

NO. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS
v.
STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF MARCH 9, 2021, REMOTE
MOTIONS FOR SUMMARY JUDGMENT HEARING BEFORE HONORABLE
MICHAEL A. MELLOY, SPECIAL MASTER, UNITED STATES
CIRCUIT JUDGE, 111 SEVENTH AVENUE, SE, CEDAR RAPIDS,
IOWA 52401, beginning at 10:31 a.m.

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1 **JUDGE MELLOY:** Let's get started. I'm
2 sure there will probably be some people joining us as
3 we go along, but the -- try to figure out some way to
4 get rid of that ding. I'm not sure if I can do that
5 or not.

6 This, of course, is in the case of State
7 of Texas versus The State of New Mexico and State of
8 Colorado, United States Original No. 141. We're here
9 this morning on the pending motions for summary
10 judgment, and before I take the appearances, just a
11 couple of housekeeping matters. I think there was a
12 little confusion about the service, and we have made
13 sure that the video service that's taking care of the
14 Zoom hearing is -- has an updated service list. I'm
15 not sure they had an update one before yesterday, but
16 we made sure they have the current service list that's
17 been updated from time to time over the past number of
18 months. Also, just a reminder that please if you are
19 not one of the attorneys who is participating in the
20 hearing, please turn off your video if it is on, and,
21 also, I would ask everyone to mute their microphone
22 unless you're actually speaking, so we don't get a lot
23 of background and hear your dog or anything barking or
24 any cat videos or anything of that nature so please do
25 that.

1 So to get started, let's take the
2 appearances. We'll start with the State of Texas.
3 Mr. Somach, are you going to lead off?

4 **MR. SOMACH:** Yes, Your Honor. For the
5 record, Stuart Somach counsel of record for the State
6 of Kansas -- State of Kansas -- State of Texas. With
7 me from Somach Simmons & Dunn are Theresa Barfield,
8 Sarah Klahn, Francis Goldsberry, Robert Hoffman. From
9 the Texas Attorney General's Office, Priscilla
10 Hubenak, and if he hasn't joined already, he will
11 join, and that's the Texas Rio Grande Commissioner,
12 Mr. Pat Gordon. Also on the phone will be Suzy
13 Valentine, who is the engineer advisor to the Texas
14 Rio Grande Commissioner. We also have some expert
15 witnesses that will be listening in to the hearing.
16 They did submit declarations. That would be Dr. Scott
17 Miltenberger, Dr. Robert Brandes, and Dr. Bill
18 Hutchison.

19 **JUDGE MELLOY:** All right. And for New
20 Mexico?

21 **MR. WECHSLER:** Good morning, Your Honor.
22 Jeff Wechsler from Montgomery & Andrews for the State
23 of New Mexico. Also representing New Mexico, we have
24 Cholla Khoury and Zachary Ogaz from the Office of the
25 New Mexico Attorney General. Marcus Rael, Luis

1 Robles, and Susan Barela for Robles Rael & Anaya.
2 Lisa Thompson, Michael Kopp from Trout Raley, and John
3 Draper and Corinne Atton from Draper & Draper. We
4 also have in attendance New Mexico State Engineer and
5 Compact Commissioner John D'Antonio, the Interstate
6 Stream Commission Director Rolf Schmidt-Petersen, the
7 general counsel for the Office of the State Engineer,
8 Gregg Ridgley, the general counsel for the Interstate
9 Stream Commission, Arianne Singer and Shelly
10 Dalrymple. We also have experts, as well, listening
11 in. Thank you.

12 **JUDGE MELLOY:** And Colorado?
13 Mr. Wallace?

14 **MR. WALLACE:** Yes, good morning, Your
15 Honor. This is Chad Wallace for the State of
16 Colorado. Also from the Colorado Attorney General's
17 Office are Preston Hartman and Scott Steinberger. We
18 also have listening in from the Colorado Division of
19 Water Resources, State Engineer Kevin Rein, Deputy
20 State Engineer Mike Sullivan, and Division Engineer
21 Craig Cotten.

22 **JUDGE MELLOY:** And for the United
23 States?

24 **MR. DUBOIS:** Good morning, Your Honor.
25 James Dubois for the United States, lead counsel, at

1 least. With me from Department of Justice is Judith
2 Coleman, who will actually be presenting the argument
3 this morning for the United States, Lee Leininger and
4 Jennifer Najjar, and from the solicitor's office, we
5 have -- from Department of Interior, we have Chris
6 Rich and Shelly Randel, and we have, I believe,
7 Michelle Estrada-Lopez and Rita Frazier from the
8 Bureau of Reclamation, and, also, we have a couple
9 staff members on, Emily Maitland and Seth Allison. I
10 don't think I've missed anyone. If I have, I
11 apologize, but it's -- I think we're up to 80
12 something folks on the call at this point.

13 **JUDGE MELLOY:** All right. Albuquerque
14 Bernalillo County Water Authority, who do we have on?

15 **MR. BROCKMANN:** Good morning, your
16 Honor. It's Jim Brockmann on behalf of the
17 Albuquerque Bernalillo County Water Utility
18 Authority,.

19 And joining me today is the water
20 authority's general counsel, Peter Auh, and he will be
21 -- he's got some other commitments so he'll probably
22 be popping in and out of the hearing throughout the
23 course of the day. Also joining intermittently will
24 be Mr. John Stomp, who for 13 years was chief
25 operating officer for the water authority. He -- he

1 retired in December of last year and is now full-time
2 law student and a -- and a law clerk for our firm, so
3 he will be joining intermittently. Thank you.

4 **JUDGE MELLOY:** All right. City of El
5 Paso.

6 **MR. CAROOM:** Doug Caroom representing
7 the City of El Paso. With me is Susan Maxwell and the
8 general counsel for El Paso Water Utilities, Danny
9 Ortiz may be joining us.

10 **JUDGE MELLOY:** All right. City of Las
11 Cruces? Are you appearing for them also,
12 Mr. Brockmann?

13 **MR. BROCKMANN:** Mr. Stein is on the
14 line. I see him talking, but I'm not sure that his
15 audio is working yet.

16 **JUDGE MELLOY:** All right. So Mr. Stein
17 is on. Anybody else you know of?

18 **MR. BROCKMANN:** I believe he's -- Las
19 Cruces is also joined by -- by Adrienne Widmer, one of
20 their members of the water utility, Jorge Garcia, who
21 is a former director, Delila Welsh, who is their
22 present utilities director, and a couple experts that
23 may be joining, Lee Wilson and Dr. John Shewmaker.

24 **JUDGE MELLOY:** Okay. Then El Paso
25 County Water Improvement District No. 1?

1 **MS. O'BRIEN:** Good morning, Your Honor.
2 Maria O'Brien, counsel for El Paso County Water
3 Improvement District No. 1. Also, Renea Hicks,
4 counsel for the District is also on. Mr. Jesus Reyes,
5 the general manager for the district is on, and the
6 district engineer, Dr. Al Blair, is -- is on.

7 **JUDGE MELLOY:** Okay. And then we have
8 Elephant Butte Irrigation District.

9 **MS. BARNCASTLE:** Good morning, Your
10 Honor. Samantha Barncastle for the Elephant Butte
11 Irrigation District. With me today, I have a board
12 member, Mr. Greg Daviet. I will also be joined by
13 another board member at some point this morning, board
14 president, Mr. Mike McNamee. We also have the manager
15 of the irrigation district, Mr. Gary Esslinger, and
16 then our two experts, Dr. Erek Fuchs and Dr. Phil
17 King, and I believe Dr. King is still in the process
18 of getting his vaccine and then he will join us as
19 soon as possible after. I would like to note briefly
20 for the Court, I did receive two requests for comment
21 from the press regarding this hearing today, and one
22 of them requested a copy of the e-mail that has the
23 Zoom link for this hearing, although I don't see her
24 on today yet.

25 **JUDGE MELLOY:** Well, that's fine. It's

1 an open hearing, and anyone from the press or public
2 in general certainly free to listen in. I just
3 reiterate, however, turn off the video and -- and mute
4 your microphone so that it's essentially viewing the
5 hearing and listening to it but not participating
6 otherwise.

7 Hudspeth County Conservation?

8 **MR. MILLER:** Yes, good morning, Your
9 Honor. This is Drew Miller for the Hudspeth District.
10 I don't believe anyone from the District is on, on the
11 call this morning.

12 **JUDGE MELLOY:** All right. New Mexico
13 Pecan Growers?

14 **MS. DAVIDSON:** Good morning, Your Honor.
15 Tessa Davidson on behalf of New Mexico Pecan Growers,
16 and perhaps listening by phone with me today is Don
17 Hackey, Tyson Akin, Phillip Arnold and David Salopek,
18 all owners of pecan farms, and I also did share the
19 Zoom link with some UNM law students who had an
20 interest in listening today so they may also be
21 joining intermittently.

22 **JUDGE MELLOY:** Okay. New Mexico State
23 University?

24 **MR. UTTON:** Good morning, Your Honor.
25 This is John Utton representing New Mexico State

1 University. I expect that the general counsel, Roy
2 Collins and also Scott Field from the general
3 counsel's office will be attending at various portions
4 of today's hearing. Also, Scott Brenner from the
5 president's office, who's in charge of water and land
6 issues. Our firm also represents Public Service
7 Company of New Mexico, or PNM, and the Camino Real
8 Regional Utility Authority, who are not in this case,
9 but they are in the -- they are claimants in the lower
10 Rio Grande adjudication, and I expect that
11 representatives of those two entities may also be
12 attending today. Thank you, Your Honor.

13 **JUDGE MELLOY:** Okay. And then we have
14 the -- anyone on for the Southern Rio Grande
15 Diversified Crop Farmers Association?

16 **MR. OLSEN:** Good morning, Your Honor.
17 A.J. Olsen as counsel for the farmers. Also joining
18 -- may be joining is the president of the Southern Rio
19 Grande Diversified Crop Farmers, Shane Franzoy.

20 **JUDGE MELLOY:** Okay. And anyone on for
21 the State of Kansas?

22 (No response.)

23 **JUDGE MELLOY:** Okay. Very good. All
24 right. Anything we need to talk about before we get
25 into the arguments with any of the counsel?

1 **MR. SOMACH:** Your Honor, I just want to
2 make a note before we get started, and that's that
3 early this morning, we received a PowerPoint, I guess,
4 that Mr. Wechsler will utilize in his presentation.
5 We had asked yesterday if there had been or there
6 would be any -- any visuals that would be utilized by
7 any of the parties and didn't hear anything back.
8 Given the evidentiary objections that all the parties
9 have -- or most of the parties have made, we're still
10 kind of going through that PowerPoint, but I just
11 wanted to make note of it. It'll take us a little
12 while. I know we have a couple of hours before we get
13 to the New Mexico presentation, but I just wanted to
14 apprise you of that before we get started.

15 **JUDGE MELLOY:** All right. Very good.
16 Thank you.

17 All right. If there's nothing further
18 then, I'll ask Mr. Somach, are you going to make the
19 argument?

20 **MR. SOMACH:** We intend to divide our
21 argument with Ms. Barfield addressing the Texas
22 preliminary motion for summary judgment, as well as
23 responding to the arguments made in the New Mexico
24 apportionment motion, and Ms. Klahn will address the
25 two notice motions made by New Mexico and also the

1 so-called state law issues raised by the State of New
2 Mexico and New Mexico amici in their briefing, and --
3 and we're doing this because of the homogenized nature
4 of this one hour that we have to address what are a
5 considerable number of motions that are out there and
6 hope that that will -- will work well. I'll handle
7 the closing way back -- or way down the road here when
8 we get there. I did want to make a couple of -- of
9 preliminary comments, however, before Ms. Barfield
10 leads out, in the way of introduction. We will
11 address incidentally the questions included in your
12 March 2nd order, and I want to address, however, as
13 way of introduction, three issues very quickly. The
14 first is kind of a reminder that the core Texas case
15 is not complicated, and because of a magnitude of the
16 briefing and what's come before, it's sometimes
17 forgotten that essentially the Texas case is one where
18 we believe the Compact anticipated that Texas would
19 receive something from the Compact, that its
20 apportionment was intended to be received as Rio
21 Grande surface water flow that would not be interfered
22 with as a flow down the river from Caballo and
23 Elephant Butte Reservoirs. While a great deal of this
24 case is factual and will attempt to determine
25 quantities of water intended to flow to Texas and the

1 degree of interference with the receipt of those
2 quantities, certain things are undisputed. Ms.
3 Barfield will go into much greater length on these
4 points, but in summary, the first part is that the Rio
5 Grande basin below Elephant Butte Reservoir was fully
6 appropriated at the time the Compact was entered into
7 in 1938. The second point is that pumping of
8 groundwater in the Rincon and Mesilla groundwater
9 basin depletes Rio Grande surface water flow. The
10 third point related to the second point is that,
11 therefore, groundwater pumping in New Mexico depletes
12 surface water flow that otherwise is apportioned to
13 Texas. While factual development may be necessary to
14 determine the baseline that actions by New Mexico are
15 measured against, as well as the scope of the Texas
16 apportionment, those three points are not in dispute,
17 and they form a foundation not only for everything
18 that will precede us in these motions -- succeed us in
19 these motions, as well as as we move into -- into
20 trial.

21 The second introductory point I wanted
22 to make relates to the structure and the apportionment
23 within the Compact and the 1938 depletion condition.
24 Again, Ms. Barfield will also discuss these points in
25 detail, but, in short, Texas believes that the text

1 and structure of the Compact are unambiguous and
2 provide that the area below Elephant Butte Reservoir
3 was to be treated as a unity and that the treaty
4 obligation to Mexico and the EBID contractual rights
5 were to be taken from Texas' apportionment and that
6 the apportionment was not the same as the project
7 allocation any more than the project boundaries define
8 the scope of Compact boundaries below Elephant Butte
9 Reservoir. Texas also believes that the text and
10 structure of the Compact unambiguously preserves a
11 1938 depletion condition, not just above Elephant
12 Butte Reservoir, which appears to be admitted by New
13 Mexico, but also below. But the point that I wanted
14 to make in the context of what I just said is that if
15 you determine the Compact is ambiguous on either of
16 those points, there are now material factual issues in
17 dispute that need to be considered on the
18 interpretation of the Compact on those issues and that
19 that would preclude summary judgment on them and that
20 those questions would need to go to trial.

21 The third point I want to make is really
22 related to the last point, also, and that is many of
23 the issues raised in your March 2nd order are similar
24 to those you raised in your April 14th, 2020, order.
25 In the Texas motion, we attempted to address those

1 issues but noted then, as I note now, that many of
2 those issues are fact intensive and require further
3 factual development that can only be properly
4 addressed at the time of trial. While there are
5 various objections pending on evidentiary materials,
6 the nature of those disputes and the magnitude of the
7 issues will require a reservation of rulings until
8 trial when those issues can be had.

9 With that as an introduction, I'd like
10 to introduce Ms. Barfield, who will address the Texas
11 motion

12 **JUDGE MELLOY:** Thank you. Before Ms.
13 Barfield starts, I do want to make one request to
14 Heather. Would you, after the hearing is over, I
15 understand you're doing realtime; is that correct?

16 **THE REPORTER:** Yes.

17 **JUDGE MELLOY:** Would you -- would you
18 e-mail me the realtime transcript or disk and -- I
19 know there will be an official transcript later, but
20 just so we have it as soon as possible to use for --
21 for our purposes?

22 **THE REPORTER:** Yes. Absolutely.

23 **JUDGE MELLOY:** All right. Ms. Barfield.

24 **MS. BARFIELD:** Good morning, Your Honor.
25 Good morning. I'm Theresa Barfield. I will address

1 three fundamental components of the Texas motion for
2 summary judgment. First, what is the Compact
3 apportionment as set forth in an unambiguous 1938
4 Compact. As part of that discussion, Your Honor, I'll
5 talk about Issue No. 4, as well as Issue 2(e) in Your
6 Honor's March 2nd order, which tie into that
7 apportionment discussion.

8 Second, I'll discuss that the Compact
9 protects delivery of the apportionment of conditions
10 that existed at the time the Compact was executed in
11 1938, and, third, I'll discuss that New Mexico's
12 groundwater pumping depletes surface water flows in
13 the Rio Grande in excess of the '38 condition as
14 established by New Mexico's own admissions. I will
15 then defer to Ms. Klahn. Ms. Klahn will address the
16 remaining Issue 2 questions that you had in your March
17 2nd order, which are very factually intensive, as well
18 as state sovereignty issues and some other matters,
19 Your Honor.

20 So, first, in evaluating the
21 apportionment question, Your Honor, the first thing
22 that we have to decide is that overarching issue of
23 whether the Compact is unambiguous or whether it is
24 ambiguous. Now, Mr. Somach mentioned this, but I'm
25 going to go through it in a little further detail. So

1 as we know, the Compact is a contract. It is a law of
2 the United States, as well. The Court's duty is to
3 enforce its terms. If the plain text is unambiguous,
4 a Court cannot consider relief that is inconsistent
5 with the terms of the Compact itself. If it is
6 ambiguous or if we need extrinsic evidence, material
7 and disputed extrinsic evidence, then summary judgment
8 isn't proper. We have to go onto trial to determine
9 these issues in terms of the meaning and intent of the
10 contract -- Compact rather.

11 Now, as set forth in Texas' briefing,
12 the apportionment in the 1938 depletion condition,
13 they're not ambiguous. You can read the Compact, the
14 terms of the structure and the text as supporting the
15 text's position. Now, by way of contrast, the New
16 Mexico apportionment scheme, as set forth in their
17 motion, it's built entirely on extrinsic evidence.
18 Their motion must fail as a matter of law on that
19 basis alone. Now, the difference between our argument
20 and the apportionment that's put forth by New Mexico
21 is we don't need the extrinsic evidence, and if we are
22 right that we don't need it because the text is, in
23 fact, unambiguous, then the Court need not and, in
24 fact, cannot go any further than that.

25 Now, that brings us to the question of,

1 well, what exactly is the Compact apportionment?
2 Well, you only have to go as far as the Compact
3 itself. In Article 3, New Mexico receives its sole
4 apportionment at the Colorado/New Mexico state line,
5 then you move onto Article 4, which has New Mexico
6 deliver the Texas apportionment into the reservoir,
7 subject, of course, to preexisting legal obligations
8 already in place at the time the Compact was
9 negotiated and, of course, this is the 1906 treaty,
10 and it's also the EBID Reclamation contract. Then you
11 take a look at the Article 4 delivery obligation by
12 New Mexico into the reservoir in conjunction with the
13 Article 1 definitions. New Mexico delivers in the
14 project storage, but it becomes usable water under the
15 Compact. It's an inflow/outflow gaging situation. So
16 how does the Compact deal with water under Article 4?
17 Well, we really need to look at Articles 7 and 8.
18 That gives us context, Your Honor. So 7 and 8 in
19 Texas as well as the Texas Rio Grande commissioner,
20 the power to make demands of New Mexico as well as
21 Colorado, such as credit relinquishment, releasing
22 water in upstream storage reservoirs, as well as the
23 ability to actually accept relinquished water back
24 into the reservoir. So this is power to control the
25 water in project storage under the Compact that

1 becomes usable water once New Mexico delivers it into
2 the reservoir. Now, we're not ignoring, Your Honor,
3 the fact that it does also include an allowance for
4 New Mexico to make a demand for releases from
5 Colorado. We -- and we addressed this in our brief.
6 But if New Mexico could not demand from Colorado, that
7 would leave New Mexico holding the proverbial bag in
8 terms of when Texas made a demand upon New Mexico for
9 water. So it's consistent.

10 So this brings us to the Article 3 and
11 Article 4 delivery requirements. Delivery, by
12 definition, means to surrender control. Once the
13 water is delivered into the reservoir, New Mexico
14 simply has no more control over that water, and that's
15 why Article 7 and Article 8 powers belong to Texas.
16 Now, certainly New Mexico admits, and quite frankly,
17 why shouldn't it, that once Colorado delivers the
18 indexed volume of water to New Mexico under the
19 Article 3 requirements, that Colorado has no further
20 dominion or control over that water that's been
21 delivered. So -- but New Mexico would nonetheless
22 have us believe that the definition for delivery under
23 Article 4 is somehow different than the definition
24 under Article 3. It's just not. And well accepted
25 principles of contract interpretation, which apply

1 here, which are wholly briefed in our motion as well
2 as in our opposition to New Mexico motion dictate that
3 it's not.

4 Now, under both Articles 3 and 4,
5 delivery is an express obligation. It's accompanied
6 by the word shall. It is a clear and unambiguous
7 mandate. Now, did the Compact expressly say -- and
8 this is a point New Mexico raises -- New Mexico, don't
9 deplete when the water is released from the reservoir?
10 Well, no, those express words are not in the Compact,
11 but they didn't have to be. New Mexico relinquished
12 control when it delivered the water to the reservoir
13 under Article 4 just exactly like Colorado
14 relinquishes control when it delivers to the
15 Colorado/New Mexico state line under Article 3. Even
16 EBID, as set forth in the EBID brief, who is the sole
17 beneficiary of project water within geographic New
18 Mexico says that over the course of nearly a hundred
19 years of performance, that EBID has always considered
20 its project water supply to come from the Texas
21 apportionment. This is the Compact Texas geographic
22 New Mexico concept. You have to deal with the area
23 below the reservoir as a unit. You can't divide it up
24 the way that New Mexico wants to divide it up. There
25 just has to be a unity, and this --

1 **JUDGE MELLOY:** What is it in the Compact
2 that says that the EBID contract entitlement is not an
3 apportionment to Texas -- I mean, to New Mexico? Why
4 is that not an apportionment?

5 **MS. BARFIELD:** So the EBID -- let me
6 read that back.

7 **JUDGE MELLOY:** Pardon me?

8 **MS. BARFIELD:** So the -- here -- here's
9 the thing. This gets into the idea that the
10 downstream contracts, as the Supreme Court noted in
11 its March, 2018, order are intertwined with the
12 Compact. We get it. The project is intertwined with
13 the Compact and, in fact, you know, one of the
14 Compact's purposes is to protect the project. So in
15 order for us to consider whether or not the language
16 that's in the EBID contract, the downstream contract,
17 is an apportionment or not an apportionment, let's go
18 ahead and look to the language of the contract itself
19 because what is clear in those contracts, Your Honor,
20 is that this 57/43 split, and that's the apportionment
21 scheme that New Mexico is putting forward, that split
22 is not a water allocation split, even in the plain
23 language of the downstream contract. That split, Your
24 Honor, is an approximate division of irrigable acres
25 between the two districts who are the recipients of

1 the project water. Now, even though you can look at
2 historical performance and say, well, maybe the water
3 has historically been split from a project allocation
4 perspective, kind of along the lines of that 57/43,
5 it's a very factual analysis; however, it doesn't mean
6 that the pro -- that the contract itself expressly
7 identified that to be an apportionment. The word
8 apportionment isn't in there. The word water
9 allocation isn't in that contract. So --

10 **JUDGE MELLOY:** I thought previously you
11 had argued that that was an allocation but not an
12 apportionment? I thought that was always your
13 argument.

14 **MS. BARFIELD:** It is an allocation.
15 Yes, Your Honor. And that's not inconsistent. So the
16 contracts do support that the water -- okay. The
17 project supply is delivered through the project
18 pursuant to those contracts, but what I am talking
19 about is the plain text and the unambiguous language
20 of the contract itself and the fact that New Mexico
21 uses that 57/43 split that's set forth in those
22 contracts as the means by which it believes it's
23 entitled to call that apportionment. But if we're
24 really looking to the plain text and the plain
25 language of not only the Compact but the contract, the

1 contract doesn't actually call it a water allocation
2 split. It calls it -- it's a split that talks about
3 irrigable acres that's about recouping project money.
4 It's about how the districts had to pay the FED's back
5 for the project construction cost. Now, in practice
6 and how the project worked in terms of, you know,
7 dividing up the water and so forth, according to
8 performance history, well, sure, loosely that was used
9 as some sort of benchmark; however, that doesn't make
10 it plain language that -- that is attributable to the
11 actual Compact. We have to --

12 **JUDGE MELLOY:** Do you dispute -- do you
13 dispute that that has been the allocation for 60 years
14 and that they have done it that way for 60 years?

15 **MS. BARFIELD:** Well --

16 **JUDGE MELLOY:** You said earlier, it was
17 -- it was a fact issue, but is it a disputed fact
18 issue? Is -- is that really in dispute?

19 **MS. BARNCASTLE:** The precise details are
20 very disputed. They are the subject of what need to
21 be tried testimony, but for purposes of what we're
22 here to do and certainly for purposes of what Texas is
23 asking for relief for in its motion for summary
24 judgment isn't the determination of the specific
25 quantitative analysis of how the split has occurred

1 over the course of history since the Compact was
2 enacted. It is talk -- we're talking in broader
3 terms, the umbrella terms of what is the actual
4 apportionment language the apportionment that Texas is
5 entitled to. The details of determining the
6 quantities of that apportionment, how the quantities
7 have been determined from, you know, annually from
8 each year since the Compact is -- is -- has -- was
9 enacted and all the things that affect that, those are
10 factual issues, and those are issues that will have to
11 be decided at trial. So even if we determine
12 apportionment, what the apportionment is here, and,
13 again, what the apportionment is, is Texas is entitled
14 to all of the water in the reservoir once it's
15 delivered pursuant to Article 4 by New Mexico, and
16 then what happens after that, it becomes project
17 delivery, project allocation, you're looking at
18 supply, you're looking at one of the numbers, you're
19 talking about qualitative analysis that is a disputed
20 factual issue, and there's a lot of nuances and a lot
21 of things that go into those analyses, and that's why
22 we have all of these experts. But we don't need the
23 experts to look at the plain language of the Compact
24 itself and determine what's the apportionment. We can
25 do that now. We can determine the apportionment now.

1 We can go to trial, and we can talk about quantifying
2 that apportionment.

3 So moving on, Your Honor, if --

4 **JUDGE MELLOY:** Go ahead.

5 **MS. BARFIELD:** Okay. If we go onto --
6 let's talk about -- in terms of the apportionment,
7 let's go ahead and talk about one of Your Honor's
8 questions that you asked in the March 2nd order. One
9 of those was talking about the Supreme Court language,
10 and I do think this is an important issue to address.
11 New Mexico has raised this issue several times, and
12 Your Honor tees it up so that we can talk about it
13 today and really the issue is the March, 2018, opinion
14 stated that the United States was serving as an agent
15 of the Compact charged with ensuring the Compact's
16 equitable apportionment to Texas and part of New
17 Mexico is, in fact, made. And that part of New Mexico
18 is, in fact, made, that's where the rubber meets the
19 road, and that's what we've all been talking about.
20 Now, the Supreme Court cited in its March, 2018,
21 opinion on the reply brief that Texas had written in
22 response to certain exceptions that -- that were
23 filed. So the question --

24 **JUDGE MELLOY:** Actually -- they not
25 cited it. When I went back and looked at your reply

1 brief, they almost quoted it verbatim so, I mean, that
2 was --

3 **MS. BARFIELD:** That's correct.

4 **JUDGE MELLOY:** That was Texas. They
5 quoted Texas' language in the opinion.

6 **MS. BARFIELD:** Well, and that -- therein
7 lies the question, was it Texas' language? So let --
8 let's talk about that. That's actually what I wanted
9 to address today. So that -- that really speaks to
10 Your Honor's questions about was it -- did -- did that
11 constitute an admission by the State of Texas and then
12 you also wanted to know if it would be law of the
13 case. So I -- I would say definitively the answer to
14 both of those questions is no, Your Honor, but, you
15 know, first, let -- let's talk about the admission
16 issue. The phrase that Your Honor questions is simply
17 not an admission under the law, and, also, we can
18 provide case citations supplementally if Your Honor
19 would like them, but the gist of it is that you cannot
20 inadvertently admit something in the context of a
21 legal brief, and particularly have it then construed
22 to the detriment of your client when you're not
23 talking about some sort of equivocal
24 evidentiary-related issues. Context matters. So Akin
25 to citing to case authority in support of a legal

1 proposition, the context of the cited case matters,
2 like, you know, courts would typically frown upon
3 attempts to take cases out of context in order to
4 stand for proposition that wasn't supported by the
5 original use of that same proposition. So the same
6 applies here. When we trace the source of the
7 statement in question, which is critical to
8 understanding what an answer to these questions must
9 be no, you see that the text in Texas' reply to the
10 exceptions did not constitute some sort of unequivocal
11 statement regarding New Mexico according to how the
12 apportionment below the reservoir. In the Court's
13 2018 opinion, we were also -- this is important to
14 look at the context of the 2018 opinion, as well. We
15 were addressing the limited issue of the scope of the
16 United States intervention in the case in the context
17 -- context of those two exceptions that the Court
18 agreed to hear. So Texas filed this brief. We filed
19 it addressing several aspects of the exceptions, but
20 it was primarily related to New Mexico's requests that
21 -- that the Court should disregard all of the Special
22 Master's reasoning to support the recommendation to
23 deny its motion to dismiss. So that's the source that
24 was cited. When you trace that source and you go to
25 Page 40 of Texas' exceptions, you see that Texas

1 actually cited the first Special Master in the first
2 interim report at 219. That's where that statement
3 came from. Then when you go to the Special Master's
4 first report at 219, you see a discussion there that
5 refers back even within the report itself to Page 212.
6 So once you get through tracing this back to the
7 context of where that statement came from, you see
8 that the Master was talking about -- he was using the
9 language in tandem with saying New Mexico did not have
10 any state sovereignty, dominion, or control of the
11 water. So what Texas did in its response brief was to
12 just repeat the Master's language from the Master's
13 report, but we did so in support of our endorsing the
14 entirety of the first Special Master's report, which
15 included that there was no sovereignty, no dominion,
16 and no control by New Mexico over the water below the
17 reservoir. We read that short phrase and part of New
18 Mexico as a Reclamation allocation to EBID, not an
19 apportionment to New Mexico, because you can't have an
20 apportionment that when you have no sovereign rights
21 for it. So you just can't divorce the relationship
22 between the cite and the source of the cite, the
23 context matters. Indeed, even the Special Master in
24 the first report, in the same paragraph that Texas
25 cited, the Special Master describes the U.S. claim as

1 one that is, quote, "To protect its ability to deliver
2 project water to its consumers as required by
3 contract." So that is the context that we're looking
4 at. Further confirmation that the phrase should not
5 be read as an admission is that Texas has never
6 endorsed the motion that New Mexico had an
7 apportionment below the reservoir. You need only take
8 a look back at the discussion between Mr. Somach and
9 the first Special Master on this very issue during
10 oral argument on New Mexico's motion to dismiss. Now,
11 this was back in August of 2015. There, Mr. Somach
12 made the exact argument that we're making now. He was
13 very precise, and to show you the precision, I'm going
14 to read what he said. It's very brief, but it was at
15 Page 84 for Your Honor's records of that August
16 transcripts in 2016. Mr. Somach stated, "The proper
17 analysis is that the water is delivered into Elephant
18 Butte Reservoir to Texas and that Texas' right to that
19 water apportioned to it is subject to two things: The
20 preexisting project contracts, particularly for water
21 delivered into southern New Mexico and the treaty
22 obligations, the 60,000 acre-feet treaty obligation."
23 He also made a similar statement at Page 79. Also
24 important is that this issue of apportionment was not
25 teed up as a true discussion point until now, this

1 briefing, and upon Your Honor's request during status
2 conference that we all had over the course of the past
3 few years and certainly after the March, 2018,
4 opinion.

5 Excuse me. So this feeds into Your
6 Honor's second question related to this subject in
7 that order, and that's whether or not this Supreme
8 Court language should become a law of the case. Now,
9 again, the answer to that is no, but I just want to
10 take Your Honor back to that April 14th, 2020, order
11 that Mr. Somach mentioned in his introduction. There
12 Your Honor has previously addressed this question when
13 it considered and denied New Mexico's motion for
14 partial judgment on matters previously decided. Now,
15 you'll recall that those were the law of the case
16 motions, and we have one that was out there, as well,
17 that you -- that you heard. So in the New Mexico
18 motion, however, those law of the case motions, the
19 issues that New Mexico asked Your Honor to consider
20 and, in particular, Principle No. 8, and I say
21 "Principle" because that's the language that New
22 Mexico used in its motion, but New Mexico's Principle
23 No. 8 was the exact same statement in question here,
24 and New Mexico even cited in their motion to the
25 Court's March, 2018, opinion in support of the

1 statement as one of its principles. So New Mexico put
2 forth Principles 6 and 7, also. They were all loosely
3 based on this idea that they had an apportionment
4 below the reservoir and even for Principles 6 and 7,
5 New Mexico cited back to this same statement in the
6 Court's opinion. So importantly, Your Honor, in
7 denying New Mexico's request to elevate that statement
8 into law of the case, you know in your April 14th
9 order at Page 3, again at Page 7, and Page 11, that
10 the rulings in this case to date, including the March,
11 2018, Supreme Court opinion, were preliminary, and
12 largely jurisdictional and very narrow in the scope.
13 You were mindful and cautionary to us as the parties
14 to not try to expand the scope of this beyond what had
15 truly been developed from an evidence perspective.

16 Your Honor further confirmed in that
17 order at Page 11 that the Supreme Court did not
18 purport to address the details of each party's Compact
19 apportionment. You, again, reference that at Page 19,
20 that whether New Mexico entitlements below the dam
21 Compact rights is an outstanding issue. You know, in
22 sum, the parties -- we did brief that issue and took
23 your determination in that April 14th order with quite
24 frankly your questions that were outstanding and
25 instructions and sort of, like, what you would like to

1 see developed from evidence perspective, and that
2 brings us to where we are today because we, Texas and
3 New Mexico, filed these motions, and from Texas'
4 perspective, we did try to capture Your Honor's open
5 questions, as reflected in that April 14th order and
6 answer them with evidence in -- in our MSJ.

7 Now -- go ahead.

8 **JUDGE MELLODY:** Can I ask you to go back
9 to something you talked about, I think, at the initial
10 -- maybe -- maybe somebody else is going to cover
11 this. But as I understand it, it has always been
12 Texas' position that the 1938 condition is in essence
13 frozen for purposes of Compact interpretation, which
14 raises a whole host of issues, but I'll just limit it
15 to a couple. First of all, what do we mean by the
16 1938 condition? Do we mean the condition on the day
17 the Compact was actually signed? Do we mean the
18 condition that was existent when the joint
19 investigative report was prepared in the mid to late
20 '30s, which I think most people would agree has formed
21 kind of the basis for the Compact? Do we look at the
22 fact that at the time the Compact was signed, a lot of
23 crops were not being -- a lot of the acreage was not
24 being farmed because of various government programs on
25 the Great Depression. As I understand it, your

1 position is that we also have to go back and put the
2 same crops in. We've got to plow up the pecan groves
3 and replant it in cotton. I mean, is that -- is that
4 what you're saying? We look at what -- we look at
5 exact number of acres with exact same crops that were
6 being cultivated on the date the Compact signed or is
7 there any flexibility in that?

8 **MS. BARFIELD:** So, Your Honor, I -- I
9 think those were all very good questions, and I want
10 to respond to that twofold. First, you raised the
11 issue of, you know, perhaps it was all very factual.
12 Well, it is very factual. So that type of factual
13 discussion is precisely what the parties will be doing
14 at trial. It's precisely what the parties have been
15 doing with their experts. There's been a massive
16 amount of effort to go back and to look at those
17 issues, and there's -- there are many variances to
18 actually quantify what the '38 condition was. But
19 it's fair to say for purposes of what we're doing
20 here, and certainly for purposes of the relief that
21 Texas asked for in its motion for summary judgment is
22 that we don't have to define what the '38 condition is
23 right now from a quantitative perspective. We just
24 need -- or what we've asked for is a determination
25 that Texas is entitled to it. Now, Ms. Klahn also, I

1 will tell you, that she will go into a little more
2 detail in -- particularly in the context of Your
3 Honor's questions from March 2nd, which speak to these
4 historical documents, particularly at the time of --
5 of entering into the Compact, but for purposes of
6 looking at what was -- or is the relief that Texas is
7 asking for, again, it is about establishing that we
8 are entitled to the '38 condition. We completely
9 understand that there's going to be a lot of
10 discussion as to what that actually means. There's
11 going to be a lot of input, a lot of facts, a lot of
12 disputed facts that are very material. They have to
13 go to trial. And it's going to be an evidentiary
14 production to talk about to really define what the '38
15 condition is, but what we are saying is that at this
16 point in time, we're entitled to a ruling that says we
17 are -- we get the '38 condition. Let's go try and
18 figure out what that is and what that looks like and
19 what those quantities would be and evaluate how those
20 quantities played out over the course of the operation
21 of this Compact. But we are entitled to the '38
22 condition. That's the baseline. So let's stop
23 talking about these other things. We're entitled to
24 the '38 condition. And when we look at whether or not
25 we are actually entitled to the '38 condition, the New

1 Mexico admissions are super important for the Court to
2 consider. And this goes back to talking about, you
3 know, plain language of the Compact, what are these --
4 what do these sections of the Compact mean, and more
5 importantly, what has New Mexico admitted in that
6 regard. So we have indices that exist and are free
7 for delivery that are by New Mexico's own admission
8 based upon 1938 depletion conditions. New Mexico
9 admitted this through witness Estevan Lopez, who was
10 put up to talk about these issues as a 30(b)(6)
11 witness, so, of course, as a 30(b)(6) witness, he was
12 talking as an agent of New Mexico and speaking as if
13 he were New Mexico, and he admitted this. So
14 likewise, the amount of water that gets delivered into
15 the reservoir under Article 4, again, is based upon a
16 1938 condition. Mr. Lopez also admitted that that '38
17 condition applies above the reservoir as it applies to
18 Article 4 in the context of his 30(b)(6) deposition.

