellaneous Purposes Act. Those
18 clearly expand the case beyond what we have.

19 The other issues, as the Court was pointing
20 out, really are defensive issues. New Mexico
21 had -- wants to argue that nothing in Texas is
22 impacting compact deliveries and not to be considered,
23 and they can do that with or without a counterclaim.
24 They want to argue that pumping in Mexico is having the
25 same effect. And they can argue that.

1 Each of the other counterclaims' points, we
2 would submit, really are defensive issues that can be
3 presented without a counterclaim. So the thing to do
4 to maintain the scope of the case and prevent its
5 enlargement so we can go forward is to deny all the
6 counterclaims.

7 Last point regarding counterclaim number 7
8 specifically, which is the miscellaneous purposes
9 contracts, in New Mexico's reply brief, they kind of
10 hedged and said that these contracts altered the
11 compact apportionment between Texas and New Mexico.
12 They didn't explain how.

13 But the point I want to make is all of these
14 contracts that El Paso is in, and I think that's all of
15 them that there are, involve El Paso contracting with
16 EP No. 1, a Texas district. So that this is project
17 water that is allotted to EP No. 1 that is available
18 for purchase by El Paso pursuant to the terms of the
19 Miscellaneous Purposes Act.

20 We're not taking any water that's allotted to
21 New Mexico. Even though I think EBID could sell it if
22 they chose to do so. But the point I want to be sure
23 we understand is those contracts are for Texas water.
24 They are not changing the apportionment at all.

25 Thank you, Your Honor.

1 THE SPECIAL MASTER: Thank you. Yes.

2 MS. DAVIDSON: Thank you, Your Honor. I know
3 you were hopeful no one else would speak, but I'll try
4 to make it quick. I'm Tessa Davidson. I'm the
5 attorney for New Mexico Pecan Growers, and I've been
6 asked also to speak on behalf of the Southern Rio
7 Grande Diversified Crop Farmers Association, who filed
8 a motion for leave to join our brief in this matter,
9 our amicus brief.

10 And our farmers collectively irrigate
11 approximately 60,000 acres of crops and orchards in the
12 Lower Rio Grande in New Mexico, and our farmers use
13 surface water deliver on EBID and also groundwater from
14 their individual wells that they've drilled in the
15 basin.

16 And our brief addresses the issue of New
17 Mexico's standing to pursue its claims involving the
18 operating agreement. And it was our brief that you
19 mentioned earlier where we do recognize that the
20 operating agreement could provide an effective
21 framework for a remedy in this action.

22 But the reason we believe New Mexico must be
23 allowed to participate on its claims is because the
24 operating agreement effectively -- it's effect on
25 farmers in New Mexico causes New Mexico farmers to have

1 less surface water to use for irrigation and to rely
2 more heavily on groundwater.

3 And that implicates the State's interest, it
4 implicates other users in New Mexico that rely on
5 groundwater. And New Mexico administers groundwater.
6 And we believe that in order to fully resolve all of
7 the issues affecting New Mexico farmers, the State
8 needs to participate on those issues.

9 When the operating agreement was executed,
10 the way it was sold to the farmers is that it's okay.
11 More surface water is going to go down to Texas to
12 account for offsetting the effects of groundwater
13 pumping, and in exchange you'll be able to replace your
14 irrigation needs with groundwater.

15 So, in effect, it made us more reliant on
16 groundwater, the very thing Texas is suing New Mexico
17 over now, and even some joke that -- it's not even a
18 joke, it's just a refrain that we hear often, that the
19 operating agreement effectively transformed EBID into a
20 groundwater district, because we get so little surface
21 water now with the operating agreement.

22 However, because the parties to the agreement
23 didn't seek New Mexico's approval of this new regime
24 for EBID farmers, that led to the suit in the federal
25 district court case, which led to the retaliation suit

1 here in this action.

2 As a consequence, New Mexico's farmers now
3 have no guarantee on how much groundwater they can use.
4 They're being sued -- or New Mexico is being sued for
5 farmer pumping in this case, and under New Mexico's
6 prior appropriation doctrine farmers now have to rely
7 more on what we call junior groundwater rights to New
8 Mexico to reach our irrigation demands.

9 And I think it's important, Your Honor, to
10 understand what New Mexico's appropriation doctrine
11 provides. Under our doctrine in New Mexico, the state
12 engineer's charged with administering water rights and
13 producing priority dates to ensure that New Mexico
14 complies with its compact obligations.

15 And in New Mexico, if you have a senior water
16 right that's not being fully fulfilled, you can make a
17 priority call on a junior user and seek to shut them
18 off. Because it's best to be senior in a water system,
19 especially within with a downstream compact obligation,
20 the parties of New Mexico have been actively litigating
21 the prior case in the Lower Rio Grande adjudication for
22 decades now, and in that adjudication, New Mexico takes
23 the position that the farmers' right to use surface
24 water is the same date as the United States'
25 appropriation of Rio Grande project water. And so

1 currently the Court in that case is determining that to
2 be a 1903 priority date.

3 New Mexico also takes the position that the
4 day you drill a groundwater well establishes the
5 priority date for your right to use groundwater. So
6 generally, you can imagine most farmers drilled their
7 groundwater wells after the project was constructed and
8 after 1903.

9 There's also others in the basin that claim a
10 senior right to all of the farmers' rights in surface
11 water and groundwater, and some of those folks sought
12 to intervene in this case. And the City of Las Cruces
13 has made those claims against the farmers.

14 And so the farmers currently are working to
15 try and resolve all these interstate priority disputes
16 because they're kind of caught between a rock and a
17 hard place.

18 They are for surface water. Their senior
19 right to surface water is going downstream. They are
20 left with junior groundwater rights with no guarantees
21 on how they can use them or that a senior's not going
22 to call against them. So we're actively working with
23 others right now to try and resolve these interstate
24 disputes.

25 And we're making progress. We do have a

1 settlement framework, and we are making progress so
2 that water rights administration can work well for
3 compact obligations in New Mexico.

4 But it's for the very reason that we're kind
5 of stuck in this priority, I don't know, Catch-22, I
6 guess, it's for that very reason that EBID cannot
7 represent the entirety of all of the farmers' interests
8 under the operating agreement because each farmer has
9 an individual interest in any reduction of surface
10 water because they must replace it with groundwater.

11 And in doing so, you have higher pumping
12 costs; you have to drill or maintain wells, you have to
13 make sure that the aquifer is managed so that you have
14 a long-term supply of water to New Mexico, and you have
15 to manage increased soil salinity.

