

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TEXAS,)
)
) Plaintiff,)
)
) v.) No. 141, Orig.
)
NEW MEXICO AND COLORADO,)
)
) Defendants.)

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Plaintiff,)

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NEW MEXICO AND COLORADO,)

Defendants.)

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Washington, D.C.

Wednesday, March 20, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:31 a.m.

APPEARANCES:

FREDERICK LIU, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

LANORA C. PETTIT, Principal Deputy Solicitor General, Austin, Texas; on behalf of Texas.

JEFFREY J. WECHSLER, ESQUIRE, Santa Fe, New Mexico; on behalf of New Mexico.

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P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 141 on the original docket, Texas against New Mexico and Colorado.

Mr. Liu.

ORAL ARGUMENT OF FREDERICK LIU
ON BEHALF OF THE UNITED STATES

MR. LIU: Mr. Chief Justice, and may it please the Court:

A consent decree requires consent. The proposed consent decree in this case, however, would dispose of the United States' claims without its consent. The decree would impose obligations on the United States without its consent. And the decree would bind the United States to an interpretation of the Rio Grande Compact that is contrary to the Compact itself. For each of those reasons, the proposed decree should be rejected.

I want to emphasize why the United States is here today. The Compact apportions the water below Elephant Butte. The Compact does so by incorporating and protecting the delivery of water by the Rio Grande Project to

1 Mexico and to two irrigation districts, one in
2 New Mexico and the other in Texas. The United
3 States intervened in this case to enforce the
4 Compact's protection of the project.

5 As New Mexico acknowledges, the
6 Compact imposes on New Mexico a duty not to
7 interfere with the Project's delivery of water.
8 The United States claims that New Mexico is
9 violating that duty by allowing too much
10 groundwater pumping.

11 Six years ago, this Court upheld the
12 United States' right to pursue those Compact
13 claims, recognizing that the United States has
14 distinctively federal interests in protecting
15 the supply and the allocation of Project water.
16 Those distinctively federal interests are why
17 the United States is still here today.

18 In the United States' view, the
19 proposed decree fails to address the groundwater
20 pumping that precipitated this suit in the first
21 place. Instead, the proposed decree would allow
22 that pumping to continue at unsustainable
23 levels, and it would not stop that pumping from
24 taking water from the Project's beneficiaries,
25 namely, the two irrigation districts and -- and

1 -- and Mexico.

2 The proposed decree would thus fail to
3 protect the Project or the Compact's
4 apportionment, and that is why the United States
5 could not give its consent to this proposed
6 decree.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Liu, does the
9 United States have a claim that's independent of
10 the states'?

11 MR. LIU: Of course we do, Justice
12 Thomas.

13 JUSTICE THOMAS: What is -- what is
14 that claim?

15 MR. LIU: That's the claim that we've
16 brought since the beginning of this case. It's
17 the claim that this Court held in 2018 is a
18 claim we -- that's backed by distinctively
19 federal interests. It's a claim that says New
20 Mexico is violating its delivery obligation
21 under the Compact.

22 JUSTICE THOMAS: Is that a claim that
23 we would normally look at in an original action,
24 or is that a claim that could be vindicated in
25 another forum?

1 MR. LIU: It's not a claim that can be
2 vindicated in another forum. I think it's
3 actually a perfect fit for this -- this Court's
4 original jurisdiction because it is a claim
5 arising under an interstate commerce that we
6 have brought against another sovereign state.
7 That's precisely the sort of dispute that I
8 think this Court has long held is appropriate
9 for this Court to arise -- to exercise original
10 jurisdiction over.

11 JUSTICE THOMAS: You're an intervene
12 -- the U.S. is an intervenor, right?

13 MR. LIU: Correct.

14 JUSTICE THOMAS: When you intervened,
15 I thought our understanding was that you were --
16 your -- your interest was consistent with that
17 of the State of Texas?