19 We also have requests for admission --
20 yes, Your Honor? You're silent. You're muted. Still
21 muted.

22 **JUDGE MELLOY:** What do we mean by '38
23 condition? Is it the condition that existed on the
24 day the Compact signed? Is it the condition that
25 existed for the roughly six months or year that took

1 to negotiate the Compact? Is it the condition that
2 formed the basis of the Joint Investigative Report? I
3 mean, what is -- if I am saying the -- if I'm saying
4 the '38 condition applies, what do we mean by that?
5 Forget about the facts about what that condition is.
6 Just what is -- what is -- is it a specific date? Is
7 it a time frame? Is it an investigative report? What
8 is it?

9 **MS. BARFIELD:** Your Honor, I don't think
10 it's a specific date. I do think it's going to boil
11 down to a time frame. What I think is clear is the
12 '38 condition is the totality of the circumstances
13 that were occurring and considered -- considered by
14 the negotiators of the Compact itself at the time the
15 Compact was being negotiated. Most certainly the JIR
16 is going to come into play. There are other reports
17 and other historical documents that are going to come
18 into play. What is clear is the '38 condition isn't
19 anything that happened after 1938. It isn't anything
20 that happened after the parties actually negotiated,
21 signed that Compact, and had the United States come in
22 and enact that Compact as a statute. It's going to be
23 things that were in close proximity to what was going
24 on at the time of the negotiations and those
25 particular details and defining the specifics of those

1 details, that's what I was referring to before, Your
2 Honor, and that's what is appropriate, because those
3 -- those are materially, some disputed, some not
4 disputed, issues in terms of what types of things,
5 what was the agree -- the agreement, the intent of the
6 drafters and so forth to establish the precise details
7 of the '38 condition, and it's going to be a big issue
8 at trial. But we're trying to establish here again is
9 just that we're entitled to that '38 condition, which
10 means none of this course of performance that New
11 Mexico has put forth in their briefing that happened
12 after 1938. That's absolutely irrelevant to what we
13 are talking about and -- and what is the set of
14 circumstances and what was the known universe of
15 things that were going on at the time of the Compact
16 was entered into.

17 **JUDGE MELLOY:** Well, I mean you can say
18 it's irrelevant, but what -- but how the project was
19 operated for 60 years has to have some relevance.

20 **MS. BARFIELD:** But the -- I think that
21 the relevance in that regard matters to the question
22 that's being asked. So I think that my point that I'm
23 trying to reiterate, Your Honor, is that the question
24 that's being asked in the motion for summary judgment
25 by Texas is the entitlement to the '38 condition

1 itself. Now, New Mexico may comment at trial when
2 we're talking about this '38 condition -- let's say
3 the Court establishes the '38 condition, says, yes,
4 Texas, you're entitled to that. You're entitled to
5 that condition. It's not going to stop New Mexico
6 from coming in at trial and bringing in course of
7 performance evidence over the course of, as Your Honor
8 states, the next 40 years or the next 80 years or
9 whatever to say, well, you know, you guys did all
10 this, and we know that question of acquiescence is out
11 there. Those are trial issues. Those aren't issues
12 for summary judgment. Those are issues that might be
13 relevant to damages, that might be relevant to say
14 that, you know, at some point, there's got to be a
15 mitigation or something or another or you're not
16 entitled to everything you asked for because you
17 didn't do A, B, C, or D in the course of performance
18 over the course of the next 40, 50 years. Those
19 issues are going to come into play. So I'm not
20 saying, per se, Your Honor, they're irrelevant.
21 They're not irrelevant to the grand scheme of
22 everything that the parties are doing here. I am
23 saying they're irrelevant to saying that we're
24 entitled to the '38 condition. They could become
25 relevant at some later time in a disputed fashion and

1 that trial, when we put on our live witnesses to talk
2 about these things in terms of what quantification of
3 damages that Texas is entitled to at the end of the
4 day.

5 **JUDGE MELLOY:** All right. Well, thank
6 you. Are you done, Ms. Barfield?

7 **MS. BARFIELD:** Yes. I'm going to turn
8 it over to Ms. Klahn now, make sure she has enough
9 time to go through her issues. Thank you very much,
10 Your Honor.

11 **MS. KLAHN:** Good morning, Your Honor.

12 **JUDGE MELLOY:** Good morning.

13 **MS. KLAHN:** My name is Sarah Klahn. I
14 am going to back cleanup here on the remainder of the
15 issues that are on offer for today. I want to just
16 start by addressing the question you were having the
17 colloquy with Ms. Barfield about. I think the -- her
18 points about quantifying and what's the actual number
19 and those kinds of things are valid, but the 1938
20 condition we're talking about is the depletion
21 condition associated with water that was available for
22 Texas' apportionment. This sort of plays into some of
23 the things in your March 2nd order. So in 1938, there
24 was essentially effectively no groundwater pumping.
25 So when the parties negotiated, the states negotiated

1 790,000 acre-feet for Texas' apportionment, the
2 understanding would have been that the water is going
3 to go into the reservoir and it's going to go out
4 again. I'm going to leave aside the legal entitlement
5 issues for the moment. And it's going to go some to
6 EBID and it's going to go some to Texas. But once
7 groundwater pumping became common in the '50s and
8 '60s, what happened as we tried to explain in our
9 motion was the amounts of water that were passing from
10 the project into Texas are getting picked off. Parts
11 of it is getting picked off because of groundwater
12 pumping.

13 **JUDGE MELLOY:** I always thought that was
14 what this case was about is -- is that you have
15 790,000 acre-feet come out in a -- in a full release
16 year, and EBID is entitled to some of that under its
17 contract, surface water, and whether we call that the
18 New Mexico entitlement or -- or whatever, but they're
19 entitled to that, and that Texas' position has been
20 then the -- the return flows that are generated by
21 that release and other groundwater and the other water
22 that's released that isn't given to EBID should flow
23 on down to Texas and that the -- and that it's
24 important both for quantity and quality of the water
25 that that water flow unimpeded.

1 **MS. KLAHN:** That's correct.

2 **JUDGE MELLOY:** And that -- and that it's
3 implicit in the contract or the Compact that Texas
4 cannot -- I mean, excuse me. Let me start over.

5 It's implicit in the Compact that New
6 Mexico cannot then pump water out of the river, either
7 directly or indirectly through groundwater pumping,
8 that's supposed to flow down to Texas. Now, am I --
9 am I missing -- I mean, to me, that's always been my
10 understanding of the whole -- what this case has
11 always been about.

12 **MS. KLAHN:** That's exactly right.
13 That's exactly right. And so -- so I think that what
14 we're -- what we are -- when we -- when I -- let me
15 try and tie this into your March 2nd order then, in
16 order to be efficient here. One of the things Your
17 Honor raised in the March 2nd order was in the
18 overarching theme of entitlements to return flows and
19 groundwater and accounting for those things, one of
20 them was course of performance and acquiescence
21 related to New Mexico's groundwater development, and
22 as I understand that question, it raises the legal
23 question of whether New Mexico obtains some
24 entitlement to groundwater that it would not otherwise
25 have had if Texas had objected to the development of

1 the wells in EBID. And I think given our discussion
2 here now, let me just get into this a little bit. So
3 Texas, first of all, doesn't agree that you could get
4 -- New Mexico could get such an entitlement, even if
5 there had been some kind of acquiescence, which I'm
6 going to explain to you why there wasn't. Texas could
7 not have foreseen that the wells would be -- you know,
8 obviously, during the drought, I'm sure Texas was
9 aware that New Mexico was putting some wells in
10 because Texas was putting wells in during the drought,
11 but the USGS was commissioned by the Office of the
12 State Engineer of New Mexico to do an analysis of --
13 an evaluation of what the impacts would be from
14 groundwater pumping in New Mexico. There were two
15 reports produced, and one of the things I would say
16 Texas could not have foreseen is that New Mexico would
17 allow the use of those wells contrary to the
18 recommendations in the USGS reports. So these are
19 1947/'54 reports that -- that concluded things like
20 groundwater and surface water in the lower Rio Grande
21 are the same source. Little net new water can be
22 produced in EBID from groundwater pumping because the
23 two resources are the same. Pumping will dry up the
24 drains leading to a shortage of return flows, and if
25 pumping is employed, it ought to be measured, and

1 reductions and return flow amounts should be replaced.
2 These were the United States' recommendations.
3 Subsequently -- and, Your Honor, I'm going to just
4 break here and tell you we have a list of documents
5 that may be responsive to your March 2nd Paragraph
6 2(a) request, what documents are important for these
7 things, and if you'd like at the end, I can -- we can
8 supply those by a letter with a Sharefile link. But
9 these have all been disclosed by us previously, and
10 they are all referred to in our declarations. There's
11 a subsequent report in 1961 by a New Mexico state
12 engineer -- sorry -- New Mexico State University
13 engineering professor, Gunaji, and he suggested -- his
14 report concurred with the USGS reports as far as how
15 the wells should be developed, but interestingly,
16 there was data in that report that suggests that at
17 least initially, New Mexico well users were operating
18 consistent with the USGS recommendations. In fact,
19 during the wetter years of '58 to '60, Gunaji has a
20 table that shows there was very little well pumping.
21 So early on, there was recommendations about how well
22 pumping could have been done without injury to Texas.
23 There was, in fact, early -- apparently early evidence
24 that they were being operated in that manner, and I
25 think it's just impossible for Texas to have foreseen

1 that the wells would come to be developed to be used
2 in the way that they've been used today. And I have
3 to -- I have to inject here. I'm sure Ms. Coleman is
4 going to get into this, but the United States didn't
5 encourage well pumping during the drought. There are
6 some drought notices that I saw were in Mr. Wechsler's
7 power point. If you actually read the language of the
8 drought notice, what the U.S. -- what the Bureau was
9 trying to do was to ensure that as many farmers as
10 possible could get a crop off during the drought, and
11 those drought notices encouraged farmers who had wells
12 to transfer some of their water rights temporarily to
13 small tract farmers who weren't going to be able to
14 make a crop. So I think that the whole sort of what
15 we know documentarily about what happened in the late
16 '40s through the '50s into the early '60s is
17 consistent with what probably -- the recommendations
18 were made. It looks like initially they were being
19 operated -- the wells were being operated that way.
20 It was only subsequently that I think issues that --
21 it was only subsequently that problems arose. The
22 other thing I don't think Texas could have foreseen is
23 that New Mexico would do so little to regulate its
24 wells. I mean, we have testimony from the Rio Grande
25 Water Master that they don't do any regulation of

1 groundwater in New Mexico to protect Texas' Compact
2 apportionment, and further more, there's the fact --
3 again, we're getting into a lot of facts here, as Ms.
4 Barfield has already made the point. There's plenty
5 to talk about at trial. But, you know, there were
6 some wet and dry periods between the 1950s until the
7 early 2000s, and honestly, some of the wet periods
8 mask the impacts from groundwater pumping. That
9 doesn't mean they weren't accumulating effects from
10 the groundwater pumping, and that those chickens came
11 home to roost in early 2000s when the drought started
12 but almost immediately, things -- Texas objected. The
13 districts negotiated the operating agreement starting
14 in 2006. We filed this lawsuit in 2013. So I don't
15 think that there's any period of Texas, you know,
16 knowing what was going on in New Mexico and -- and not
17 acting on it, and -- and I guess I would point out
18 also that based on Kansas versus Nebraska, the second
19 Special Master's report on April 16th, 2003, lays out
20 the legal standard for acquiescence, which requires a
21 long period of time during which Texas knew that New
22 Mexico was depleting its apportionment, and further,
23 it requires of New Mexico to have informed Texas that
24 it was using groundwater in a way that was depleting
25 Texas' apportionment so that Texas was on notice. It

1 turns the whole notice thing in New Mexico's arguments
2 on its head. Texas became aware of the problem with
3 New Mexico groundwater pumping in the early 2000s, as
4 I mentioned, and the legal standard for acquiescence
5 has not been met in this circumstance. I'd also
6 mention, New Mexico itself didn't even know how much
7 groundwater was being pumped until around 2009 when
8 they finally had a measurement scheme in place. So
9 the wells that were installed in the 60 years
10 previously, when one of the recommendations from the
11 USGS was you ought to be measuring what you're doing
12 here, took them 60 years to get to a place where they
13 were actually knew what was going on so that sort of,
14 I think, hopefully ties together a little bit of the
15 discussion that you had regarding the '38 condition.
16 Do you have any questions about that?

17 **JUDGE MELLODY:** No. Go ahead.

18 **MS. KLAHN:** Okay. While I'm taking my
19 argument out of order, I'm going to go ahead and move
20 on to the section in your March 2nd order related to
21 D1 and D2, and the -- I'm -- I really am responding
22 directly to what was in your order so if I -- if I'm
23 sort of plowing old ground, let me know, and I can --
24 I can stop. But the questions asked what is D1 and
25 D2. Well, D1 is the curve developed using Mexico

1 diversions plotted against Caballo releases. D2 is
2 the curve developed by the Bureau using all
3 diversions, EBID, EP1, and Mexico, against Caballo
4 releases. So why did the Bureau create this curve in
5 1985 or so after the project had been passed to the
6 districts so that the districts could operate it. The
7 Bureau had to come up with a way to ensure that they
8 were actually delivering enough water to the
9 districts. So historically, the Bureau had kind of an
10 ad hoc system where they took water orders from
11 farmers and they delivered directly to the field
12 headgate. In the new regime, what the Bureau did was
13 they did we're taking this curve, and we're going to
14 say if there's releases of 300,000 from Caballo --
15 that's probably not the right number, but some number
16 from Caballo, we can go to this curve and say this is
17 how much should be in the river below Caballo to make
18 sure that the deliveries are equitable to all the
19 districts, because the change was they delivered to
20 the district canals. So it was, like, basically
21 delivering it to a river headgate instead of all the
22 way to the farms, which has significant implications
23 for the quantity of water that was delivered to the
24 farms during that era. So what was delivered at the
25 river headgate has more losses by the time it gets to

1 the farms. So --

2 **JUDGE MELLOY:** I think that what --
3 maybe I wasn't clear. What my -- what I was concerned
4 about was the fact that it's my understanding that in
5 developing D1 and D2, that Reclamation took into
6 account the groundwater pumping and that that was --
7 that was factored into the D1/D2 formulas and that
8 that was done obviously they're the administrator, so
9 they must've thought it was okay to do that, and that
10 Texas, if you don't want to use the word acquiescence,
11 but whatever, didn't have any objection to -- to that
12 formula that factored into groundwater pumping. Am I
13 wrong in how they developed the D1/D2?

14 **MS. KLAHN:** I mean, to the extent that
15 you're attributing intent to include groundwater
16 pumping, I think it is not a correct statement. It
17 was just a fact between '51 and -- 1951 and 1979, the
18 years of diversions that the Bureau used to develop
19 D2, there was groundwater pumping kind of built into,
20 baked into that diversion data because whatever was
21 diverted downstream at EP1 had had some of that water
22 depleted on its way down. Now, nobody knew how much
23 water had been depleted. There were no groundwater
24 models at that point. There was no New Mexico
25 measurement data. That wasn't going to happen for

1 another 30 years. So I think the parties just -- or
2 the Bureau at least, I don't think there was any --
3 again, I'll let Ms. Coleman speak to what they knew,
4 but my guess is that there wasn't any understanding
5 that there was -- that there -- that there could be or
6 should be an adjustment to that D2 curve, and that's
7 what we've suggested in our papers, including in
8 Dr. Brandes' second declaration, that the adjustment
9 to the D2 curve would actually bring it up to account
10 for those depletions that happened after 1938.

11 As far as objections, as far as I know
12 New Mexico didn't object, Texas didn't object to the
13 use of the D2 curve, but remember this is a project
14 delivery curve. The states don't have a say in how
15 the projects deliver water, and project deliveries are
16 not reported to the Rio Grande Compact Commission. So
17 there's kind of a disconnect between what the Bureau
18 is doing with D2 and what the states knew and when
19 they knew it and, also, by the same token, the Bureau
20 can't control New Mexico groundwater pumping. So the
21 impacts from the reliance on D2 for over those years
22 were things that even if the Bureau had -- had, you
23 know, wanted to do something about it, it -- they
24 didn't have the authority to.

25 Let's talk a little bit about

1 groundwater pumping and the relevance of groundwater
2 pumping in Texas and the questions asked what is the
3 relevance, if any, and I'm -- the answer is not much.
4 The Hueco Bolson, which is where most of the
5 groundwater pumping in Texas takes place, and the
6 Hueco, just for geographical purposes, is located
7 overlying sort of the southeast side of El Paso all
8 the way down through EP1. So vast majority of the
9 Compact area within the state -- geographical state of
10 Texas is underlain by the Hueco Bolson. It's
11 undisputed that the Hueco Bolson is disconnected from
12 the Rio Grande. Pumping in the Hueco Bolson has
13 nothing to do with this case, and New Mexico's
14 modeling demonstrates it has nothing to do with this
15 case, and we recited that in our reply brief citing to
16 the testimony of Shane Coors who has found that the
17 impact of El Paso gage flows from Hueco Bolson pumping
18 is essentially insignificant. By contrast, the Texas
19 Mesilla -- so the Mesilla aquifer, which is what we're
20 mostly arguing about in this case, the Mesilla aquifer
21 does extend across the state line into Texas just a
22 little bit. El Paso's Canutillo well field is located
23 in the Mesilla Bolson and -- and the -- it, according
24 to New Mexico's declarant Peggy Barroll, El Paso pumps
25 about 24,000 acre-feet as an annual average. By

1 contrast and total pumping in the Texas Mesilla Bolson
2 is around 31,000 acre-feet. By contrast, and you'll
3 see some graphs, I'm sure today in the New Mexico
4 PowerPoint. New Mexico's pumping in the Mesilla
5 aquifer ranges up as high as 300,000 acre-feet. So
6 the -- the orders of magnitude difference between
7 those two types of -- those two locations of pumping
8 mean that the majority, like 80 percent of the impacts
9 that are seen at the El Paso gage from Mesilla pumping
10 are attributable to New Mexico, and the final thing to
11 know about this is that Texas has said from the
12 beginning that whatever portion of that impact at the
13 El Paso gage can be attributable to Texas, Texas is
14 going to take care of. Texas is already mitigating it
15 in the sense of having El Paso having contracts that
16 do a species of mitigation to deal with those impacts.
17 So this whole idea that what's happening in Texas is
18 as bad as what's happening in New Mexico as far as
19 groundwater depletions simply isn't true.

20 I think the last point I'd like to talk
21 about before I jump into the New Mexico motions is the
22 very first question you've asked in the second -- in
23 the March 2nd order about which documents inform
24 issues related to the Texas entitlement of 790,000
25 acre-feet, which, Your Honor, we understood to mean

1 how return flows fit into that entitlement, and as I
2 said at some point this morning, we have a list of
3 documents we'd like to supply to you that sort of
4 focus -- will focus the inquiry into that, but for the
5 most part, I think that your reliance on the JIR is
6 correct, because I think that's from what we can --
7 from what the historian tells us, the negotiators for
8 the Compact relied on the JIR. So the numbers that
9 were being discussed during the negotiation for the
10 Compact, 800,000 acre-feet was the number that was
11 discussed for the longest period of time. That
12 incorporated this understanding that there were going
13 to be return flows that were not going to be depleted
14 by subsequent groundwater pumping, and that would
15 allow as much as, I don't know, 20 percent, 25 percent
16 additional amounts of water because, of course, the
17 waters released from Caballo goes on to the land, some
18 of it returns. So you have a relationship that
19 something like 790,000 acre-feet of apportionment to
20 about 920,000 acre-feet of total project yield because
21 some of that water gets reused. And I -- you probably
22 already found it in the JIR, but Table 90 in the JIR
23 is the table that reflects those return flow amounts
24 and then Dr. Brandes, our declarant, just reduced that
25 Table 90 to an R chart in his second declaration. But

1 you can see that as you move down the river, Texas --
2 more and more of the source of supply that was
3 anticipated to be used by farms down the river would
4 be return flow, and so when you get to Texas, it's
5 been 30 and 60 percent.

6 Your Honor, I still have the two New
7 Mexico motions to kind of pre -- pre-respond to, and I
8 want to make sure I'm doing okay on time.

9 **JUDGE MELLODY:** Well, yeah, go ahead.

10 **MS. KLAHN:** Okay. Thank you. The first
11 one, I'll -- I'll start with is the -- the one that's
12 the New Mexico motion that suggests that Texas didn't
13 sustain any damages in what New Mexico refers to as
14 full supply years, and Your Honor has reduced that to
15 Paragraph 2E, asking a similar question, Must
16 groundwater pumping be curtailed and/or does Texas
17 sustain any damages during what it refers to as full
18 supply years? So groundwater pumping effects on the
19 aquifer are cumulative, and so there could be years in
20 which EP1 receives an adequate amount of water, but
21 it's not the total amount of water that could have
22 been available if New Mexico's wells hadn't been
23 operated. And so the -- the cumulative effect of that
24 is the reason why our damages evaluation was for the
25 entire period of record. We didn't ask for damages on

1 an annual basis as may have happened in other cases
2 that Mr. Wechsler was involved in. We asked for
3 damages that span the period of record because that
4 allowed our analysis to take into account the years
5 that may have been a little wetter and the years where
6 there was more groundwater pumping when it was a
7 little drier. So that's the kind of flat-footed
8 answer to that question. Second, more importantly
9 perhaps, we've never alleged that we needed project
10 supply. That's not what the Compact apportioned to
11 us. The Compact gave us an apportionment, and the
12 danger of using full supply instead of an
13 apportionment as the test for whether or not Texas got
14 its water is that the -- the definition has changed
15 over time. So if New Mexico's motion state a valid
16 claim, which we don't think it was, begs the question,
17 okay, which full supply do you want to use? Do you
18 want to use the full supply when the Bureau said it
19 was 760,000 acre-feet? Do you want to say it was
20 736,000 acre-feet? Which full supply number, because
21 they've changed over the years, would one employ, and
22 in any event, none of them are 790,000 acre-feet. In
23 short, Texas' apportionment has been reduced every
24 year because of groundwater pumping, full supply or
25 not, and the damages may bump up and down, but that's

1 exactly why we did a damages analysis that span the
2 period from '85 to -- to 2016. Any questions on that?

3 **JUDGE MELLOY:** No.

4 **MS. KLAHN:** The last thing I'd like to
5 address is the New Mexico's motion arguing that we
6 should -- that Texas should not be able to recover
7 damages for years in which it gave New Mexico no
8 notice that it didn't receive its water, and in the
9 context of this portion of my argument, Your Honor,
10 I'm going to also -- these -- these arguments, I would
11 say sort of also cover the Texas positions on the
12 application of state law in this case that are
13 reflected in our brief. As a starting point, to get
14 to New Mexico's position that -- that -- that Texas
15 was required to give notice, New Mexico starts with an
16 improper reading of California BUS saying that Cal BUS
17 imposes state law in Reclamation projects for both
18 appropriation and distribution. New Mexico completely
19 ignores Footnote 21 in Cal BUS, which acknowledges the
20 -- where Justice Rehnquist acknowledged the
21 applicability of the supremacy clause, and when state
22 law conflicts with the goals of federal law, it has to
23 give way. More importantly, Cal BUS applies to the
24 Bureau, and so in that respect, New Mexico's argument
25 that somehow Texas is subject to New Mexico state law

1 and has to place a priority call is divorced from the
2 language of the Compact. I mean, nothing in the
3 Compact language suggests that the states even talked
4 about the possibility that Texas would have to be
5 subject to Section 8 of the Reclamation Act or
6 otherwise subjected to New Mexico law to get its
7 apportionment. In fact, quite the contrary because if
8 you look at the historical context of the negotiation
9 of the Compact, as Dr. Miltenberger's declarations
10 establish, there was a 1935 lawsuit filed by Texas
11 alleging that New Mexico was interfering with
12 deliveries to Elephant Butte Reservoir, and that --
13 that lawsuit was -- was litigated in front of a
14 Special Master all the way up to Texas' rebuttal
15 testimony. At the time Texas was prepared to put on
16 its rebuttal testimony, the states said asked for a
17 stay and then spent 1937 and 1938 negotiates the Rio
18 Grande Compact. Given that historical back --
19 backdrop, Texas' -- I can't -- I'm not sure if I said
20 this, and if I did, I apologize. I'll say it again.
21 The 1935 lawsuit filed by Texas alleged that New
22 Mexico was interfering with deliveries to Elephant
23 Butte Reservoir. That was the condition that was in
24 place at the time before the Compact. That was when
25 state law arguably applied. With that historical

1 backdrop, Texas would not have negotiated a Compact
2 that subjected it to New Mexico state law for
3 distribution of its apportionment. It just doesn't
4 make any sense. And New Mexico deals with this lack
5 of Compact language essentially silencing the Compact
6 by suggesting that this is exactly like Tarrant,
7 except Tarrant lost. Tarrant made the same argument.
8 They said silence in the Compact means that we can
9 invade Oklahoma, and we have this cross-border commons
10 where we can take water out of Oklahoma that we would
11 be entitled to under the Red River Compact if it would
12 just flow down here, and Justice Sotomayor does, in
13 fact, reference these background principles ideas that
14 perhaps the states had in mind and New Mexico sort of
15 tries to tag off of that. But ultimately, the Court
16 rejected the background principle that somehow or
17 other, the states had agreed to allow this
18 cross-border activity. Here, New Mexico argues
19 silence in the Rio Grande Compact supports an
20 interpretation that Texas ceded its sovereignty in the
21 same way, that Tarrant was arguing that Oklahoma had
22 ceded its sovereignty, but there would be no point to
23 such a Compact. Why would Texas agree to have its
24 water subject to distribution rules made by the State
25 of New Mexico? It could have just skipped the Compact

1 all together and -- and let EP1 and the Bureau fight
2 with New Mexico, and it chose not to do that.

3 Now, with that said, under Hinderlider,
4 there is a place for New Mexico law under Hinderlider,
5 and that is that New Mexico law has to be applied in a
6 way that protects the apportionment as it travels
7 below Caballo to the El Paso gage, and to date, not
8 only has this not happened, the opposite has happened,
9 and New Mexico groundwater pumping has depleted Texas'
10 apportionment. In its response to Texas' motion for
11 summary judgment, New Mexico suggests that Hinderlider
12 on Page 108 of Hinderlider, that Hinderlider, somehow
13 consistent with the Bureau placing a call on the river
14 so Texas can get its apportionment. It's not clear
15 how Bureau -- the Bureau can call for Texas'
16 apportionment. It's not a party to the Compact. But
17 anyway, it isn't what Hinderlider held at all. The
18 cite on Page 108 stands for the proposition that the
19 Colorado state engineer, a state official in Colorado,
20 was entitled under the Compact to make sure that water
21 flowed down the river from Colorado to New Mexico to
22 satisfy the river Compact. And furthermore, on the
23 same page in 108, Hinderlider states that the upstream
24 state here in New Mexico, upstream state's water
25 rights are only entitled to water to the extent they

1 don't interfere with the downstream state's
2 apportionment. That's the proper reading of
3 Hinderlider, is that no application of state law can
4 create an interest below Caballo that is equivalent or
5 superior to the Texas apportionment. In conclusion,
6 there's no basis to impose a notice requirement on
7 Texas in evaluating our damages claim, and there's, as
8 a threshold to either the State receiving its
9 apportionment or for it to recover its damages. If
10 you have any questions, Your Honor, I'll stand for
11 them.

12 **JUDGE MELLOY:** I don't think so. Thank
13 you. All right. Are we ready to move onto -- is
14 Texas done at this point?

15 **MS. KLAHN:** Yes, sir.

16 **JUDGE MELLOY:** Okay. Then we'll move
17 onto United States. Just for scheduling purposes, let
18 me say, what I think I'll do is I'll hear the United
19 States argument. We'll take a break, and then
20 probably after New Mexico, may take a longer break for
21 some type of lunch break and then come back and hear
22 the amici and Colorado and any rebuttal. So let's --
23 let's move onto United States at this point. After
24 this argument, then I will take a short -- a short
25 break. And let me see. Remind me, again, who's going

1 to argue for the United States? Ms. Coleman, is it?

2 **MR. DUBOIS:** Yes, Ms. Coleman is going
3 to argue for the United States.

4 **JUDGE MELLOY:** All right. Ms. Coleman,
5 you may proceed when you're ready.

6 **MS. COLEMAN:** Good morning, Your Honor.
7 In 2014, the United States intervened in this case to
8 protect the important federal interest in the Rio
9 Grande project and that concern motivated our
10 complaint and intervention and it motivates or motion
11 for partial summary judgment now. To use the words of
12 the New Mexico state engineer, there are problems on
13 the Rio Grande. We intervened in this case to get
14 those problems resolved for the future, and we seek
15 prospective relief only. To that end, we seek partial
16 summary judgment on two issues. First, we seek a
17 declaration that under the Compact, New Mexico has an
18 obligation to prevent water uses that interfere with
19 the project's ability to effectuate the apportionment.
20 That includes preventing water uses that interfere
21 with the project's access to return flows. We agree
22 with the statement in the March 2nd order that the
23 790,000 acre-feet normal release represents
24 Compact-level recognition of the importance of return
25 flows in the apportionment. Under Hinderlider, New

1 Mexico must administer state law below Elephant Butte
2 and anywhere in the state, in fact, in a manner that's
3 consistent with the Compact's design. The Compact's
4 design, with respect to the area between Elephant
5 Butte and Fort Quitman, is straightforward. Article 4
6 of the Compact unambiguously requires New Mexico to
7 deliver water to the project for distribution by the
8 project, and distribution by the project
9 unquestionably entails the use and reuse of return
10 flows, including return flows that originate as
11 seepage. We use the term depleted when we talk about
12 New Mexico's obligations, and we distinguish that from
13 use and so we say that New Mexico's obligation under
14 the Compact is to prevent water uses that deplete the
15 Rio Grande beyond EBID's contractual entitlement, and
16 that's in two senses, as I think it's been
17 established, and there's no question. The only entity
18 in New Mexico that's authorized to receive water from
19 the project is the Elephant Butte Irrigation District,
20 therefore, New Mexico has an obligation to prevent
21 depletions of the Rio Grande by entities other than
22 EBID irrigators. It also has an obligation to prevent
23 depletions above EBID's contractual amount. Now, when
24 I say depletions are different from use, that's
25 different -- that's -- you know, that's a very

1 important distinction, especially given the bulk of
2 New Mexico's response to our motion.

3 **JUDGE MELLOY:** Let me go back to the
4 statement you just made. I want to make sure I
5 understood it. I understand the argument that New
6 Mexico has to administer its laws in such a way as not
7 to deplete water that is -- that is part of Texas'
8 apportionment, including arguably return flows, and
9 we'll talk about that a little more. But are you also
10 saying that they have some obligation to make sure
11 EBID doesn't take too much water?

12 **MS. COLEMAN:** Well, in --

13 **JUDGE MELLOY:** I'm not sure if I
14 understood your second statement.

15 **MS. COLEMAN:** Yes. Insofar as New
16 Mexico has an obligation to ensure that water use or
17 water depletion by anyone, anywhere to not exceed the
18 amount of EBID's contractual entitlement. So it could
19 be that even if EBID irrigators are staying fully
20 within their contractual entitlement, if the surface
21 water is being depleted by others outside of EBID,
22 that's on top of the E BID contractual entitlement.
23 Now, if --

24 **JUDGE MELLOY:** Well, I guess what I'm --
25 what I'm -- I want to make sure I understand because

1 -- and maybe it's not important for summary judgment,
2 but there are -- there are two potential entities here
3 within New Mexico. You have the EBID members who are
4 -- who are contractually entitled to some amount of
5 water, and then there is the non-EBID farmers and
6 growers who, as I understand it, the argument is New
7 Mexico has to control their water use so that it
8 doesn't impinge on Texas' apportionment, right? But
9 what about if -- what -- what responsibility, if any,
10 does New Mexico have to make sure EBID isn't taking
11 too much water? Are you saying they're responsible
12 for -- for that as opposed to the United States or as
13 opposed to some other entity?

14 **MS. COLEMAN:** Well, EBID itself is
15 responsible for making sure its irrigators don't take
16 too much water, but, yes, you know, the state engineer
17 is -- has the regulatory authority and should exercise
18 that regulatory authority to make sure that EBID
19 irrigators and indeed all irrigators and all users,
20 including municipal users, do not take water to an
21 extent that depletes the Rio Grande beyond EBID's
22 contractual entitlement. I'm not sure if that answers
23 your question.

24 **JUDGE MELLOY:** Well, it sort of does.
25 I'm just -- I'm just not sure that EBID is necessarily

1 to be treated exactly the same as any other person who
2 -- any other entity that may be pumping water. But I
3 don't know. I'll have to think about that.

4 **MS. COLEMAN:** We certainly agree EBID
5 has, you know, unique status within New Mexico in that
6 it is the entity that is actually authorized to be
7 depleting surface water. Anyone outside of EBID is
8 not, therefore, the -- you know, the state engineer
9 who retains regulatory authority below Elephant Butte
10 should be exercising that authority to regulate those
11 uses outside of EBID, and I think the state engineer
12 has, you know, implemented regulation with respect to
13 irrigators within EBID through the farm delivery
14 requirement, which I'm sure we'll discuss at length at
15 some point, and, you know, in recognizing, you know,
16 the surface water allocation and saying they have to
17 use the surface water before they use the groundwater,
18 you know, but as -- as I think you said in your April
19 14th order from last year, the Compact applies to the
20 entire state, and New Mexico has to, you know,
21 administer water uses by all water users consistent
22 with the Compact.

23 So I did -- I did want to clarify that,
24 you know, we talk about depletions, and that's what
25 we've been doing here. But as we've stressed, and I

1 will stress again, we are not seeking a categorical
2 ban on groundwater pumping below Elephant Butte. That
3 would be a ban on use. We are seeking restrictions on
4 depletions that are fully consistent with the Compact
5 and its apportionment and its intention to effect an
6 equitable apportionment. So while plenty of others,
7 you know, might use the water, and although we -- you
8 know, there might be some authorization and
9 contractual issues with that, for Compact purposes,
10 you know, not every use necessarily results in a
11 depletion of surface water if, for example, it is
12 offset by import water, if, for example, it is, you
13 know, balanced out by voluntary retirement of acres or
14 fallowing in particular acres. There -- there are a
15 number of options that prevent use from becoming
16 depletion. Of course, we, you know, are not going to
17 hide the ball on this one. Of course, you know, a
18 declaration establishing New Mexico's obligation under
19 the Compact is going to result in a restriction of
20 groundwater pumping. We don't -- we don't deny that.
21 But whether we are not seeking a ban on it. It needs
22 to be administered and regulated. That's --

23 **JUDGE MELLOY:** So, now, how did -- and
24 this ties a little bit into this issue of -- of -- of
25 state law versus supremacy of the Compact and

1 supremacy of federal law. Do you envision a decree --
2 or you've asked for an injunction, but a decree or
3 something that would say, New Mexico, you have to
4 decrease your groundwater pumping by 70 percent, you
5 figure out how to do it; or are you -- are you
6 envisioning that the Supreme Court or somebody go
7 through and specifically start picking out wells that
8 have to be shut down? I mean, how are we going to --
9 I guess I'm looking at the mechanics of this. Is it a
10 declaration that New Mexico, here's what you've got to
11 do, you figure out how to get it done, or what?

12 **MS. COLEMAN:** Well, we haven't expressed
13 any position on the specific nature of the remedy, of
14 course, and we've said that the scope and content of
15 the injunction should be determined through, you know,
16 presentation of evidence. We acknowledge that New
17 Mexico has concerns about its economy, about its
18 reliance interest, and we understand the potential
19 disruptive effect. You know, now that said, you know,
20 I think we would, of course, agree that the state
21 engineer and New Mexico legislature would, you know,
22 would and should, you know, identify the ways under
23 state law to bring itself into compliance. I don't
24 know that a Supreme Court original action is the place
25 to pick and choose among wells, but I do think there

1 needs to be a clear direction, and I think we've shown
2 that some sort of injunctive remedy is needed to
3 ensure that New Mexico actually follows through this
4 time and, you know, I think what we've argued for is
5 completely consistent with what the New Mexico
6 legislature itself found and what the state engineer
7 reiterated in his brief regarding the -- you know, the
8 2003 statute and the, you know, quote unquote AWRM
9 regulations that there is an urgent need for action,
10 the state engineer needs to act, and the time for that
11 was 15 years ago. So let's -- I think we are just
12 asking for recognition of that fact to -- to shape and
13 frame the trial on the United States claims going
14 forward, recognizing that there is a -- a lot of other
15 material to be gone through at trial as between, you
16 know, the claims between the states.