16 And EBID is not the party that's going to
17 represent the farmers' interests in this matter. As to
18 those consequences, the State of New Mexico is the only
19 party that can represent our interest in that regard.

20 As you've heard -- and I do find it,
21 actually, very ironic to listen to the disputes
22 regarding New Mexico's standing to challenge the
23 operating agreements and allocation procedures because
24 it's that very dispute that led us here, and you've
25 heard that today.

1 I also find it very interesting that Texas
2 and the United States do not know what allocation the
3 downstream contracts established originally, yet they
4 do know that New Mexico has violated this unknown
5 standard. And in that regard, if that's true, then New
6 Mexico certainly has the right to claim that its
7 apportionment under those downstream contracts have
8 also been violated by the new allocation procedures in
9 the operating agreement.

10 It's our belief that New Mexico's claims
11 involving the operating agreement must be heard in this
12 action to protect our dual interests in irrigation
13 water in New Mexico and essentially ask that you deny
14 the motions to strike New Mexico's complaint on the
15 operating agreement.

16 Thank you.

17 THE SPECIAL MASTER: Thank you. We -- I was
18 kind of -- I'd still like to finish the hearing before
19 lunch if that is agreeable with everyone, go a little
20 longer, but I do think we need to take a 10- or
21 15-minute break if we want to continue. So let's break
22 for a few minutes. We'll take 15.

23 (Recess taken from 12:53 p.m. to 1:10 p.m.)

24 THE SPECIAL MASTER: Please be seated. All
25 right. Are we done with the amici or anybody else wish

1 to be heard?

2 MR. JONES: If Your Honor please, my name is
3 Alvin Jones. I am with the Southern Rio Grande
4 Diversified Crop Farmers Association. I'm the other
5 half of Ms. Davidson's presentation. If you'd just --

6 THE SPECIAL MASTER: Why don't you come
7 forward.

8 MR. JONES: Yes, sir. So I don't know what
9 became of my motion to appear. It's amicus, but it's
10 still there somewhere, Judge, and I'd be grateful to
11 find it and move on. I don't think anybody opposed it.

12 THE SPECIAL MASTER: I'd have to go take a
13 look at the motion. I don't recall seeing it. I know
14 you've listened in on some calls. I didn't know that
15 you had actually filed a motion, and I need to take a
16 look at it.

17 MR. JONES: I appreciate it, Judge.
18 Thank you, sir.

19 THE SPECIAL MASTER: Mr. Somach?

20 MR. SOMACH: I just want to address a few
21 points they made, and I will try to do it as briefly as
22 possible.

23 The first, you asked, I think Mr. MacFarlane,
24 whether or not everything was frozen in 1938. We do
25 believe that the physical situation was frozen as of

1 1938 because that was the deal that was cut, and -- but
2 the law itself isn't frozen. Reclamation law moves
3 ahead. And to the extent that changes in law don't
4 affect a compact, they are very appropriate in terms of
5 moving -- moving forward, but I just wanted to
6 distinguish those two things.

7 The physical situation that has depletions,
8 that is how one determines what each state gets. And
9 if it's a rolling target, then there is no -- there's
10 nothing set there.

11 And referring to something Mr. Brockmann
12 said, we have argued it. We do believe that it's the
13 1938 condition that's the baseline for discussion. But
14 that language comes right out of the Special Master's
15 report. You know, the reference to it is from the
16 report, and it responded directly to the allegations
17 that New Mexico made that it had no obligation to
18 maintain depletion of a 1938 compact level.

19 So that when you follow where the issue
20 generated from, it generated from the motion to dismiss
21 and from our complaint. The motion to dismiss was in
22 response to our statement that it was a 1938 condition.
23 They said that it wasn't a 1938 condition. The Special
24 Master addressed that, and he said it is a 1938
25 condition.

1 So, you know, one can argue, but our position
2 is that was part and parcel of what was before the
3 Court and the Special Master in the motion to dismiss
4 that is to be decided.

5 Mr. Roman began by -- and I don't know why,
6 but he began by talking about shifting positions,
7 leveling that charge against the United States and
8 Texas. From -- and I will say this unconditionally,
9 without any qualification, you could read every brief
10 we have submitted, every document we have submitted,
11 our positions have been consistent. They have not
12 changed. They have not vacillated whatsoever.

13 THE SPECIAL MASTER: I thought, and this will
14 get back to something Mr. MacFarlane was saying, I
15 thought if there was one thing in this case that was
16 undisputed, it was that there would be X amount of
17 water released that was project water and that Texas
18 got 43 percent and New Mexico got 57 percent.

19 Now, it may be that that the water districts
20 get that, and so I don't want to get into that
21 discussion. But I thought if there was one thing that
22 wasn't going to be in dispute, it was 43/57. Now I
23 understand that's not even agreed upon.

24 MR. SOMACH: Well, I think Ms. Davidson said
25 that somehow the United States and Texas are confused

1 about apportionment.

2 I began by saying we believe, and this is
3 very consistent with what the districts say, we believe
4 that the Article IV delivery obligation is -- is a
5 delivery to Texas, into the reservoir. And I think I
6 said that's why the Texas Rio Grande commissioner can
7 make demands on Texas and Colorado related to debits
8 and credits in that reservoir.

9 And what I said was that what Texas got was
10 subject to the contract with EBID and the treaty with
11 Mexico. I said that to Mr. Grimsal in the argument of
12 the motion to dismiss. He did not agree with me on
13 that point.

14 And he talks or he -- the terminology there
15 does talk in terms of apportionments to Southern New
16 Mexico. And somebody said also earlier, was in some
17 respects it doesn't matter because of what -- the way
18 Special Master Grimsal dealt with that issue was by
19 saying certainly Texas's apportionment and its delivery
20 into the reservoir, and he termed what EBID got as
21 apportionment, but he said they relinquished dominion
22 and control over that water, which meant they agreed to
23 the arrangement by which that water was allocated to
24 the districts.

25 And that's why I said you've got to look at

1 its validity, among other things, you have 57/43,
2 that's a hundred percent, but I indicated earlier a
3 hundred percent isn't going to meet all the irrigation
4 demands, the 155,000 total acres. You have to have
5 return flow so you actually have to have 120 percent of
6 the water in order to get all those lands irrigated,
7 and that's why you have to deal with that project as a
8 unity.