18 MR. LIU: Yes. And our -- and to be
19 clear, our underlying claims are exactly the
20 same as they were --

21 JUSTICE THOMAS: Well, but Texas and
22 New Mexico -- and it's rare that we have the
23 states who actually agree on anything -- but
24 Texas and New Mexico have agreed. So what -- if
25 your interest is the same as Texas's interest,

1 then why are you still here?

2 MR. LIU: No, I want to distinguish
3 between two things. Our claims are the same.

4 JUSTICE THOMAS: Yeah.

5 MR. LIU: The claims are the same, but
6 our interests have always been different. I
7 mean, that was the point of the 2018 decision.
8 If our interests were the same, then, you know,
9 that's basically what the states said six years
10 ago. The United States has the same interests,
11 so just let them remain as amicus in this case
12 --

13 JUSTICE GORSUCH: Counsel --

14 MR. LIU: -- supporting Texas.

15 JUSTICE GORSUCH: -- counsel, if I
16 might just follow up on that. You're -- you're
17 -- you're invoking the 2018 decision.

18 MR. LIU: Right.

19 JUSTICE GORSUCH: As I recall it --
20 and I pulled it up because it didn't quite match
21 what I thought I heard you say -- we said that
22 this case does not present the question whether
23 the United States could initiate litigation to
24 force a state to perform its obligations under
25 the Compact or expand the scope of an existing

1 controversy between the states. And we
2 emphasized that it asserted its Compact claims
3 seeking substantially the same relief as Texas's
4 without Texas's objection.

5 That's no longer true. None of that's
6 true anymore.

7 MR. LIU: Well, I would respectfully
8 disagree, Just -- Justice Gorsuch. I think we
9 are -- are pursuing the same --

10 JUSTICE GORSUCH: Seeking
11 substantially the same relief as Texas? Then
12 how come they're on the other side?

13 MR. LIU: Well, I think, if you look
14 at the operative complaints in this case, the --
15 the relief we're seeking here is the same as the
16 relief that Texas is seeking. What's changed
17 since the 2018 decision isn't a change in the
18 nature of the claims. Our claims -- Texas and
19 the United States are still pursuing the same
20 claims.

21 What's changed is a difference in
22 litigating position. And I don't read the
23 Court's paragraph, that passage you just read,
24 Justice Gorsuch, as suggesting that after having
25 let the United States in the case, that the

1 Court was going to continue policing --

2 JUSTICE GORSUCH: I've got to say
3 you're making me regret that decision.

4 (Laughter.)

5 MR. LIU: Well, no, Justice Gorsuch, I
6 read that -- I read that -- that paragraph as
7 standing for the --

8 JUSTICE GORSUCH: The representation
9 we had in 2018 was we're just here because we
10 help enforce the Compact.

11 MR. LIU: Yes.

12 JUSTICE GORSUCH: And we have to
13 administer the Compact, and we are completely
14 aligned with Texas. And that made sense. But
15 you didn't have -- you're -- you're not a party
16 in the sense that you have some interest here
17 other than administering the Compact. And at
18 the end of the day, it's a compact between
19 states that we're adjudicating here in an
20 original action, right?

21 MR. LIU: Yeah, just two quick
22 responses. I think, back in -- in 2018, the
23 representation before this Court was that the
24 parties' litigating positions may well diverge
25 as the case goes on precisely because the United

1 States has different interests than Texas.
2 That's what New Mexico told the Court, what
3 Colorado did, what the United States told the
4 Court. And we reiterated it at oral argument,
5 that the interests were different. Now --

6 JUSTICE GORSUCH: Let's say we had
7 denied you intervention, okay? You wouldn't
8 have been a party to the litigation. Do you
9 agree that your water deliveries under the
10 Compact, you -- you'd have to make them pursuant
11 to the consent decree?

12 MR. LIU: If we hadn't intervened, no.
13 I mean, I think even if we weren't --

14 JUSTICE GORSUCH: The Compact would
15 bind you, wouldn't it?

16 MR. LIU: Even if we were not a party,
17 a consent decree cannot bind any third party,
18 whether they're a formal party to the case or
19 not. And that's just --

20 JUSTICE GORSUCH: But you'd have your
21 litigating -- you'd have the opportunity to
22 litigate that in federal court, federal district
23 court, those claims, your arguments. But,
24 otherwise, the Compact is the compact, right?