17 **JUDGE MELLOY:** Well, you've asked for
18 summary judgment on the issue of an injunction, and I
19 guess the question I have is, well, what would that
20 injunction say? And as I -- and as I mentioned in my
21 order, I think injunctions that say nothing much more
22 that follow the law, or in this case, follow the
23 Compact, are frowned upon because it doesn't tell them
24 to do anything that -- that you can then measure their
25 compliance against. What -- what would -- you said

1 you wanted -- you want an injunction as part of the
2 summary judgment order. What's that injunction going
3 to say.

4 **MS. COLEMAN:** If I may just correct the
5 record on that, I think we emphasized this in our
6 reply. We are not seeking an injunction as part of
7 our summary judgment order. We are seeking a ruling
8 that we are entitled to injunctive relief with the
9 scope of that injunction to be shaped through trial.
10 I mean, I think everyone would prefer to be doing that
11 in some -- some sort of negotiated or agreed way, but
12 if that's not possible, then through trial. And I --
13 I would just -- you know, since we're not asking for
14 it as part of the judgment, you know, it might not be
15 necessary to go into this, but -- but I would, just
16 for context at least --

17 **JUDGE MELLOY:** Well --

18 **MS. COLEMAN:** Yes?

19 **JUDGE MELLOY:** Go ahead. I'll let you
20 finish. I'm sorry.

21 **MS. COLEMAN:** This is brief. I would
22 just refer the Court to Texas v. New Mexico Pecos
23 River decision from 1987. It's 482 US 124, I believe,
24 and the injunction part of that ruling is at Pages 135
25 to 36, and that injunction actually enjoins New

1 Mexico, its officers and agents and so on, to -- sorry
2 -- are hereby enjoined to comply with the Article 3A
3 obligation Pecos River Compact to deliver water to the
4 Texas -- Texas line in particular ways that were
5 established in that case using a particular
6 inflow/outflow methodology, for example. So in that
7 case, there is an injunction to comply with the
8 Compact obligation that is, you know, therefore,
9 specified in a particular way even if the actions
10 necessarily to come in to develop that implementation
11 were not specified in the order.

12 **JUDGE MELLOY:** Yeah, but we're not talk
13 -- you're not talking about an injunction that says
14 comply with a specific provision, such as the
15 requirement to -- for the inflow requirement into
16 Elephant Butte that -- that, you know -- it'd be one
17 thing if you were saying that New Mexico hasn't been
18 complying with that specific delivery obligation, and
19 we can measure that by gages. That's a whole
20 different -- that's a whole different type of thing.
21 But let me ask you this: One of the things that both
22 -- all three of the entities that are parties to the
23 operating agreement, United States, Elephant Butte,
24 and El Paso District No. 1, had urging -- had been
25 urging me not to get into the -- into the operating

1 agreement, but when you're telling -- but then New
2 Mexico is going to come back and say, well, how do we
3 figure out what to do on groundwater pumping when we
4 got the operating agreement overlaying everything? Do
5 we -- does that mean we get -- so 57 percent we only
6 get 43 percent, because I understand that's basically
7 what the operating agreement did, plus shut down all
8 the pumping? I mean, I don't know how we avoid the
9 operating agreement when we start talking about that.

10 **MS. COLEMAN:** Well, first, let me say
11 that, you know, the validity of the operating
12 agreement is not at issue in this lawsuit. That
13 counterclaim was dismissed. That claim is the focus
14 of a stayed federal district court case that is
15 awaiting the outcome of this decision, and as we've
16 said, we would look at the operating agreement again
17 and make any changes necessary to comply with the
18 order. So setting aside that issue, I think there's a
19 number of things to say about the operating agreement,
20 of course, but the -- first, you know, the operating
21 agreement is a, you know, measure that is put in place
22 to reduce the injury to Texas because New Mexico was
23 not able to take that action on its own, at least not
24 in time. So, you know, that -- that agreement is in
25 place. Now, you know, it does not address, among

1 other things, long-term impacts to the aquifer, you
2 know, as New Mexico has reminded us numerous times,
3 the operating agreement, you know, has set off even
4 more -- arguably set off even more groundwater pumping
5 below Elephant Butte as the EBID irrigators attempted
6 to make up for the fact that they were getting less
7 surface water and did so, you know, aided by the order
8 allowing them to take 4-and-a-half acre-feet per acre
9 or more. So we've got, you know, an aquifer that is
10 being depleted at an even greater rate, and the
11 operating agreement is not -- you know, cannot and
12 does not, you know, account or, you know, can't
13 mitigate against that long-term effect. And, now,
14 secondly, within the operating agreement itself, if
15 the, you know, EBID, if -- you know, as we know, the
16 operating agreement results in the, you know, EBID
17 deciding not to take some of its -- the water that's
18 released to it so that that water can be used to
19 actually make the delivery to Texas, and that amount
20 is accounting for groundwater pumping impacts, not
21 just those caused by EBID, but all the groundwater
22 pumping impacts below Elephant Butte. We think that's
23 separate injury to the project. This can be remedied.
24 The problems that, you know, New Mexico has with the
25 operating agreement can be remedied if groundwater

1 pumping within New Mexico is restricted and, you know,
2 managed appropriately. If the impacts of groundwater
3 pumping decrease, the change to EBID's water
4 deliveries also decreases, and they can be closer to
5 D2. But that is within the control of the State of
6 New Mexico, and -- and nothing in the operating
7 agreement precludes them or makes it irrational to
8 reduce groundwater pumping.

9 **JUDGE MELLOY:** One of the things that
10 I've thought about with this whole lawsuit and the
11 Compact in general is the fact that it's unusual in
12 the sense that as the Supreme Court stated in its
13 opinion, essentially the Compact incorporates the
14 contracts between EBID, Elephant -- I mean, El Paso,
15 and Reclamation, and that becomes, in essence, the --
16 the underpinnings of the Compact. And so the -- but
17 the parties, I think Colorado points this out -- the
18 parties to the Compact don't control how it's
19 administered. It's -- it's between the two water
20 districts and Reclamation. That seems very odd, and
21 -- and what's to prevent Reclamation and the two water
22 districts from renegotiating their contracts? I don't
23 know. I just -- it's made me -- I just find that to
24 be an odd way to do it, that you have three states or
25 parties to a Compact that's being administered by

1 three entities that aren't parties to the contract --
2 Compact.

3 **MS. COLEMAN:** Well, I mean, first of
4 all, you know, the states agreed to that. Congress
5 approved it. And so, you know, that's -- that's the
6 way --

7 **JUDGE MELLODY:** But what's to prevent
8 those three entities from not just renegotiating their
9 contracts to the detriment of one state or the other?

10 **MS. COLEMAN:** Well, I think that, you
11 know, Colorado's brief actually, I think that's Page
12 44, contains, I think, a helpful discussion about how
13 -- we don't, you know, fully align with Colorado on --
14 on, you know, whether you call it an apportionment or
15 not, but that Reclamation law supplies the content of
16 what, you know, the requirements and regulation would
17 be, you know, below Elephant Butte. So it delivers to
18 the project and then, you know, the project is
19 operating under Reclamation law and other federal
20 statutes and those impose restrictions. So, you know
21 -- you know, Reclamation can't necessarily go off
22 entering into contracts with whoever it wants. You
23 know, there -- there are limitations. You know, if
24 they want to provide water for -- or convert some of
25 the water to certain uses, you know, that'd have to

1 follow the 1920 act. And so even -- you know, the
2 Compact doesn't need to specify all those Reclamation
3 law requirements in order to provide, you know,
4 administerable system, and so, you know, if some -- if
5 the argument is that -- I think the states -- I
6 wouldn't say -- you know, the states can't run the
7 project. It is a federal project. Elephant Butte
8 dam, Caballo dam, those are owned by the federal
9 government, and that's -- you know, and that is under
10 Reclamation law. So, you know, if the issue is
11 they're not complying with Reclamation law, that's a
12 different issue, but it's not a provision of the
13 Compact.

14 **JUDGE MELLODY:** All right. I got you off
15 track. I'll let you get back to your argument. Go
16 ahead.

17 **MS. COLEMAN:** I'm happy to be off track,
18 frankly, rather than speaking into -- into the camera
19 with that response. I do -- Ms. Klahn covered a lot
20 of the ground that I would, and I'm sure Texas'
21 supplemental filing will cover this, but I do want to
22 look for a minute at the -- the 790 point about the
23 Compact level recognition of return flows, and, you
24 know, the Joint Investigation Report, in our view, is
25 more than sufficient on this front, and, you know, I

1 have a few other citations for you, but first, within
2 the Joint Investigation Report, I -- I would direct
3 the Court and the parties to the discussion of Pages
4 99 to 103 of the Joint Investigation Report, and in
5 particular, on Page 101, the report explains how it's
6 calculating the -- you know, the amount of water,
7 quote unquote, to be assured to the section of the
8 basin between Elephant Butte and Fort Quitman, and so
9 they're look at, you know, what's the demand from the
10 irrigation districts, what's the -- what's the treaty
11 obligation, what are the river losses, what's needed
12 for water quality. And when they're talking about the
13 irrigation demand, you know, within the project, it
14 specifically states that the report is assuming
15 continuing use of the arroyo inflows and drainage
16 returns, and based on that assumption of continuing
17 use of the drainage returns then, you know, factoring
18 in, you know, six or seven other, you know,
19 ingredients, if you will, in the calculation, the
20 report concludes that the amount to be assured from
21 Elephant Butte is 773,000 acre-feet. Now, that's
22 assuming 145,000 irrigated acres, not the 155,000 that
23 was eventually developed and authorized, but I think
24 you're already seeing them put the pin in there
25 somewhere very close to 790 based on an assumption of

1 drainage returns. And there's a similar type of
2 analysis done in -- in this -- the Board of Army
3 Engineers report regarding the Reclamation fund in
4 1911. This is New Mexico's Exhibit 310 where it,
5 again, is discussing the feasibility of the project
6 and, you know, whether it will work once it's built.
7 It was not yet built at that point. And it con --
8 looks at, you know, 750,000 acre-foot release and
9 800,000 acre-foot release, and it says, you know, we
10 think that, you know, within this range is going to be
11 an adequate supply, and part of that reasoning is that
12 the transit loss, which was assumed to be 20 percent
13 would be, quote, partly offset by the drainage return
14 and the ability to use it downstream, and it's based
15 on that assumption, you know, without that assumption,
16 it would need to be a hundred thousand acre-feet, is
17 the implication in that report, but with that
18 assumption, you could conclude something between 750
19 and 800,000 would make the project work. So this
20 notion of the, you know, drainage return being an
21 important consideration in understanding the release
22 from Elephant Butte for project purposes and
23 eventually for Compact purposes is pretty firmly
24 established in the record and, you know, other exhibit
25 cites on this, be it New Mexico's Exhibit 341, which I

1 believe specifically refers to seepage return.

2 **JUDGE MELLOY:** Do I understand from the
3 Joint Investigative Report that the number that was
4 eventually agreed upon, the 790,000, was, in large
5 part, determined by the amount of water that would
6 need to be released to flow on down to El Paso for
7 their quantity of -- of irrigation requirements, but
8 there was also a factor in there for quality of water
9 that there was some concern that if you didn't release
10 enough water and there weren't enough return flows,
11 that the salinity would get so high that the water
12 wouldn't be useful or am I -- am I understanding that
13 correctly?

14 **MS. COLEMAN:** Yes. In that there is,
15 you know, a line item. I'm referring to Table 95 on
16 Page 103 of the Joint Investigation Report, where it's
17 specifically referring to salinity control in the
18 Tornillo area, from the Tornillo canal, and -- and
19 that was an assumption that at this very bottom of the
20 project -- at the very bottom, but near the bottom of
21 the project, the return flows would -- the salinity of
22 the return flows would make irrigation not -- would
23 not be fit for irrigation use. So, yes, water quality
24 is part of that consideration and -- and that line
25 item in there in Table 95 is -- is a whopping 7,000

1 acre-feet.

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

3 **MS. COLEMAN:** Okay. I do want to talk
4 about, you know, return flows, you know -- return
5 flows. Let's talk about the New Mexico position on
6 return flows for a minute here. And I know you're
7 going to see this in their slides, in Slides 23 and
8 26, but, you know, so return flows, what do they
9 consist of? They consist of water that has been
10 delivered for irrigation that then seeps out of the
11 canals or seeps out of irrigated farmland or overflows
12 irrigated farmland and returns back to the river
13 either directly or through the drains. New Mexico's
14 definition of return flows would only include those
15 molecules of water that run the gambit of New Mexico
16 groundwater pumps and survive triumphantly returning
17 to the Rio Grande. They would exclude all of the
18 seepage on route to the Rio Grande. As long as their
19 pumps can reach it, it's not part of return flow.
20 That circular reasoning is just, you know, once you
21 see it and they have not ever really as far as I can
22 tell put it in writing, you know, just cannot be
23 sustained. It cannot be that the Compact apportions
24 water, you know, that's flowing on the surface to the
25 irrigated farmland, then when the water goes into the

1 ground, it loses its Compact status. It's no longer
2 apportioned. It's open for appropriation, but then if
3 it manages to hit a drain or the Rio Grande to get
4 back to the river, well, it's back to being part of
5 the Compact apportionment. It's just not a -- a
6 sustainable view. And in support of this view, we
7 know later on Page 62 of their reply to their
8 apportionment motion, and, again, that was an
9 incorrect citation, we might add, purporting to,
10 quote, a 30(b)(6) deposition, that actually had
11 nothing to do with it, they corrected that in Slide 23
12 of their presentation to show some testimony from Bert
13 Cortez from one of these non-30(b)(6) depositions that
14 that purportedly shows the Reclamation defines return
15 flows to include, quote, only that water that reaches
16 the bed of the Rio Grande. Obviously, you know, the
17 Court can draw some conclusions from looking at these
18 deposition testimony excerpts and the exhibits, but as
19 I just explained, the notion that return flows are
20 only the water that survives New Mexico's interference
21 is -- is wholly inconsistent with the Compact. And
22 while I'm on the subject of these slides, if I may
23 give something of a pre-buttal, it would be that, you
24 know, Slide 26 saying Reclamation never analyzed the
25 impact of groundwater pumping on return flows is -- is

1 somewhat misleading. The United States geological
2 survey has been engaged for a number of years, as New
3 Mexico well knows, on a very detailed modeling of, you
4 know, groundwater flows below Elephant Butte. That
5 model is not available in time for the litigation in
6 this case, but the notion that this has not been
7 studied is not supported.

8 **JUDGE MELLOY:** Isn't that what the
9 Conover reports were about?

10 **MS. COLEMAN:** Yes, they were. Indeed.
11 They -- and, you know, I think -- and, actually, that
12 provides a good opening to talk about what happened in
13 the 1950s, because I think if we're going to talk
14 about --

15 **JUDGE MELLOY:** Well, go ahead -- well,
16 let me just ask you this about the Conover report. As
17 I understand what he said was basically if you -- if
18 you engage in groundwater pumping within probably a
19 year or maybe less, you'll dry up the return flows,
20 but the assumption that I think was implicit or maybe
21 explicit in the report was that times of drought or
22 low water levels are transient so what will happen is
23 you dry up the return flows for a few years but then
24 there will be years of plenty and then you recharge
25 it. So it's a cycle so at the end of the day,

1 hopefully over an extended period of time, no harm no
2 foul because what you draw down, you replenish. Is
3 that -- is that a fair summary of where he got to?

4 **MS. COLEMAN:** I'm not sure if I would,
5 you know, say that he sort of casually assumed that
6 the system would restore itself. I -- you know, I
7 can't quote you Conover chapter and verse right this
8 second, but I think he acknowledged that several years
9 of sustained pumping would have a real effect, and --
10 and would, you know, severely impact project
11 operations and, of course, you know, we're now in a
12 situation -- you know -- actually, let me back up.

13 I think that assumption is what
14 underlies Reclamation's -- you know, the -- the
15 notices and announcements that say, you know, if you
16 have a well, which by the way, we couldn't control or
17 stop you from installing, but if you have a well, you
18 know, why don't you use it and give your surface water
19 allotment to your neighbor so that we all get through
20 this? And I think the understanding at that time was
21 that, you know, again, with a plentiful year, the
22 system would recharge, and then, you know, we could
23 put this behind us. We're in a situation now, and we
24 have been for 20 years, where the system does not
25 recharge. This is essentially a zero allocation year.

1 I've been informed that it's now a 4 percent
2 allocation year and the season will be delayed and
3 shortened to six to eight weeks, I believe, you know,
4 and so this notion from the 1950s that, you know, all
5 will be hunky-dory if you wait for the drought to end
6 just does not translate to today.

7 **JUDGE MELLOY:** And that's basically my
8 understanding what the problem is, that is it -- is
9 the Conover assumed that recharging but when you have
10 20 years of drought, you're not going to recharge
11 and...

12 **MS. COLEMAN:** That's correct. And I
13 think generally this -- you know, one of the questions
14 in the -- in the March 2nd order got to this is that,
15 you know, looking at New Mexico's obligations under
16 the Compact, violations of the Compact, damages to
17 Texas and so forth, just, you know, doing this on a
18 year-to-year basis is -- you know, is not a great fit
19 for this Compact in this hydrologic system, and so
20 what we're looking at is sustained interference and
21 development, you know, post Compact and, you know, in
22 a drought scenario that threatens the project, and --
23 and that's -- you know, that is why we're here, to get
24 that situation fixed. I'm trying to -- let's see if
25 there's other questions that -- that I can answer.

1 **JUDGE MELLOY:** Well, I'd like you to
2 address the issue that -- that, I think, New Mexico
3 relies upon very strongly is that Reclamation actually
4 encouraged pumping during the -- during the '50s and
5 -- and that it's baked into the D1/D2 curve with no
6 objections. So -- so there must be some recognition
7 by that, that it's -- that it's allowed under the
8 Compact.

9 **MS. COLEMAN:** So, you know, first, let
10 me -- let me just, you know, preface this with, you
11 know, the doctrine of acquiescence does not apply to
12 the United States. We are not a party to the Compact
13 or contract relying on the Compact, so we're not a
14 performing party. But I think these are --

15 **JUDGE MELLOY:** Well, let me just say
16 this.

17 **MS. COLEMAN:** Sure.

18 **JUDGE MELLOY:** You know, as I read some
19 of these cases, Supreme Court seems to get around that
20 by saying, well, it's not really acquiescence. This
21 is what it meant all along, and if it didn't mean this
22 all along, why would you have done it for 40 years.
23 And so they don't call it acquiescence. They just
24 call it contract interpretation. But go ahead. With
25 that understanding that --

1 **MS. COLEMAN:** Yes. Yes. Contract
2 interpretation where the going along and getting along
3 for 40 years is the actions of -- of the states. I
4 think, you know, there's probably some limitation to
5 be able to -- you know, I'm not denying that that
6 conduct is relevant to some aspect of this case, but
7 as far as, you know, an interpretation of what the
8 Compact says and means, I think that it -- you know,
9 it can only go so far. Now, you know, you'll note
10 that, you know, first of all, the encouragement of
11 pumping, as Ms. Klahn pointed out, is kind of, you
12 know, stressing those few -- those documents from a
13 handful of years to the extreme and have to be
14 balanced against, you know, the studies going on
15 simultaneously showing that that pumping was having an
16 impact and, in fact, to quote you other pages from the
17 project's histories where they say in 1955, oh, wait,
18 our drains ran dry, oops. You know, so this is -- you
19 know, it's a building understanding. Now, backing up,
20 again, as -- as we've stressed, Reclamation had no
21 control and indeed the state itself did not control
22 the drilling of the irrigation wells in the lower Rio
23 Grande until, you know, the state didn't, you know,
24 start to control it until 1980. So, you know,
25 Reclamation is there, the project is there, and wells

1 are starting to go in, in the 1940s. You know, and
2 then as already in the 1940s, you have drought, you
3 know, irregular or drought conditions starting, and
4 more wells are going in. And, you know, so -- and
5 then you have a period of stress, and you have a --
6 you know, a project superintendent who says, you know,
7 yes, use your -- you know, if you have a well, which
8 we couldn't stop you from putting it in, use it so
9 that your neighbor can get through this. Now, they're
10 not purporting to interpret the Compact. They're not
11 -- you know, they're not talking about, you know, this
12 is full consistent with the apportionment and things
13 like that. This is a ground-level decision in, you
14 know, extreme circumstances. I'm sure New Mexico will
15 argue that otherwise, but I think the notion that --
16 you know, that a field manager or project
17 superintendents or, you know, from Mr. Kirby,
18 Mr. Flock, Mr. Resh, Mr. Cortez, that any of these
19 people can change the meaning of statute won't get you
20 very far, I think, in the court. So let me -- I'm
21 trying to think. There was something else that came
22 to mind when I was explaining all of that. But, you
23 know, I think, the other point I want to address just
24 quickly while we're talking about the pumping that's
25 referenced in the question in your order, the wells in

1 the late 1970s, you know, EBID, you know, again, you
2 have a project manager who apparently granted an oral
3 license to EBID to drill wells that were understood to
4 be deep water wells on project rights of way from --
5 you know, we were not able to find any documents, I
6 think, beyond what New Mexico found in looking at this
7 issue, but based on the, you know, related court
8 decision in that case, those wells were used for two
9 years and -- and they stopped because state engineer
10 restricted them and then, you know -- and then the
11 EBID farmers were too upset that the -- that the wells
12 were drawing down their own wells. So with two years
13 of those pumps, we have, you know, four or five years
14 in the 1950s, and in the meanwhile -- you know, in the
15 meantime, groundwater pumping within New Mexico
16 explodes. So I think, you know, in general, as I've
17 said, you know, it's unquestionably relevant; however,
18 we think the relevance is to remedies and not to the
19 interpretation of the Compact.

20 **JUDGE MELLOY:** Has groundwater pumping
21 greatly expanded since the year 2000? The number -- I
22 should say the number of wells as -- I know New Mexico
23 says there's been expansion of groundwater pumping
24 caused by the operating agreement, but aside -- are
25 there a lot of new wells being put in?

1 **MS. COLEMAN:** Well, my understanding is
2 that there are -- you know, new wells are not
3 permitted. Instead, everything has to be
4 characterized as a change of an existing well, and,
5 you know, perhaps New Mexico can clarify this, but
6 even a change of an existing well could include an
7 expansion of that well. But I think you
8 unquestionably see an intensification of pumping in
9 the 2000s, you know, those high-capacity wells are in
10 there. They're going to be put to use when there's a
11 drought. And so, you know, New Mexico, I know, has --
12 you know, has their contention that the level of
13 pumping has not increased, and, you know, we think
14 it's -- you know, it appears to be a bit above what
15 was happening in the 1950s, but I don't think the
16 Compact allows the 1950s to be every decade. It
17 doesn't allow the 2000s to be every decade. You know,
18 it's using years of duress to define a baseline
19 apportionment to New Mexico is not consistent with the
20 Compact. Let me see. Is there anything else from the
21 list that I should address?

22 **JUDGE MELLOY:** No, that's fine. Go
23 ahead.

24 **MS. COLEMAN:** Okay. I think -- I'm
25 trying to see if there's anything else that we think

1 we need to address. You know, on this question of --
2 of agency, you know, I do want to stress, and I think
3 it's clear that from the Supreme Court's opinion, you
4 know, it's very -- you know, qualified. The U.S.
5 might be said to serve as sort of an agent of the
6 Compact charged with showing that the apportionment to
7 Texas and part of New Mexico is, in fact, made and
8 then another rough analogy is that the Compact, you
9 know, could be said to implicitly to incorporate the
10 project, not splitting the infinitive, you know, and
11 so I think there's a tendency to put an awful lot of
12 weight on -- on words that I think Justice Gorsuch was
13 using to try to convey perhaps a complex idea to -- to
14 public readership, and I don't think you need to find
15 that it's law of the case to find, you know, that the
16 analogy fits, that project effectuates the
17 apportionment. You know, the project determines the
18 distribution of water in New Mexico consistent with
19 the Compact and not -- New Mexico is not the judge in
20 its own case and could not control Texas'
21 apportionment.

22 **JUDGE MELLOY:** This goes back to one
23 question, though, that keeps coming -- we keep coming
24 back to, and you -- you disagree with Texas and say
25 that New Mexico does have an apportionment below

1 Elephant Butte, but you -- but you don't tell me what
2 that apportionment is. What is the apportionment --
3 if they have an apportionment, what's the
4 apportionment?

5 **MS. COLEMAN:** The apportionment is what
6 the project delivers to EBID or what EBID is entitled
7 to plus, you know, whichever pre-project rights might
8 be out there that, you know, likely remain to be
9 adjudicated.

10 **JUDGE MELLOY:** So --

11 **MS. COLEMAN:** Again --

12 **JUDGE MELLOY:** So is the -- so I guess
13 that's what I was asking the Texas attorneys is, is
14 the apportionment of -- that New Mexico has is that
15 the contract right that EBID has? Are they one and
16 the same?

17 **MS. COLEMAN:** You know, currently, they
18 -- you know, the EB -- I'd say that the EBID contract
19 is the, you know -- the EBID's contractual entitlement
20 is, you know, virtually all of the New Mexico
21 apportionment, and when I say virtually to leave open
22 the possibility of the pre-project water rights, you
23 know, coming in -- coming into play. But I do, you
24 know, want to push back on, you know, again, I hate to
25 say semantic issue, but trying to fit the square peg

1 of the Compact into the round hole of an equitable
2 apportionment, you know, it doesn't -- we don't need
3 to press the Compact so hard to fit it into all of
4 these boxes and all of this terminology. You know, I
5 hesitate to say that New Mexico, you know, quote
6 unquote, has an apportionment as if it's, you know,
7 some, you know, shows in commerce that, you know, some
8 block of water that they can allocate as they see fit,
9 you know, were they ever to, you know, disband EBID.
10 That's not how we -- that's not how this Compact works
11 and it's not how we would define it certainly. You
12 know, what the Compact does is it, you know, requires
13 obviously delivery to the project and then the
14 project, you know, Reclamation law, the contracts are,
15 you know, the directions, the instructions and the
16 recipe about how that apportionment occurs. You know,
17 to us, I would say that, you know, apportion is a
18 verb, and we're not talking about the -- an
19 apportionment, apportion as a noun that New Mexico
20 gets to carry around and -- and split up as it sees
21 fit. I do want to point out that EBID's -- the
22 downstream contracts include a 19 -- you know, the
23 1938 contract between EBID and EP1 approved by
24 Interior and it says expressly that that contract
25 terminates, you know, if the contract with EBID

1 terminates. So I think, you know, while, you know, I
2 don't think the Compact, you know, turns the EBID
3 contract into law, it definitely, you know, would make
4 the act of apportioning dependent on Reclamation law
5 and the existence of a Reclamation contract.

6 **JUDGE MELLOY:** I guess that was going
7 back to the question I had earlier that it just seems
8 like -- that that's kind of what the apportionment
9 almost is, is dependent upon Reclamation law, and it's
10 dependent upon a contract that the parties to the
11 Compact aren't parties to.

12 **MS. COLEMAN:** That's what they chose,
13 and that's how they chose to resolve their disputes.
14 You know, I understand the discomfort with not
15 necessarily coming out with the Compact quantifies X,
16 you know, the states have the opportunity to write a
17 Compact that way as they did for Pecos, which has a
18 57/43 split in it, and they chose not to do it. So,
19 you know, that ultimately the choice that has to be
20 respected.

21 **JUDGE MELLOY:** Well, so but just so I
22 understand, is the position of the United States that
23 the equitable apportionment that's referred to in the
24 Compact, and they use the words equitable
25 apportionment, is the contractual entitlement that

1 EBID has under the contracts with Reclamation, plus
2 maybe a little preexisting, but we'll put that aside?
3 But that is -- that is the apportionment that you --
4 that you say New Mexico has?

5 **MS. COLEMAN:** Yes. I think we would
6 agree with that characterization to the extent that it
7 needs to be defined in a particular way. Now, that's
8 a very lawyerly answer. But, you know, that is -- I
9 think that's the way we would characterize it, and I'm
10 not sure that we need to -- more needs to be said
11 about it. Actually, this brings me to the question
12 ambiguity of the Compact if I may. I think in -- in
13 the quest to -- to gain some clarity, you know, you're
14 going to hear from New Mexico the Compact is
15 ambiguous, but there's no term that they're pointing
16 to as ambiguous. This is not, you know, Pecos that
17 expressly references a 1947 condition, and there was a
18 need to interpret what the 1940 condition -- 1947
19 condition is, how it was to be calculated. There's no
20 -- there's no textual hook for that within the Compact
21 and so I think that, you know, this quest to -- to pin
22 something down is essentially a quest to rewrite the
23 Compact in light of what we know now. So with that,
24 you know, I'll -- I'll reserve the rest for -- for
25 rebuttal. I'm sure we'll have a number of things to

1 say in response to New Mexico. I don't want to hold
2 us all up from a break.

3 **JUDGE MELLOY:** All right. Okay. Well,
4 let's take -- let's take a ten-minute break, and then
5 we'll get back. It's -- well, let's see. According
6 to the clock on my computer here, it's 12:42 Iowa
7 time. Let's plan to be back at 12:55. So it would be
8 whatever 55 -- I guess would be 11:55 Denver, 10:55 in
9 the west coast. So let's -- we'll be back in about 15
10 -- 10, 15 minutes. Thanks.

11 (Break.)

12 **JUDGE MELLOY:** If you are ready,
13 Mr. Wechsler, you may proceed.

14 **MR. WECHSLER:** Thank you, Your Honor.

15 **JUDGE MELLOY:** Go ahead.

16 **MR. WECHSLER:** Thank you. And we do
17 have some visuals. We thought an hour was an awfully
18 long time to talk, especially since everybody is
19 talking. I don't know if I'll go through all of those
20 documents. It'll depend on the subjects that interest
21 you. What I do intend to talk about is quickly about
22 the apportionment and the way that we view the
23 apportionment. I'll move relatively quickly to the
24 U.S. motion and the groundwater issues because we
25 thought that -- that that was most -- what you were

1 most interested in hearing from us, and I'll -- I'll
2 finish up with talking about the full supply and the
3 notice in that order. Please at any time, I'd rather
4 be talking about the questions that are interesting to
5 you. So I want to start just with an overview and so
6 in -- in that context -- and are you able to see my
7 screen?

8 **JUDGE MELLOY:** No. Just a second here.
9 I can now. Go ahead.

10 **MR. WECHSLER:** Okay. What I want to
11 show is, the area we're talking about here, there's
12 the geographic area, and here's the Rio Grande Compact
13 area with the districts shown in -- in color there at
14 -- at the bottom, and, you know, obviously we're
15 talking about this here at the area at the very
16 bottom. We think it's just helpful to give an
17 overview as to where we are now and to do that, it's
18 more helpful to look closer there. So Texas' claim,
19 as you heard today, is that all of that water below
20 Elephant Butte belongs to Texas, even though as you
21 can see on this slide, 57 percent of that project
22 acreage is in New Mexico. It claims that New Mexico
23 surrendered any state entitlement to water for those
24 lands leaving it with -- with no protection, and I'll
25 emphasize that part because without a Compact

1 apportionment, New Mexico has no recourse if Texas or
2 the United States takes part of its -- its water. I
3 do want to take issue with one thing that Mr. Somach
4 said at the very beginning. He said it was undisputed
5 as part of Texas' position that groundwater pumping in
6 New Mexico is taking water that belongs to Texas or
7 that's apportioned to Texas, and we don't agree with
8 that, and that goes with the way that the Compact
9 apportions according to the -- the project, which I
10 now understand the United States agrees with. So
11 turning then to the United States' position, they had
12 said that New Mexico does have an apportionment. They
13 said it was unable to quantify that, but I was very
14 pleased to learn from Ms. Coleman today that actually
15 they agree largely with -- with New Mexico's position
16 on this issue. The only thing that I would comment
17 there on their position now, though, is that it's not
18 so strange to me that the states relied upon an
19 existing project to form the apportionment. After
20 all, that was an area that had been in dispute prior
21 to the Compact, even prior to the project being
22 adopted, and they found that what was working through
23 the project, they were comfortable with. They were
24 comfortable with that division. So I think what was
25 adopted by the states was the principle of dividing

1 the amount of water and that underlying principle, as
2 you can see most clearly but reflected elsewhere, is
3 the idea that there is an equal amount of water that
4 goes to each project acreage, and you see that playing
5 out through the entire course of performance of this
6 project, even predating the Compact. That's what was
7 accepted. That can't be changed at any point going
8 forward. Now, certainly, there's other aspects of the
9 downstream contracts and all of the operations that
10 don't bear on things that the Compact talks about, but
11 that underlying principle can't be talked about --
12 can't be changed rather. Colorado, it has its
13 argument that it largely adopts the motion to dismiss
14 that New Mexico had -- had previously brought, but we
15 think that it's only New Mexico offers a unified and
16 equitable explanation of the Compact, and that
17 includes a full explanation of the plain language,
18 which we think on the -- the apportionment issue is --
19 is not ambiguous. We do think that it entitles New
20 Mexico to that apportionment, and we think it's clear
21 there, but we think it should also give comfort to the
22 Court and to the Special Master that the -- the long
23 history -- negotiating history and the course of
24 performance is consistent with New Mexico's position
25 as is the 2018 decision, and really, that's the only

1 -- New Mexico's theory is the only one that's
2 consistent with all of those. Let me talk briefly
3 about the 2018 decision. You asked does it control?
4 Clearly, the answer is yes. There -- as a recap, the
5 United States had brought an exception asking whether
6 it could bring claims arising out of the Compact, and
7 the Court said yes. It reasoned that the project and
8 the downstream contracts were inextricably intertwined
9 with the Compact. It was only because the -- the
10 contracts had established a certain amount of water,
11 again, that amount that's equal to each acre. You can
12 see that in the Clayton letters, was -- was allowed to
13 supply lands and that the Compact could accomplish --
14 it's only because of that, that the Compact could
15 accomplish its purpose of effectuating an equitable
16 apportionment, and that the United States acted as an
17 agent ensuring that that equitable apportionment was
18 accomplished, and based on that very reasoning, the
19 Court allowed the U.S. to bring the Compact claims.
20 Now, you asked does that law of the case. The answer
21 is certainly yes. It's direct guidance from court in
22 this case. I don't understand Texas' dicta argument
23 given that we're talking about the same case here,
24 and, in fact, in case there's any question about that,
25 the Court was explicit about this at Page 960 of its

1 opinion where it said, quote, the case is remanded to
2 the Special Master for further proceedings consistent
3 with this opinion, in other words, it's telling you
4 that you're to follow the direction it gave in that
5 2018 decision. You also asked -- you asked about the
6 citation that the Court made to Texas and asked if
7 that's an admission, and I think there's been multiple
8 admissions throughout this case. I think Ms. Barfield
9 indicated well maybe that was just inadvertent, but
10 we've pointed out several other times where they've
11 said the same. You can see at Page 30 of our reply
12 where -- where Texas in its sur-reply said, therefore,
13 the project water leaving Elephant Butte belongs to
14 either New Mexico or Texas by Compact, and that's
15 quoting the -- the Special Master's report, and even
16 in the very first brief that they wrote in this case
17 asking the Court for leave to file the case, they
18 said, again, this is a quote, "The allocations of
19 water provided for as part of the authorization of the
20 Rio Grande project were included by the Rio Grande
21 Compact to also apportion the waters of the Rio Grande
22 between New Mexico and Texas." So it's pretty clear
23 that Texas was not being inadvertent there. So let me
24 talk briefly about the Compact itself and the
25 apportionment. So I'll talk first about the plain

1 language, and I'll make three points there. The
2 Compact explicitly keys to irrigation demands, and we
3 think that that's really important. That's the
4 purpose that they were trying to -- to solve in --
5 below Elephant Butte with the apportionment is
6 ensuring that the crops on the project lands, that
7 their irrigation demands were satisfied. And one
8 reason that's important is the amount of water that
9 was available for division and, in fact, the amount
10 that would be delivered each year changed based on a
11 whole variety of things, water supply conditions,
12 amount of water in storage, the crops that individual
13 farmers were growing, the amount of water that was
14 being ordered by -- by either citizens in New Mexico
15 or in Texas. But so long as those irrigation demands
16 were satisfied, then the -- the states were -- were
17 also satisfied. Second, the project does operate as a
18 single unit. We agree with Texas on that, and that
19 was the way it operated prior to the Compact, and that
20 meant that you operated from top to bottom to ensure
21 that each acre received the same amount of water and
22 that the same rules apply to both states. We think
23 that same principle ought to continue to apply.
24 Third, the states intended to adopt a mechanism that
25 was different from the Article 3 and Article 4 parts

1 of the Compact. So if you recall, if we back out to
2 the -- the map I'm showing you now, in this area up in
3 Colorado, they have an inflow/outflow methodology, and
4 that ensures certain flows, and then in this area, all
5 the way up to Elephant Butte, they also adopted an
6 inflow/outflow methodology, which essentially locks in
7 the amount of water that was to -- to be delivered,
8 including, I'll point out, return flows, but they
9 explicitly did not adopt that below Elephant Butte,
10 which means they intended something different. So if
11 we turn then to the negotiating history, it's likewise
12 undisputed that the Compact intended to protect
13 existing uses. So -- so why is that important? The
14 reason it's important if I go -- if I zoom in a little
15 bit is this entire area there in green, all of that
16 area was already in use at the time of the Compact,
17 and so it follows, if they intended to, through the
18 Compact, protect existing uses, they intended to
19 protect New Mexico's uses in that area, in the green
20 area that you see there. It's also --

21 **JUDGE MELLOY:** Let me interrupt you here
22 for a second, Mr. Wechsler. The -- and I think this
23 gets to the nub of the problem. What is existing
24 uses? And as I understand it, there seems to be a
25 recognition that the Joint Investigative Report formed

1 a significant basis for the negotiation between the
2 parties and -- and was used to determine what was
3 existing use, and it's also my understanding that the
4 -- the JIR specifically discussed the importance of
5 return flows for both quantity and quality of water
6 that would flow into -- into Texas, and if you're
7 there to protect existing uses, how can you say that
8 Texas would have agreed to a system whereby New Mexico
9 would allow pumping or some other way of diversion
10 that would dry up the return flows?