9 At various times you will hear, when we get
10 into the factual arguments, the discussion of compact
11 Texas, and it was because what New Mexico negotiated
12 for, and I know Ms. Barncastle alluded to this, was the
13 middlemen, that's what they cared about.

14 It was left, in terms of the history of
15 negotiations, to the Texas commissioner to negotiate
16 for the unity, because it was the only way Texas was
17 going to get its water was to ensure that it operated
18 as a unit. In fact, one of the negotiators for Texas
19 was actually from New Mexico. So we'll get into that,
20 but it's the unity of the project and the it's going to
21 operate which I think is a critical -- you know, a
22 critical element.

23 And let me also say this: Texas has never
24 said, nor does it believe it could interfere with the
25 contracts that exist for the project. This is in

1 contrast to the New Mexico position. And that is
2 because we do believe that those downstream contracts
3 are important. They were what we agreed to when we
4 negotiated the compact.

5 The water that is apportioned to Texas is
6 either in the contract with EP No. 1, EP No. 1 and El
7 Paso, as has been described, or Hudspeth. We
8 don't -- there is no separate giving of water by the
9 State of Texas outside of those contracts.

10 And we are not -- that, I think, is what
11 differentiates. The issue came around about whether or
12 not we're -- what we're arguing. What we're trying to
13 do is protect the apportionment, the totality of that,
14 from New Mexico's activities by obtaining more than
15 they were entitled to.

16 That's quite different than trying to
17 dictate, you know, what is -- what that water could be
18 utilized for. We do not and would not take the water
19 away from EP No. 1 and give it to El Paso, for example.

20 I'm not sure whether New Mexico believes,
21 because it's got some apportionment, it could take the
22 water away from EBID and give it to Las Cruces. I,
23 quite frankly, don't know the answer to that because
24 they've started getting into and trying to deal with
25 contracts. We have not done that. It differentiates,

1 I believe, our case from theirs.

2 I did want to come back just briefly to this
3 question of the exceptions and New Mexico's exceptions.
4 I took this out of their brief. They said the purpose
5 of New Mexico's exceptions were to preserve the
6 critical complaint -- compact interpretation issues for
7 trial, when the Court would have a full record on which
8 to base its decision, and then they say the Court gave
9 precisely that. This is at their consolidated last
10 brief at ten.

11 But that just defies any way any logical
12 person would look at what occurred. They made
13 exceptions. They may have -- I have no idea, you know,
14 could be that's what they were trying to do. But they
15 ignore the fact that the Court rejected their
16 exceptions.

17 So if their intention was to preserve those
18 exceptions by filing their position -- the compact
19 interpretation by filing their exceptions, the Court
20 rejected that. I mean, if anything, they rejected
21 their exceptions.

22 THE SPECIAL MASTER: Did you read the Supreme
23 Court's opinion when they say the exceptions are
24 overruled, but we have to go through each exception and
25 then say, okay, this one is overruled, this one is

1 overruled?

2 MR. SOMACH: I don't think you have to do
3 that. There were only exceptions filed by Colorado,
4 the United States, and New Mexico. That's all that
5 were there.

6 THE SPECIAL MASTER: I know.

7 MR. SOMACH: The United States' exceptions
8 were granted.

9 THE SPECIAL MASTER: They were sustained, and
10 I think I'd have -- I think the language was exceptions
11 of the United States are sustained and all other
12 exceptions are overruled.

13 MR. SOMACH: Are overruled. And so how do
14 you get we won out of, in fact, you lose. It befuddles
15 me.

16 The issues with respect to the MPA, the water
17 supply and the operative, that we've talked about. I
18 don't think I need to say much more about that, other
19 than the fact that I think that a dismissal of those
20 causes of action doesn't mean that if somehow
21 there's -- there are actions that are depriving New
22 Mexico what they are entitled to, that those things
23 don't get litigated as part and parcel of the compact
24 dispute. It's just that they're not separate causes of
25 action under those statutes, and that's the way they've

1 been pled.

2 I actually don't want to spend any time
3 responding to Colorado's claims. We responded
4 thoroughly to those arguments in our brief, and I
5 didn't hear anything in there that responded to the
6 arguments that we made in our briefs. And we maintain
7 on each one of the issues that our positions are
8 correct and that, among other things, Colorado
9 misconstrues much of what -- the basis, the foundation
10 upon which their arguments are made. But we fully
11 responded to those, and so I'm not certain that it
12 would be productive to just repeat what we've already
13 briefed.

14 I wanted to move into the final issues that
15 were raised by the last three amicus. And the first
16 is, again, with respect to our affirmative defenses --
17 I mean the motion to -- the Rule 56 motion on the
18 affirmative defenses.

19 A fundamental legal theory that we believe is
20 accurate is that you can't change what the compact says
21 and that there's -- and that's been the longstanding
22 view of the Court. The issue you raised earlier, and I
23 thought was a significant issue, and that is, well, I
24 may not be able to tell you you're not entitled to get
25 what the compact says you're entitled to get, but it

1 doesn't negate the damages to somebody. There's
2 nothing in the compact that tells me or dictates what
3 damages are. And I think that -- and I want to make
4 certain that I'm clear that when I -- when I was
5 concurring on that, that's what I was concurring on.

6 I am not stepping back one bit from the
7 argument that says you can't use those equitable
8 defenses to change what the compact says. And here I
9 think we've got to be careful because the parties do
10 this all the time because they sign -- they cite
11 equitable apportionment cases from compact cases.

12 Those are not the two same -- actually, an
13 apportionment case is a case where the Court exercises
14 equitable powers to create an apportionment. Compact
15 is, as you've indicated, a very significant but still a
16 contract. And the case law indicates that the Court
17 will not rewrite this compact, once again, a compact,
18 regardless, and there is no case where they've done
19 that. No one has cited that case. If it's there,
20 we'll take a look at it. But no one has cited that
21 case.

22 Finally, I wanted to respond to a couple
23 of -- this lawsuit's not a retaliation lawsuit. I
24 don't know where that came from, but we did not file
25 this case -- we would never file a case in the United

1 States Supreme Court invoking the original jurisdiction
2 of the Court -- of a court in retaliation for the fact
3 that they sued under the operating agreement. After
4 all, we weren't even a party to the operating
5 agreement.

6 This suit was filed because New Mexico was
7 not doing anything to remedy the situation, and we'll
8 put evidence on this, despite the fact that we have
9 been, for a very long period of time, seeking some
10 redress from the State of New Mexico on those issues.