25 MR. LIU: Yeah, I don't -- Justice

1 Gorsuch, I -- I don't think that's the under --

2 JUSTICE GORSUCH: Under the
3 Reclamation Act, your -- your responsibility is
4 to administer the Compact?

5 MR. LIU: That -- that's -- that's
6 correct. Under reclamation law, we have
7 contracts with the two irrigation districts that
8 are at issue in this case, and the problem with
9 this consent decree is that it would impose
10 obligations on us that are actually contrary to
11 those downstream contracts.

12 And so, when this Court said in 2018
13 that the Compact implicitly incorporates, can be
14 thought to implicitly incorporate the downstream
15 contracts, that -- that -- that's a real
16 problem, that the consent decree --

17 JUSTICE JACKSON: So, Mr. --

18 JUSTICE GORSUCH: Do you agree that
19 the Reclamation Act requires you to follow state
20 water law unless there's a clear congressional
21 directive to the contrary?

22 MR. LIU: That is correct. But I -- I
23 will say this. This consent decree is not state
24 water law. This consent decree is an agreement
25 between two states that they wish to have

1 embodied in a federal judgment. And so Section
2 8 of the Reclamation Act has nothing to say
3 about whether this consent decree can be imposed
4 on the United States.

5 JUSTICE KAGAN: Mr. Liu, I -- I -- I
6 think I need more facts to really know what to
7 make of this case. I mean, you're here. The
8 two water districts that get water from this
9 Compact are still on the United States' side.

10 MR. LIU: Correct.

11 JUSTICE KAGAN: But -- but Texas has
12 given up the ghost, if you will.

13 MR. LIU: Right.

14 JUSTICE KAGAN: Why? What has
15 happened --

16 MR. LIU: Right.

17 JUSTICE KAGAN: -- so that these
18 different entities have diverged?

19 MR. LIU: Right.

20 JUSTICE KAGAN: And what do you still
21 want that Texas has decided is unnecessary?

22 MR. LIU: Right. So here -- here's
23 what we want. We want the same thing we wanted
24 in 2018 when this -- this Court approved our
25 claim. So the easiest way to understand this is

1 to break down the elements of our claim, duty,
2 breach, remedy.

3 With respect to duty, we want the
4 Court to recognize that New Mexico has a duty of
5 non-interference with respect to the Project.
6 The problem with this consent decree is that
7 instead of recognizing that duty of
8 non-interference, it gives the states a right to
9 interfere with the Project by forcing water --

10 JUSTICE KAGAN: Do you -- do you want
11 the 1938 baseline?

12 MR. LIU: We do. And that goes to the
13 second element of breach. We -- we came in --
14 we -- we, since -- since this Court's 2018
15 decision, have litigated alongside Texas all the
16 way -- partway through a trial that the right
17 baseline against which to measure New Mexico's
18 interference was a 1938 baseline.

19 JUSTICE KAGAN: And you want this why?
20 Because you think what will happen? Are your
21 treaty obligations at stake? Are you just
22 fearful that the water districts won't have the
23 water that they need? What -- what's the
24 thought here? And -- and, again, what's your
25 understanding of why you and Texas diverge?

1 MR. LIU: Yes, it's -- it's -- it's --
2 our concerns here go to both the supply of
3 Project water and its allocation. We are
4 concerned that the groundwater pumping is
5 occurring at unsustainable levels, which will
6 have a devastating effect over the long term on
7 the supply of Project water, and that will mean
8 down the road that we might not have enough
9 water to meet irrigation demands in the
10 districts and in Mexico.

11 We're also concerned about the
12 allocation of water, and by that, I mean the
13 allocation is currently accomplished through the
14 downstream contracts that the government has
15 entered into and the treaty with Mexico.