11 **MR. WECHSLER:** I think that goes to the
12 question of -- of what the -- the states were
13 intending to protect. So they could have done exactly
14 what you're suggesting, Your Honor. They could have
15 said, well, we know how to limit depletions. We know
16 how to ensure certain flows arrive in Texas, and so
17 we're going to do exactly that. We did that in
18 Article 3. We did that in Article 4. We're going to
19 do that below Elephant Butte. They chose not to.
20 Instead, what they did is they said, well, we're going
21 to protect these -- these -- the irrigation demands,
22 and certainly the -- the amount of return flows might
23 change based on groundwater pumping. The amount of
24 return flows also might change based on a whole number
25 of factors. As I said, it was a dynamic system at the

1 time. It remains a dynamic system. I think that they
2 didn't intend to limit any potential future
3 development, and I'll -- I'll point out why that is
4 here in a moment, but that was pretty clear at the
5 time of the -- of the Compact, that they understood
6 that they were --

7 **JUDGE MELLOY:** So -- so it's your
8 position that under the Compact, Texas gave up their
9 right to demand return flows?

10 **MR. WECHSLER:** What Texas gained in the
11 Compact was the right to 43 percent of project supply
12 to ensure that its irrigation demands were satisfied,
13 first through surface water through the project, and
14 second, through groundwater pumping in Texas.

15 **JUDGE MELLOY:** And so New Mexico got all
16 the return flows under your theory?

17 **MR. WECHSLER:** No. I don't think that
18 that's right. I don't think that there's -- I think
19 that there are -- what I would say is there's --
20 there's limits, there's three natural limits to the
21 amount of water that New Mexico could -- could take,
22 and so New Mexico's position is essentially that all
23 -- the -- the groundwater pumping is contemplated by
24 the Compact on existing project acres for existing
25 project purposes. We think that's consistent with the

1 -- the -- the language of the Compact that keys to
2 irrigation demands.

3 **JUDGE MELLOY:** So there no limit to how
4 much pumping?

5 **MR. WECHSLER:** No. There is a limit.
6 There's three limits. So the first one is because
7 you're talking only about that land, which is covered
8 by the project, then you're limited to supplemental
9 irrigation pumping to -- to supply project crops, and
10 that -- that itself places a limit. I'm going to show
11 you a couple slides here, which will help you
12 understand from a physical perspective, what that
13 means. And -- and so the second limitation that I
14 would point out to you is that there's physical limits
15 because there's only 88,000 acres and as Commissioner
16 Clayton pointed out, that amount was frozen. There's
17 only so much water that crops can take up to satisfy
18 their -- in the Compact's parlance, the irrigation
19 demands. So, first, you get your -- your supply of
20 surface water, and on top of that, you get
21 supplemental supply of groundwater to satisfy those
22 irrigation demands. Now, what I'm showing you here,
23 to help explain these physical limitations, so this
24 slide we're looking at shows that there's an almost
25 exact linear relationship between the amount of

1 groundwater pumping that occurs and the surface water
2 supply, in other words, when there's significant
3 supply, there's less groundwater pumping. When
4 there's more groundwater pumping -- when there's --
5 when there's less, rather, surface water supply,
6 there's more groundwater pumping, all to satisfy those
7 irrigation demands. This is how the project operated
8 at a time of the Compact. It's how it continues to
9 operate or at least it did until the operating
10 agreement came along. So here's the annual pumping in
11 -- in New Mexico for the D2 period, after that D2
12 period, and then in the D3 period. You can see that
13 it's remained remarkably stable. In fact, it was less
14 than that during the -- the 1979 to 2005 period, less
15 than the D2 period, and what's happened now is you've
16 seen a jump in that D3 plus carryover time period
17 groundwater pumping. That's being caused by the
18 operating agreement, because New Mexico is being
19 deprived of its surface water, and as you recognized
20 earlier, the -- that's causing the New Mexico aquifer
21 to become depleted. Now, I will clarify something
22 that I think you may have said earlier, and that is,
23 actually, up until these recent years, New Mexico has
24 been careful in studying -- the aquifer has always
25 recovered, so you got a slight drop in the aquifer in

1 times of -- of short surface supply, and then that
2 would rise in times of normal supply because that
3 water would be replenished. Now, that cycle
4 unfortunately is changing now in -- in ways that are
5 quite dangerous to the State of New Mexico. So here
6 what we see is the total amount of surface water and
7 groundwater that has been applied to New Mexico lands,
8 again, remarkably stable. You see this dating all the
9 way back as far as we have records. As somebody
10 indicated before, in fact, yes, New Mexico is metering
11 all of its groundwater pumping now, something that
12 Texas is not doing, but I'll point out something as
13 we're looking at this slide, and that is you can see
14 New Mexico's average of both surface and groundwater
15 is just over 3 acre-feet, which is pretty consistent
16 with historical operations. In Texas, when they apply
17 a full supply allocation, what they give is 4
18 acre-feet of surface water, and there are no
19 limitations whatsoever on groundwater pumping. And so
20 this idea that there's no limit on the amount of
21 groundwater pumping that could occur in New Mexico is
22 simply not consistent with historic operations. We
23 think it's largely a red herring. The third limit --
24 I mentioned there's basically three limits that we
25 recognize on groundwater pumping. The third is New

1 Mexico in Stream System Issue 101 has come in and
2 placed strict limits on the amount of water that can
3 be used in New Mexico within the project area, and
4 it's very consistent with the Compact. It allows
5 3.024 acre-feet, and I'll pause there and remind you
6 that that is the amount that Reclamation determined
7 was a full supply of surface water, and then a little
8 bit amount of groundwater pumping that's supplemental
9 to that, again, to satisfy irrigation demands. Texas
10 has no such limitations, and then the last slide I
11 want to show you here to -- to finalize that idea of
12 -- of the limitations, here we see the annual crop
13 consumption on project lands in New Mexico, and, you
14 know, you can see, again, remarkably stable dating all
15 the way back to that D2 period. So this idea that
16 there's no limits or somehow limits or New Mexico is
17 going crazy on groundwater pumping is -- is simply not
18 consistent with the -- the record. So if I turn back
19 to the negotiating history, I think what I was saying
20 is that -- I was moving onto point out that the states
21 intended to continue the operation of the --

22 **JUDGE MELLOY:** Well, let me ask you a
23 question while you're pulling that up. You said one
24 of the limiting principles was that -- was that the --
25 as I understand it, that those farms and branches and

1 so on within EBID, the 88,000 acres, that they were --
2 they were allowed to do supplemental irrigation
3 pumping. How many acres are there that are pumping
4 outside of EBID?

5 **MR. WECHSLER:** For groundwater pumping,
6 I think that it's -- the answer is in the thousands.
7 It's not a lot of additional groundwater pumping that
8 occurs in -- in New Mexico, so I don't think that
9 that's the kind of concern that Texas has suggested it
10 is. I apologize. I was just trying to correct my
11 screen, which seems to have swapped itself. I'll just
12 show the presentation from here. Are you able to see
13 that if I do it this way?

14 **JUDGE MELLOY:** I do, yes. I can see it.

15 **MR. WECHSLER:** Okay. Good. So, again,
16 we're not talking about a lot of acreage that are
17 outside of the project. And, again, pretty important
18 that what the negotiators were intending to do is to
19 protect the continuing operation of the project. In
20 fact, the -- in the Court's parlance, the Compact --
21 the project was inextricably intertwined with the
22 Compact and that means that they were happy with that
23 arrangement that had been going on and wanted to
24 continue that. You have seen in the Clayton letter, I
25 won't show it now, but that the idea was that each

1 acre of land would receive the same amount of water
2 that allows you to divide the water 57/43 based on the
3 existing acreage because of the 88,000/66,000 split.
4 And then the other thing that I think is important is
5 that you had a recognition that there would be further
6 development of the groundwater resources, and the --
7 the place I'll point to here, although there's a
8 number of points cited in our brief, but here you can
9 see the rules and regulations for the Compact
10 administration, and these were adopted every year
11 since 1939 so every year since 1939, the states could
12 have changed these rules but chose not to, and you can
13 see immediately at the Compact and even to today, it
14 contains this language, that the -- the Compact
15 apportions the waters of the Rio Grande above Fort
16 Quitman and permits each state to develop its water
17 resources at will. Now, what we -- we think that
18 that's pretty important, because contrary
19 understanding would have prevented any further
20 development in either state, and specifically, it
21 would have prevented the growth of municipalities
22 because the only supplies that existed for them really
23 at that time were the groundwater supplies and -- and
24 as pointed out by Dr. Stephens, our expert historian,
25 there was no intent to limit the size of those

1 municipalities. And then the next thing that I'll
2 point to in terms of the apportionment is that course
3 of performance, which we don't agree with Texas that
4 you can only look to that course of performance as
5 part of if you find the Compact provisions ambiguous,
6 we think you can look to help inform the provisions of
7 the Compact. The Court has been clear about that.
8 I'll point most specifically to the -- the Oklahoma
9 versus New Mexico Footnote 5 for that provision, and
10 what you see there is, again, the most important
11 principle is that there's an equal amount of water
12 going to each acre, and here, you can see this is the
13 primary witness for reclamation who served as their
14 30(b)(6) witness in an earlier case indicating, well,
15 how was water historically divided. In Paragraph 8
16 there, you can see, well, it was divided on an equal
17 amount per acre basis, and then in 1980, that's when
18 that switched to the 57/43, but we know that what they
19 were trying to do in D2 is essentially get the amount
20 of water to the diversions from the river that would
21 allow them to serve 3.024 acre-feet per acre, and that
22 number is incredibly important because what that is is
23 the amount that Reclamation determined constitutes a
24 full supply that satisfies all irrigation demands, and
25 that number has not changed over the years. You can

1 then see sort of the way that history of performance
2 plays out there, and here you're looking at the annual
3 allocations by districts. You can see it's exactly
4 57/43 up until the operating agreement, and once the
5 operating agreement comes into place, you see that
6 Texas is getting significantly more water than 43
7 percent. Now, they claim, well, that's because we're
8 trying to offset groundwater pumping, but as
9 Dr. Barroll has indicated in her expert reports and
10 declarations, which are found in -- in the record
11 here, they have drastically overcompensated, so even
12 if you take into account groundwater pumping, New
13 Mexico has been deprived of, depending on exactly how
14 you do the accounting, between roughly 700,000
15 acre-feet, and 1 -- 1 million acre-feet over that
16 time period that D3 has been in place. And so you
17 also see in the course of performance, in our briefs,
18 I don't want to belabor the point, but a number of
19 pronouncements that have been made over the years by
20 Texas, by the Texas engineer, by the Texas
21 commissioner, and ultimately from the Rio Grande
22 Compact Commission itself in which they're recognizing
23 yes, in fact, New Mexico has an apportionment and that
24 the allocations that the Compact makes on an annual
25 basis impact that allocation. All right. So there's

1 three things I want to highlight in the Texas motion
2 before I move onto talk about the groundwater. The
3 first is this idea that Texas has that New Mexico got
4 no water to serve that entire green area you see there
5 on -- on the right. Now, as we outlined in our brief,
6 that's contrary to principles of equitable
7 apportionment. It's contrary to the background
8 principles that are embodied in each of the state's
9 constitutions that those resources belong to the
10 state. It's contrary to this long course of
11 performance you're looking at here. In fact, it's
12 contrary to the Court's 2018 decision, and -- and,
13 again, this is important because if New Mexico has a
14 Compact apportionment, then it has protection to
15 ensure that its citizens receive that amount of water,
16 not just one citizen with its own narrow interest, but
17 New Mexico is looking out for all of its -- its
18 citizens. The -- turning then to the 1938 condition,
19 Texas had a very hard time when you were talking to
20 them earlier defining what that 1938 condition exactly
21 is, and if that's the case, it's premature. And then
22 one of the other counsels got on and said, well, it's
23 depletions that existed in 1938, and so I don't know
24 how to pick between those two theories. But what I
25 can say is it's either premature to make any ruling on

1 that. We think it's contrary to all the evidence
2 obviously, but -- even if you were to accept that.
3 Secondly, if it were to be based on depletions, then
4 it does exactly what you were expressing concern
5 about, and that is it locks in the idea that cotton
6 grown on certain acres in each state are all that is
7 allowed by the Compact, and that can't be. We know
8 that from the way in which the Compact has evolved,
9 the way it's been enacted. We see that in D2. We see
10 that in the allocation. We see that in the large
11 number of changes that we outline in our brief that
12 have occurred in both states to -- to crops, to
13 infrastructure, et cetera. Then the final point I
14 want to highlight from the Texas brief is even though
15 the language and circumstances in Texas and New Mexico
16 with regard to the Compact and the downstream
17 contracts, it's exactly the same. It claims a Compact
18 right whereas it says New Mexico, all you have is --
19 well, New Mexico has nothing, it's just that EBID has
20 -- has a contract right, and I do, again, want to
21 correct one thing that you said earlier, and that is I
22 don't want you to have the impression that somehow EP
23 -- I'm sorry -- EBID is entitled ultimately to use
24 that water in New Mexico, because it's not. What it
25 does is it brings that water to the ultimate users who

1 are New Mexico citizens, that is the farmers, and so
2 that, you know, the State of New Mexico has delegated
3 a limited role there to -- to EBID, and we shouldn't
4 be elevating what that is.

5 All right. So let's turn then to the
6 issue of groundwater in the U.S. motion. I want to
7 talk about, first, whether the Compact prohibits
8 groundwater pumping to both states and then about the
9 injunction. We think the same principles apply for
10 evaluating this question, so you're looking at the
11 Compact plain language. You're looking at the
12 negotiating history in the course of performance. The
13 first thing that I'll say is we think that making a
14 decision on groundwater is premature. We do recognize
15 that the issue of whether depletions caused by
16 groundwater, whether those depletions need to be
17 accounted for as part of the apportionment. That is
18 an issue that certainly will need to be decided by you
19 and by the Court, but there are significant factual
20 issues that make it improper at this time, and
21 actually, candidly, New Mexico considered bringing its
22 own motion on groundwater as part of the dispositive
23 motion based on this long --

24 **JUDGE MELLOY:** Well, I thought it was --
25 as I understand it, there may be a dispute about the

1 amount of depletion, but there's no dispute that --
2 that even your own experts can see that groundwater
3 pumping is depleting both return flows and surface
4 water. Am I incorrect?

5 **MR. WECHSLER:** Well, we agree that
6 groundwater pumping impacts surface water and return
7 flows, so you are correct about that. I want to be
8 careful there, because what we do not agree on and
9 what there is a dispute on is whether or not those
10 depletions have had any impact on deliveries to Texas
11 whatsoever and, in part, has to do with the full
12 supply and the timing and nature of those -- that
13 groundwater pumping in the impacts. We think during
14 times of full supply, as I'll talk about in a little
15 bit, but during those times, Texas has received
16 everything to which they are entitled to. And I would
17 also point out that this is undisputed that all of the
18 water that EP1 has ordered, that Texas has ordered,
19 has been received by EP No. 1. In other words, this
20 concept of interference has not occurred in the way
21 that Texas and the United States referred to it. Now,
22 what happens instead is -- this is all controlled from
23 the -- the -- the reservoir, right, so you can account
24 for certain releases to ensure that each state --
25 sorry -- each district gets the amount of water that

1 they're ordering. That, again, historically happened.
2 It happened prior to the Compact, and it continues to
3 happen today, so that EP1 has always received the
4 water that it -- it ordered. So -- so to just say do
5 --

6 **JUDGE MELLOY:** If -- if -- well, the
7 United States attorney indicated that this year, there
8 may be only a 4 percent allocation. So can -- can
9 either district order more than 4 percent of -- of
10 790,000 cubic -- I mean, acre-feet?

11 **MR. WECHSLER:** Well, it doesn't end up
12 being exactly 4 percent of 790, because it's not
13 divided in storage. You know, when they do the
14 allocation --

15 **JUDGE MELLOY:** Well, whatever the number
16 is, can they order more than what is going to be
17 released?

18 **MR. WECHSLER:** No. A district cannot
19 order more than is allocated by Reclamation. Now --

20 **JUDGE MELLOY:** So the fact that they're
21 getting what they ordered really doesn't mean they're
22 getting full supply?

23 **MR. WECHSLER:** Well, it does in full
24 supply years.

25 **JUDGE MELLOY:** Let's put aside full

1 supply years for a minute.

2 **MR. WECHSLER:** Okay.

3 **JUDGE MELLOY:** What happen -- what
4 happens -- I guess the issue I -- I'm wrestling with
5 is, so you have periods of drought, and I guess we're
6 in the 20th year now of the most recent one, and
7 Reclamation is only able to release a portion of a
8 full supply. Can -- what happens to the two districts
9 when that happens? Isn't it -- it seems to me that El
10 Paso has a -- certainly a credible argument that if --
11 if New Mexico is siphoning off water, that -- that
12 they're getting less than what they're entitled to
13 under their apportionment.

14 **MR. WECHSLER:** Well, I think we
15 recognize in water-short years that there can be
16 injury to both EP No. 1 and -- and EBID. In other
17 words, to the two states. And -- and I'll address
18 your question about whether Texas groundwater pumping
19 matters. It does in the same exact way that it
20 matters in New Mexico.

21 **JUDGE MELLOY:** Well, let's talk about
22 New Mexico. We're talking about New Mexico. Let's
23 stick with New Mexico for a minute.

24 **MR. WECHSLER:** Sure, of course.

25 **JUDGE MELLOY:** What gives New Mexico the

1 right to groundwater pump and reduce the flow down to
2 Texas in short years?

3 **MR. WECHSLER:** In short years, the
4 answer is we agree that there could be a Compact
5 violation, that there's a reduction there, and that
6 what -- the way you measure that is --

7 **JUDGE MELLODY:** Do you disagree that
8 that's been happening?

9 **MR. WECHSLER:** In the record that you
10 have before you, it happened in two years. You can
11 see this in Dr. Barroll's September, 2020, report,
12 which is part of the record. That is there were two
13 water-short years, in '03 and '04, and in those years,
14 yes, the groundwater pumping in New Mexico reduced --
15 reduced the overall supply that was available to be
16 divided and released and, therefore, the amount -- we
17 categorized both the amount in storage, the amount of
18 allocations, and the amount of diversions that that --
19 that would have impacted Texas, and the -- the answer
20 is it impacted Texas to the tune of approximately
21 105,000 acre-feet. Now, you -- then you look to the
22 record after the operating agreement where New Mexico,
23 even accounting for groundwater pumping, as I said,
24 has been deprived between 700,000 and 1.1 acre-feet,
25 and I think then you have to compare those two things.

1 But -- but that is -- to your point, yes, we concede
2 that in water-short years, there is an impact and that
3 the depletions caused in each state, outside of the
4 project acreage by groundwater pumping, has to be
5 accounted for. And so, again, this -- this goes back
6 to the limits that I indicated that we think exist,
7 and this idea that -- that Texas and the United States
8 say that New Mexico feels like it can pump to without
9 any end period is -- is simply incorrect. So the -- I
10 was talking about the factual issues, though, that
11 precluded a decision on this point now, and that goes
12 to the -- you know, what the -- the impact of that
13 long course of performance, which I have not really
14 heard Texas or the United States give a satisfactory
15 answer to. There's -- there's a dispute over really
16 what constitutes return flows, and -- and I do want to
17 comment on something that counsel for the United
18 States said. They indicated that somehow New Mexico
19 had this circular reasoning because it's only when
20 water got back to the Rio Grande River. Actually,
21 it's -- that's -- that's their rationale that -- that
22 we're using here. You saw the -- or the United States
23 made reference to the deposition testimony of its own
24 witnesses, and I'll point out that in Texas, what you
25 have is a situation in which water that doesn't make

1 it to the river, they -- they built an infrastructure
2 there, a lined canal, and, now, water is going to that
3 lined canal, which parallels the river, and because
4 the water doesn't make it into the river, they say,
5 well, it's not return flows, and, therefore, it's not
6 part of the project supply. So we're going to give
7 you, Texas, a credit for that, whereas in New Mexico,
8 in their complaint, what they're saying is, well, if
9 you prevent that same water getting back to the river,
10 the way they did in Texas, you don't get a credit.
11 What you get is a lawsuit against New Mexico, and so
12 whatever you decide is the principle that should
13 apply, that should apply throughout the entire basin,
14 you know, without regard to the -- to the -- to the
15 state line. So then the -- the -- thinking about
16 whether or not the Compact allows groundwater, if you
17 first look to the Compact, we acknowledge that the
18 Compact is silent on whether or not groundwater
19 pumping is allowed below Elephant Butte, but there is
20 some valuable guidance, and first, we know that the
21 states understood how to set flow limits, how to limit
22 return flows or set return flows, because that's what
23 they did in the inflow/outflow methodology in Article
24 3 and 4, but they specifically chose not to do that
25 here, and instead, as I point out, what they did is

1 they keyed on irrigation demands. In other words, if
2 those irrigation demands within the project are being
3 satisfied, first by project water and then
4 supplemental groundwater pumping, then -- then the
5 purpose of the Compact was satisfied. Now, you -- you
6 turn to the negotiating history. It's not disputed
7 that the operation of the Compact was intended to
8 continue as it did in 1938, and, in fact, that did
9 include groundwater and these other uses that have
10 been referred to by some of the other parties, and
11 there were mechanisms in place to protect that to
12 ensure that you still got enough water to satisfy the
13 irrigation demands. Again, that's true in both
14 states. We know that the state, negotiating states at
15 the time of the Compact understood that groundwater
16 had an impact on surface water. For example, we can
17 see in the joint investigation that both states relied
18 on groundwater pumping for municipal purposes, and
19 there was this idea that this -- it would continue.
20 You can see these cited at Pages 19 and 23 -- through
21 23 of our response to Texas. And yet there was an
22 understanding that that -- that would continue, and
23 the states, even with that knowledge, chose not to
24 limit groundwater. In fact, Texas itself actually
25 pushed to limit the amount of information that was

1 gathered as part of the joint investigation because it
2 didn't think that that was necessary, and you can see
3 that at the New Mexico Exhibit 345. And then you get
4 to the Dr. Stephens opinion, which you can see at Page
5 22 of New Mexico's response to Texas in which she
6 indicates there's really no -- the historic record
7 does not reflect any intent by the parties to limit
8 groundwater pumping or to -- to limit development of
9 those resources. As I said, it was necessary to allow
10 the municipalities to continue. So then we turn to
11 this course of performance, and we know that in the
12 1950s, the United States actively encouraged the
13 states to use groundwater. Here, you see you can make
14 a determination as to whether that's encouraging there
15 or not. They're requesting them to use to the
16 greatest extent possible as a source of supply the
17 groundwater. I heard someone saying earlier, maybe
18 they were requesting. I don't think that the record
19 reflects that. I would encourage you to look at all
20 of those documents for yourself. Both states relied
21 on that groundwater pumping. Both states put in a
22 significant number of wells in part with the
23 encouragement and participation of the United States.
24 In fact, EP No. 1 today has over 60 groundwater wells
25 that they use to supplement supply, most recently in

1 2014, and we know that the United States worked with
2 EBID in the 1970s to develop its own set of
3 groundwater wells, and I'd point the Court most
4 specifically to -- to the Mestas case, which is found
5 at New Mexico Exhibit 415, and there you see the
6 United States in the form of the Bureau of Reclamation
7 actually going to court in the late 1970s to protect
8 the right of project beneficiaries to obtain
9 groundwater, separate and apart from the -- the
10 project supply, and it confirmed -- the United States
11 confirmed in that case that it had no claim to
12 groundwater or return flows. And then we can see next
13 in the record, when New Mexico declared the basin in
14 1980, so you asked earlier, does New Mexico allow any
15 groundwater pumping -- any new groundwater pumping,
16 and the United States couldn't quite answer. The
17 answer is no, and even if there's a change permit,
18 that does not, as the United States suggested, expand
19 the right in any way, shape, or form. In fact, when
20 there's a change in a water right that limits the
21 amount of water right to the amount that was
22 historically used. And so in 1980 and '82, New Mexico
23 said, well, there's no new groundwater allowed.
24 Something that, again, parenthetically is not true in
25 Texas. You could walk in there today and get a new

1 groundwater right. But here, you see the Compact
2 commissioner saying we urge you to reconsider that
3 decision, and we highlighted a part, but really the
4 whole thing is relevant here. And then that leads us
5 to the D2 allocation methodology, which was adopted
6 somewhere in the early 1980s. You see a document
7 reflected from 1985. I think it was developed before
8 then. And -- and as was conceded earlier, that
9 incorporated all groundwater pumping from 1951 to
10 1978, and it's undisputed that there were no
11 objections to that for over 40 years. That was the
12 understanding of the parties. And, in fact, it was
13 used -- it's even used today in the operating
14 agreement to determine the apportionment to EP No. 1.
15 And then the next thing I'd point you to as part of
16 this course of performance, which you asked about, is
17 the New Mexico adjudication. So it's adjudicating its
18 rights to all of the water users. In New Mexico, I
19 mentioned that that is consistent with the Compact.
20 In Stream System Issue 101, what you see is that it
21 explicitly allows for conjunctive use of groundwater
22 and surface water. That -- that is the surface water
23 of the 3.024 and then supplemental supplies of
24 groundwater just above that to -- to ensure that
25 irrigation demands are satisfied. What's important

1 about that is the United States was a participant.
2 This is after the year 2000. And as they admit, they
3 did not object, and they did not appeal. So here they
4 were in a judicial proceeding essentially concurring
5 by their silence in the idea that conjunctive
6 management of groundwater and surface water in New
7 Mexico is allowed and you see that carried forward
8 into the 2008 operating agreement, which uses D2 to
9 allocate water to EP No. 1, and unfortunately only to
10 EP No. 1, and what we see is that by doing so, what --
11 and I've got two examples on this slide. There's
12 others that, you know, you see, for example,
13 Mr. Cortez indicating yes, it grandfathered in the
14 amount of groundwater pumping that occurred from 1951
15 to 1978. What the 2008 operating agreement says about
16 this is, it's consistent with the provisions of the
17 Rio Grande Compact, and I would point you to New
18 Mexico Exhibit 510, Page 14, Paragraph 6.12, which is
19 to say --

20 **JUDGE MELLODY:** I read that a little
21 differently. Maybe I'm wrong. I took that more as
22 the purpose of the 2008 operating agreement was we
23 don't want to go in and tell -- have to either tell
24 New Mexico to force farmers to shut down their wells
25 or us to be the heavy-handed entity that forces the

1 shutdown of the wells and so as -- as an -- a
2 compromise, we'll grandfather in the wells or we'll
3 offset it with surface flow, that that is part of a --
4 that was part of a negotiated compromise, not that
5 that was something necessarily a recognition of a
6 legal right.

7 **MR. WECHSLER:** Well, I think it was a
8 compromise. The point that I'm making is that the
9 parties, and they've confirmed this in deposition
10 testimony, are saying that that arrangement, wherein
11 the level of groundwater pumping up through 1979 was
12 grandfathered in. In other words, that -- that's
13 allowed, and it's consistent with the Compact. I'll
14 point out to you that there's a problem with this idea
15 that it was a compromise, and that is it didn't
16 involve the states. So we know there was an equitable
17 apportionment between the two states. That equitable
18 apportionment can't be changed without the
19 participation of -- of those states. So that may --
20 and the second problem I'll point out is that may have
21 been the intent that you're suggesting. I don't doubt
22 it was. But they -- I think as the United States
23 attorney actually acknowledged when she was talking to
24 you, they -- they overcompensated, and so what you get
25 is, you know, there's too much water going to Texas,

1 and, in fact, part of the reason that happened and,
2 again, this is found in the record and not disputed is
3 that the United States really didn't evaluate what the
4 impacts from groundwater pumping were prior to
5 entering into the operating agreement, which is
6 somewhat remarkable. And -- and I'd say you have this
7 long course of performance, and -- and none of the
8 parties have really addressed that. The United States
9 includes a single paragraph in its -- in its briefing,
10 and Ms. Coleman really offered no explanation earlier
11 this morning when you -- you asked about her. Turning
12 to the United States' position, I mean, I want to be
13 clear, I heard them suggesting it was something else,
14 but the position of the United States that they take
15 in this case is that all groundwater pumping in the
16 lower Rio Grande is prohibited, and the way they get
17 there is by defining incredibly broadly this concept
18 of interference, which Reclamation, you know, says is
19 basically any -- any slight change to surface water,
20 which would be contrary to all concepts of groundwater
21 -- of water administration. But that is what they are
22 suggesting. No groundwater in the lower Rio Grande.
23 We think that there's four problems with the United
24 States' position. I mean, one, it's -- it's
25 inconsistent with the course of performance, and it --

1 its own position in this case. As you, I think,
2 recognized earlier, the Court, in multiple cases, I
3 point you most specifically to Tarrant and Alabama
4 versus North Carolina case, said that the course of
5 performance is to use their language, quote, "Highly
6 instructive in interpreting what was intended by the
7 states in the Compact," and, therefore, it's quite
8 significant that they offer no explanation for this
9 course of performance. The second problem with the
10 United States position is it depends on the
11 methodology for the apportionment that we know was
12 rejected by the states and that is we know that the
13 states didn't intend to lock in certain level of flow
14 at the state line: we can see that Texas Commissioner
15 Clayton said exactly that, and they knew how to do
16 that in Articles 3 and 4 and yet they chose not to do
17 that here. The United States and for that matter
18 Texas offered no explanation. The third problem with
19 the United States' position is that to be entitled to
20 any relief, including declaratory relief, the United
21 States must prove injury, and they use the -- the
22 euphemism interference, but the United States makes no
23 effort whatsoever in its motion to show that there's
24 actual injury. So that injury has to be that they're
25 prevented from making Compact deliveries, and in this

1 case, what it means is making those Compact deliveries
2 to Texas since New Mexico represents its own interests
3 with regard to its apportionment, and they haven't
4 done that. They've made no effort whatsoever to show
5 that. What they asked you to assume is that there's
6 injury because the -- all parties agree that
7 groundwater pumping has the potential to impact
8 surface water, but that's not the same as showing that
9 there's some amount of water not arriving in Texas
10 that should have, and they, again, make no effort to
11 do that. It's like in a false advertising case saying
12 that GM engaged in advertising, and, therefore,
13 they're entitled to a finding of false advertising.
14 It's skipping the single-most important factor. Was
15 it false in the first place? Here, the United States
16 is skipping whether there's actually interference with
17 the delivery to Texas. In this case, they can't show
18 any injury because there hasn't been any, and this
19 goes to the point I think I was making earlier. Let's
20 see if I can find it. This is one location where you
21 can see it. It's found throughout the record. It's
22 really not disputed that all deliveries that have been
23 ordered have arrived at -- at Texas and since that's
24 true, the United States can't show any kind of
25 cognizable injury, and they're certainly not entitled

1 to summary judgment. The fourth problem with the
2 United States' position is that it's based on a
3 fundamentally-flawed understanding of the case, and
4 specifically, the United States seems to argue that
5 any change in the amount of surface water represents a
6 Compact violation, even if that change doesn't impact
7 the amount arriving in Texas, but the gravamen of the
8 United States complaint, and you can see this in
9 Paragraph 15 of its complaint, is its claim that New
10 Mexico allowing groundwater pumping has prevented it
11 from delivering the 43 percent of available project
12 water from reaching Texas and the Court explicitly
13 allowed the United States in the case because it
14 claims parallel that of Texas, in other words, the
15 United States wasn't able to make those deliveries to
16 Texas, and -- and as in your previous orders in April
17 of 2020, you said that, you know, this is a Compact
18 case. What we're looking at is what are the
19 entitlements of each of the two states, and then we're
20 going to look at did the two states get their
21 entitlements? We think that's exactly right, but
22 that's not the theory the United States appears to be
23 going on. If they think there's some problem that
24 they have delivering water intrastate within the state
25 of New Mexico to -- to water users, they have

1 intrastate remedies, surely that's not the thing --
2 the kind of thing that the United States Supreme Court
3 needs to take out -- take up, and, in fact, they've
4 confirmed that in a number of their precedents. I
5 guess I would point to Nevada versus California as
6 one. But it's found throughout. So then I want to
7 get to this issue of does groundwater pumping in Texas
8 matter, and the answer is yes, it does, and so as --
9 as background, again, we talked about the fact that
10 the Compact incorporates the project. They wanted to
11 have -- allow the project to continue to operate the
12 way it had, and we talked about the way that the
13 project operated then and operates now where at the
14 beginning of each year, Reclamation takes into account
15 the water supply conditions, amount of water
16 available, is it dry, is it wet, et cetera, the
17 efficiencies of the project, in other words, that that
18 incorporates this idea of groundwater pumping, and it
19 makes an allocation at the beginning of the year. And
20 so with that background, it -- the groundwater pumping
21 in Texas impacts New Mexico in two different ways.
22 The first way is it literally just depletes surface
23 water in New Mexico when that groundwater pumping
24 occurs close to the border. The second and more
25 important way for purposes of your discussion -- or

1 your question, rather, is that the groundwater pumping
2 anywhere in the project impacts project storage in the
3 same way. And someone earlier referred to Table 90 of
4 the joint appendix. Here, you see that Table 90, you
5 can see highlighted here where there were drain flows
6 and seepage, i.e. return flows, that were relied upon
7 at the time of -- of the Compact. And so -- let's
8 see. So what we see then is the -- the level of
9 drawdown that has occurred in Texas, and that's what
10 this slide is showing, so sort of kind of boot in the
11 southeastern part, that's the Texas portion here, and
12 this is color coding to the drawdown caused by
13 groundwater pumping. New Mexico is on the -- the left
14 there. Here's 1940, and then I'll fast forward to
15 1980, which is when the title transfer occurred. And
16 here you can see a significant additional drawdown
17 occurring in the Texas portion of the basin, and then
18 I'll fast forward again to 2017, and, now, you see
19 there's a very large amount of -- of drawdown
20 occurring in Texas. So why is this happening? Or
21 maybe I should say why does this matter for purposes
22 of the Compact apportionment. Here's an illustration.
23 This one is illustrative. It doesn't have to be the
24 Franklin Canal and the Riverside Canal, but it should
25 help you understand what's going on here. And what

1 you see here is here's the amount of water released
2 and there's a certain amount represented by yellow
3 that's the return flows, and then at the bottom here,
4 we -- we've indicated particular return flows, those
5 in this area that are El Paso Valley drain flows,
6 right. And at the time of the Compact, that formed
7 that project supply that satisfied demand. And then
8 you get groundwater pumping which causes depletions,
9 and what ends up happening, there's no return flows in
10 Texas from that happening, and you can see there's
11 this gap, this amount of water that's no longer being
12 satisfied. So -- so what happens? Well, what happens
13 is they have to release more water, so you can see
14 that reflected in the hash at the bottom there. This
15 is more water. And then more water being released
16 from -- from the project. So what -- why does that
17 impact New Mexico? Well, if as New Mexico and the
18 United States agreed, New Mexico is entitled to 57
19 percent of that project supply, obviously 57 percent
20 of 100 units is 57 units, but if the units are 50
21 units, 57 percent of that is now 28 units, right, and
22 so New Mexico has been impacted, and this is the exact
23 way that groundwater pumping anywhere within the
24 project impacts the overall project supply, and it's
25 exactly what I mentioned earlier in those years of low