11 Second thing is, this lawsuit is against the
12 State of New Mexico. This is not a lawsuit against
13 Southern New Mexico. And suggestions somehow that all
14 burdens should be borne by Southern New Mexico is
15 incorrect.

16 This goes to the idea that what New Mexico
17 got was protection of the Middle Rio Grande. And so
18 they can't have it both ways. They can't protect the
19 Middle Rio Grande and then just keep taking more and
20 more water below the Elephant Butte Reservoir.

21 And so all we suggested, and I believe that
22 when remedies come -- as we know, the Court doesn't
23 like to give money damages. The Court would prefer to
24 give water.

25 And all we're saying is there's only so much

1 water in southern -- in New Mexico and in the Rio
2 Grande project. And if more water needs to be
3 provided, it's -- this lawsuit is against the State of
4 New Mexico. And if they have to provide more water,
5 regardless of where it has to come from, they will have
6 to provide that water.

7 I have remedies, but I just wanted to make
8 certain that this is not indemnity against Southern New
9 Mexico at all, quite frankly. It's quite the opposite.
10 But this is a lawsuit against Southern New Mexico. Any
11 remedy will have to be from the State of New Mexico,
12 whether that be in dollars or whether that be in water.

13 Thank you.

14 THE SPECIAL MASTER: Mr. MacFarlane?

15 MR. MACFARLANE: Thank you, Your Honor.

16 Someone once said never trust an attorney who
17 stands up and says, Your Honor, I'll be brief, but I
18 want to make three quick points in rebuttal.

19 First, on sovereign immunity. A sovereign
20 immunity waiver is for narrow, tailored, specific kinds
21 of remedies and claims. It's a tool to be applied to
22 ensure that only cognizable claims are heard and to
23 prevent a case from expanding without limit into
24 general grievances. New Mexico's contention --

25 THE SPECIAL MASTER: Well, let me ask you the

1 question I asked Mr. Roman, which is, let's assume at
2 the end of the day it's determined that Texas is not
3 getting the water to which it's entitled under the
4 compact. But it's through no fault of New Mexico's
5 because of mismanagement of the project or you're
6 giving Mexico, instead of 60,000 you're giving them 150
7 or whatever, where does sovereign immunity fit into all
8 that?

9 MR. MACFARLANE: Well, I think you're
10 actually anticipating the second point I was going to
11 make. You asked Mr. Roman could you, at the end of the
12 day, issue a decree that included an injunction
13 ordering the United States to do X, Y and Z.

14 If we're not a defendant, if we haven't
15 waived our sovereign immunity to claims against us, as
16 opposed to the claims we brought as a plaintiff, then I
17 think the answer to that question is no.

18 But Your Honor can issue a decree, and the
19 United States can look at it and determine if our
20 present project operations are consistent with that
21 decree, make changes if necessary -- after all, we are
22 the project operator -- and if somebody disagrees with
23 our conclusions, then, you know, we are subject to
24 claims in district court under the Administrative
25 Procedure Act or, you know, wherever.

1 But I think it's not to say that there isn't
2 a remedy, but I think your position as the Special
3 Master here, and ultimately the Court, is to fashion a
4 decree which declares what the equitable apportionment
5 is that's in dispute here, and as -- you know, the
6 United States will be bound by that decree, as we said
7 we would be.

8 We intervened to allow full resolution of the
9 issues in the case as those issues existed in early
10 2018 before New Mexico filed its counterclaims, and we
11 did not open ourselves up to any counterclaim that
12 could be dreamed up or somehow tied in to an alleged
13 violation of compact.

14 I think, you know, in our earlier colloquy we
15 got to the point where I think the -- there is an
16 understanding that the case can be litigated on the
17 basis of Texas's complaints and those counterclaims
18 against Texas, and it will result in a decree declaring
19 what the equitable apportionments are below Elephant
20 Butte Reservoir and dispose of the significant issues
21 that are involved there.

22 My third and final point has to do with the
23 infamous 57/43. There is nothing in the Supreme
24 Court's decision that tells that that was a division of
25 water between New Mexico and Texas.

1 The only reference to 57/43 in the Court's
2 opinion had to do with the percentage of irrigable
3 acres in the project. Out of a total of 155 irrigable
4 acres, 57 percent are located in EBID, 43 percent in EP
5 No. 1. That is a very, very different thing from
6 dividing up project water supply along a 57/43 divide.

7 THE SPECIAL MASTER: Well, they may not have
8 specifically said it, but they also said, and I just
9 went back and reread it, because I was curious, over
10 the break I reread the decision, although I have
11 probably read it 20 times already, but they said that
12 also 57/43 was the allocation between the two districts
13 as to what they were going to pay for.

14 MR. MACFARLANE: Right, construction costs.

15 THE SPECIAL MASTER: And the implication was
16 that that was because that was the allocation of water
17 they were receiving.

18 MR. MACFARLANE: No, that's not correct, Your
19 Honor. And I don't believe the Court said that and I
20 don't believe that's a fair inference of what the Court
21 said.

22 Those were the allocated shares of project
23 construction costs based upon number of irrigable acres
24 in each district.

25 The 57/43 division of water, however that's

1 defined, and frankly, we would ask 57 percent,
2 43 percent of what? Are we talking about project
3 supply? Are we talking about project releases? Are we
4 talking about project supply before we account for
5 depletions from groundwater pumping or after?

6 These are all -- it is a very, very tricky
7 issue to get your arms around. New Mexico may think
8 that a 47/53 division of project supplies has been
9 agreed to. It has not. I think that's basically New
10 Mexico's position. And that -- you know, if they want
11 to make that their position, that's their business.
12 But it's not something, frankly, that any authority has
13 declared, decreed or resolved.

14 THE SPECIAL MASTER: Did Mr. Grimsal make a
15 finding on that?

16 MR. MACFARLANE: I don't believe he did.

17 Thank you, Your Honor.

18 THE SPECIAL MASTER: Mr. Roman?

19 MR. ROMAN: We've been here for a very long
20 time today, especially you, Your Honor, amongst all of
21 us, so I too will be quite brief and make clear that by
22 not addressing issues we're certainly not acquiescing
23 to them, but this has all been briefed very
24 extensively.

25 THE SPECIAL MASTER: I understand.

1 MR. ROMAN: I first want to briefly touch on
2 what Mr. Somach was saying about the 1938 condition,
3 especially with respect to the contention that it is
4 something that was already established as law of the
5 case by the Special Master report somehow without being
6 adopted by the Court. Because there is no basis for
7 their suggested '38 condition in a compact itself or in
8 the Court's opinion.