1 supply where New Mexico acknowledges those have to be
2 accounted for and -- and figure out what the impact
3 has been over those years. So what the -- the import
4 of that is, is if you adopt a rule that, you know, if
5 you disagree with New Mexico and you say, look, no
6 groundwater pumping was allowed, even on project
7 acreage for project purposes, what that means is that
8 rule applies everywhere. Whatever the rule you -- you
9 adopt or the Court adopts, that applies throughout the
10 entire system. So let me talk a little bit about the
11 injunctive relief. You asked a couple questions about
12 that injunctive relief, and specifically you asked is
13 it premature, and I would say premature and misguided.
14 Let me start by saying an injunction is an extreme
15 remedy. It's all the more true in an interstate case
16 where the Court time and again has expressed its
17 reluctance to enjoin a state and thereby enjoin
18 principles of federalism. And so in an original
19 action, you have to establish six elements to be
20 entitled to an injunction. Success on the merits.
21 I've been talking about how they're unable to show
22 that. Irreparable injury, remedies of law are
23 inadequate, balancing a hardship's way of in favor of
24 an injunction, that the public interest would be
25 disserved by permanent injunction and that there's a

1 cognizable danger of a recurrent violation, and then
2 because the Court is reluctant to enjoin a state, the
3 United States has to show these elements by clear and
4 convincing evidence at which is the -- what applies in
5 summary judgment. But in this case, even though the
6 United States is seeking the extraordinary relief of
7 enjoining of quasi sovereign state, they ask that you
8 do this without even establishing really any of those
9 elements. So let me start with injury, and I would
10 say the United States spends most of the time sort of
11 talking about what they call interference. But -- but
12 they -- as I said, they make no effort to show that
13 any action in New Mexico interfered with their
14 abilities to make deliveries to Texas, which is
15 necessary, and, in fact, at least until today, they
16 argued it wasn't possible to show injury, because it's
17 not possible to quantify the Compact apportionment. I
18 -- I understand them to be walking that position back
19 today, and -- and they also can't show this injury
20 because we know that water was -- was ordered and
21 received. Now, in thinking about those third, fourth,
22 and fifth elements I just identified, the United
23 States makes no effort whatsoever to establish/address
24 any of those elements, and the motion could be denied
25 on -- on that grounds alone, and they also don't

1 attempt to establish a cognizable danger of a
2 recurrent violation. I don't think they even use
3 those words in their briefs, which we know that the
4 Court found dispositive in Kansas versus Nebraska,
5 that 2015 decision, even though there were significant
6 questions about Nebraska's compliance there, and the
7 Special Master in Montana versus Wyoming also declined
8 to grant an injunction, again, because there was no
9 showing of a cognizable danger. I mean, injury --
10 injunctions are very serious matters. The United
11 States motion doesn't rise to that level, and it
12 shouldn't be seriously considered by the Special
13 Master. And to -- to talk about briefly this idea
14 that you raised is it premature. Well, they haven't
15 established the elements of is it premature for that
16 reason, but it's also premature because injunctions
17 are intended to be narrowly tailored injunctive relief
18 to address the harm, but in its brief, the United
19 States admits that, quote, the extent of the actual
20 and potential harm to a project may require resolution
21 at trial. In other words, they're not telling you
22 what that level is, and -- and, therefore, you can't
23 determine exactly how to frame an injunction. Again,
24 you asked what that ought to look like, and I really
25 didn't hear a very specific answer. I don't -- I'm

1 unaware of any court anywhere that would grant that
2 kind of injunction that she suggested. She pointed to
3 the case of Texas versus New Mexico, No. 65 Original.
4 As you point out, that injunction, which was entered
5 into, that decree containing an injunction was entered
6 in 1988, and it contained very specific guidance in
7 the form of river master manual as to what had to be
8 followed in order to comply with the -- the Compact.
9 They asked for no such thing here, and since that
10 time, you know, I have been involved in cases where
11 states have made direct requests for injunctive relief
12 citing, for example, that case, and Special Masters
13 have almost uniformly been unwilling to grant an
14 injunction. So talk a little bit about the full
15 supply. And, again, this is outlined in the briefing.
16 The project Reclamation is the one that establishes
17 the amount of the allocation. New Mexico's not
18 involved in that process. Then the -- the maximum
19 amount of water that could be taken in any given year
20 is the extent of that allocation. You see here
21 Mr. Cortez saying exactly that, that, you know, either
22 district is only entitled to take what has been
23 allocated to them, and then a full supply that the
24 Reclamation determined was the amount necessary to
25 release water to get 3.024 acre-feet to each acre, and

1 that is what has been come to known as a full supply.
2 You know, and -- and the parties largely agree as to
3 which years that's true with the exception of 2007,
4 which is reflected in -- in this slide. It's true
5 that -- that the amount of that full supply has been
6 modified slightly over the years. You can see that
7 reflected in the black line here. That's the full
8 supply. Over the bulk of those years, the number was
9 376,000 acre-feet. That's crept up a little bit. I
10 think now it's 388 or something based on release -- a
11 release of 790 as opposed to what amount do you need
12 to get 3.024 to each acre. But two things. I mean,
13 first is as to this question of would Texas be
14 entitled to any more, the answer is pretty clearly no.
15 I mean, first of all, it -- it represents a full
16 supply, in other words, the amount that is necessary
17 to satisfy irrigation demands, so it comports with the
18 Compact in that sense, and you're seeing here, this
19 red line is showing how much water was actually
20 ordered. So this idea that somehow they should have
21 been taking more, which you heard from them earlier,
22 or they might have taken more is the line by the
23 historical record, and then the Texas asked you
24 earlier, well, which number should we take, should we
25 take 376 or 388? What I'll submit to you is let's

1 take the number they themselves said they're entitled
2 to. This is from the Texas adjudication. You can see
3 it's the New Mexico Exhibit 515. In that adjudication
4 where the United States was a party, Texas evaluated
5 how much water was it entitled to. You know, how much
6 water could EP No. 1 take from the river, and their
7 answer was 376,000 acre-feet of water per year from
8 the Rio Grande. That is to say that is the limit --
9 that's what they say they're entitled to based on
10 their own water right, their own adjudication, to
11 which New Mexico was not a party. And so which --
12 which that number comports with the -- the full supply
13 that Reclamation set over the bulk of that full supply
14 year, and I'll also tell you that in our adjudication
15 motion, we also outlined that this is also the amount
16 that when asked, Texas Commissioner Gordon indicated
17 he was entitled to. Now, what he said was a
18 mathematical formula. He said it's the 790 minus
19 60,000 to Mexico and then 1.2 percent amplifier
20 because of the return flow effect and then 43 percent
21 of that. And I'll -- I'll save you the mathematics,
22 which we do in our -- our apportionment motion. That
23 number comes out to exactly 376. Well, not exactly.
24 It's a little bit of change there. And so you see
25 Texas commissioner saying what are we entitled to in

1 this case, it's 376. You see the Texas adjudication
2 saying we're entitled to 376. Any groundwater pumping
3 that occurs -- any depletions from any area that
4 occurs beyond that, Texas simply isn't entitled to any
5 more water. That's completely consistent with the way
6 the project was operated at the time the Compact was
7 entered into. It's completely consistent with the
8 doctrine of appropriation, which seems to maximize the
9 overall amount of water use for different water users,
10 which we know was important to those states, because
11 they've said so in every single one of the -- the
12 rules since adopting the Compact.

13 Finally, I'll talk very briefly about
14 the -- the notice issue, and so here today --

15 **JUDGE MELLOY:** Let's make that very
16 brief. That's pretty fully briefed, but go ahead if
17 you have things you want to say.

18 **MR. WECHSLER:** Well, I don't know that I
19 have anything to add then that's -- that's not in the
20 brief. The only thing that I would highlight that's
21 highlighted here is the fact that without that
22 information, New Mexico has no way of knowing at any
23 given time how much water should be getting to Texas
24 because those waters are made based on irrigation
25 demands. New Mexico is simply not involved in the

1 ordering process. It doesn't know how much is
2 ordered. It doesn't know how much is released. It
3 doesn't know how much water at any given time in the
4 river should be going to EBID or EP No. 1. That
5 concept of notice has been imported previously, you
6 know, to an intrastate case. We think that the same
7 exact principles apply here by virtue of the document
8 of appropriation having been incorporated, and the
9 last thing I would point out to what Texas said
10 earlier, as we point out in our brief, we certainly
11 accept the teachings of Hinderlider, but it's still
12 necessary to show a conflict with the Compact itself,
13 and I will also point out that, you know, that they
14 used Hinderlider for the idea that the notification
15 shouldn't be allowed. Hinderlider comes from the La
16 Playa Compact between New Mexico and Colorado and
17 actually on that Compact, there's a call that's made
18 from New Mexico to Colorado every single year. So
19 with that, I appreciate your attention. If there's no
20 further questions, thank you very much.

21 **JUDGE MELLOY:** All right. Well, thank
22 you, Mr. Wechsler. We're going to break for lunch in
23 just a minute, but before we do, in case -- I see over
24 a hundred people on the call. Some may not want to
25 come back after lunch. Let's pick a day to get back

1 together by Zoom to talk about scheduling. I would --
2 I'm basically open any time next week. I was thinking
3 Tuesday or Wednesday of next week. Does anybody for
4 whom that does not work or feel that's going to be a
5 problem? Let me put it this way, if there's an
6 objection, let me hear it now or forever hold your
7 peace so --

8 **MR. WECHSLER:** My only request, Your
9 Honor, is I have a scheduling conference at 10:00
10 Mountain, 11:00 Central, 9:00 Pacific for an hour. So
11 other than that --

12 **JUDGE MELLOY:** On which day?

13 **MR. WECHSLER:** I'm sorry. On Tuesday,
14 the 16th.

15 **JUDGE MELLOY:** Well, let's just do it on
16 -- we'll do it on St. Patrick's Day. 11:00 on the
17 17th?

18 **MR. WECHSLER:** Yes, sir.

19 **JUDGE MELLOY:** If there's no objection,
20 we'll plan to do that. I'm going to take a -- let's
21 -- it's now a few minutes after 2:00. Let's reconvene
22 at 3:00 Central time.

23 **MR. DUBOIS:** Your Honor, that was 11:00
24 Central?

25 **JUDGE MELLOY:** Yes. 11:00 Central.

1 **MR. DUBOIS:** Very good. On the 17th.

2 **JUDGE MELLOY:** Okay. We'll reconvene
3 in, I guess, 55 minutes, at 3:00 Central, 2:00
4 Mountain, 1:00 Pacific time. All right. See you
5 then. Thank you, everyone.

6 (Break.)

7 **JUDGE MELLOY:** Well, Mr. Wallace, I
8 think you're up next.

9 **MR. WALLACE:** Yes. Good afternoon, Your
10 Honor. We're ready to proceed.

11 **JUDGE MELLOY:** You may proceed when
12 ready.

13 **MR. WALLACE:** Thank you. As you can
14 tell from reading all the briefing, Colorado has a bit
15 of a different position, specifically with regard to
16 the Compact apportionment question. That's what I'm
17 going to talk about today. It appears that the
18 motions that the parties have submitted are all
19 relying on you to interpret the Rio Grande Compact and
20 its apportionment and find a violation of those
21 Compact terms. As the way -- the way the Colorado
22 sees it, that's simply the wrong question to ask.
23 It's because, first, the motions all essentially
24 ignore the inflow/outflow method that the Compact
25 plainly and unambiguously establishes for its

1 apportionment scheme. Second, by ignoring those
2 inflow/outflow method, the parties then introduce
3 silence into the Compact, and thirdly, they, in place
4 of this introduced silence, argue the Compact
5 implicitly incorporates the Rio Grande project made
6 apportionments or modify Compact apportionments. And
7 this is simply not the case. Under the principles of
8 Compact interpretation, we have to first look at the
9 clear terms of the Compact, which does, in fact, set
10 out the means to apportion the water under the Compact
11 itself. Now, it may mean that the Compact is not the
12 right tool to answer all of the questions regarding
13 this dispute, and Colorado doesn't seek to get into
14 all of that. What we want to do is to present to the
15 Court the clear understanding of how the Compact does
16 apportion water. As I said, it's not ambiguous how it
17 does it. The Compact sets out a number of gages in
18 Article 2, and those gages are the sole method used to
19 determine the apportionment and compliance with the
20 apportionment. Using those gages, we have the tables
21 and relationships in Articles 3 and 4. And those
22 don't quite do what the parties -- the other parties
23 have indicated. What they do, these tables and
24 relationship establish the inflow and outflow numbers
25 for each of what Colorado has called the river

1 reaches. The term river reach is not in the Compact,
2 but it's simply what we use to describe the series of
3 gages are in the Compact and how those work with the
4 -- the tables relationship in Articles 3 and 4. And
5 lastly, the Compact uses a system of credits and
6 debits to adjust deliveries made under Articles 3 and
7 4. Thus, the Compact does not make specific
8 allocations of a quantity of water to states in and of
9 themselves. Instead, what it does is it allocates
10 water based on the inflow/outflow gages through the
11 specific reaches. And if I'm not too technically
12 compromised, I'm going to attempt to share my screen
13 with -- with you, Your Honor. This is an exhibit that
14 Colorado submitted with its response brief. Can Your
15 Honor see that map?

16 **JUDGE MELLODY:** I can.

17 **MR. WALLACE:** And this map is -- is used
18 for illustrative purposes only. We're not making any
19 representations or actual boundaries or the scale, but
20 I wanted to use it to -- to help you to understand
21 where these gages are and -- and what it is that they
22 do. And you'll see that what they have done is we've
23 shaded a number of areas to represent drainage basins.
24 So these are the flows as they collect to the Rio
25 Grande river and its tributaries. I'll start at the

1 top. This is the closed basin area. It is mentioned
2 in the Compact, this area does not normally contribute
3 any flow to the Rio Grande itself, although it is
4 included in the definition of Rio Grande basin
5 Compact. This upper gage is the first inflow gage on
6 the Rio Grande near the town of Del Norte, Colorado.
7 It measures the water coming into the Rio Grande. The
8 corresponding outflow gage is here near, not quite at
9 the Colorado/New Mexico border. Colorado also has a
10 separate delivery obligation, as we've explained in
11 our briefs, which is the Conejos system, which has the
12 Conejos River and two of the larger tributaries of the
13 Conejos, Los Pinos and San Antonio River. Those, Los
14 Pinos and San Antonio, actually go through for some
15 part New Mexico and reenter Colorado where these two
16 gages are indicated. That's near Ortiz and flow into
17 Colorado. What's important to us here is that we
18 recognize when water is flowing across state
19 boundaries and it matters for Compact administration
20 and accounting, the Compact included gages. So here
21 where we have these two rivers, the Los Pinos and San
22 Antonio, flowing from New Mexico into Colorado, these
23 gages limit the measured inflow of Colorado's portion
24 of the Article 3 delivery obligation. We also have up
25 here near Mogote gage and Conejos gage at Mogote Los

1 Pinos and San Antonio together prior inflow gages from
2 the Conejos system, which is measured near from the
3 Conejos meets the Rio Grande. That's what makes up
4 the Article 3 gages and tables and relationship for
5 Colorado. But as you'll notice, it's very important
6 there are a number of other rivers Colorado does take
7 water from that are not included in the system. On
8 the right-hand side of this map, this light yellow
9 portion, is the Costilla Creek system. This creek
10 flows through New Mexico and Colorado and enters the
11 Rio Grande main stem below Colorado/New Mexico line.
12 This river system is part of the drainage supply of
13 the Rio Grande, but it is not apportioned by the
14 Compact. As we pointed out in our brief, the
15 apportionment as New Mexico and Colorado is taken care
16 of by the amended Costilla Creek Compact. This is an
17 example of a division of waters within a measured
18 inflow/outflow system. It's consistent with the Rio
19 Grande Compact, but the Rio Grande Compact importantly
20 does not provide the details of how New Mexico and
21 Colorado split that water. The separate amended
22 Costilla Compact does. Another interesting part of
23 divisions is on this yellow portion center of the map
24 right here, which is the Rio Chama, which actually
25 starts in Colorado. Colorado does have water rights

1 here on this system. There are no Compact gages at
2 the state border, but the Chama contributes to the
3 flow at the Rio Grande further down above the city of
4 Santa Fe. You'll see below that confluence is where
5 we actually have the inflow gage for -- for the middle
6 system, the middle reach of the river, it's not
7 actually at the New Mexico/Colorado state line. It's
8 much further down so that it can capture all of these
9 other inflows. The part we are talking about
10 primarily today is this lower reach of the river. We
11 have Compact gages below Elephant Butte and below
12 Caballo reservoir, but there are no Compact gages
13 identified in Article 3 any way further down through
14 New Mexico or through Texas. So there's no way, using
15 Compact accounting, to measure any of the flows. As
16 we described in our brief, there is a delivery
17 requirement for New Mexico under Article 4. That
18 delivery requirement is in the Rio Grande at San
19 Marcial gage. I think there's been some confusion in
20 the briefing and the statements today. The Compact
21 doesn't say deliver to Texas or deliver to the
22 project. It's delivery at a specific gage location,
23 not to an entity and the last Compact gage we have is
24 the one below Caballo dam, so there's really no way
25 for any of the states to even track where this water

1 goes under the terms of the Compact after it leaves
2 Caballo reservoir. So that -- that's how the Compact,
3 and its unambiguous terms, actually divides the water
4 and how the parties have been accounting for that
5 division for a number of decades. Parties have not
6 tracked their Compact accounting deliveries to either
7 of the irrigation districts below Elephant Butte as
8 part of the Compact apportionment or deliveries to
9 Texas below Caballo reservoir. In fact, there's no
10 way that they can do that because they have no Compact
11 gages with which to measure the flows. Now, it
12 appears that all the other parties are arguing some
13 degree of Compact apportionment through the Rio Grande
14 project, and they make various arguments about
15 incorporation of the project, delegation of Compact
16 apportionments, or it seems a divestment or an
17 incorporation of a third-party contract exchanges
18 states apportionment. I want to take each of these
19 arguments by party in turn. First, I'm going to start
20 with New Mexico. New Mexico's argument relies on an
21 incorporation of the Rio Grande project making its
22 Compact apportionments based on essentially a 57
23 percent/43 percent basis. There is no language in the
24 Compact incorporating Rio Grande project. Along with
25 -- and there's reasons for I want to get into Your

1 Honor's question about the 790,000 acre-feet and what
2 that might indicate. As you're well aware, that's
3 mentioned a few places in the Compact, particularly
4 with an annual average release of 790,000 acre-feet.
5 It's important to realize, also, that while it may
6 signal some recognition of the total irrigation
7 demands below project storage, and that's a very
8 reasonable assumption to make, it doesn't further
9 indicate how that 790,000 acre-foot release is to be
10 divided as between New Mexico and Texas or any of the
11 other entities such as Mexico is taking that water.
12 That language simply is not in the Compact at all. It
13 is in the Compact for a number of important reasons,
14 which -- which relate primarily to obligations
15 upstream of project storage.

16 **JUDGE MELLOY:** Well, if -- if you're
17 saying that the Compact does not equitably apportion
18 the water below Elephant Butte, that means there's no
19 way to tell what either state 's equitable portion is;
20 that's your position, right?

21 **MR. WALLACE:** I would put a finer point
22 on it, Your Honor. I would say that there is an
23 equitable portion. The Compact apportions water from
24 the head waters down to Fort Quitman. So -- so the
25 argument is not the one that New Mexico started the

1 case with, which is the Compact doesn't deal at all
2 with waters below Elephant Butte. What the Compact
3 does is it divides the water through these three river
4 reaches, so there is an apportionment. It's
5 essentially San Marcial gage down to Fort Quitman, but
6 it doesn't then further subdivide, and I think --

7 **JUDGE MELLODY:** Well, to me, almost what
8 you're saying then is the Compact fails it's essential
9 purpose, because the preface to the Compact says that
10 it's going to equitably divide the waters between
11 Colorado, New Mexico, and Texas above Fort Quitman,
12 and if it only does it above basically Elephant Butte,
13 then I don't know, where does that leave us? Is the
14 Compact -- like you say, is the Compact a fail?

15 **MR. WALLACE:** No. I don't -- and I
16 don't think you can presume that it failed to do what
17 its task was, which is to apportion the water among
18 the states. It doesn't say apportionment to the
19 states individually. The scheme the states came up
20 with in 1938 to make that division was the
21 inflow/outflow gages, and it didn't need to further
22 divide the water below Elephant Butte because that
23 division had already taken place, so what the Compact
24 needed to do was to get water to the Elephant Butte
25 area so that it can eventually be put into storage.

1 That's why we get the demand of 790,000 acre-feet as
2 an annual average release because we needed to know
3 what the upstream basins needed to contribute to make
4 that happen.

5 **JUDGE MELLOY:** Are you essentially
6 adopting Texas' position that whatever the condition
7 was in 1958, however we define that position, that's
8 what the apportionment is below Elephant Butte?

9 **MR. WALLACE:** No. We don't disagree
10 with Texas when it says that the project is not
11 incorporated to make Compact apportionments. I think
12 we're in agreement with Texas in that regard. We do
13 not agree that there is a 1938 frozen condition. That
14 simply does not exist upstream of Elephant Butte
15 either. We have a number of debits and credits,
16 allowances, entire table of relationships expects
17 there to be various flows and various consumptive
18 uses, depending on those flows, so there's really
19 nowhere to say anything was fixed. What the parties
20 did, however, was -- was through the joint
21 investigation report, use that to help identify what
22 was needed below Elephant Butte. I use Elephant Butte
23 just as a general area, because normally we're talking
24 about in the bed of the Rio Grande at San Marcial, but
25 when we say what Elephant Butte needed or what we

1 needed below there, there are a number of uses already
2 in place, and this is another reason why you can't say
3 the project is effecting an equitable apportionment
4 between Texas and New Mexico, because there are other
5 water uses in play already. One of the items we've
6 brought up in our brief was the Bonita canal system.
7 Bonita ditch takes water actually directly out of the
8 middle of Caballo dam, so the United States having
9 built Caballo dam has to have notice that it built the
10 pipeline into the dam for the Caballo community ditch.
11 That water is taken out. It is admittedly a relative
12 small window. We're looking at about 325,000 gallons
13 a year on average, however, it is there. I think it
14 points out an important legal principle is they take
15 water that counts as a release for irrigation demands
16 out of project storage, but it is not for project
17 delivery.

18 **JUDGE MELLOY:** Well --

19 **MR. WALLACE:** What --

20 **JUDGE MELLOY:** So do you -- do you feel
21 that the language in the Supreme Court decision is
22 either dicta or just wrong that the Compact is
23 inextricably intertwined with the Rio Grande project
24 and that the Compact was executed in such a way that
25 the United States has a legal obligation to deliver a

1 certain amount of water to Texas?

2 **MR. WALLACE:** I don't think the Court
3 was wrong as long as we're aware of the -- the limits
4 of what it was talking about. In the -- in the 2018
5 opinion, the Court was faced with a question of
6 whether the U.S. could bring a claim arising under the
7 Compact. In -- in answering yes to that question, it
8 was identifying the unique federal interest possessed
9 by the United States. The primary one being the
10 operation of the Compact and delivery of water under
11 the downstream contracts. I don't think it detracts
12 from recognizing what the Compact does is set up these
13 inflow/outflow gages and these river reaches as a
14 means to do that. What the states recognize, though,
15 is that they, in 1938, did not need to further
16 subdivide that water under the Compact. Instead, they
17 let existing law function to do that, and that takes
18 into account all of the uses. So we have the 1906
19 treaty with Mexico. We have pre-project rights such
20 as the Bonita ditch system, and we have the downstream
21 contracts. I think it's -- it's appropriate for the
22 Court to recognize the existence of the downstream
23 contracts. Frankly, the project controls the bulk of
24 all the water in the system. From Mexico, we're
25 talking up to 60,000 acre-feet, and we're talking

1 fairly small amounts for these -- these pre-project
2 rights, as well. So by default, we look at the
3 project as controlling the bulk of it. That water had
4 already been divided, and the parties expressed no
5 intents to change how that operated. So in -- in that
6 instance, Colorado agrees with many of the other
7 parties that what we need to look at is what the
8 project did and how the project is operated over the
9 years. The difference is that there is no indication,
10 no clear term in the Compact the parties intended to
11 make the project operations be Compact obligation for
12 any of the parties. What it did, instead, is say,
13 look, we've got this lower reach, Elephant Butte down
14 to Fort Quitman. We have guaranteed certain flows
15 that are going to arrive in this lower reach. We know
16 that the project is going to deliver the bulk of all
17 of this water. Why do we need to even talk about it
18 because this division is already happening? What
19 we've done to the Compact is guaranteed the project
20 success because we know now it will get water, even if
21 we've got upstream future development, that
22 development will be subject to the delivery
23 obligations in the bed of the Rio Grande. The
24 project, by act of its location and physics, is going
25 to pick it up. So the point that we're really making

1 here to jump over all of this confusion, is is it's
2 not really a Compact answer. The Compact cannot
3 provide the answer to this because it's not there, and
4 it's so much effort to try and, I think the U.S. said
5 this earlier this morning, fit a square peg in a round
6 hole, because even they're recognizing the problems
7 with making all of the minutia of Compact operations
8 -- the minutia project operations a Compact
9 obligation.

10 **JUDGE MELLODY:** So what does this say
11 about -- so what does your argument say about the
12 underlying complaint to Texas' complaint that New
13 Mexico can't interfere with project deliveries to
14 Texas?

15 **MR. WALLACE:** So, you know, there's
16 already been a motion to dismiss by New Mexico based
17 on failure to state a claim under the Compact. All
18 that looks at, and all it did look at is whether
19 Texas, under the presumed facts, stated a claim for
20 relate, and that was essentially that New Mexico was
21 causing or allowing to happen interference with
22 project deliveries to the detriment of Texas, and that
23 was assumed to be true. I don't see what it really
24 changes what Your Honor or the Supreme Court can do
25 with this case. We still have an interstate dispute

1 as between Texas and New Mexico over alleged actions
2 interfering with project deliveries and those
3 deliveries are two different irrigation districts, one
4 wholly within New Mexico, one wholly within Texas, as
5 states under *parens patriae*, and represent those
6 irrigation districts and the water users within them
7 as against other states, which is exactly what we have
8 here. So we have a situation where the Compact really
9 doesn't answer our questions, but as indicated through
10 the briefing, all of the arguments so far today,
11 everyone wants to look at, as they probably should,
12 the project, project history, Reclamation law, and how
13 that is operated, because that answers all of our
14 questions. For a given release, how much return flows
15 do you expect, how much consumptive use is allowed,
16 and where is this water delivered? None of these
17 issues are measured in the Compact. The Compact has
18 no gages. It has no accounting mechanism, and it
19 hasn't since its inception to look at Compact delivery
20 obligations as between lower New Mexico and Texas. We
21 would have to invent all of these terms about Compact
22 releases from project storage, Compact deliveries to
23 farmers, Compact potential limits on consumptive use,
24 Compact return flow obligations. You're not --

25 **JUDGE MELLOY:** So what do you think I

1 should say to the Supreme Court about Texas'
2 complaint? Dismiss it? I don't know. Where does
3 this -- where does this get us? What's -- what's the
4 end point?

5 **MR. WALLACE:** I think, Your Honor, that
6 the end point would be essentially the same. You are
7 going to have to listen and take evidence on all the
8 parties' arguments regarding project operations.
9 Whether it's the New Mexico 57/43 split, whether it's
10 the U.S. arguing that there's a delegation to it of --
11 of a Compact obligation, which -- which the U.S. both
12 says it has, as a Compact matter, but yet doesn't want
13 to act as an agent for the states to enact it, and
14 even the Texas argument, which does not incorporate
15 fully the project as making Compact delivery
16 obligations, but Texas' argument needs to implicitly
17 incorporate the project because Texas' argument, if I
18 understand correctly, is that it gets all of the water
19 at Elephant Butte, subject to EBID contract, even
20 though that's not mentioned in the Compact, in order
21 to know what you're taking away from Texas'
22 apportionment under its own argument, you would need
23 to know exactly what EBID is supposed to get and how
24 much it's supposed to return. That lies entirely
25 within examination of the project. So -- so I think,

1 Your Honor, what you'll need to do, it doesn't really
2 change. You're going to need to examine the history,
3 the course of conduct, the expert reports regarding
4 project operations about the water release, diverted,
5 consumed, returned; however, none of those issues are
6 Compact issues. What they are is a dispute between
7 Texas and New Mexico over the respective state
8 obligations under Reclamation of law. That's still an
9 interstate dispute over water between those two
10 states. So the legal vehicle for finding the answer
11 to this is different. It's not the Compact, but --
12 but there is still an interstate dispute, and I
13 believe you'll be taking very similar evidence. It's
14 just --

15 **JUDGE MELLODY:** So when the Compact says
16 it's -- it's apportioning money -- apportioning water
17 above Fort Quitman, it's really apportioning water
18 above the last gage, which is just south of Elephant
19 Butte?

20 **MR. WALLACE:** It's still apportioning
21 water between the headwaters of Fort Quit man, but
22 there is no sub apportionment between Elephant Butte
23 and Fort Quitman. That whole reach is -- is one under
24 the Compact. There's -- there's nothing -- there's
25 nothing to subdivide that. And if you look at Article

1 14 of the Compact, I think this bears this out, with
2 the simple mathematical problem. So Article 14 of the
3 Compact states, "The schedules herein contained in
4 quantities of water herein allocated shall never be
5 increased nor diminished by reason of any increases or
6 diminution in the delivery or loss of water to
7 Mexico." Now, if the Compact allocated water below
8 Elephant Butte, by mathematical necessity, if there's
9 an increase in loss to Mexico, that is if Mexico is
10 taking more than 60,000 acre-feet, you would have to
11 adjust the allocation, in this case, let's take, for
12 example, if Texas gets everything, Texas has allocated
13 all of the water at Elephant Butte under the Compact,
14 by necessity, if Mexico were to increase losses in the
15 river, you would have to then reduce the allocation to
16 Texas in this example. This is simple math. The
17 water is not there anymore. I -- I think that you can
18 read that clearly to mean the Compact does not
19 allocate specific portions below Elephant Butte.

20 **JUDGE MELLOY:** Well, I thought that that
21 clause -- that article also referred to the fact that
22 there was a general consensus at the time the Compact
23 was negotiated that Mexico was getting more than
24 60,000 acre-feet.

25 **MR. WALLACE:** Yes. Yes. So that --

1 **JUDGE MELLOY:** So -- and then this was
2 designed so that it wouldn't fall necessarily on any
3 state to -- but maybe I'm wrong. I don't know.

4 **MR. WALLACE:** I think you're reading it
5 in the right way. This was designed around the
6 knowledge at the time that, in addition to the 60,000
7 being delivered in the bed of the Rio Grande at the
8 Acequia Madre for Mexico, there are a number of
9 illicit diversions going to New Mexico, as well.
10 You're right that what Article 14 does is it prevents
11 the increased delivery or increased diversion of water
12 by Mexico by impacting other allocations. The point I
13 make here is if there is an allocation made to Texas
14 and lower New Mexico below Elephant Butte, that number
15 has to be changed. Because --

16 **JUDGE MELLOY:** Why can't you, instead of
17 having absolute numbers, just say 57/43, and by
18 implication, then New Mexico bears 57 percent of the
19 loss, and Texas 43 percent of the loss?

20 **MR. WALLACE:** So that would be an
21 argument to deal with because one we're talking about
22 the allocations below Elephant Butte. It makes it
23 clear that -- that any increased loss to New Mexico is
24 not going up the middle and the upper reaches, but
25 then what you're looking at is it's bringing in a

1 57/43 allocation amount, which is not in the Compact,
2 but that still then raises questions that you asked of
3 the United States earlier today, you know, what is the
4 number, what -- what is the number that either EBID
5 gets or that it's entitled to consume or -- or deplete
6 the river bottom. Without that answer, we can't know
7 the impacts that percentage, in other words, we're
8 shrinking the pie. The percentage is the same. The
9 pie is getting smaller. We don't know what that pie
10 size is supposed to be, and given that we don't have
11 any Compact gages, and we're not -- by "we," I mean
12 the states don't have Compact gages, we don't have the
13 knowledge of what the U.S. allocations are. We're not
14 in control of what those allocations are. We can't
15 know whether the Compact is being complied with. So I
16 think that -- that presents that problem that's come
17 up numerous times today is the question, well, what is
18 the number? Right. Even if we're looking at a
19 straight -- straight percentage, the question then
20 becomes is it a percentage of a full supply,
21 percentage of what absolute value, a percentage of
22 what allowed depletion? And, again, these are all
23 very important questions to figuring out relationship
24 of water delivery between New Mexico and Texas. None
25 of them, however, are found in the Compact.

1 **JUDGE MELLOY:** Okay. All right. Well,
2 very interesting. Anything else, Mr. Wallace?

3 **MR. WALLACE:** I believe I'm close to
4 running out of time. I would like to save the last
5 couple minutes, if I can, for later in the afternoon.

6 **JUDGE MELLOY:** All right. Okay. Thank
7 you. All right. We'll turn to the amici at this
8 point. Let me just -- let me -- doesn't mean
9 everybody has to speak, but I'm going to start with --
10 I think I'll start with Elephant Butte. Ms.

11 Barncastle, do you want to -- do you want to be heard?

12 **MS. BARNCASTLE:** Yes, absolutely, Your
13 Honor. Thank you.

14 **JUDGE MELLOY:** Go ahead.

15 **MS. BARNCASTLE:** Let me start my timer
16 because I do run the risk of going over, so I'm going
17 to try and keep myself in line here. I'd like to
18 start, Your Honor, with the jurisdictional argument,
19 and that being the question of which New Mexico entity
20 has jurisdiction over the project, EBID or the state
21 engineer, and why that is so important, and it's
22 important because New Mexico believes that if it has a
23 Compact apportionment, it thereby has oversight over
24 the project, and New Mexico's position is simply
25 incorrect, even if it does have an apportionment below

1 the reservoir, because the oversight it seeks is
2 already statutorily designated and assigned to EBID.
3 Now, when I say New Mexico here, I mean the state
4 engineer, because as I've explained before, it's not
5 the attorney general or the legislature that would
6 assert this control. It's the New Mexico state
7 engineer who also serves as the New Mexico Compact
8 commissioner. Because New Mexico believes that
9 whoever has oversight over the project has the final
10 authority in dealing with issues such as the 2008
11 operating agreement and New Mexico's given the
12 oversight they seek, they will use that oversight to
13 invalidate the operating agreement and potentially
14 other of our contracts, such as the contracts that
15 they take issue with down on the Texas side of the
16 state line. It's EBID's position that EBID and only
17 EBID has the authority to enter into contracts for the
18 operation and maintenance of the project within the
19 New Mexico portion of the project, and that includes
20 the authority to deal with water delivery issues such
21 as those that led to the 2008 operating agreement.
22 Interestingly, New Mexico used to agree with this
23 position. In fact, they agreed so much so that they
24 refused to participate or provide support to EBID when
25 it was litigating the cases that led to the operating

1 agreement. Instead at the time insisting this was a
2 southern New Mexico problem and an EBID problem, yet
3 now it insists that they had the authority all along,
4 and EBID should never have attempted to resolve the
5 issues on its own, and further, that they need to
6 protect EBID from Texas and the United States. Yet
7 when they had the chance, they didn't do that. They
8 took the opposite position. That said, just because
9 New Mexico does not have an apportionment below the
10 reservoir under the Compact does not mean that it is
11 deprived of its state law authority to administer
12 groundwater. The project appropriated all of the
13 unappropriated waters of the Rio Grande, and state law
14 sets up the project differently than other water users
15 in New Mexico, but this didn't mean that the state
16 engineer was still not required to exercise his lawful
17 authority over groundwater within New Mexico so as to
18 protect the senior surface water right of the project.
19 Now, EBID does not dispute OSE's authority to
20 administer groundwater below the reservoir. EBID
21 does, however, take issue with the way OSE has
22 administered groundwater, and that is the heart of
23 EBID's concern. If OSE's oversight over the project
24 is to be -- can be some sort of forecast and how it
25 will exercise -- I'm sorry. Let me stop.

1 If OSE's oversight over the project can
2 be forecasted by how it has exercised its control over
3 groundwater, the project is going to be in a bad
4 situation, and that's why EBID is so concerned with
5 its jurisdictional issue. As stated in our brief,
6 EBID is an entity who is comprised of and represents
7 most of the farmers in the lower Rio Grande, with the
8 exception of a few thousand acres outside of the
9 project. EBID is the only entity that has a legal
10 authority to deal in project operations regardless of
11 whether you do find an apportionment for New Mexico or
12 not below the reservoir.

13 **JUDGE MELLOY:** Are your interests
14 different than the interests of entities such as the
15 New Mexico pecan growers and the Southern Rio Grande
16 Diversified Crop Farmers Association or New Mexico
17 University?

18 **MS. BARNCASTLE:** I don't think so. No.
19 In fact, I have a whole section in my argument where I
20 -- I go through that, and so let me -- let me find
21 that.

22 **JUDGE MELLOY:** Well, that's -- that's
23 fine. But I just want to make clear, because it seems
24 at times that they're not on the same page with EBID,
25 but maybe I'm wrong.

1 **MS. BARNCASTLE:** No, I think as -- as a
2 general proposition, Your Honor, our goals are the
3 exact same. Our strategy is substantially different.

4 **JUDGE MELLOY:** Okay.