9 And there was no evidence taken on this
10 issue, nor could there have been. Given that it was a
11 motion to dismiss, we were at a 12(b)(6) stage. So I
12 think that reading into the fact that an exception was
13 denied that didn't even explicitly address the '38
14 condition because it was part of the reasoning,
15 potentially, tangentially, in a special master's
16 initial report, which, again, was not adopted in full
17 by the Court, would be taking it way too far.

18 This is something on which, if the parties
19 did, in fact, agree to that, as Mr. Somach suggested,
20 then at the very least the Court would certainly need
21 to take a significant amount of historical evidence on
22 the nature of the discussion, the nature of what was
23 agreed to, and should not be seen as having been
24 established already as a law of the case.

25 THE SPECIAL MASTER: Well, that's one of the

1 things I was going to say is that one of the exceptions
2 you made was to the extensive historical analysis that
3 was done in the report.

4 I don't think I can agree that we did all the
5 ruling, that the Supreme Court adopted every single
6 section of that 200-page historical analysis.

7 MR. ROMAN: Agreed.

8 THE SPECIAL MASTER: Maybe that is
9 Mr. Somach's position. I'm not sure.

10 MR. ROMAN: I also want to briefly touch on a
11 statement that Your Honor just made about when you were
12 characterizing hasn't the 57/43 been established, I
13 believe you referred to it as 57 percent of project
14 releases, and I just wanted to make the distinction,
15 and I think that Mr. MacFarlane somewhat brought that
16 up too, the distinction between project releases and
17 project deliveries.

18 Because this has been discussed, there's kind
19 of a multiplier in the project. If it was only
20 57 percent of project releases that were apportioned to
21 New Mexico, then in fact, given that multiplier effect
22 of return flows, the 43 percent would, in fact, be much
23 greater than 43 percent.

24 So I think instead what we would say is what
25 was apportioned was 57 percent of project deliveries

1 and 43 percent of project deliveries. Because the way
2 that the project is operated is given a particular
3 release, say a full release of 790 -- 790,000
4 acre-feet, there is -- a larger amount can then be
5 delivered over time to those farms.

6 So it would be 57 percent of that larger
7 amount from top to bottom that the system operated as a
8 whole is delivered to the farms throughout the project.
9 Just wanted to make that distinction clear.

10 And, finally, maybe to end on a little bit of
11 a hopeful note, there is something that I believe we
12 can say we absolutely do agree with Texas' side.
13 Mr. Somach said that the equitable defenses cannot
14 change what the compact says, what the apportionment
15 is. We couldn't agree more. That's very true. And
16 that's why all of our equitable defenses go towards
17 damages, towards has there been a violation in the past
18 that has not been brought to people's attention.

19 You characterized this earlier as basically a
20 big, complex contract case, and in a contract
21 enforcement proceeding, those are available defenses.
22 Because by not being put on notice of an alleged
23 violation through years and years and years, the law
24 has said that's not fair.

25 And this is a compact apportionment

1 enforcement case. The same logic applies to that. But
2 to be very clear, we are not seeking to reform the
3 terms of the compact or to change the apportionment
4 from what we believe it already is through making those
5 arguments and saying because it wasn't raised, somehow
6 we have a larger apportionment than we were originally
7 given.

8 And with that, unless you have other
9 questions, I will wrap it up.

10 THE SPECIAL MASTER: No. I do have some
11 questions for the group as whole, but no.

12 MR. ROMAN: Thank you, Your Honor.

13 THE SPECIAL MASTER: All right. Well, unless
14 there's anything further, we'll show at least this part
15 of the proceeding closed, the motions submitted.

16 I'd indicated a couple other things we wanted
17 to talk about was this, what I thought, was a discovery
18 motion, which I understand now it's not, so we can skip
19 over that.

20 The other issue is I wanted to talk a little
21 bit about the schedule. It's obviously slipped some,
22 and hopefully we can stay on schedule with the new
23 proposed trial date. And if there's any further
24 slippage, it's going to come between that close of
25 discovery and the trial date.

1 One thing I wanted to discuss, and it's
2 actually -- Mr. Somach alluded to this in one of his
3 arguments, and other parties as well, there's
4 apparently going to be a fair amount of evidence and
5 maybe expert testimony presented relative to historical
6 analysis, for want of a better term, of the context in
7 which the compact was negotiated and other historical
8 issues that may be relevant to the case.

9 And I know that New Mexico objected to the
10 former special master going, what they considered to be
11 outside the record, and doing his own independent
12 research and then doing an historical analysis.

13 But having said that, is anybody -- is there
14 that much fundamental disagreement? I mean, is
15 there -- can that form the basis of a historical
16 analysis or a historical context for this dispute, the
17 parties can then supplement if they feel there's
18 additional information that's required or maybe address
19 specific inaccuracies that they feel are contained in
20 the first interim report.

21 I'm just wondering, is there some way to take
22 advantage of all the work and all the -- of everything
23 that's been set out and not duplicating those 200 pages
24 with a whole new start-to-finish historical analysis?

25 Mr. Roman?

1 MR. ROMAN: Your Honor, can I address that
2 first? Yes, thank you. We would be utterly opposed to
3 taking what work had been done on the basis that we
4 don't even know how the original special master chose
5 which items to look at. Those were not tested through
6 cross-examination. He may have adopted certain
7 people's -- certain historians' views of certain things
8 which are very much, potentially, contradicted by other
9 historians that weren't consulted, or maybe were
10 consulted and he decided not to adopt those.

11 This is fundamental to this case. We have,
12 right now, an argument that there wasn't even an
13 apportionment to New Mexico below Elephant Butte, that
14 the parties agreed that there would be a '38 condition
15 as part of this, even though they somehow never put it
16 into the compact itself, even though other compacts do
17 have that type of provisions in them, and I think,
18 respectfully, it would be inviting error to take work
19 that had already been done without it going through the
20 crucible of cross-examination and development and true
21 expert reports put forth by the parties.

22 If there is a concern about saving time, I
23 would say it's more important to get it right, and we
24 can't be -- any party here should be worried about
25 being stuck with certain findings or with certain

1 positions that the special master adopted without
2 taking evidence on those specific issues by the
3 parties.