5 **MS. BARNCASTLE:** EBID's brief went
6 through a fairly exhaustive explanation of both the
7 federal and state legal cause that support our
8 position, and so I'm not going to attempt to go back
9 through those today, but I would note for the Court
10 that New Mexico didn't respond at all to our
11 substantive argument. Instead it argued that we
12 should be disregarded all together. It couched our
13 argument as a -- a violation of the parens patriae
14 doctrine and attempts to silence EBID on this issue,
15 however, I would note a couple of things on that point
16 that New Mexico has not likewise attempted to silence
17 any of its other water users, so that in and of itself
18 should lend -- should pique your interest. And
19 yesterday, New Mexico acknowledged the importance of
20 our argument when it sought to strike the United
21 States' notice of errata in its documented quotes,
22 important -- this issue is important to this
23 litigation in that the new position by the U.S.
24 attacked the authority of New Mexico state engineer,
25 which is a relevant issue in this litigation. Well, I

1 took that to mean that New Mexico, through its
2 opposition to our brief on the basis that it was an
3 irrelevant argument. Nonetheless, New Mexico failed
4 to effectively respond to the substantive argument
5 even yesterday regarding its lack of authority over
6 the project, and it has not pointed anywhere to any
7 statutory authority or case law that gives it the
8 control over the project that it seeks. Now,
9 conversely, like I said before, EBID does point to a
10 substantial amount of authority riddled throughout New
11 Mexico and federal law, and despite having briefed
12 this Issue substantially, I would say there are two
13 examples that I didn't cover that -- that are
14 important here. The first is a case that dealt with
15 what we call wasteway 18. A wasteway is an area where
16 we return water to the river after use in our system,
17 and we sought in 2016 to put pumps in the river at
18 that point and pump into our wasteway and push water
19 back the opposite direction into our system. That's a
20 new point of diversion. At the time the state
21 engineer initially took the position that a permit for
22 that new point of diversion was required, and we took
23 them to court, and through that process, they withdrew
24 their position after discussions with EBID and the
25 United States, instead agreeing that only notice is

1 provided -- is -- is required, not a permit. There's
2 no permit requirement. They do not have permit
3 oversight in that way. Another good example to point
4 to is the statutes in New Mexico that govern
5 irrigation districts versus the statutes that govern
6 irrigation districts cooperating with the United
7 States. EBID is the latter. There are many other
8 irrigation districts who are not cooperating with the
9 United States, and there are some significant
10 differences between the statutory authority for those
11 entities and for ours. I would just point you to
12 Section 73-9-14. That is the irrigation district
13 statute that sets up the powers of the board of
14 directors for an irrigation district not cooperating
15 with the United States, and it is different than ours.
16 Ours do not contain provisions requiring approval of
17 OSE, but those statutes do require multiple different
18 types of approvals. So New Mexico's legislature knew
19 how, if it wanted to, to require EBID to report to and
20 get permits from the state engineer, but it does not
21 require us to. And as I've already said, EBID
22 disagrees with New Mexico that even if it has an
23 apportionment below the reservoir, it can now inject
24 itself into project operations at any level. We
25 disagree that it needs to do so either. Just a quick

1 procedural note, I think this section of my -- my
2 presentation deals with your Item 2E in your order
3 from March 2nd, and that is the practical effect, if
4 any, of saying that New Mexico loses dominion or
5 control over the waters of the -- it delivers to the
6 reservoir. Our position is just as true as -- against
7 the State of Texas as it is against the State of New
8 Mexico. Whether you call the lower Rio Grande area
9 Compact Texas or Compact New Mexico, it doesn't change
10 the fact that neither state can inject itself into
11 project operations. They are not signatories to any
12 contracts, and that was by design under the federal
13 law. The New Mexico has an apportionment below the
14 reservoir if it does, also does not mean that it's
15 entitled to usurp EBID's authority in EBID's contracts
16 or that they can actually get control over the water
17 that is reserved for the project. Again, my brief
18 goes over this ad nauseam. This Court, if you do find
19 that New Mexico has an apportionment, you should take
20 care to craft an order that limits New Mexico's
21 oversight over the apportionment as we don't want to
22 end up in a situation where New Mexico can suddenly
23 pit southern New Mexico's water use against northern
24 New Mexico's water use. For example, if New Mexico
25 has an apportionment below the reservoir and above the

1 reservoir, can New Mexico then take the position that
2 water uses north of the reservoir, such as the prior
3 paramount native American rights are senior to the
4 project water uses in the southern New Mexico thereby
5 delivering less water to the reservoir to allow senior
6 water uses upstream to take precedence over the
7 project? If so, wouldn't that destroy the entire
8 purpose of the Compact? Another example would have --
9 would be the relinquishment of credit water issue.
10 Currently, it is the Texas commissioner who calls upon
11 the New Mexico commissioner under the Compact to
12 relinquish water for use within the project. With the
13 proposed change by New Mexico, would New Mexico now
14 have the authority to call upon itself to relinquish
15 such water, and if so, how would that work? Or would
16 the Texas commissioner remain in -- in charge? The
17 Compact doesn't contemplate New Mexico acting on
18 behalf of the project in any way, so would we just
19 make it up as we go? New Mexico's argument that they
20 need authority over the project to protect EBID is
21 intriguing, as I've previously said. A number of New
22 Mexico's policies already allow that taking a project
23 water via the ground without compensation to the
24 farmers, and that's why we're here. So we disagree
25 that New Mexico has done everything necessary and

1 required to protect the project from an unreasonable
2 interference by non-EBID pumpers. So New Mexico
3 claiming that it's here to protect us is, you know,
4 the standard word from the government and we're here
5 to help, and that doesn't fly around EBID. And let me
6 just explain here. I'll digress a little bit, and
7 this will get a little more to your point that you
8 just raised regarding our growers groups, because it's
9 worth noting here that EBID singled out non-EBID
10 pumpers because EBID believes it has lawfully provided
11 the necessary offset for EBID's members pumping and
12 those depletion effects on the surface supply when it
13 entered into the 2008 operating agreement. With
14 respect to EBID pumpers, we believe they are and
15 should be treated differently since they are part of
16 the project and because they have used their surface
17 water as an offset under the operating agreement to
18 protect EP No. 1 and Mexico from improper interference
19 with surface supply by their groundwater pumping. So
20 this kind of gets to your question, 2F, in your order
21 regarding whether an injunction on groundwater pumping
22 is required, and our answer is no, at least not for
23 EBID member pumping, and no curtailment is necessary
24 so long as the operating agreement is in place. EBID
25 --

1 **JUDGE MELLOY:** I guess that was kind of
2 my -- that was what I was getting to in my question
3 about the interrelationship between the operating
4 agreement and shutting down pumping is sort of an
5 either/or situation, isn't it?

6 **MS. BARNCASTLE:** Yes, it is. Because we
7 bargained for the ability to continue to pump
8 groundwater that otherwise interfered with surface
9 water deliveries so long as we provided an offset via
10 our surface water and keep EP No. 1 whole. And so if
11 you curtail our groundwater pumping and leave the
12 operating agreement in place, EBID's deprived of the
13 benefit of its bargain, and it's our position that
14 such curtailment within EBID is unnecessary, but it's
15 also not supported by the -- the case law that allows
16 EBID to tap those drain flows, and -- and I could
17 digress further into that, but I did a little bit in
18 my brief, so it's not necessary here. But let me just
19 be clear that we're not claiming that there is a
20 federal groundwater right here. What I'm suggesting
21 is that EBID members are on a different playing field
22 than other groundwater users, both under state and
23 federal law, that works to protect their investment.
24 That includes their ability to act as the project
25 water whether it's on the surface or in the ground.

1 New Mexico's issuance of groundwater permits for
2 supplemental wells seems to acknowledge this fact.
3 It's only -- it only gives supplemental well permits
4 to EBID farmers and no others, and so following on the
5 heels of that via the 2008 operating agreement, it's
6 our offset that allows those supplemental permits to
7 continue to be exercised, and so in short, we do
8 believe that a different standard applies to our
9 farmers. And -- and then this is -- this gets
10 directly to your point from before. We recognize that
11 some of our constituents do not believe the operating
12 agreement is perfect, but the policy decision made by
13 the officials who are elected to run the district, my
14 board of directors, was to avoid making the --
15 perfecting the enemy of the just is good, and my board
16 has consistently held the policy position that the
17 2008 operating agreement is just as good or better
18 than anything suggested by anyone since this struggle
19 began. And the fact that a small number of EBID
20 constituents disagree with our policies is -- is
21 something that New Mexico continues to point out, and
22 -- and we just don't think that it's any -- anything
23 necessary -- that necessarily destroyed our arguments
24 or our position. In fact, our board has continually
25 also taken the policy position that we do not silence

1 our own constituents, and if our own constituents seek
2 to disapprove of our positions, which some of them
3 have, and they are participating here, it is my
4 instructions that I do not in any way seek to silence
5 them, because it's my board's view that our end goals
6 are not at odds. Our strategies are. And so my board
7 would never approve of me coming to you and saying
8 don't agree -- don't listen to our constituents. We
9 do think their views are important. And they're not
10 necessarily in line with ours all the time in terms of
11 strategy, but at the end of the day, we all have the
12 same goal, to protect our ability, to continue to grow
13 crops. And I think that is my time, Your Honor, but I
14 do have, if you'll permit me to go a little bit over,
15 I do have to sum some things up if you don't mind.

16 **JUDGE MELLODY:** Go ahead.

17 **MS. BARNCASTLE:** The bottom line here is
18 that New Mexico does not have an apportionment below
19 the reservoir, but even if it does, it does not have
20 control over that apportionment as it would over a
21 traditional apportionment in other Compacts, because
22 this is a different situation with both state and
23 federal law crafted specifically for Reclamation
24 projects that protect EBID's authority and its
25 members' beneficial use rights from infringement by

1 its home state, and this is done by design for
2 multiple reasons. Now, EBID does not buy into the
3 57/43 split. We actually tend to agree somewhat with
4 Colorado on that issue, though we don't go near as far
5 as Colorado. The Compact specifically defines usable
6 water as all water exclusive of credit water, which is
7 in project storage and available for release in
8 accordance with irrigation demands, including
9 deliveries to Mexico, and irrigation demands is not
10 defined, but it necessarily fluctuates, and over the
11 last hundred-plus years of the project, nobody has had
12 an issue with it fluctuating. We don't see the need
13 to tie the hands of the project to prevent it from
14 allowing that fluctuation. The 57/43 split is just
15 simply not necessary, and it's not supported by -- by
16 the strict terms of the Compact. So my concluding
17 remarks, Your Honor, I'd like to remind you of my
18 argument at the April, 2019, hearing in Denver where I
19 laid out what I called the zero sum game set up by the
20 Compact whereby the upstream state delivers to the
21 downstream state, and once it does, it can no longer
22 exercise any control over what it delivered. And I
23 think you heard variations of that argument from both
24 Texas and New Mexico this morning. We believe that
25 the Compact is put in place for the exact purpose of

1 protecting delivery of water to the project despite
2 all of the upstream development of water, and in that
3 way, the project was inherently incorporated into the
4 Compact. New Mexico seeking to assert itself into
5 operations below the reservoir is in violation of the
6 Compact itself. It can't deliver on the one hand and
7 then not leave that water alone on the other hand. It
8 must leave that water alone, other than its obligation
9 to protect it. The only certainty is that New
10 Mexico's arguments are an attempt to confuse and
11 discredit EBID's duly-elected board's policies. Our
12 goal is to continue to protect the investment of the
13 farmers in the lower Rio Grande in both the surface
14 water and the groundwater and to continue to be able
15 to rely on both of those sources of water, and we
16 believe that recognizing that the Compact protects
17 EBID's water from interference by New Mexico is
18 important to protecting the future of irrigated
19 agriculture in the lower Rio Grande. That includes
20 protection of the 2008 operating agreement, which is
21 the only wet water offset that you have before you.
22 So with that, Your Honor, that concludes my prepared
23 presentation. I had several points that came up this
24 morning regarding questions you had, but I will
25 refrain from diving into those in the interest of time

1 unless you ask me to.

2 **JUDGE MELLOY:** All right. No, that's
3 fine. Thank you, Ms. Barncastle. I'll -- I'll turn
4 to Ms. O'Brien at this point for El Paso Water
5 Improvement District.

6 **MS. O'BRIEN:** Yes. Good afternoon, Your
7 Honor. Thank you for the opportunity to address the
8 matters before you today. And I -- I think you've --
9 you've heard a lot today. I think I'll start out by
10 saying that I think clearly in answering the questions
11 that we believe are right for determination as a legal
12 matter, I think stating the obvious, the dispute in
13 resolving the questions that are able to be resolved
14 as a legal matter center on the interplay of the
15 Compact and the Compacting states' acknowledgment and
16 reliance on the preexisting Rio Grande project as a
17 means for distributing the waters from and below
18 Elephant Butte. Now, there is, I think, fundamental
19 misunderstandings and misstatements by -- certainly by
20 New Mexico with regard to this relationship. The
21 Compact clearly gave both Texas and New Mexico limited
22 but valuable rights with re-- from and below Elephant
23 Butte, and in essence, that was protect the project.
24 Each state gets the right of the other state not
25 interfering with project deliveries. New Mexico takes

1 this and conflates completely the project and the
2 Compact as a means to manufacture for itself a Compact
3 right both in terms of claiming a right in the
4 district's contract as a way to measure and inviolate
5 Compact apportionment to it and New Mexico also
6 conflates the project in the Compact to justify its
7 depletions of project supply by pointing to the United
8 States' efforts to deliver to the districts under
9 Reclamation law their rights in mitigating New
10 Mexico's Compact violations interfering with those
11 project deliveries. So where are we then? What can
12 you decide as -- as a legal matter? Well, we have to
13 get this relationship between the Compact and the
14 project right, and Ms. Barncastle's concluding
15 remarks, I think, nicely summed up what I was just
16 trying to articulate in terms of de-conflating the
17 project in the Compact. So the first question --
18 there are two questions we believe you can resolve as
19 a legal matter by just looking at the Compact, looking
20 at the terms and the structure of what the Compacting
21 parties agreed to in 1938. So the first is does the
22 Compact leave New Mexico free to interfere with and
23 intercept Rio Grande project deliveries to the
24 districts after New Mexico has made its Article 4
25 obligated delivery into project storage.

1 **JUDGE MELLOY:** Well, let me ask you
2 something about that. And I guess in the arguments
3 that we've heard today, I now understand, if I
4 understand correctly, that almost all the pumping that
5 we're saying New Mexico is doing to interfere with
6 Compact deliveries to El Paso and to Texas are all
7 occurring within EBID. So are we really saying it's
8 New Mexico that's doing it or are we saying it's EBID
9 that's doing it? And I understand EBID saying, well,
10 we recognize our problem, and that's why we have the
11 operating agreement to -- to -- to compensate for it,
12 but is it really New Mexico or EBID?

13 **MS. O'BRIEN:** Well, Your Honor, we
14 believe it is New Mexico, as the groundwater pumping
15 that is occurring within EBID is authorized by state
16 law permits. It is not authorized by the project, and
17 it is depleting project supply. What the operating
18 agreement was able to do, with regard to project
19 operations, which, again, project operations are
20 within exclusive authority of the United States and
21 the two districts. The Compact did nothing to usurp
22 the Reclamation rights and obligations of the two
23 districts and the United States. The United States --
24 the districts have rights in their contracts. They
25 have -- we have bought and paid for the project, along

1 with the United States, and we continue to pay for the
2 project on an annual basis and are provided under
3 federal law with the right to that project supply.
4 The Compact did nothing to usurp that. New Mexico
5 simply is trying to stand on our shoulders and
6 insinuate itself into something it has no business
7 insinuating itself into, neither does Texas. The
8 operating agreement was the successful effort, because
9 it has now been in place and successfully operating
10 the project since 2008 of the districts in the United
11 States to mitigate the effects of groundwater pumping
12 in New Mexico on the ability of the project to deliver
13 what it needed to deliver to the two districts, and in
14 that context, EBID made certain decisions with --
15 regarding foregoing certain amounts of surface supply
16 to ensure that downstream, EP No. 1 got the water
17 supply to which it is entitled to. And so as Ms.
18 Barncastle said, EBID, in essence, protected the
19 rights of groundwater pumpers within EBID to the
20 extent that they desire to continue pumping
21 groundwater to meet some of their irrigation demands.
22 New Mexico is seeking to upend that contractual right
23 and arrangement by saying, oh, no, it's not even the
24 districts that have the right to that water. It's New
25 Mexico, and we get a sum certain, and we get to pump

1 groundwater on top of that. The operating agreement,
2 in fact, what it did was solved the interstate issue
3 by mitigating New Mexico's Compact violations. But
4 the problem remained that intrastate, New Mexico
5 continues to pump groundwater in addition to what the
6 operating agreement anticipated putting more and more
7 of a burden on EBID. So while in large respect, the
8 operating agreement is solved, the interstate issue in
9 terms of the districts getting what they are entitled
10 to, it did not solve the intrastate Issue that is now
11 on EBID's shoulders. So, Your Honor, the answer to
12 the -- the first question, did the Compact leave New
13 Mexico free after its met, it's in the Compact very
14 clear, delivery obligation under Article 4 into
15 project storage, is it free to then, upon release, to
16 take that back out to groundwater pumping or
17 otherwise? It is -- it is not. Mr. Wallace made a
18 point of saying, well, it's -- you know, it's
19 completely silent as to what happens after New Mexico
20 makes its Article 4 delivery. Well, the reason it's
21 silent is because there was no need for an
22 inflow/outflow paradigm or anything of the sort
23 because the project had existed for a quarter of a
24 century, and it was functioning, and it continue -- it
25 continued to -- to function after that, and that was

1 the intent of the Compacting parties. It didn't need
2 -- they didn't need -- Texas and New Mexico didn't
3 need anything more than the project, and the promise
4 by either state, Texas or New Mexico, not to interfere
5 with those deliveries. New Mexico has violated that
6 -- that promise. So, Your Honor, you can decide, we
7 believe today, on the record before you, which need go
8 no further than looking at the Compact, that New
9 Mexico has a delivery obligation under Article 4 to
10 deliver into project storage, which is defined in the
11 Compact, and deliver means deliver, so New Mexico
12 points to the district's contracts that it wants to
13 say establishes its right. Well, the only contract to
14 which New Mexico is a party is the Compact.

15 **JUDGE MELLOY:** Well, Texas isn't a party
16 to the contract either.

17 **MS. O'BRIEN:** That's correct.

18 **JUDGE MELLOY:** So is Texas even the real
19 party of interest here for purpose -- should this
20 really be a lawsuit between EP1, EBID, and United
21 States over your district not getting the water and
22 then, of course, you settle it, which is fine, but is
23 -- are you -- do we even -- I almost hear you say we
24 don't have the real parties of interest here.

25 **MS. O'BRIEN:** Two thoughts with regard

1 to your question there, Your Honor. First, the case
2 Texas has -- has brought is to enforce New Mexico's
3 promise not to -- to deliver into Elephant Butte and
4 not to then interfere with that delivery once it is
5 released. That is what -- that's the lawsuit that
6 Texas has brought, and they -- that is, I would say,
7 their singular right under the Compact to enforce that
8 promise of New Mexico. With regard to the way the
9 case frankly has evolved or the case New Mexico would
10 like this to be, you're right. The districts and the
11 United States are the real parties of interest. New
12 Mexico, in fact, brought the case, would like to
13 prosecute here in federal district court in New
14 Mexico, which is stayed with pending motions to
15 dismiss in -- in that case, and those are challenges
16 to the operating agreement. It has now brought those
17 claims into this case, most of which have been
18 dismissed by Your Honor, but that -- that was -- New
19 Mexico didn't like that, so what they've done now is
20 tried to transmute translate its Compact claims to
21 invalidate the operating agreement by saying, oh,
22 that's EBID's 57 percent and the course of performance
23 of Reclamation, those are our rights and the operating
24 agreement violates that. That is -- they cannot --
25 first of all, there's no legal basis for that claim.

1 The -- when the -- when the Supreme Court said that
2 the Compact implicitly incorporates the downstream con
3 -- contracts, it did so, again, I think what
4 Mr. Wallace articulated, it did not do so -- it only
5 did so in the context of describing the U.S.'s
6 relationship to the Compact. It delivers to the
7 districts, which equates to any apportionment from or
8 below Elephant Butte. So it depends on which case
9 you're talking about in terms of what were real
10 parties of interest to. We articulated many times to
11 Your Honor, if New Mexico's efforts continue, as they
12 do today, to argue that it has -- in signing the
13 Compact, it usurped the rights of the districts in
14 their contracts and that New Mexico has a right in and
15 to the project and in and to project operations, then,
16 yes, we are absolutely the real parties in interest,
17 but we don't believe that there's a legal basis, a
18 valid legal basis for New Mexico's position with
19 regard to that. There's nothing in the Compact that
20 says the district's rights under Reclamation law,
21 which, again, have existed for, you know, a quarter of
22 a century, and the United States' obligation
23 Reclamation law, there is nothing that says that those
24 rights were usurped, set aside, secondary to the
25 rights of the states that were provided by the

1 Compact. Again, from and below Elephant Butte, what
2 are the rights of Texas and New Mexico? The right of
3 either state not to interfere with project deliveries.
4 This goes to the second question that we believe is a
5 matter of law Your Honor can decide on the record
6 before it, and that is does the Compact establish a
7 quantifiable amount or determinable apportionment of Rio
8 Grande project water that must be delivered to Texas
9 or New Mexico as an apportionment. The question --
10 the answer to this question, as with the first, is no.
11 And with regard to both of these questions, Your Honor
12 need only look at the Compact, the terms and structure
13 of the Compact. That is what the states agreed to in
14 1938, and the inquiry and answer with regard to the
15 two questions we believe are answerable today will
16 need go no further than the terms of the -- of the
17 Compact. The amounts that are delivered downstream
18 are a function of project operations and accounting
19 under federal Reclamation law, and they're the rights
20 and the obligations of Reclamation and the districts.
21 These -- New Mexico tries to point to the Supreme
22 Court language, again, which was in a limited con --
23 context of deciding what the U.S. interest was for
24 purposes of intervention. In incorporating the
25 downstream contracts, again, the Compact did not usurp

1 the district's contractual rights or replace them. It
2 incorporated them so as to protect the preexisting
3 rights of the districts and the Reclamation and
4 Reclamation law governing the project. Reclamation's
5 delivery of apportionment pursuant to its Reclamation
6 law obligations after New Mexico finishes its Article
7 4 delivery is a far cry from providing New Mexico any
8 Compact rights in those Reclamation contracts or
9 project operations, and project operations includes
10 how is water going to be allocated to the two
11 districts. That is, you know, at the heart of project
12 operations, how does allocation occur. Those
13 operational rights, those contractual rights, they are
14 not rights of New Mexico or of Texas. They are the
15 rights of the districts and the United States in the
16 project that were left undisturbed by the Compact.
17 The Compact basically is -- has -- imposes an
18 obligation on New Mexico and on Texas to stand aside
19 allowing the project to function. So, again, your
20 answer, who's the real party of interest? It depends.
21 Certainly, Your Honor, if you found that New Mexico
22 could usurp and stand in the shoes of the districts
23 and claim some inviolate Compact right to 57 percent
24 of project supply, as they defined it, we are
25 absolutely the real parties in interest, but that's

1 not what the Compact gives New Mexico. For all these
2 reasons, New Mexico's now both implicit and explicit
3 challenge to the operating agreement must fail as a
4 matter of law. Indeed, in New Mexico's consolidated
5 reply brief, they argue that the operating agreement
6 and issues related to it are at the heart of this
7 case. We respectfully disagree. We don't believe New
8 Mexico has the right, the legal right, or the ability
9 to challenge the operating agreement. And contrary to
10 New Mexico's argument that the lack of a numeric
11 quantity to either state, either state, Texas or New
12 Mexico, it does not result in incomplete
13 apportionment. New Mexico confuses general equitable
14 apportionments with what New Mexico actually agreed to
15 here, and that is that the project would take over
16 with the rights and obligations of the project parties
17 undisturbed.

18 **JUDGE MELLODY:** You are going to have to
19 kind of move on here in a minute, so do you want to
20 bring it to an end, Ms. O'Brien?

21 **MS. O'BRIEN:** Sure. Sure, Your Honor.
22 So I think I was pretty much wrapping up there. The
23 -- again, we do believe despite, you know, at this
24 point hours of arguments and the thousands of pages
25 you've been provided by the parties that those two

1 questions, New Mexico's delivery obligation under
2 Article 4, and its Compact prohibition on New Mexico's
3 ability to interfere with the project deliveries, once
4 it delivered under Article 4, it cannot do that. The
5 Compact did not leave it free to do that. You can
6 determine that today. And secondly, Your Honor, can
7 also determine that there is no quantifiable
8 apportionment as to either state, the right they got
9 limited is valuable, the right of either state not to
10 interfere with project deliveries. Thank you.

11 **JUDGE MELLOY:** All right. Thank you.
12 Well, why don't we go back and just sort of in
13 alphabetical order. Mr. Brockmann, is there anything
14 you want to say?

15 **MR. BROCKMANN:** Yes, Your Honor. On
16 behalf of some of the New Mexico amici, we have kind
17 of set an order to try to be efficient and build on --
18 on an argument, so I didn't know if you were going to
19 start with Mr. Caroom to finish the Texas amici. If
20 not, I think Mr. Utton was planning on starting --
21 planning on starting on behalf of the New Mexico
22 amici.

23 **JUDGE MELLOY:** All right. I can go to
24 Mr. Caroom first. Mr. Caroom, do you want to be
25 heard?

1 **MR. CAROOM:** Yes, Your Honor, I do. And
2 I will endeavor to be brief. Three points I'd like to
3 address. First one is New Mexico's full supply
4 motion. It clearly shows that this theme, which has
5 been developing about using the project to define the
6 Compact obligations can be taken too far, and -- and
7 it shows it in the numbers. If you look at the
8 Compact, it has 790,000 acre-feet as an average or
9 normal release, but New Mexico points out that 763,000
10 acre-feet is all that's required for a full supply.
11 So that -- then they go ahead and say that a full
12 supply satisfies the Compact obligation. So they
13 basically used the project and Bureau of Reclamation's
14 operation of it to define the Compact obligations, and
15 I -- I find myself in sympathy with Colorado in its
16 argument that you're going too far when you do that.
17 And we would like to point out that not only is that a
18 legal error, but it's practically important. That's a
19 bunch of water. The difference between operating the
20 project with a 790,000 acre-foot release versus 763.
21 That's water that El Paso could use badly.

22 Second point, I would be cautious about
23 reading too much into the Supreme Court's 2018
24 decision and language. The favorite part of New
25 Mexico, which says that the U.S. is an agent for

1 ensuring the Compact's equitable apportionment to
2 Texas and part of New Mexico does sound like New
3 Mexico is getting an apportionment, but there are
4 other parts of the -- of the opinion, specifically in
5 discussing Texas' delivery of water into Elephant
6 Butte instead of its state line, the Court said the
7 downstream contracts promise Texas water districts a
8 certain amount of water every year from the
9 reservoir's resources. And it's the phrase Texas
10 water districts that I want to -- want to focus your
11 attention on. It's districts, plural, and they're
12 Texas according to this description, and it's a Texas
13 delivery that's being made. So you can look at other
14 parts of the Court's opinion and see support for the
15 idea that Texas is receiving the entire delivery into
16 Elephant Butte. You know, for most purposes, in terms
17 of figuring out the impact of groundwater pumping and
18 what ought to be done about the interference with
19 deliveries, it really doesn't matter very much whether
20 New Mexico has got an apportionment, but it does
21 matter with regard to the 2008 operating agreement,
22 and it's become very clear from New Mexico's briefing
23 that they are looking at having an apportionment as
24 their legal basis for challenging the 2008 operating
25 agreement.

1 Third point is relative to the United
2 States' request for injunctive relief. The situation
3 presented by this litigation is not new. There is an
4 excellent law review article that we cited in our
5 brief last year, 2019, called, "Interstate Water
6 Litigation in the West, a 50-year retrospective."
7 It's by University of Denver Water Professor Burke
8 Griggs, and what he talks about is the groundwater
9 revolution. He makes the point that until the '50s,
10 the technology wasn't there for these high-production
11 irrigation wells that we see so much of now, and also
12 the interstate Compacts addressing surface water were
13 all pretty much written before the '50s. So you have
14 a situation where technology has moved past where the
15 negotiations were for the Compact, and reviewing the
16 cases, he goes through them and states that the
17 Supreme Court has repeatedly concluded that these
18 Compacts address the groundwater depletion, even
19 though it's not specifically mentioned, because if
20 it's hydrologically connected, it's going to be
21 impacting the surface water allocation of the Compact.
22 And he goes through to make it -- he makes a final
23 interesting point. He says that the upstream states
24 are economically and politically incentivized to
25 delay, to not implement the surface water allocation,

1 to take advantage of the groundwater supply, and if
2 you look at the history with New Mexico, that is
3 certainly true. On the Pecos River, that is exactly
4 what happened, and here on the Rio Grande, it was well
5 along the way until El Paso made claims to get water
6 out of New Mexico, and that's when the state engineer
7 closed the basin and shut down the new groundwater
8 wells. So it was -- it was purely a defensive measure
9 when they did that. It wasn't to enforce the Compact,
10 and I would suggest that the politics and economics
11 haven't changed, that New Mexico officials are going
12 to need an order in order to resist the politics and
13 economics that are involved. Thank you very much,
14 Your Honor. I'd be happy to answer any questions.

15 **JUDGE MELLOY:** Thank you, Mr. Caroom.
16 Let me see. Does that cover all the Texas interests?
17 Hudspeth County, do you -- where are you in this,
18 Mr. Miller? Is he here?

19 **MR. MILLER:** Yes. Hi, Your Honor. I'm
20 going to -- I'm going to refrain from offering comment
21 today. Thank you.

22 **JUDGE MELLOY:** Thank you. All right. I
23 think that's all of the non-New Mexico interests. And
24 who did you say was going to go first, Mr. Brockmann?

25 **MR. UTTON:** Your Honor, it's John Utton.

1 **JUDGE MELLOY:** Okay. Mr. Utton, go
2 ahead.

3 **MR. UTTON:** Thank you. As I mentioned
4 at the beginning, I'm representing New Mexico State
5 University and filed an amicus brief, and as I also
6 mentioned, our law firm represents Public Service
7 Company of New Mexico and the Camino Real Regional
8 Utility Authority, who are claimants in the lower Rio
9 Grande adjudication and have representatives on this
10 proceeding. What I would like to talk about really is
11 what Your Honor brought up and, I think, discussed
12 very pointedly just recently, and that is who are the
13 real parties in interest. I think that by examining
14 the basic structure of authority over water will help
15 answer the issues in this case, at least some of them.
16 Much of the dispute, as you discern, is who has
17 authority to do what and where should we be deciding
18 it and -- and who should be deciding it. On the one
19 end, you have the states to whom Congress ceded the
20 public water in the late 1800s. The public waters
21 were ceded to the states to regulate and -- and to
22 make the best use as they want to under the prior
23 appropriation doctrine. On the other end of the
24 spectrum are the beneficial users of the water. They
25 are the people who actually own the water rights, put

1 it to beneficial use. The water rights are pertinent
2 to their land, and in New Mexico, there are 16,000 of
3 those beneficial use water rights users in the lower
4 Rio Grande adjudication, including EBID members. In
5 the middle between those two ends, you have United
6 States and the irrigation districts. They do play a
7 critical role, but they are not the owners of the
8 water, nor do they have an apportionment, like the
9 states. They are also not the beneficial water rights
10 owners, at least not in New Mexico. They are
11 essentially middlemen. They play a critical role. I
12 don't want to demean them in any way. They are
13 essential. They have gained the right to impound,
14 divert, and convey water, but they do not have the
15 authority to alter apportionments that belong to the
16 states, and they do not have the authority to infringe
17 on the water rights of beneficial users. They are a
18 sort of agent whose duty it is to deliver water. So
19 we have the states who own the water, the U.S. and the
20 districts who receive state approval to appropriate
21 the use of the water, and we have the end users who
22 own the usufructuary right to the public waters, and
23 oftentimes in -- in this situation, you hear an
24 analogy to the -- the apple tree where the apple tree
25 is the public water that's owned by the states so the

1 states own the apple tree, and the usufruct is the
2 right to pick those apples and consume them. When
3 viewed this way, I believe, Your Honor, that the lines
4 of authority and the lines of argument are much
5 clearer than presented in much of this briefing and
6 argument. I think there are three important examples
7 of this. The first example I would give is that Texas
8 argues that New Mexico does not have an apportionment
9 below Elephant Butte because New Mexico does not have
10 a contract with the U.S. Texas points out that EBID
11 is the only party with a contract. Said that again
12 today. This argument misapprehends the lines of
13 authorities and roles of the parties. New Mexico does
14 not need a contract with the U.S. for New Mexico's own
15 apportionment. The process is the reverse. The U.S.
16 obtains approval from the states to use water, not
17 vice versa, and that is what has happened here. In
18 1906 and 1908, the Reclamation service that had been
19 newly created and by the Reclamation Act of 1902 filed
20 notices with the territory of New Mexico to
21 appropriate the public waters for the Rio Grande
22 project and, you know, that led to a usufructuary
23 right in the project and the water users. It served
24 as a basis for the apportionment by -- of the states
25 by the Compact. And then in the New Mexico

1 adjudication, the project appropriation was recognized
2 as an impoundment, storage, and water conveyance
3 right, and at the same time, the adjudication court
4 has recognized and continues to recognize the
5 important water rights of EBID members, as the
6 beneficial users who own the water right. The fact
7 that EBID has a contract with Reclamation has no
8 bearing on the existence of New Mexico's ownership as
9 a state of its public waters. Congress resolved that
10 question 150 years ago, as we discuss in our amicus
11 brief on Pages 13 and 14, and those involved the --
12 the acts beginning in -- in 1860 through 1877, the
13 homestead acts and the mining acts that severed the
14 public waters from the federal government and ceded
15 them to the states, and the Rio Grande Compact did not
16 change that. So in summary, New Mexico does not need
17 a contract with the U.S. to have an apportionment,
18 that would be an equivalent of requiring the owner of
19 the apple tree to have a contract with the apple
20 picker to prove ownership of the tree. A second
21 example, Your Honor, and Ms. Davidson is going to
22 cover this in more detail, both the U.S. and EBID
23 contend they have authority to reallocate water from
24 the New Mexico side of the project to the Texas side.
25 Now, this -- this goes to the questions that -- and

1 the exchange that you had with Ms. Coleman. In
2 particular, you asked what's to prevent the three
3 entities from renegotiating contracts to determine to
4 the detriment of one state. Well, the answer is they
5 cannot do that. As middlemen or agents, it is
6 difficult to find any authority for that. As holders
7 of a usufruct granted by the state, they do not have
8 permission to change the use out of state. EBID has
9 said in their brief that there is nothing to prevent
10 the project beneficiaries from making deals with
11 another that change the distribution of water within
12 the project, but that cannot be true in the absence of
13 the owner of the corpus of the water or those that own
14 the beneficial usufruct from agreeing to that. The
15 actual project beneficiaries are the EBID members who
16 own the water rights. They have not agreed to that
17 deal, so neither the states that own the public waters
18 nor the beneficial users have agreed. An agreement
19 among middlemen is not enough. It would be like the
20 apple pickers getting together and deciding to
21 redistribute the apples contrary to the wishes of the
22 principals. Ms. Davidson is going to talk more about
23 that, and I think the state's reply brief also has a
24 fair amount of discussion on Page 57 so I'm going to
25 stop there and move to my last point. This is the

1 third example of this problem. Based on the structure
2 that I have described, the U.S. would also exceed its
3 authority when it seeks relief in this interstate form
4 for grievances that are purely intrastate, as
5 discussed by Mr. Wechsler today. In its motion for
6 summary judgment, the U.S. repeats Texas' claim that
7 New Mexico, quote, "New Mexico must deliver the water
8 apportioned to Texas," which is fine, that is what
9 Texas claims, but the U.S. then goes further and
10 demands that New Mexico must also make delivery to the
11 project lands in New Mexico. This additional claim
12 goes beyond what is necessary to resolve Texas'
13 Compact claims. It would interfere with New Mexico's
14 sovereign authority to administer and adjudicate uses
15 solely within New Mexico. The U.S. claim is a request
16 for intrastate administration, but made in the U.S.
17 Supreme Court. Again, the U.S. did not receive an
18 apportionment of water under the Compact. It received
19 the usufructuary right from the state that is subject
20 to state administration. As NMSU details in our
21 amicus brief, this is not the first time the U.S. has
22 sought to order the jurisdiction of the process
23 including the comprehensive stream system
24 adjudication. As I mentioned, there are 16,000
25 claimants in the state case that have the right to

1 notice of U.S. claims against them. NMSU appears as
2 an amicus, but may not appear as a full party in these
3 proceedings the public service of New Mexico operates
4 a power plant southwest of Las Cruces. It supplies
5 enough electricity for 120,000 homes. It is a party
6 to lower Rio Grande adjudication, but it's not a party
7 to this case. Same with the Camino Real regional
8 utility authority, which provides water service to the
9 City of Sunland Park and the border industrial area.
10 It is a party in the state adjudication, but not a
11 party in this case nor are 16,000 other water users.
12 As NMSU describes in its brief in Section 3 the
13 McCarran amendment and U.S. Supreme Court cases
14 interpreting that law require a unified proceedings of
15 all claimants to water within a state. U.S. requests
16 preferential and piecemeal determination of its claims
17 that can be resolved in the state form and should be
18 and must be. They ask that it be done here in the
19 absence of other claimants. As we discuss in greater
20 detail in our brief, we urge you to reject their
21 request to expand this case beyond what is necessary
22 to resolve the Texas Compact claims. We also ask you
23 to look carefully at the lines of authority in order
24 to determine who the real parties of interest are.
25 Thank you, Your Honor.