4 And right now we're in a position where
5 people are having to do historical reports without
6 their being an agreed-upon even period of record to
7 look at. We don't know what the geographic scope of
8 this case is. Does it end at the state line? Does it
9 go into the project as a whole? There are a lot of
10 uncertainties.

11 But what we can't have, to have a good
12 resolution of this case that I think has solid
13 grounding and that informs Your Honor, truthfully, of
14 the real basis for a lot of these claims is kind of
15 picking and choosing piecemeal from a summary that was
16 not based on testimony or evidence or cross-
17 examination by anybody in the party, and I would urge
18 there to be a full evidentiary hearing on the
19 historical things the same way that there would be on
20 any other important part of this case.

21 And I don't say that simply because in my
22 view the first special master had a bunch of holes or
23 got some things wrong. I say that as a litigant, that
24 I think it's fairer to everybody to hear that type of
25 evidence.

1 THE SPECIAL MASTER: Mr. Somach?

2 MR. SOMACH: Yeah. We've never said, and
3 this goes to the point that I think was at the end of
4 the argument, the only thing we say from that report
5 that is there are those five points. That's why we
6 pulled those out.

7 That said, we don't have a problem with the
8 massive amount of work that the special master went to,
9 and it seems to me that a logical way of protecting New
10 Mexico from what they're concerned about is if there
11 are specific objections, rather than take
12 the -- because, quite frankly, it's all part of what we
13 will do is repackage all that stuff in one form or
14 another.

15 It seems silly to have to go through all of
16 that effort since it's there. If there's something in
17 particular that might be subject to disagreement and,
18 therefore, perhaps additional testimony or expert work
19 on it, that's a better way of proceeding.

20 That focuses us down and it also, of course,
21 allows us to operate within the time frame we have, but
22 in terms of getting expert reports done and getting the
23 trial -- this case ready for trial in the time that
24 we've had.

25 So I don't think that there's any argument

1 that those factual issues are in any way, shape or
2 form -- while in this case, the special master said
3 they were not. But there's a lot of good stuff there,
4 and it seems really silly to kind of throw it out and
5 have to just repackage it.

6 If there's an issue with it, why not just
7 focus on the issue and make that the point of
8 litigation as opposed to unwrapping the whole thing?

9 THE SPECIAL MASTER: Now, we're only about 60
10 days away from your reports being due. Have you hired
11 a historian?

12 MR. SOMACH: We have. And I'll let the
13 United States speak for themselves. I'm not as
14 concerned what the United States has. The historian
15 was going to fill in.

16 Let me say there's two universes of historic
17 information. This goes to this question of if the
18 basic compact interpretation the special master did was
19 a matter of law, because it was an unambiguous compact,
20 then one doesn't have to put in extrinsic evidence to
21 interpret the compact. So it kind of hinges on the
22 decision that you will make at one point in time.

23 And on the other hand, if there's a
24 determination that it is ending and that those legal
25 determinations are not binding and that there is a need

1 for extrinsic evidence, then there's another whole
2 universe of historic expert materials that will have to
3 be added to the report we're doing, and that will
4 create a time crunch for us to do that.

5 THE SPECIAL MASTER: Mr. MacFarlane?

6 MR. MACFARLANE: Thank you, Your Honor.

7 In terms of the -- well, our -- we have hired
8 a historian but only relatively recently. Our view is
9 that, to be perfectly candid, part of what we would
10 need the historian to do may depend on how Your Honor
11 rules on these law of the case issues. And if those
12 are going to be open again for litigation and factual
13 development, then we have to get somebody cracking on
14 that.

15 Frankly, I think, in terms of an expert
16 historian report, a May 31 deadline is just about
17 impossible. But looking closely at the schedule, the
18 most recent schedule that Your Honor issued at the end
19 of January, you've got about ten months between close
20 of discovery and the trial date, and I think there is
21 some time there that through maybe compressing the
22 schedule for dispositive motions, that we could maybe
23 build in an extension of some time for the disclosure
24 of expert reports on historical matters and depositions
25 of expert historians without further delaying the

1 trial.

2 So we would urge Your Honor to give that some
3 serious consideration. And like I said, I mean,
4 I -- you know, we did not object to Special Master
5 Grimsal's tutorial and investigation that he conducted
6 on his own on the history of the Rio Grande compact,
7 although I do understand the concerns that have been
8 raised about it.

9 We don't think he necessarily got it wrong,
10 but at the same time, I mean, if we are going to have
11 full-blown discovery and basically replay all of those
12 issues, I think it's going to depend, to some degree,
13 on how Your Honor rules on the law of case matter, but
14 if we are going to get into extensive discovery on
15 that, we need to know that kind of up front so that we
16 can get our experts directed and moving forward as
17 quickly as possible, and we will definitely need some
18 relief on that May 31st deadline.

19 THE SPECIAL MASTER: Well, I guess that's the
20 plan I was making. And I'm not even sure that it was
21 inappropriate for the special master to do the
22 research. I mean, certainly as a judge you oftentimes
23 have to go do your own independent research if you
24 don't feel that what the parties have presented to you
25 fully answers the question.

1 So I'm not saying it was inappropriate. And
2 I guess the question is, is it wrong? If it's not
3 wrong, what's the difference? I mean, why reinvent the
4 wheel?

5 And I understand New Mexico would be saying,
6 well, we don't like the procedure, but I'm not sure
7 you're saying it's wrong and -- and I understand maybe
8 you don't think it's complete. And if that's the case,
9 you can supplement it. But why not just tell us what's
10 wrong about it or what you feel you need to add to it
11 to make it complete?

12 MR. ROMAN: Well, Your Honor, for one thing,
13 it sets up a position where the default is essentially
14 what was done in independent research without any input
15 from the parties, and then it becomes up to the party
16 to basically try to overturn what the default
17 assumption is rather than having independent reports
18 where based on rebuttal reports, based on depositions,
19 based on, well, did you consider this, did you consider
20 that, we don't have any basis for knowing what it was
21 that led to some of these conclusions that the special
22 master came to, and the way to do that is to be able to
23 depose the parties' experts and --

24 THE SPECIAL MASTER: Well, why not just have
25 your historian look at it and say, yeah, I agree with

1 this, I agree with this, I agree with this, I agree
2 with this. I looked at those same source documents,
3 and the conclusions are reasonable, but he missed
4 others, or I disagree with him, which is -- but why not
5 have your historian just look at this and say what's
6 wrong with it?

7 MR. ROMAN: In some way, it really turns the
8 process on its head, and rather than having an organic
9 report that can be put together thematically from start
10 to finish that actually ties things up, you're instead
11 poking at various places in a report that someone else
12 put together that may be set up completely differently.

13 It really robs the parties, each party, of
14 the chance to tell their story and to explain it in a
15 cohesive way. And if another party is very happy with
16 the way that the special master put things and the
17 research that they happen to do and the sources that
18 they happen to use, then by all means that can
19 certainly be incorporated into another report and it
20 wouldn't -- it wouldn't really add to the burden.
21 Because for them, it's already been done.

22 But, again, to have us be in a position of
23 having to just be reactive to something that wasn't
24 based on anything that any of the parties did is in
25 some ways kind of a black box of where did all of this

1 come from is really, I think, putting certainly us, but
2 I think really all parties, in an unfair position of
3 nothing being able to -- I think they have the right to
4 frame their arguments and collect the arguments in the
5 way they want to frame them.

6 I'm certainly cognizant of not reinventing
7 the wheel or wasting time. This is fundamental, it's
8 not a waste of time, and the parties shouldn't be
9 deprived of the opportunity to present the type of
10 evidence that they want to present.

11 THE SPECIAL MASTER: Well, let me think about
12 how we're going to approach that issue.

13 I guess the only other thing I was going to
14 mention -- or I really wasn't going to mention, I
15 decided, I'll just throw it out, is -- and I understand
16 Mr. Somach's position that this was not a retaliation
17 lawsuit, but I also understand that to some extent --
18 and I'm not asking for a commitment from Texas, they
19 were sort of in a position where they could play with
20 the operating agreement, and of course the United
21 States and the two water districts are a party to it --
22 New Mexico says, well, we are kind of mad because we
23 weren't a party to it, but we probably could have lived
24 with it. Pecan Growers said they could live with it.
25 If everybody could live with it, why isn't that the

1 basis of sitting down and trying to work this thing
2 out?

3 MR. ROMAN: I would be very careful of
4 agreeing that we ever said we could live with it as
5 constituted.

6 THE SPECIAL MASTER: You said you could live
7 with it with a few modifications.

8 MR. ROMAN: And the extent of those
9 modifications would certainly be part of any
10 discussions we have. I think that what we would call
11 modifications might be called significant changes by
12 other folks or we might say we just need a few tweaks
13 and they might say, well, that's way too big.

14 As currently constituted, the State is not
15 comfortable and cannot support the operating agreement
16 because we believe that it is inequitable in terms of
17 assessing too much of the damage, as I said before, if
18 any, to New Mexico from things outside of its control.

19 So, yes, some of it is just a procedural
20 issue of we can't be having these modifications going
21 on that truly change apportionment that don't give us
22 any opportunity to weigh in on them, but it's much more
23 than just procedurally.

24 It is the facts in the operating agreement
25 and the way in which it operates that we believe are,

1 as currently constituted, unfair. But as a framework
2 for something and working it out, it truly is something
3 that we believe we can work with with the other parties
4 and with the districts to come up with something that
5 does truly account for the effect of hydrologically
6 connected groundwater pumping in New Mexico or it truly
7 does account for any water that should be getting to
8 Texas that isn't getting to Texas.

9 Of course, that begs the question in some
10 ways of what should be getting to Texas. But assuming
11 we can work with that, especially if we go back to how
12 the project has historically been operated up until the
13 time of the operating agreement, where a certain amount
14 of groundwater pumping through 1978 was factored into
15 that, and it's only deviations from that post '78 until
16 the operating agreement started that are really at
17 issue, then, yes, it's something that I think we can
18 work with and we'll have -- it's a scientific question
19 as much as a legal one, Your Honor.

20 And if we can get scientists together to
21 actually look at this and agree on some of the
22 parameters and then allocate where blame, if you want
23 to call it blame, should be laid, then I do think it's
24 something that we can work with in a way of moving on.

25 THE SPECIAL MASTER: Well, I wasn't even

1 going to bring this up. Because I -- well, first of
2 all, I don't want to be involved in settlement
3 discussions, but I also know from the special master
4 manual that they recommend that we encourage settlement
5 at every opportunity.

6 And I assumed that the settlement is probably
7 premature at this point in the sense that, as you have
8 mentioned, Mr. Roman, maybe scientists have to get
9 together and make some assessments of current
10 conditions and where the blame lies, so to speak, but I
11 just thought that if that could form a framework, do
12 you want try to do it -- start talking about it now
13 before a bunch -- you know, the longer the case goes,
14 there's the cost factor, which is not inconsequential.

15 But maybe even more of a factor is the one
16 that was raised about just everybody's under this cloud
17 of uncertainty. And if this case goes on for another 5
18 or 10 years, that means 5 or 10 more years of
19 uncertainty in addition to the substantial
20 out-of-pocket costs that are forming. I guess that's
21 something --

22 MR. ROMAN: Could I address that real
23 quickly, Your Honor? Because I agree completely, you
24 know. I'm on the ground, you know, I hear about the
25 consequences of that uncertainty. And for some of the

1 municipalities, maybe their uncertainty is lying with a
2 decision that might come 10 or 15 years down the line.

3 Farmers on both sides of the border, they are
4 faced with this uncertainty every day as far as what do
5 we plant, how much are we going to get for our
6 allocation. They may have troubles getting loans for
7 what they need because of that uncertainty.

8 So I'm absolutely aware of how much that
9 uncertainty can affect an entire regional economy. And
10 I don't think that it's too premature to discuss having
11 a framework to then use what would need to be some of
12 the technical people to start looking at this.

13 But what's difficult is when you -- if we
14 were to establish a framework and some bedrock
15 principles on which if we can agree on these things,
16 then let's turn it over to the geeks, if you will, and
17 I say that with all the love in the world for the
18 scientists, but the difficulty is when you're going to
19 have a framework set up and then be litigating and
20 trying to settle it at the same time in terms of
21 resources, again, very limited resources that would
22 have to go towards full-blown litigation on one hand
23 and developing individual scientific models, but also
24 working with scientists getting together in a group and
25 trying to come up with some answers to this.

1 I understand that this case has been going on
2 for a long time but not relative to many other complex
3 interstate water cases. I understood that Texas is
4 saying we need to get to trial right away because we're
5 being irreparably harmed.

6 We certainly disagree with that and say that
7 there's an adequate remedy of law to the extent that
8 they've not received what they should be.

9 The farmers are clearly, in Texas, receiving
10 what they need for their irrigation purposes, given
11 that about half the water going over there is being
12 used for municipal supplies instead of farming
13 supplies.