1 **JUDGE MELLOY:** Thank you. Ms. Davidson,
2 are you going next?

3 **MS. DAVIDSON:** No, Your Honor.
4 Mr. Olsen is going to do a brief introduction of his
5 clients and then I'll address the Court.

6 **JUDGE MELLOY:** Mr. Olsen?

7 **MR. OLSEN:** Yes, Your Honor. May it
8 please the Court. I appear today on behalf of the
9 Southern Rio Grande Diversified Crop Farmers
10 Association. This is a group of farmers made up of
11 the lower Rio Grande area. They utilize both surface
12 and groundwater for the irrigation of a wide variety
13 of crops ranging from alfalfa to cotton, vegetables
14 including onions, lettuce, chili, cabbage, and
15 watermelons. The members of the association are also
16 members of EBID, but I find it important to inform the
17 Court today that the association and its members have
18 joined with the pecan growers in supporting New Mexico
19 in its position regarding the Compact apportionment
20 issue. Your Honor, in order to avoid duplication of
21 remarks to the Court, I'll defer to Ms. Davidson. I
22 would like to point out that the farmers also adopted
23 and agree with Mr. Utton's remarks, and I thank the
24 Court for the opportunity to appear today.

25 **JUDGE MELLOY:** Thank you, Mr. Olsen.

1 All right. Ms. Davidson?

2 MS. DAVIDSON: Thank you, Your Honor,
3 and I want to thank you for providing the opportunity
4 to hear from the actual owners of the water rights in
5 New Mexico's lower Rio Grande valley. We are here
6 today to argue in supporting New Mexico's motions and
7 its opposition to the other motions and will also
8 address specific reasons why the United States' motion
9 should be denied. But first, I want to give you just
10 a little bit more background and given some of your
11 questions to Ms. Barncastle on -- on our positions and
12 our farmer members positions in this matter on why
13 they're so interested in this litigation and why
14 they've been so active in participating in -- in
15 support of New Mexico. As Mr. Olsen indicated, he and
16 I represent two farmer groups with several hundred
17 members who use water delivered by EBID and through
18 their facilities. For decades, these farmers have
19 paid, and they continue to pay EBID assessments, and
20 those assessments have been used for decades to
21 reimburse the construction cost of the project, and
22 also for annual operation and maintenance costs today
23 for project facilities, and as you already heard a lot
24 today, they also use groundwater from wells, and if
25 this matter goes to trial, the farmers themselves will

1 explain to you in their own words how Reclamation has
2 encouraged this use of groundwater within New Mexico
3 for irrigation purposes for at least 70 years. And
4 you might guess that drilling groundwater wells and
5 using groundwater and paying electricity to pump
6 groundwater is -- it has a high price tag, so they
7 needed encouragement to drill wells. It's not
8 something they necessarily wanted to do or could
9 afford to do, but they needed to do to satisfy the
10 irrigation demands within the project at different
11 times through history and Reclamation encouraged those
12 that could afford to drill the wells to share with
13 those that could not afford to do so. Since
14 implementation of the new operating procedures, since
15 about 2006 and now under the new operating agreement,
16 the farmers continue to have to pay EBID assessments,
17 but they're getting much less bang for the buck.
18 They're getting much less surface water for those
19 assessments, and in turn, their pumping costs have
20 greatly increased. And this year, as you heard from
21 Ms. Barncastle and others, if you're an EBID irrigator
22 who doesn't have a well, you're just simply out of
23 luck. There is no water to be used for irrigation
24 purposes.

25 **JUDGE MELLOY:** Will those farmers have

1 to just allow their fields to go fallow then?

2 **MS. DAVIDSON:** Yes.

3 **JUDGE MELLOY:** Will they be able --

4 **MS. DAVIDSON:** Or they could possibly
5 try and get an agreement with the groundwater users if
6 they could to lease groundwater rights, but in a lot
7 of situations, there are farmers who don't even have
8 access to facilities where groundwater could be pumped
9 to them. But, yes, Your Honor, and I think in one of
10 New Mexico's declarations attached to one of their
11 responses, the district -- the district master for the
12 Office of the State Engineer did give examples of
13 seeing subsistence gardens that have died, orchards
14 that have died since the implementation of the
15 operating agreement. Given these real-life dynamics,
16 our clients believe it's very important for you to
17 understand and encouragement from Mr. Olsen and you
18 also asked Ms. Barncastle this question, that even
19 though they are irrigators within EBID, they
20 unequivocally feel that EBID does not speak for them
21 in this particular litigation. They are very
22 concerned to see the consequences of the operations
23 over the last 15 years and, now, under the operating
24 agreement, and they strongly disagree with EBID's
25 characterization of their farmer operations being

1 located on some fictional islands called Compact
2 Texas. Unlike EBID, they dispute that Texas or its
3 Compact commissioner acts in their best interest or
4 that Texas has any motivation to protect their
5 continued ability to farm. Our farmers do not pay
6 taxes in Texas. They do not vote in Texas, and no
7 Texan-elected official or appointed Compact
8 commissioner is accountable to them in any -- in any
9 manner whatsoever. Our members are New Mexicans.
10 Their business operations are in New Mexico. They pay
11 their taxes to this state, and they vote here, and
12 they're confident that New Mexico is pursuing their
13 interest in this litigation, and they support its
14 positions on the pending motions.

15 On the other side of the coin, the
16 motions filed by Texas and the United States confirm
17 what New Mexico farmers have suspected all along.
18 They advocate for an equitable treatment, and they
19 bend history to ignore that the Rio Grande project,
20 since its very inception, has always been intended to
21 provide equal footing to all acreage receiving
22 irrigation water from the project, and this is from
23 its inception, Your Honor. And interestingly, my
24 clients sat at the same table as the United States in
25 the lower Rio Grande adjudication fighting for an

1 early priority date recognition for the project water
2 that's supplied in New Mexico, and we litigated for
3 two weeks the history of the project and its
4 inception, and one of the fundamental purposes and
5 agreements at that time with -- with everyone
6 advocating for the project, and as you see in some of
7 the documents in the 1904 national irrigation Congress
8 is that all project beneficiaries would be treated
9 quality. In this case, it's undisputed through the
10 briefing that all project farmers paid their share for
11 construction of the project. It's undisputed that the
12 downstream contracts explicitly recognize that farmers
13 rights to project waters, the water that's been used
14 to irrigate their farms are legally appurtenant to
15 those farms and in our briefing you see and as
16 Mr. Utton noted that the United States Supreme Court
17 had just issued an opinion in 1937 that confirmed
18 this, this understanding in Reclamation law and -- and
19 that was explicitly provided in the downstream
20 contracts that those -- that the users of the right,
21 the beneficial users of the water, the owners of the
22 vested water rights appurtenant to their land, and
23 further, the parties in the downstream contracts
24 themselves explicitly recognize this, and they
25 explicitly agree, all parties, never to interpret the

1 downstream contract so as to alter, diminish, or
2 impair the right of project landowners to such rights.
3 And at the same time, when EBID was formed and then at
4 the time of the Compact, under state law, EBID's
5 required to deliver water pro rata on a pro rata basis
6 to EBID lands. It's also prohibited under state law
7 from contracting with others outside of the district
8 if it would interfere with the vested rights of any of
9 its project water users. So, Your Honor, all of these
10 contractual promises and the legal framework that
11 provided equal footing for project lands existed at
12 the time of the Compact. They existed at the time the
13 Compact was negotiated and signed, and the Clayton
14 letters that New Mexico referred to in argument today
15 indicate that the compacting states were aware of
16 them. They were aware of this framework of equity,
17 and they had to have relied on them when the states
18 agreed to a Compact that is silent as to the split or
19 apportionment of water below Elephant Butte. It's --

20 **JUDGE MELLOY:** That doesn't -- that
21 doesn't really answer the question, though, does it,
22 of what about the water users in New Mexico siphoning
23 off either groundwater or surface water that should
24 have been apportioned to Texas.

25 **MS. DAVIDSON:** Well, Your Honor, it's --

1 it's argued that the apportionment contemplated in --
2 in the Compact was based on this notion that all
3 project lands had equal footing, and we do agree with
4 the United States, as well, that at the time of the
5 Compact, there were its recognition of prior users.
6 As a matter of fact, a lot of the irrigation users in
7 New Mexico were existing on old ditches, even before
8 -- even before the project came in, into --

9 **JUDGE MELLOY:** But to say they're all
10 entitled to equal use doesn't answer the question of
11 what if you take Texas' water? They're not getting
12 equal use then.

13 **MS. DAVIDSON:** Well, Your Honor, and I
14 agree.

15 **JUDGE MELLOY:** I mean, that's what the
16 whole case is about.

17 **MS. DAVIDSON:** Right.

18 **JUDGE MELLOY:** We can sit here and say
19 all day everybody gets equal use, but if you are going
20 to take their water, that's not equal use.

21 **MS. DAVIDSON:** You're right, Your Honor.
22 And what we believe is that the operating agreement
23 shifted the equal use of surface water from New Mexico
24 down to in favor of Texas to offset what -- what EBID
25 and United States felt need to be offset from other

1 depletions.

2 **JUDGE MELLOY:** I understand that. I
3 think everybody agrees that -- that EBID and EP1 and
4 United States said instead of trying to shut down the
5 wells, we'll switch the ratio, and that was the
6 compromise that was reached. And, you know, not
7 everybody is happy with it. I understand that. But
8 still, you still have to answer the question, what
9 happens if it's determined that water that's intended
10 for Texas is not being -- not getting to Texas?

11 **MS. DAVIDSON:** Well, and I don't think
12 that acknowledging that the apportionment was
13 established based on this notion that all lands were
14 entitled to receive equal amount of water. Once that
15 apportionment is quantified in any given supply year,
16 either the project doesn't always have full supply,
17 but whatever it is, New Mexico's position is that we
18 split it equally, pro rata, on acreage, and once that
19 apportionment and that baseline was established, Your
20 Honor, then New Mexico understands and has a baseline
21 for which it has to make sure and administer water so
22 Texas gets its share -- its equal share. So as far as
23 at the time of the Compact --

24 **JUDGE MELLOY:** So does that mean that we
25 shut down wells?

1 **MS. DAVIDSON:** If necessary. If Texas
2 isn't getting its equal share, if necessary, New
3 Mexico needs to administer its water users to make
4 sure that the apportionment -- Texas gets its share,
5 yes.

6 **JUDGE MELLOY:** How do you pick which
7 farmer has to shut down his or her well?

8 **MS. DAVIDSON:** Well --

9 **JUDGE MELLOY:** It seems to me that what
10 the operating agreement said was, okay, we don't want
11 to go and pick out -- I don't know, I'll pick a
12 number, there's 400 wells. We don't want to say,
13 okay, these 50 have to shut down, so what we'll do is
14 we'll adjust the surface water flow. Now, may have
15 not have been a perfect compromise, but it's -- it's
16 one way to address it, isn't it?

17 **MS. DAVIDSON:** Yes, it is. And we have
18 taken the position in prior briefing before the Court
19 that we view the operating agreement as an offset plan
20 for New Mexico. We do -- we do see it that way. We
21 do think that that's one way that New Mexico could
22 agree to make sure Texas gets its -- its share -- its
23 share of the apportionment. The problem is, is that
24 New Mexico and the farmers weren't included and had no
25 ability to chime in on that -- on that suggestion and

1 that proposed solution and, now, we're seeing the
2 consequences of it, and we do feel like it
3 overcompensates Texas, and it harms New Mexico
4 irrigators.

5 Regarding United States and the
6 districts' view of the apportionment, like you, I
7 think -- I think I felt a little discomfort and
8 difficulty to accept the view that the compacting
9 states intended to give the United States and the
10 districts free will to agree to whatever they want to
11 do with project water or, as EBID claims in its brief,
12 that it can give all of its allocation to EP No. 1 if
13 it decides to or vice versa, because under that view
14 of the Compact, Your Honor, how can New Mexico be
15 responsible for any alleged impacts to Texas'
16 apportionment? If New Mexico has no rights under the
17 Compact, how can it ensure that its aquifer remains an
18 equilibrium, that the project is operating to provide
19 return flows or how can it ensure there will be enough
20 surface water in New Mexico to recharge the aquifer
21 and improve project efficiency? New Mexico cannot
22 simply be responsible for all of the operational lens
23 of the districts and the United States. I mean, if
24 the districts and the United States really do agree
25 that New Mexico in one given year doesn't get any

1 surface water and there's no surface water, they're
2 going to give it all to EP No. 1, and they have the
3 authority to do that, surely New Mexico can't be
4 responsible for the consequences and the impacts of
5 what that does to its aquifer and project
6 efficiencies. There must be a baseline by which to
7 gage New Mexico's obligation and by which it can
8 respond to mitigate any damages, otherwise, how does
9 the Compact achieve the goal of removing all future
10 controversy between the states?

11 **JUDGE MELLODY:** Well, I think we can
12 agree it didn't meet that goal.

13 **MS. DAVIDSON:** It could have intended to
14 still. Finally, Your Honor, the farmers view the
15 United States as attempting to shirk its own
16 responsibilities under the Compact. As recognized by
17 the Supreme Court, there's been a lot of discussion on
18 this language today, we think -- we think it's
19 undisputed that at least the United States has a
20 contractual duty to all project farmers, and it's sort
21 of an agent under the Compact to see that the
22 equitable apportionment effectuated to both sides of
23 the states. In our view, it can't pick sides and
24 favorites, and even if the United States believes that
25 only irrigation wells in New Mexico are depleting

1 project supply, what has it done about it? Well, as
2 you heard today, it's done nothing. Instead, it
3 encouraged the use of groundwater for irrigation and,
4 now, 70 years later, there's economies built around
5 that irrigation use. Ms. Coleman claims the U.S.
6 could do nothing to prevent groundwater from being
7 used, but that's not true. Since 1980, it could have
8 filed protests to applications for wells. New Mexico
9 allowed those who claim a well and imperative surface
10 supply to file a protest and prevent a permit from
11 being issued. It's never taken that route. And as
12 you heard from Mr. Wechsler, U.S. participated in
13 litigation in the lower Rio Grande adjudication to
14 determine irrigation water requirements. Those
15 requirements expressly sanction groundwater irrigation
16 use. They didn't appeal the judgment, and they didn't
17 object to it. In sum, Your Honor, our client farmers
18 feel like the U.S.'s unwanted stepchildren. For
19 years, the U.S. cheered them along while they made
20 improvements to meet their irrigation demands, but
21 now, it's seeking the drastic relief of an injunction
22 to stop the groundwater pumping in some ill-defined
23 way to protect project supply, and as Mr. Wechsler
24 thoroughly addressed, the U.S. fails to support that
25 request, and it should be denied.

1 In conclusion, Your Honor, we believe
2 New Mexico has provided more than ample evidence that
3 the Compact effectuates an apportionment below
4 Elephant Butte based on the equal footing of all
5 authorized project acreage to use water to meet
6 irrigation demand. We request that you grant its
7 motions. Thank you.

8 **JUDGE MELLOY:** All right. Thank you,
9 Ms. Davidson. Are there any other amici that want to
10 be heard?

11 **MR. STEIN:** Yes, Your Honor. I wish to
12 be heard.

13 **JUDGE MELLOY:** Mr. Stein?

14 **MR. STEIN:** Yes. I'm speaking on behalf
15 of the City of Las Cruces and Your Honor will be
16 introduced to some new issues here with respect of the
17 city and its municipality and its obligations and how
18 it interacts with this process with the state
19 particularly on the administration of water rights to
20 ensure Compact compliance. Initially, I have to fill
21 out the attendance list of Las Cruces personnel
22 attending when my audio failed this morning. Also
23 attending for the City are the City attorney Jennifer
24 Vega Brown, Robert Cabello of the City attorney's
25 office, and our three consultants, Dr. Jorge Garcia,

1 Dr. Lee Wilson, and Dr. John Shewmaker. Your Honor,
2 the city of Las Cruces is the state's second-largest
3 city. It is an actual user of water here, as Ms.
4 Davidson spoke of with respect to her group. It has
5 the greatest amount of water rights municipality that
6 are directly at risk in the motions that have been
7 filed by Texas and the United States. The city's
8 water use began in 1849 with diversions from the Rio
9 Grande of surface water in the Acequia Madre de Las
10 Cruces. Today, our groundwater rights were initiated
11 in 1905 with the first city well, although that was
12 based on and built on community domestic wells that
13 began to be drilled in the 1870s. The city is the
14 center of the economic hub of southern New Mexico,
15 southwest New Mexico, and provides essential public
16 health and welfare services to the community. That
17 consists of providing water to businesses, homes,
18 hospitals, schools, theaters, restaurants, public
19 places. It does all of that. When it diverts the
20 water, it treats it. That's regulated under the Safe
21 Drinking Water Act. It's regulated by a federal
22 agency, so the treated water is distributed to our
23 customers. When the water is -- a portion is
24 consumed, and a portion is not consumed. The
25 unconsumed part is returned back to the Rio under the

1 City's NPDES permit, which requires it to be treated,
2 and that is also a regulated process by the United
3 States Environmental Protection Agency out of Region 6
4 in Dallas, Texas. Now, the City also treats and
5 discharges effluent from other entities, such as New
6 Mexico State University under the umbrella of its
7 NPDES permit. I want to go directly to the issue that
8 has, I think, emerged as the center here, and that is
9 that there is groundwater pumping that the State of
10 New Mexico allows and doesn't interfere with when it
11 takes project water and is some way complicit in
12 allowing that, and that forms the subject of the
13 injunction request that was present in the United
14 States motion where they say that relief is warranted
15 -- injunctive relief is warranted because New Mexico
16 has not fulfilled its obligations and, therefore,
17 violated the Compact. That's a request. Earlier
18 today, Ms. Coleman said, well, they're not asking you
19 to issue the actual injunction. Well, maybe just the
20 right to get it. I'd like to address that issue from
21 the standpoint of the City of Las Cruces. In the --
22 the City of Las Cruces has taken measures to protect
23 surface flows, to protect Compact deliveries, and to
24 protect project deliveries, and it has done so under
25 the authority of permitting from the State of New

1 Mexico. In the early 1980s, the City began moving its
2 pumpage to the Jornada Del Muerto sub basin, or the
3 east -- we call it the east Mesa. The significance of
4 that is that the east Mesa is disconnected from the
5 Rio Grande, largely disconnected. It's separated from
6 the Rio Grande by a geologic structure named the horst
7 and the consequence of that is that pumpage that
8 occurs in the Jornada cannot -- the effects of that
9 cannot propagate and cannot migrate to the Rio Grande.
10 They stop at the horst. The horst stops and prevents
11 them from migrating to the Rio Grande. That has two
12 effects. First of all, the -- the diversions that are
13 being made by the City, and the City now has four well
14 fields in the east Mesa. The diversions that are
15 being made in the east Mesa do not have the effects on
16 the Rio. Secondly, the effluent that is derived from
17 those diversions, when it was discharged back into the
18 Rio with the City's NPDES permit, is entirely new
19 surplus water that is added to the flows of the Rio
20 that augments and supplements them and increases them
21 because it's entirely an important source coming
22 initially in, which is transported by the City of Las
23 Cruces. This is somewhat similar, I think, to what
24 Ms. Klahn was describing with respect -- with respect
25 to the Hueco Bolson. I have not studied the hydrology

1 there, but I think the principle is the same, and it's
2 -- it's -- it appears throughout numerous western
3 states. So what the City has been doing since the --
4 the 1980s is citing pumping in a way that doesn't
5 effect the flows and that actually adds water back
6 into the Rio. In addition, we have valley wells.
7 Those are now governed by -- those are in hydrologic
8 communication with the Rio, and they are now governed
9 by our consent order negotiated with the State, which
10 specifically requires the City to put its treated
11 effluent back into the Rio Grande after it has
12 collected it at the Jacob Hands Treatment Plant at all
13 times when it is needed during drought situations, and
14 that is when the allocation in EBID is less than 2
15 acre-feet, which is what we anticipate it will always
16 be in the future. Result of this administrative mix
17 is that there are no city effects on the Rio. There
18 is a protected administration in place, at least as
19 far as the City of Las Cruces is concerned, by the
20 State of New Mexico, and there are disputed facts that
21 preclude the granting of an injunction of water.
22 Second point I want to talk about, Your Honor, is the
23 so-called 1938 condition. We agree and concur with
24 the argument presented by Mr. Wechsler that there is
25 no such thing in the Compact. Mr. Wallace also got to

1 that -- that view. The idea of a 1938 condition, Your
2 Honor, is something that Texas borrowed from the Pecos
3 River Compact where the apportionment formulates in
4 1947 condition, and that has been such a nightmare to
5 understand and administer that it's consumed decades
6 of litigation, and we shouldn't go there. The
7 specific effect of creating a 1938 condition on the
8 lower Rio Grande with respect to groundwater would be
9 disastrous for the City of Las Cruces. It would upend
10 decades of water planning, land use planning,
11 annexations, water planning, and tens of millions of
12 dollars that have been spent on water supply and water
13 treatment infrastructure that is already in the
14 ground. One irony, the United States has been a
15 partner with the City of Las Cruces through its
16 funding in many aspects that provide for the City's
17 water use. Let me cite the most significant. The
18 City has obtained a permit on the west Mesa. Most of
19 the city's pumping is on the east Mesa, but the City
20 obtained a decade ago a permit to revert 8,000
21 acre-feet of water on the west Mesa. That's on the
22 other side of the river. The money that we needed to
23 get the water lines to join those wells to the west of
24 the city system on the east Mesa and in the valley was
25 provided in the late 1990s by the United States. They

1 provided almost all of it through the United States
2 Environmental Protection Agency. Those wells will not
3 come online until the mid 2030s, and they will have an
4 offset requirement that accompanies them.

5 One final point, Your Honor. An issue
6 was made in the United States' complaint and
7 intervention, particularly in Paragraphs 12, 14, and
8 15, which indicated that non-project water users have
9 to acquire contracts with the Department of Interior
10 and could not rely on state permitting. Some of the
11 United States witnesses have indicated that the United
12 States is not pursuing that in depositions, and Ms.
13 Coleman may have taken a step in that direction this
14 morning when she acknowledged a distinction between
15 diversions on the one hand and depletive effects on
16 the Rio on the other with the two not being equated
17 because there were a number of strategies whereby one
18 who does create a depletive effect can erase it with
19 important waters as I've described in the Jornada or
20 with treated effluent discharged back into the Rio.
21 Nevertheless, it's still -- it's still a complaint.
22 It's still of a concern to the City of Las Cruces.
23 The United States, for its part, has claimed -- they
24 claimed in their response to the Colorado brief that
25 New Mexico had no prior rights that were grandfathered

1 in prior to the signing of the Compact in '38. What
2 they said was New Mexico could have bargained for
3 grandfathering so-called preexisting water rights, as
4 has been done in other Compacts, but it did not. Two
5 points in response to those claims, Your Honor. The
6 Rio Grande joint investigation, which has been
7 discussed here in the -- at numerous times in the
8 arguments, contains two tables where municipal
9 diversions are referenced. One is Table 71 at Page
10 87, and the second is Table 97 at Page 104 -- Pages
11 104 through 105. The municipal city or municipal or
12 town right that they're describing is Las Cruces. In
13 addition, Your Honor, the City contends that the
14 adoption of the D2 curve, which has been described
15 here, does grandfather in groundwater pumping through
16 1978 and the City of Las Cruces' groundwater is
17 contained within that. Your Honor has recognized the
18 principle that the manner in which a Compact has been
19 administered or implemented is powerful evidence as to
20 the understanding of the parties as to what it means.
21 The D2 curve was designed to manage the allocation of
22 surface water to the two districts. It was based on a
23 period of record of 1951 through 1978. I thought it
24 was first applied in 1980. There was some testimony,
25 an exhibit today, saying 1985. Any event, the City

1 contends that its rights were -- were contained within
2 it. Had we believed that they were not, Your Honor,
3 the City would have taken measures to address it in
4 the 1980s. And with that, Your Honor, I will -- I
5 will thank you for your opportunity to -- to address
6 the Court. There were three things the City hopes to
7 achieve from this litigation, and that is that its
8 portfolio of rights is recognized, that its --
9 secondly, that its administration of those rights is
10 administered and confirmed, and thirdly, that its
11 plans going forward as contained in its water
12 development plan are equally respected. Thank you,
13 Your Honor.

14 **JUDGE MELLOY:** Thank you. Any of the
15 other amici that we haven't had a chance to hear from?

16 **MR. BROCKMANN:** Your Honor, this is Jim
17 Brockmann. I did have some remarks I'd like to make
18 on behalf of the water authority.

19 **JUDGE MELLOY:** Go ahead.

20 **MR. BROCKMANN:** Initially, I -- I'd like
21 to say that the water authority does support New
22 Mexico's motions for summary judgment and -- and
23 opposes both Texas and the United States' motions. I
24 want to make one or two general comments on -- on the
25 apportionment issue sort of below Elephant Butte

1 before I get to the specific water authority issues.
2 Once or twice today, it was -- it was mentioned that
3 the case centers on whether or not New Mexico has
4 groundwater depletions that affect Texas' project
5 supply. I think it's important to remember that even
6 though the case was framed that way initially in some
7 of the early pleadings, New Mexico did have
8 counterclaims recognized that were allowed to go
9 forward, and the -- the thrust of those claims in my
10 opinion is -- deals with the project operation
11 generally. So it's not just about whether or not
12 groundwater pumping in New Mexico in the lower Rio
13 Grande affects Texas' apportionment, but whether Texas
14 groundwater pumping affects project supply and the two
15 states' apportionment. Likewise, as the Master
16 recognized earlier, changes have occurred since 1938
17 in irrigation efficiencies, canal linings, pipelines
18 got buried and laterals no longer used, crops changed.
19 This happened in both New Mexico and Texas. So to the
20 extent that the -- the litigation is examining project
21 efficiencies, its project efficiencies both in New
22 Mexico and Texas. A third general area deals with --
23 with accounting. It's -- it's a complex set of
24 accounting about what counts as a return flow, what
25 counts as a depletion, and New Mexico has raised

1 questions about the accounting formula that is being
2 used in Texas and how that affects New Mexico's
3 project deliveries and efficiencies. Likewise, those
4 issues will be examined in New Mexico. So in my
5 opinion, this is not about -- simply about groundwater
6 pumping in New Mexico affecting Texas' apportionment.
7 Rather, it's going to be a look at the entire project
8 operations, effects that happen in New Mexico and
9 Texas on project supply, and then how that might
10 deviate from both of the states' equitable
11 apportionment that we believe exists under the
12 Compact. Specifically, the water authority is in this
13 case, in a way, similar to Colorado. We are trying to
14 ensure that issues that are litigated and resolved in
15 the lower Rio Grande a lot of times principals do not
16 migrate upstream and effect the middle Rio Grande in
17 such a way that it would negatively impact the water
18 authority's water supplies and administration, as they
19 have typically occurred under the Rio Grande Compact
20 administration historically. Today, I just want to
21 touch on a couple of those areas. Some of them are --
22 are directly relevant to the motions for summary
23 judgment that are before you. The first is the 1938
24 condition. Both Texas and New Mexico -- both Texas
25 and the United States suggest that there is a '38

1 condition that has to be adhered to. In past, water
2 authority has raised the issue because it had been
3 centered in brief in talking about the lower Rio
4 Grande, but for the first time in these apportionment
5 briefs, Texas, in particular, suggested that there's a
6 '38 condition that limits depletions, restricts
7 depletions, above Elephant Butte reservoir, in effect
8 Articles 3 and 4. Colorado, at length in its brief,
9 explained how Articles 3 and 4 do not restrict
10 depletions to a particular time period, and I think
11 that's important. All one has to do is read Articles
12 3 and 4, and there is no language in there, there is
13 nothing implied that says there is a '38 condition of
14 depletions. Granted, when the -- when the Compact is
15 negotiated in 1938, all of the states had before them
16 that was -- was data and hydrology that existed prior
17 to that time, but they did not restrict it to a '38
18 condition as -- as other Compacts in the west have
19 done that were entered in that same time period.
20 Rather, there's an inflow/outflow index that happens
21 on an annual basis. In addition, both Colorado and
22 New Mexico above Elephant Butte under Articles 3 and 4
23 have the opportunity to -- to utilize credits and
24 debits to vary the apportionment. To me, what's
25 important about this is that there is a delivery

1 amount that becomes established, but it is not a
2 consumptive use limit. In other words, New Mexico,
3 above Elephant Butte, and Colorado can achieve that
4 delivery obligation however they want. It doesn't
5 have to be through a limitation of consumption. If
6 Colorado or New Mexico wanted to import water
7 supplies, provide supplemental wells, or do a number
8 of other management tools, those are available to
9 those states as long as they meet their delivery
10 requirements. So it is not a consumptive use limit.
11 It is not a 1938 condition. As Mr. Stein just
12 explained, the water authority also remains a little
13 bit concerned about Paragraphs 12 and 13 of the United
14 States complaint in intervention where they indicate
15 that groundwater that is hydrologically connected is
16 -- constitutes project water and that anyone using
17 that groundwater has to have a Bureau of Reclamation
18 contract to use it. It remains in the complaint in
19 intervention. It has never been withdrawn by the
20 United States. The briefing suggests that -- that
21 they are now -- the United States is now satisfied
22 with -- with attempting to have New Mexico administer
23 the groundwater, but that claim continues to -- to
24 cause the water authority discomfort in that it -- it
25 still exists in the complaint in intervention, and

1 just as it could be applied in the lower Rio Grande,
2 we're concerned that the United States would also try
3 to move it upstream into the middle Rio Grande.
4 Another issue that generally exists is the state
5 engineer's jurisdiction, I think, is challenged in the
6 lower Rio Grande, specifically with result -- with
7 respect to surface water and sometimes with respect to
8 -- to groundwater. I think it's important to note,
9 and it -- it ties in with Mr. Utton's argument that
10 New Mexico has -- has had a territorial water code
11 that existed prior to statehood, and the farmers in
12 New Mexico and the municipalities have invested
13 hundreds of millions of dollars with their
14 infrastructure with municipalities with respect to
15 well fields, pipelines, water treatment plants, the --
16 the water authority just put in a half a billion
17 dollar surface water treatment plant based upon the
18 New Mexico state engineer's jurisdiction over surface
19 and groundwater and how he administers those. So I
20 don't think you can discount our reliance on the state
21 engineer's authority in both surface and ground, and I
22 think that continues all the way to the Texas/New
23 Mexico state line, despite the -- what the Compact may
24 -- despite what the arguments are by the United
25 States, Texas, and the Districts. Importantly, in --

1 in talking about the '38 condition that was above
2 Elephant Butte, Texas and the United States have a
3 couple particular -- I don't know if I'd call them
4 admissions, but -- but particular sentences that I
5 think can pro -- provide instruction as this case goes
6 forward once the Master resolves the issue of what the
7 apportionments are between the states. In Texas'
8 reply brief to the Colorado and -- and New Mexico
9 amici brief, Texas indicated that Colorado can do
10 anything it wants with its Rio Grande water in
11 Colorado, as long as it delivers water pursuant to
12 Article 3 of the Compact. Similarly, the United
13 States, in its reply brief, indicate that, in their
14 opinion, New Mexico and some of the amici incorrectly
15 characterize the United States' position seeking a '38
16 condition. The United States says the United States
17 does not contend that the Compact requires particular
18 volumetric quantities of water to be achieved.
19 Nothing in Reclamation law or the Compact forbids
20 improvements and irrigation efficiencies, even if
21 those improvements might reduce the volume of water
22 that returns to the drains, nor has the United States
23 suggested that the Compact fixes cropping patterns as
24 they were in 1938. In my estimation, and -- and it
25 goes to some of the discussion that you had with other

1 parties earlier with respect to return flows and
2 groundwater depletions, what is going to be key for
3 administration of the Compact going forward is an
4 articulation of the apportionment. I don't think
5 there's been historical agreement always on exactly
6 what that is. There's been course of conduct that's
7 been pretty consistent, but Texas argues that's not
8 the way they understood it. The United States argues
9 that's not the way they understood it. But once that
10 apportionment is set in amount, it'll be up to New
11 Mexico to meet that -- that Compact delivery to Texas.
12 How it does that should be up to New Mexico as a
13 matter of intrastate administration. That could be --
14 your question earlier, does -- who decides which
15 groundwater wells to shut down? New Mexico decides as
16 a matter of intrastate administration. New Mexico may
17 decide it doesn't want to shut down any groundwater
18 wells. It wants to go to imported water to make sure
19 Texas has its -- its delivery. New Mexico has a
20 number of management options and tools that it can
21 employ intrastate to make that intrastate Compact
22 delivery. So to me, the key to the case is not
23 necessarily in going through all of the calculus about
24 what was expected in 1938, making the parties go back
25 to a -- a 1938 cropping levels, to 1938 efficiencies

1 or shutting down 60 percent of the groundwater pumping
2 in New Mexico, as one of the Texas experts suggests
3 needs to be done. It's about defining the Compact
4 obligations and letting the states meet those
5 obligations going forward.

6 I want -- I'd like to make one last
7 point. In a simplistic way, the operating agreement
8 has been described today as -- as the two districts
9 becoming and the United States basically becoming the
10 -- the judge and the jury in deciding whether or not
11 New Mexico met its Compact obligation, and they
12 decided what the remedy was going to be without --
13 without New Mexico's participation or approval.
14 Simplistically, it was described as, oh, because 85
15 percent of the groundwater pumping in New Mexico comes
16 from agriculture in the lower Rio Grande, we're simply
17 going to give some of our water to Texas, and that's
18 our offset. We'll make it up with groundwater
19 pumping. The operating agreement did much more than
20 that, and it has affected New Mexico from a Compact
21 perspective, and it affects the water authority from a
22 Compact perspective. The 2008 operating agreement
23 created separate storage pools, carryover storage
24 pools in Elephant Butte reservoir for each of the two
25 districts. Where that can affect the water authority,

1 one of the major supplies for the Albuquerque
2 Bernalillo County Water Authority is imported San
3 Juan-Chama water that comes from the Colorado River
4 basin. Most of that now is consumed through a surface
5 water treatment plant, but some of it goes downstream
6 and gets stored in Elephant Butte. That's imported
7 water that goes into Elephant Butte. The water
8 authority had to get a separate Bureau of Reclamation
9 storage contract to store water there. What did it
10 have to do? It had to get congressional approval to
11 have a separate storage account. It had no go through
12 an entire NEPA process, and it has -- and it -- and
13 there are evaporation formulas that apply to that
14 storage pools for the Albuquerque Bernalillo water
15 authority. So there's basically three pools of water
16 in Elephant Butte; project storage, credit water when
17 it exists, and San Juan-Chama water, and they split
18 evaporation. With the 2008 operating agreement, we
19 now have additional storage pools that did not go
20 through that same NEPA process, and it did not -- they
21 do not get charged with evaporation in the same way
22 the other -- the other -- the way the other storage
23 pools do. Likewise, when -- when there's additional
24 water, it increases the opportunity for a spill, and
25 San Juan-Chama water gets spilled first according to

1 Compact rules. So it is important to understand the
2 2008 operating agreement does affect the Compact. It
3 does affect other parties upstream. With that, Your
4 Honor, I think that that concludes my remarks for
5 today, unless you have any questions.

6 **JUDGE MELLOY:** No. Thank you,
7 Mr. Stein.

8 **MR. BROCKMANN:** Mr. Brockmann.

9 **JUDGE MELLOY:** Mr. Brockmann. I'm
10 sorry. Mr. Brockmann.

11 **MR. BROCKMANN:** That's fine.

12 **JUDGE MELLOY:** It's been a long day.
13 Before we turn to the rebuttal, why don't we take ten
14 minutes and let everybody stretch, and we'll come back
15 and let the parties sort of organize their thoughts on
16 the rebuttal, and then we'll do the rebuttal
17 arguments. All right. Let's take ten minutes.

18 (Break.)

19 **JUDGE MELLOY:** Are we ready to start the
20 rebuttal arguments?

21 **MR. SOMACH:** Yes, Your Honor. At least
22 Texas is ready when it's its turn.

23 **JUDGE MELLOY:** Go ahead. You can go
24 first.

25 **MR. SOMACH:** Actually, I want to go

1 last. I want to at least be able to respond to
2 whatever else is said if --

3 **MR. WECHSLER:** Your Honor, this is Jeff
4 Wechsler. We did agree that New Mexico would go
5 first.

6 **JUDGE MELLOY:** Okay.

7 **MR. WECHSLER:** Followed by Colorado, the
8 United States, and then Texas.

9 **JUDGE MELLOY:** Go ahead.

10 **MR. WECHSLER:** Thank you. And I have a
11 brief clarification from an argument this morning, and
12 then I'll address some of the points made by the folks
13 who went after me, Colorado, EBID, and EP1. The
14 clarification or the addition I wanted to make was the
15 amount that Texas pumping impacts New Mexico
16 diversions, and that's been calculated by modeling and
17 the amount comes to 15,500 acre-feet per year. That's
18 in diversions, not in allocations, which comes to
19 185,000 acre-feet from 2006 through 2017. You can
20 find that in a declaration and Mr. Sullivan that's New
21 Mexico Exhibit 12, Paragraph 18. Turning to one quick
22 point I wanted to make about Colorado's arguments,
23 Colorado talked about the gages defining the
24 apportionment, and I would point out that the -- there
25 is a gage below Caballo. It does measure the

1 releases. It tracks those releases. That argument
2 actually is consistent with New Mexico's view of the
3 apportionment, and that's true because the allocations
4 are made by Reclamation taking into account the amount
5 in storage and then whether or not each district --
6 each state, and by extension, each district receives
7 its amount of water is done by notice. Turning to
8 EBID's arguments, the argument that EBID made proves
9 why the Supreme Court does not allow water users
10 within a state to impeach its state in matters of
11 Compact apportionment that the state represents all of
12 its water users, *parens patriae*. Here, you have a New
13 Mexico entity arguing that the State of New Mexico
14 should not, quote unquote, usurp EBID's authority,
15 even though they derive their authority directly from
16 New Mexico, and that in one of the first arguments in
17 this case, EBID conceded that New Mexico could at any
18 point get rid of EBID or -- or change its -- its --
19 its direction. The New Mexico participation in the
20 operations of the project does occur through EBID.
21 That's by New Mexico State statute, and so it's the
22 entity that New Mexico identifies. It's a creature of
23 statute that New Mexico uses to -- to be involved in
24 -- in day-to-day operations, but not matters of
25 apportionment. EBID argues that it tries to separate

1 out the various pieces of the State of New Mexico. It
2 says that the state engineer doesn't have jurisdiction
3 down below Elephant Butte, but, of course, the state
4 in total has complete jurisdiction down there. Some
5 examples are the limits on the water use within EBID,
6 groundwater and surface water, and Stream System 101,
7 the limits on groundwater pumping, the controls of
8 river pumping, and I think as you heard the United
9 States acknowledge earlier, ultimately New Mexico and
10 New Mexico's apportionment rests with the State,
11 including all of its various components. You heard
12 from many of the New Mexico amici that EBID doesn't
13 really speak on behalf of the water rights users. In
14 fact, they don't own water rights themselves. The
15 case law makes very clear, it's -- it's the underlier
16 users that are most important, and New Mexico users
17 represents all of those entities and has to balance
18 the various interests of those entities including EBID
19 rather than just looking at a single narrow interest
20 the way that EBID does.

21 Turning to the arguments of EP No. 1,
22 there was a suggestion that at one point that EBID and
23 New Mexico were distinct. I just wanted to emphasize
24 yet again, EBID is not distinct from New Mexico with
25 matters of Compact apportionment. New Mexico, the

1 State of New Mexico, the client I represent speaks on
2 behalf of all of the water users with regard to
3 Compact apportionment. The same is true for Texas
4 with regard to its water apportionment so it, not EP
5 No. 1, speaks on behalf of all of its water users.
6 The -- the EP No. 1 argument seemed to rest on this
7 idea that there's a separate project and -- and
8 Compact component. We know that can't be true. I
9 mean, the Court directed that that wasn't true. It
10 said that the project and the -- and the downstream
11 contracts are inextricably intertwined, and that's
12 true here of the argument of the parties. We know
13 that Texas Compact commissioner, as does New Mexico,
14 recognizes that those two things are -- are
15 coextensive. When the Compact states, the Compact
16 incorporated that through existing division into the
17 Compact, it became a matter of the equitable
18 apportionment, protectable by the states, which is
19 incredibly important because what it allows each state
20 to do is go to this Court to seek vindication if it
21 feels like its rights are not being protected, the
22 kind of division that the two districts would have
23 wouldn't allow that. With regard to the operating
24 agreement that the two districts talked about
25 somewhat, we agree -- we certainly understand your

1 ruling that the validity of that operating agreement
2 is not at issue here, and most of those components we
3 have no concerns about. We also understand you to say
4 that ultimately what that case is about is what are
5 the apportionments as between the states and whether
6 each state has received that apportionment, and so
7 anything, whether it's the operating agreement,
8 actions of Texas or New Mexico or any other entity
9 that change that apportionment ultimately are at issue
10 in this case and will have to conform, to use the
11 United States' words, with what the Court determines
12 the apportionment is. The EP No. 1 says there was a
13 promise not to interfere with deliveries, but it
14 points to no language of the Compact to support that
15 argument, and as we've already heard today, it's
16 undisputed that all orders were filled and so really,
17 I don't see where that interference has come. That
18 district court case that was raised is -- is simply
19 not Compact issues. It's clear that only this Court
20 has the ability to handle those equitable
21 apportionment issues and interpret a Compact. EP1
22 shows the weakness and flaws in its argument in the
23 two main points it makes, which are incompatible
24 tension. They're inherently inconsistent. That is on
25 the one hand, it says, well, you can't interfere with

1 -- New Mexico can't interfere with the -- with the
2 deliveries to Texas and yet in -- with its second main
3 point, it says, but there's no way to quantify what
4 those deliveries are, and you cannot reconcile those
5 two things. In arguing that there's no quantifiable
6 rights below Elephant Butte, as you point out, the
7 Compact failed to accomplish its purpose of
8 effectuating an equitable apportionment. It's an
9 argument that the United States has apparently
10 abandoned today. It's contrary to all principles of
11 equitable apportionment, and it -- really, the end
12 result would mean you'd have to dismiss the case. And
13 it's also an argument that the Supreme Court said is
14 simply wrong, and since all of their arguments sort of
15 flow from those two premises, the remainder of their
16 argument is also wrong, and, also, all of the
17 arguments that the two district raised here today,
18 those arguments were each made in the motion to
19 intervene, which were well reasoned and denied by
20 Special Master Grimsall, and I would invite you to
21 review those parts of that first interim report.

22 Finally, two last points. One, again,
23 some fair discussion about the operating agreement as
24 -- to emphasize we're only interested in that part of
25 the operating agreement that implicates where the

1 water goes. I don't think it's -- as I understand, it
2 was an agreement between the two districts and the
3 United States. I don't think calling it a reasonable
4 or fair compromise is warranted on any level. I don't
5 think it's fair and equitable. It way
6 overcompensates. I think the facts make that clear.
7 We also outline a whole number of reasons why it
8 simply is not allowable. That's in our reply under
9 the apportionment brief on Pages 57 to 60. Finally in
10 closing, what I want to say is I do want to agree with
11 something that Mr. Brockmann said and that is overall
12 when you take a step back from this case, this case is
13 about the apportionments as between those two states.
14 What are those two apportionments and did those two
15 states, New Mexico and Texas, receive their equitable
16 share of water? We look forward to the Court taking a
17 full and fair review of that, and we're quite
18 confident that what you and the Court will ultimately
19 find is that New Mexico does have an apportionment
20 down below Elephant Butte, that apportionment is
21 represented by an equal amount per acre, which, in
22 short, is 57 percent of project supply, and that New
23 Mexico, in recent years, has not received that
24 apportionment. Thank you very much. Judge Melloy,
25 you're on mute.

1 **JUDGE MELLOY:** Sorry. Thank you,
2 Mr. Wechsler. Mr. Wallace.

3 **MR. WALLACE:** Thank you, Your Honor. I
4 just have a few minutes, and I'd like to make three
5 points on rebuttal. To clarify, the Compact makes an
6 apportionment through three river reaches. Each of
7 those reaches, again, if you would take a look at our
8 Exhibit 2 on the response brief, each of those reaches
9 consists of drainages within multiple states. So it's
10 not correct to look at the Compact as apportioned
11 water strictly among state's political boundaries.
12 When those -- those drainages cross state borders, the
13 Compact explicitly sets out gages where the Compact
14 intends to deal with them and/or where a state is
15 granted the ability to reach into another state's to
16 divert water, it's very explicit with that regard, and
17 it does that in Article 9 where Colorado grants New
18 Mexico the ability to come into Colorado to divert San
19 Juan-Chama water -- San Juan water into Chama River
20 into the Rio Grande basin. So, again, any time we're
21 looking at states reaching outside the political
22 borders, that's specifically mentioned. Otherwise,
23 each of the river reaches actually does run across
24 multiple states.

25 The second point I want to make is a

1 point that -- that you had asked about earlier is, you
2 know, what does the Compact effect. Did it fail in
3 its -- in its purpose, and it did not. When setting
4 out the lower river reach, it made sure that the
5 Compact made a delivery to that lower reach, thereby
6 providing water to the project. What it did not do
7 was dictate how that project operates, which -- which
8 gets to my third point, which is that the project as
9 has been demonstrated by the parties today, it is
10 operated by three parties, the United States and the
11 two irrigation districts, none of which are a party to
12 the Compact. So it would be very difficult to try and
13 imagine how the Compact would fit in the project as a
14 mechanism for apportioning water when all the entities
15 in control of it are not the Compacting states
16 themselves. The better answer is to look to
17 Reclamation law and how that project was designed and
18 intended to operate by Congress, and from that,
19 determine what, if any, state's obligations exist
20 because of the Rio Grande Project Act and divide the
21 water not through an act of the Compact, but through
22 an act of Congress in determining how we already had
23 divided that water as between New Mexico and Texas
24 through the Rio Grande Project Act and its operations.
25 I also note that using Reclamation law will give the

1 Court a lot more flexibility than will using Compact
2 and might better present a better opportunity to
3 address new technological advances, new crop types,
4 new municipal demands that simply did not exist at
5 1938. It's just really a more flexible and better and
6 more appropriate legal vehicle to solve its dispute.
7 Thank you.

8 **JUDGE MELLODY:** Thank you. And who's
9 going next? Ms. Coleman?

10 **MS. COLEMAN:** Yes. Once I take myself
11 off mute here. So there are a number of points, of
12 course, that we'd like to address, but recognizing the
13 hour is late, especially here on the east coast, I
14 will try to go through them quickly. I think the
15 first and most important thing is this notion of an
16 equal acre-foot per acre, you know, entitlement for
17 every acre of land in the project. Nothing in
18 Reclamation law requires that. Nothing in the Compact
19 requires it, and the only thing in the contract that
20 even gets close to addressing it is a shortage
21 provision in the 1938 contract that says,
22 "Distribution of the water shall so far as practicable
23 occur in a, you know, 57 to 43 division, shall so far
24 at practicable," and as we showed in our response to
25 New Mexico's apportionment brief, that has very rarely

1 actually occurred, even when you round up. What New
2 Mexico relies on for this equal acre-foot per acre
3 allegation is this affidavit from 2007 that Mr. Cortez
4 submitted in a lawsuit that was brought by EP1, and
5 New Mexico takes, you know, two sentences in that
6 affidavit and turns them into a Compact apportionment,
7 in a sense, and the words just cannot bear that
8 meaning. I think what Mr. Cortez said there and what
9 he made clear in his depositions is that water was
10 allocated, and in dry years, allotted to the farm
11 headgates so that each would be entitled in a short
12 year to the same amount of water if it was called for.
13 It wasn't always called for. It wasn't always
14 delivered, and I think the delivery data that we've
15 cited, and, in fact, that New Mexico cited, shows that
16 it does not come out to 57/43, at least when you're
17 looking at diversions from the river. So I would, you
18 know, really suggest to push back on that, you know,
19 and, you know, clear intent of requesting a
20 quantification in those terms is so that, you know, we
21 come up with a essentially fixed quantity of water --
22 surface water that New Mexico gets. It gets 57
23 percent. Texas gets 43 percent, and New Mexico gets
24 to engage in as much pumping as it wants. Now,
25 Mr. Wechsler said there were, quote unquote, natural

1 limits on the amount of pumping that can occur below
2 Elephant Butte. Those natural limits appear to be the
3 natural irrigation requirement of pecan orchards that
4 did not exist in the proportion that they did in 1938,
5 and we cite in our reply brief, New Mexico's 30(b)(6)
6 witness, explaining at the very conclusion of his
7 deposition under questioning from Ms. Klahn that the
8 cropping pattern that was used to analyze the
9 irrigation requirement was the 2008 cropping pattern
10 and not the cropping pattern that was there in 1938
11 when the project's number one crop was cotton or
12 alfalfa. Now, the cotton point, I think you'll also
13 find cropping up in the 1950s project histories. If
14 you look at New Mexico's exhibits, the 417, 419, 420,
15 I think you'll see, you know, looking at their water
16 announcements, what they're describing is that
17 supplemental irrigation occurred from the groundwater
18 so that a cotton crop could be planted, not so that a
19 pecan crop could be planted, not so that we could get
20 5.5 acre-feet per acre. It's so that maybe there
21 could be 3 acre-feet per acre, which takes us to our
22 other favorite number, 3.024. I want to back up a
23 minute and -- and refer, again, to New Mexico's
24 Exhibit 310, which is the 1911 report from the
25 engineers to Congress. In this report, as I discussed

1 earlier, the engineers reported to Congress that
2 release of 750,000 to 800,000 acre-feet could be
3 assured below Elephant Butte, and that, in turn,
4 rested on three assumptions. We talked about the
5 assumption earlier, the assumption of the availability
6 of return flows, but there were two other assumptions.
7 One was that the duty of water was 3, acre-feet per
8 acre; 2, was that other existing water rights below
9 Elephant Butte would be absorbed into the United
10 States rights. So here, we have -- we have now
11 developed a situation where we have a duty of water
12 established by New Mexico in Stream System Issue 101
13 that is 4.5 to 5.5 acre-feet per acre. I'll come back
14 to our quote, unquote lack of objection to that
15 momentarily. And we also have this assertion of
16 numerous other water rights below Elephant Butte, not
17 just the ones that predate the project, but ones that
18 developed up unto the point of the Compact and beyond.
19 So the assumptions that are behind the 790 have far
20 been exceeded and are not consistent with what is
21 occurring today in New Mexico.

22 Mr. Wechsler also referred to a problem,
23 reading from the realtime, is that our position
24 depends on the methodology for the apportionment that
25 we know was rejected by the states because the states

1 didn't intend to lock in the certain level of flow at
2 state line. I'm not quite sure what he's referring to
3 there. I've searched the briefs in the time that
4 we've had, but I will say that our position does not
5 attempt to lock in a certain level of flow at the
6 state line. Our position is to lock in our unimpeded
7 access to return flows from the project's deliveries
8 of water, and post Compact depletions from post
9 Compact development are forbidden and do need to be
10 accounted for and offset.

11 **JUDGE MELLOY:** Let me ask, a couple
12 people have raised the issue of whether the United
13 States is still asking for injunctive relief against
14 any water user that doesn't have a Reclamation permit.

15 **MS. COLEMAN:** The -- well, first of all,
16 we're asking for, you know, injunction to be
17 determined at trial against New Mexico, not -- not
18 individual water users. Second, we're talking about
19 Reclamation contracts under Reclamation law,
20 Reclamation has to contract -- historically contract
21 with an irrigation district, but can enter into other
22 sorts of contracts under subsequent Reclamation laws
23 such as, you know, for example, municipalities, and,
24 you know, it's established, you know, the only -- it's
25 established in *Israel v. Morton* and other cases that I

1 believe were cited in our motion to intervene that,
2 you know, entities or individuals who do not have a
3 contract with Reclamation are not entitled to project
4 water. Project water is there for the giving by the
5 United States, not for the taking. And, you know,
6 it's surprising to me that we would all of a sudden
7 hear a rejection of that principle in this case,
8 especially since New Mexico did not dispute our
9 statement of fact that EBID is the only water user
10 entity in the State of New Mexico with a contract for
11 that water.

12 **JUDGE MELLOY:** What I think they're
13 referring to is Paragraph 12 of your complaint which
14 says only persons having contracts with the secretary
15 may receive deliveries of water, including seepage and
16 return flow. I think that has been read to me that
17 unless you have a pumping permit from Reclamation, you
18 can't pump water. Is -- is that what was intended by
19 that?

20 **MS. COLEMAN:** No. Because Reclamation
21 doesn't issue pumping permits.

22 **JUDGE MELLOY:** I guess that's the point.
23 What does that -- what does that paragraph mean?

24 **MS. COLEMAN:** It means that if you are
25 going to take project water, you have to have a

1 contract with the secretary of the interior, and, you
2 know, I'd be happy to explain this in any supplemental
3 filing that you want, but, you know, Reclamation
4 create -- you know, establishes a project. It's
5 authorized by Congress, and Reclamation provides the
6 water pursuant to contracts historically with the
7 irrigation district. Water users association
8 irrigation districts. So that means that individuals
9 or entities who don't have a contract for that water
10 cannot take it.

11 **JUDGE MELLOY:** Well, I then go down to
12 Paragraph 13. There you say that New Mexico has
13 allowed the diversion of surface water and the pumping
14 of groundwater by persons who did not have contracts
15 with the secretary, which I assume -- and you want
16 that prohibited. Maybe they're not reading it
17 correctly, but that seems to be what you're asking
18 for, that anybody who does not have a contract with
19 the secretary cannot pump water.

20 **MS. COLEMAN:** They can't deplete the
21 waters of the Rio Grande. I mean, I think we want
22 that -- you know, as I said before, you know, the --
23 I'm sorry. The -- you know, New Mexico's
24 apportionment, as we say, is EBID's contractual
25 entitlement. It cannot allow depletions beyond the

1 contract, which means they cannot allow depletions by
2 entities other than EBID. And when I say depletions
3 again, if someone else is -- is using surface water,
4 it would need to be offset so that there is not a
5 depletion.

6 **JUDGE MELLOY:** But that's not what 13
7 says. I don't want to beat a dead horse here, but 13
8 says New Mexico is allowing the diversion of surface
9 waters as the pumping of groundwater that is
10 hydrologically connected through the Rio Grande by
11 water users who do not have contracts with the
12 secretary. And that's one of the things you've asked
13 for an injunction against. So it doesn't say anything
14 about offsets. It doesn't say anything about whether
15 it's a little bit of water, a lot of water. As long
16 as -- and as I understand it, some of the engineers
17 have said virtually every well in EBID is
18 hydrologically connected to the Rio Grande so, by
19 definition, every well in EBID needs a contract under
20 that paragraph.

21 **MS. COLEMAN:** Well, I mean, not to --
22 to, you know, slice and dice too finely, but I think
23 that, you know, the idea is that EBID has a contract,
24 and in -- in a way, the operating agreement recognizes
25 that EBID isn't, in a sense, taking some of its

1 allocation through the ground instead of from the
2 river, and that that's, in effect, what's happening,
3 and I don't -- you know, what we are asking for is the
4 state engineer to enforce -- you know, enforce
5 limitations on pumping, including by irrigators who
6 are members of EBID in order to prevent interference
7 with project deliveries. And I think it's an
8 important distinction from EBID, the district, and
9 EBID, you know, the collection of individuals within
10 EBID who have obtained permits, as we've said, up to
11 this -- you know, the farm delivery requirement of 4.5
12 to 5.5 acre-feet per acre.

13 **JUDGE MELLOY:** I asked this question
14 early on in the litigation, and I was told that it was
15 the position of the United States that every person
16 who was pumping had to have a contract with
17 Reclamation, and you're saying that's not your
18 position?

19 **MS. COLEMAN:** I think it is our -- I
20 mean, it's our -- well, I think that we have
21 essentially, you know, said that the -- you know, EBID
22 has the contract with Reclamation, and I think that,
23 you know, something needs to be adjusted if -- in
24 terms of, you know, pumping -- you know, pumping by
25 individuals is not going to be counted as part of

1 their allocation or apportionment then, yes, they do
2 need a contract.

3 **JUDGE MELLOY:** All right. I interrupted
4 you. Go ahead with your argument.

5 **MS. COLEMAN:** So I'd say on the -- you
6 know, the -- you know, we've explained in our brief
7 that the 3.024 acre-foot per acre is -- you know, was
8 at one point determined to be a normal release based
9 on normal deliveries. It became the assumption of a
10 full supply because, you know, in a sense, because it
11 was used to set -- determine initial allocations, and,
12 you know, essentially determine whether there's a
13 shortage. It's not supposed to act as a cap, and
14 really does not act as a cap. So I just want to be
15 clear about that. That's another reason why the
16 quality of acre-feet per acre just really doesn't work
17 as establishing an -- you know, the nature of the
18 apportionment.

19 Finally, with respect to injury, I --
20 I'm hoping that I was not understanding New Mexico's
21 counsel to be suggesting that the United States
22 doesn't have standing to be in this lawsuit. I
23 believe the Supreme Court has pretty firmly resolved
24 that, and I also was somewhat confused by the
25 statement that we haven't shown injury, especially by

1 clear and convincing evidence. I believe we have the
2 concession of the State of New Mexico that pumping did
3 injure Texas in 2003 and 2004, and it's not -- you
4 know, they've acknowledged that on the record in their
5 briefs in this argument. So, you know, we clearly do
6 have a clear injury of the project that has since then
7 been mitigated by the operating agreement. So I would
8 ask from the perspective of this proceeding, let's go
9 back to the year 2006. Let's not think -- let's think
10 about this pre-operating agreement. We just had a
11 serious disruption to the project allocation and
12 apportionment. The project was -- the project as a
13 whole was essentially shorted 200,000 acre-feet of
14 water over a several-year period, and, you know, what
15 happened next? Not a lot. The New Mexico legislature
16 told the state engineer to take action. Framework
17 regulations issued, and then the draft regulations did
18 not become final and then the operating agreement
19 occurred and they abandoned the effort. So we have a
20 clear injury and a clear failure to take action to
21 address the injury, and we think that's sufficient at
22 this stage to frame the trial on the United States
23 claims in terms of the remedy that needs to be
24 entered. That's really what we're asking for here is
25 a direction and guidance on where things go with the

1 United States' claims from here.

2 In closing, I just want to say, living
3 -- living in the western United States has
4 consequences. Signing interstate Compacts has
5 consequences, and there are consequences to violating
6 a Compact and failing to take action to remedy it.
7 This case is about, and our claims are about those
8 consequences and why we're seeking partial summary
9 judgment. For that reason, we ask that the United
10 States' motion be granted, and New Mexico's motions be
11 denied. Thank you.

12 **JUDGE MELLOY:** Thank you. Mr. Somach, I
13 think you get the last word.

14 **MR. SOMACH:** I started out early this
15 morning with the statement that the Texas case at its
16 core isn't complicated. That the Compact anticipated
17 that Texas would receive something, and that its
18 apportionment was to be received as Rio Grande surface
19 water flow that would not be interfered with as it
20 flows from Elephant Butte reservoir to Texas. I
21 believe you earlier articulated our case in chief as
22 well if not better than I've ever articulated it, even
23 though I've articulated it consistently, since the
24 very first pleading. In that very first pleading, our
25 complaint, we said that it was New Mexico -- that New

1 Mexico had authorized and permitted the groundwater
2 pumping that had caused the interference with -- with
3 the Texas apportionment. That's the lawsuit we
4 brought. I also said earlier today that I was
5 concerned about all of the factual allocations that
6 have overlaid what is supposed to be a -- a motion for
7 summary judgment or partial summary judgment, and to
8 the extent that facts are -- are implicated, they need
9 to be either immaterial facts or they need to be facts
10 that are not in dispute. Here, and this is what I was
11 afraid of this morning in -- in -- and got amplified
12 as I listened to -- to Mr. Wechsler's testimony,
13 Mr. Stein basically testified as to evidence that --
14 that I've never seen before, that isn't on the record,
15 and I -- I worry that all of that has mutated the
16 simple articulation of our case and has changed it
17 into something else, and the reason that I said what I
18 said this morning was if we have to go to trial on
19 those issues, we're not concerned about that. We
20 believe that while the Compact is unambiguous, that
21 all the extrinsic evidence that anyone could produce
22 would support our views of what the Compact says and
23 what it does and would support the claims that -- that
24 we make, and that's notwithstanding all of what I
25 would call testimony that was given in the guise of

1 oral argument today. We began earlier with the notion
2 of apportionment, and what we said was all the water
3 in -- that was delivered to the reservoir was
4 apportioned to the State of Texas, subject to the EBID
5 contract and the treaty with Mexico. There's nothing
6 that I've heard today that makes me at all worry about
7 that articulation of what the Compact provides.
8 There's absolutely nothing in the Compact that would
9 suggest that New Mexico received an apportionment
10 below Elephant Butte reservoir. So the only way one
11 could make the argument that they did receive
12 something below Elephant Butte reservoir would be by
13 resort to extrinsic evidence because the Compact
14 doesn't say that. What the Compact says was New
15 Mexico makes a delivery, and that delivery then is to
16 Elephant Butte project storage where it's translated
17 into usable water. What we've said all along is that
18 the project is not identical to the Compact. Compact
19 uses the project, but there is more water in the
20 system than just what is allocated by Reclamation, and
21 almost every year except the driest years, there's
22 additional water that accretes to the system down
23 below Elephant Butte reservoir, and if my
24 articulation, if the Texas articulation is correct,
25 then once the Mexico treaty obligation is met and once

1 the -- the contract rights of EBID are met, then the
2 rest of the water is Texas' water and that water is
3 not confined to the use within project boundaries. It
4 never has been. It actually is used all the way down
5 at Fort Quitman. That water that's used in Hudspeth
6 is outside the project boundaries, but we all know
7 that that water is sanctioned for use by the Compact.
8 There's no dispute to that. Hudspeth can't order it
9 as project water, but that doesn't mean that it is not
10 a beneficiary of the Texas apportionment, which is a
11 greater quantity of water than -- than -- than just
12 simply the project flow. I think the issue of 57/43
13 was handled by Ms. Coleman properly, but that's also
14 something that doesn't exist anywhere in -- in the
15 Compact, and, in fact, it -- it hasn't dominated and
16 hasn't -- and hasn't been utilized as a governor
17 whatsoever as we move forward. I also want to address
18 this 1938 condition. We -- we've never said that what
19 is in this Compact and was provided for in this
20 Compact is the same as the 1947 Compact condition that
21 -- that exists on the Pecos. What we've said is
22 simply this: That -- that depletions below Elephant
23 Butte reservoir were intended to be as they were in
24 1938, notwithstanding the discussions I heard from
25 Mr. Brockmann or Mr. Wallace, it is clear that the

1 index flows dealt with in Article 3, as well as an
2 index flows dealt with in Article 4, are predicated
3 and based upon a 1938 condition. That's what they
4 were developed based upon. What we've said is we
5 don't care what Colorado does with this water above
6 Elephant -- above the state line. We don't care what
7 New Mexico does with the water above Elephant Butte
8 reservoir so long as -- and -- so long as what's
9 delivered into the reservoir comports with what those
10 index flows are because those index flows are based
11 upon 1938 depletion conditions. Now, if they want to
12 use all that water and go buy other water and put it
13 in the reservoir, it does not matter, to be honest
14 with you. The same thing exists below the reservoir.
15 If they want to deplete all the -- the -- the merging
16 water within the watershed below Elephant Butte
17 reservoir and bring in water from somewhere else, put
18 it in a pipeline, deliver it to Texas, we've never
19 said that can't occur. All we're saying is what we're
20 entitled to is predicated upon the depletion condition
21 that existed in 1938. And in response to -- to a
22 question that you posed earlier, it doesn't mean that
23 you got to grow cotton. It doesn't mean that at all.
24 You could grow whatever you want to grow, but you have
25 to grow what you're growing based upon the water that

1 was allocated to EBID under -- under the project. You
2 can't support all those pecan trees with water that
3 was supposed to go to Texas. That -- that's the
4 distinction. Pecan trees, for heaven's sakes, there
5 are pecan trees in -- in Texas, also. We didn't stick
6 just with -- with cotton, although because of the
7 limited amount of supply and water quality problems
8 that we have, because of -- of shortages, our yields
9 are not what they are in -- in New Mexico, but I think
10 that distinction is important. We've never said that
11 you've got to stick with the exact cropping that
12 existed in 1938. We have said that the depletion
13 condition, because that's what determines how much
14 water gets to Texas. I listened to Mr. Wechsler's
15 explanation. I think he said there were three points
16 that -- that show that there's a limit on what -- what
17 New Mexico can get from -- what they can do in terms
18 of depletion. I don't -- I didn't understand much of
19 what he said to be honest with you. I tried to take
20 good notes. What I heard was as long as New Mexico
21 takes the surface water that it's allocated and adds
22 to that, that amount of groundwater that would fully
23 water, irrigate, 88,000 acres within EBID, that was
24 fine, and that's the -- that's the limit. But that's
25 basically saying we're going to take all the water we

1 need for those 88,000 acres of -- of land within EBID,
2 you get the rest. Whatever that may be. And -- and
3 -- and that may end up being zero, you know, because
4 we've got no control over what's happening in New
5 Mexico with that pumping. We're just sitting there in
6 Texas hoping and here litigating the fact that they
7 have to let our apportionment go. They can't keep it
8 captive in -- in New Mexico. They can't grow all
9 those trees on Texas' water. They have to grow their
10 trees on New Mexico's water.

11 The question of -- of -- of -- you have
12 mentioned earlier the Conover report. I just wanted
13 to -- to indicate to you that we don't entirely agree
14 with your characterization of -- of what Conover said,
15 which goes to this question of that's a technical
16 report, and you may be aided by technical testimony
17 about exactly how that -- that report -- you know,
18 what it was intended to -- to say. At its heart, what
19 it said was if you pump groundwater, you 're just
20 pumping surface water, and you've got to make it --
21 you've got to make it up. Now, sometimes it gets made
22 up by -- by recharge in a wet year that follows a dry
23 year. We agree with that. But in many years, that
24 doesn't happen. This goes to some of the issues and
25 arguments we made in terms of countering New Mexico's

1 notice motion is the fact that the problem is that the
2 harm that's being caused is often masked. It's masked
3 by the fact that the groundwater pumping impacts on
4 the surface are not annual, but they're cumulative
5 over time, and that the groundwater pumping that
6 occurs has lingering effects. The best example of
7 that and the fact that, in fact, they haven't made up,
8 as Conover would have said they need to, if they're
9 going to keep the El Paso district whole, is -- is the
10 fact that -- that, according to them, and this is the
11 first time we heard of this was in depositions, that
12 since 2011, they've been mining the groundwater basin.
13 Mining the groundwater basin means that they're
14 getting it below a level where it is either
15 economically or engineeringly feasible to recover
16 groundwater. They're just made a decision that
17 they're going to use it all up, and there won't be any
18 left. If that happens, then there will be no
19 effective mechanism to get Texas' water to Texas, and
20 that's why we're so concerned about not just stopping
21 groundwater pumping, but also by recovering the
22 groundwater basin so that it can be sustainable so
23 that it can serve its multiple purposes.

24 Recognizing that it's late, let me just
25 look through and see if there are any other points --

1 **JUDGE MELLOY:** Let me -- you know, one
2 issue that I did raise earlier was what about this
3 argument that there's a 40 or 50-year history of -- of
4 pumping, and that that's some indication of what was
5 intended under the Compact, putting aside the doctrine
6 of acquiescence, but that everybody was doing it so it
7 must have been what was intended.

8 **MR. SOMACH:** Well, I think everybody was
9 intended -- this is an interesting issue because I did
10 ask questions in a deposition of their 30(b)(6)
11 witness on this. What -- what they -- what was
12 intended was a conjunctive use of surface and
13 groundwater. That is exactly what Ms. Coleman
14 described as what the United States encouraged back in
15 that initial deep drought that existed in the early
16 '50s, and that basically is, okay, go to groundwater
17 in those -- in those -- those dry years, but go back
18 to surface water when -- when we, again, have regular
19 years. And so conjunctive use would've allowed
20 groundwater basins to recover, and it would have not
21 had the impact that it has had over -- over a period
22 of -- of time, as -- as it had -- as it has had. They
23 view conjunctive use quite differently. They view
24 conjunctive use as actually Mr. Wechsler described.
25 That is we get all our surface water and if there

1 isn't enough surface water, we'll just pump
2 supplemental groundwater to fill it up. We didn't
3 understand that that's what was occurring, and there
4 was no way for us to understand what was occurring.
5 You know, Tarrant talks about the fact that Tarrant
6 couldn't go into Oklahoma and invade sovereignty.
7 Well, we're sitting there at the bottom of the river
8 waiting for the water to come down. We have no
9 ability to understand what the status of the
10 groundwater basin is in New Mexico and so we're --
11 we're watching water. We know that they're pumping,
12 but we assume they're doing it in some kind of a
13 conjunctive manner that would allow the groundwater
14 basin to recover, and that's compounded by the fact
15 that -- and here, we're talking about decadal periods
16 of time. So 40 years is -- is four different decadal
17 periods, but in those periods, you have periods of
18 drought, and you have very, very wet years. In fact,
19 up until the -- the most recent wet years, which mask
20 what is happening with that groundwater basin. So it
21 becomes impossible for us factually to understand
22 entirely or exactly what's happening in -- in those
23 groundwater basins. And that's -- that's a
24 significant problem. When we finally realized what
25 was occurring, and this is contemporaneous with the

1 dispute between EP No. 1 and -- and -- and EBID that
2 resulted in the operating agreement, we thought it'd
3 been covered by the operating agreement, and we -- we
4 thought it had been addressed until New Mexico brought
5 suit about the operating agreement. It's not that we
6 agreed that D2 was the proper line, but I think as
7 someone has alleged, it was a negotiation. That
8 negotiation included, among other things, carryover
9 storage, which was important to EP No. 1. It included
10 scheduling of water by EP No. 1 that didn't otherwise
11 exist, and they felt and we felt that the trade offs
12 were -- were appropriate. But -- but we never
13 acquiesced to a D2 line. We never acquiesced to -- to
14 grandfather in pumping that started in 1951 to -- to
15 1978. In fact, you know, if you're looking to what
16 the Compact intended in terms of flow, it -- it makes
17 no sense, either common or legal, to say the Compact
18 negotiators intended, in 1938, to use the 1951 to 1978
19 condition to govern what Texas was apportioned. What
20 they did in that D2 line was take what was left over,
21 what New Mexico left over and did the best they could.
22 We think of it as significant and good mitigation. It
23 definitely will mitigate the damages that otherwise we
24 could claim against New Mexico, but did it fully
25 remediate the situation from a Texas position? No, it

1 didn't. It didn't because we believe that we're
2 entitled to a 1938 depletion condition.

3 Let me raise one last major issue, and
4 that is this notion of full supply. You know, full
5 supply is -- is -- is a term without definition, and
6 -- and it -- it -- is it a full apportionment? Is it
7 a full project supply? Is it a full -- full supply in
8 one year versus another year? Using their matrix or
9 metric, which is 57/43, which I've already indicated
10 we don't -- we don't think that's -- that's the
11 measure, but if you accept 57/43, and we raised this
12 in our briefs, the fundamental question is 57/43 of
13 what? Well, it -- it -- it's not. It cannot be 57/43
14 percent of what New Mexico decides is going to be left
15 over as surface flow after they -- they divert all the
16 groundwater that they need or want for use on 88,000
17 acre-feet of lands. It -- it can't be that. We
18 bargained for a portion of the surface water flow
19 based upon a 1938 depletion condition. A volume of
20 water that we agreed to. Mr. Goldsberry responded
21 saying we bargained for a 16-inch pizza, and what we
22 get is a decreased 8-inch pizza. We get our,
23 according that their metric, 43 percent, but 43
24 percent of an 8-inch pizza as opposed to a 16-inch
25 pizza. I realize that may be a little trife, but

1 that's what we're talking about when we say full
2 supply, is it that 16-inch pizza or is it the 8-inch
3 pizza? We believe it's the 1938 depletion condition
4 situation that we're entitled to. If you have any
5 other questions, I'd be more than happy; otherwise, I
6 appreciate the very long day of attention you've
7 taken.

8 **JUDGE MELLOY:** All right. Well, thank
9 you, Mr. Somach. All right. We'll show the matter
10 submitted and try to get something out in due course.
11 But in the meantime, I guess I'll see everyone a week
12 from tomorrow, so on the 17th. 11:00 Iowa time, and
13 we'll go from there. All right. Thank you, everyone.

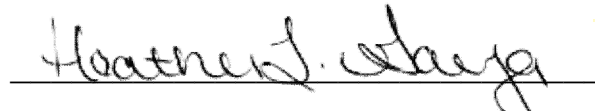
14 (The proceedings adjourned at 6:17 p.m.)
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CERTIFICATE

I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the foregoing pages comprise a true, complete and correct transcript of the proceedings had at the time of the status hearing.

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