14 So I would just urge us not to be rushing
15 headlong, if necessary. It's not necessary to get
16 there by a certain time; it's necessary to get it
17 right. And if there's -- if we're able to develop that
18 sort of framework and come to those sorts of bedrock
19 principles, and I'm not saying we would be able to, but
20 we're very much amenable to trying to do that at this
21 stage.

22 But we would then have to approach Your
23 Honor, if we are able to make some progress, and see
24 how that might factor into how this case goes along.

25 And that gives me just -- I want to bring up

1 one other point, if I could. You brought up early on
2 in this case the idea of bifurcation, especially
3 bifurcation of liability and damages.

4 And at this point, as you've heard so much
5 today, there's no agreement on a period of record on
6 what apportionment there is, what the rights and
7 obligations of each of the parties are. All we have is
8 what each party is saying is their position, and any
9 damage calculations would be made based on what each
10 party says is their position.

11 It seems to make a whole lot more sense from
12 a standpoint of judicial efficiency to determine what
13 rights and obligations are and whether they've been met
14 or not, who has been damaged, and to what extent
15 they've accrued liability before you start to engage in
16 the very expensive and time-consuming procedure of
17 calculating those damages, when, depending on how the
18 Court rules, those calculations and all that work may
19 well be moot down the line.

20 And I haven't talked to the other parties
21 about this, but I did want to raise it today since you
22 had raised it earlier, and we haven't talked about it
23 for a while, and it seems like now we're looking at how
24 the case might be developing over the future, it might
25 be a good time to revisit it.

1 Certainly not something we would have to do
2 today, but I at least want to raise it as an issue.

3 THE SPECIAL MASTER: Well, just a
4 second -- one second, Mr. Somach.

5 If what you're proposing, Mr. Roman, is that
6 we suspend discovery to allow for some negotiation --

7 MR. ROMAN: Not at all.

8 THE SPECIAL MASTER: -- I'm not interested in
9 doing that.

10 MR. ROMAN: No, not at all.

11 THE SPECIAL MASTER: Actually, to be honest
12 with you, the more I've kind of gotten into it, the
13 less I'm inclined to bifurcate.

14 I'm not -- as I more fully appreciate what
15 all the issues are, there may be some argument about
16 any bifurcation of a remedy, but certainly not as to
17 the damages. I don't think -- I don't think you can
18 separate liability and damages in this case.

19 Now, you know, if we decide that the damages
20 are X, then there's going -- there may have to be a
21 separate discussion on, okay, how do you remedy those
22 damages. But if -- but if -- you know, to use an old
23 adage, there's no harm in talk.

24 If New Mexico is doing a lot of things wrong
25 but Texas is still getting its water because you

1 figured out some way to do it and compensate them in
2 some other way, well, then I don't know that Texas has
3 much to complain about.

4 So to be honest with you, I'm less inclined
5 the more I get into the case. But I'm open. I mean,
6 you know, as we get towards trial management, I
7 certainly think this case may be tried in stages,
8 that's a very common way to do trials like this.

9 I can see, for instance, I don't know how
10 many days it will take, but X number of days where we
11 do nothing but put on historians, and then X number of
12 days where we do nothing but put on hydrologists. Now,
13 those will be long days.

14 But, you know, I can see where we might not
15 do a traditional, okay, the plaintiff puts on his whole
16 case A to Z, the State puts on his whole case A to Z,
17 you put on your defense, you know, we may look at it in
18 specific issues.

19 All right. Having said that, Mr. Somach?

20 MR. SOMACH: Well, you said a lot of what I
21 was going to say. I just want to say the State of
22 Texas is always open for discussions, and Mr. Gordon,
23 others within the state have, I think, made that clear.
24 So I just want to put that aside.

25 Secondly, you've already indicated this. We

1 do not want a stay in this case, whether it be
2 discovery or the case itself. We think it's important
3 to move forward toward trial.

4 We agree with you that bifurcation is not
5 appropriate. In fact, we've got damages and economic
6 issues that we will be submitting to New Mexico on May
7 31st when our expert reports are due. It's part and
8 parcel of our case in chief.

9 To the extent that remedies might be
10 appropriately dealt with after there's a determination
11 of liability and the scope of damages, I think that is
12 something, however, that makes sense in the scheme of
13 things. So I just wanted to at least articulate
14 Texas's position.

15 THE SPECIAL MASTER: Mr. MacFarlane or
16 anybody else want to speak?

17 MR. MACFARLANE: I don't have much else to
18 add on this point, Your Honor. I think, candidly, I
19 think the parties are probably still too far apart to
20 engage in meaningful settlement discussions at this
21 time, although, you know, the United States will always
22 sit down and listen to a proposal from anybody. But I
23 think the case should proceed on the track it's on
24 right now.

25 THE SPECIAL MASTER: Anything else that we

1 need to discuss, any scheduling or other issues that
2 have become problematic, beyond what we've talked about
3 so far?

4 All right. If not, then we're adjourned.
5 Thank you, everybody.

6 MR. MACFARLANE: Thank you, Your Honor.

7 MR. ROMAN: Thank you, Your Honor.

8 MR. SOMACH: Thank you.

9 WHEREUPON, the within proceedings were
10 concluded at the approximate hour of 2:09 p.m. on the
11 2nd day of April, 2019.

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1 REPORTER'S CERTIFICATE

2 STATE OF COLORADO)

3) ss.

4 CITY AND COUNTY OF DENVER)

5 I, RICHAEAL M. SILVIA, Registered
6 Professional Reporter, Certified Realtime Reporter,
7 Colorado Realtime Certified Reporter and Notary Public,
8 State of Colorado, do hereby certify that the said
9 proceedings were taken in machine shorthand by me at
10 the time and place aforesaid and was thereafter reduced
11 to typewritten form, consisting of 205 pages herein;
12 that the foregoing is a true transcript of the
13 questions asked, testimony given and proceedings had.
14 I further certify that I am not employed by, related
15 to, nor of counsel for any of the parties herein, nor
16 otherwise interested in the outcome of this litigation.

17 IN WITNESS WHEREOF, I have affixed my
18 signature and seal this 10th day of May, 2019.

19 My commission expires September 18, 2021.

20

21 s/ Richael M. Silvia
22 Richael M. Silvia, RPR, CRR, CRCR
23 Certified Realtime Reporter
24 Commission No. 20054027487
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