16 What this consent decree does is
17 replace that division of water with a division
18 of the state's own making.

19 As to why Texas has basically
20 capitulated its position in this case, it was --
21 everyone agreed in -- in its complaint it was
22 looking for a 1938 baseline when it filed the
23 complaint in 2013.

24 Why has it now given that up?
25 Frankly, to the United States, it is

1 inexplicable, but I think it only highlights the
2 importance of the government's intervention in
3 this case.

4 JUSTICE GORSUCH: Well, if it's
5 inexplicable --

6 JUSTICE ALITO: Well, who --

7 JUSTICE GORSUCH: -- how long -- how
8 much water has the federal government
9 misallocated over the last 40 years? It hasn't
10 used the 1938 baseline in -- in decades.

11 MR. LIU: The -- the allocation of the
12 water in the last 40 years has been pursuant to
13 an operating agreement, but I think it's
14 important to understand what that operating
15 agreement addresses.

16 That operating agreement doesn't
17 address whether New Mexico is -- is complying
18 with the Compact. New Mexico isn't even a party
19 to the operating agreement, wasn't even in the
20 room when the operating agreement -- agreement
21 was consummated. Rather --

22 JUSTICE ALITO: Who in -- who in
23 concrete terms is being hurt by this agreement?
24 Which entities here or abroad object to it?

25 MR. LIU: Well, we have entities right

1 here in this Court, the -- the two irrigation
2 districts.

3 JUSTICE ALITO: And -- and they're in
4 Texas, right?

5 MR. LIU: No. One is in New Mexico
6 and one is in Texas.

7 JUSTICE ALITO: Okay. All right. And
8 so they are -- do you think they -- they have a
9 right to assert an interest that's inconsistent
10 with that that's asserted by their states?

11 MR. LIU: They do with respect to
12 their relationship to the federal government.
13 This Court has long recognized that the *parens*
14 *patriae* principle extends only to the states'
15 representation of their own citizens with
16 respect to state interests.

17 JUSTICE ALITO: So that's what's
18 involved? Is that what's involved? New Mexico
19 and Texas are not treating these particular
20 districts fairly?

21 MR. LIU: I think that's part of the
22 problem.

23 JUSTICE ALITO: What else is -- what's
24 the rest of the problem?

25 MR. LIU: The other part of the

1 problem is that the level of groundwater pumping
2 at the D-2 level is in our view unsustainable in
3 the long term, and so the -- the -- the
4 long-term viability of the Project itself is at
5 risk.

6 I mean, when -- when we talk about the
7 districts, they're -- I want to spell out why --
8 why we think they're being treated unfairly. I
9 mean, the Reclamation Act of 1902 reflects a
10 basic bargain between reclamation and irrigation
11 districts.

12 On the United States' end of the
13 bargain, we promised to build the major
14 infrastructure, the dams and the reservoirs, and
15 to deliver water to meet irrigation needs in the
16 districts.

17 On the other end of the bargain, the
18 districts agreed to pay construction, operation,
19 and maintenance costs to defray the costs that
20 the United States invested into the Project.

21 And what this consent decree does is
22 just undermine that bargain because what happens
23 under the consent decree is that the district in
24 New Mexico bears the brunt of any continued or
25 increased pumping in New Mexico.

1 What happens under the decree is, if
2 groundwater pumping remains the same or goes up,
3 what New Mexico can choose to do is to force the
4 United States to transfer water from the New
5 Mexico district to Texas.

6 And so what happens is the one
7 district in New Mexico that actually has a
8 contract with the United States, that has paid
9 millions of dollars in construction charges and
10 continues to pay hundreds of thousands of
11 dollars each year in operation and maintenance,
12 they bear the brunt of groundwater pumping. The
13 ones who are entitled --

14 JUSTICE SOTOMAYOR: Mr. Liu --

15 MR. LIU: -- have to give up their
16 water.

17 JUSTICE SOTOMAYOR: -- I -- I've been
18 -- I've been a little bit confused by this case
19 because -- and starting with Justice Gorsuch's
20 question. I thought I remembered, and I now
21 have a copy of the appendix -- I think it's to
22 your exception -- on page 27A, compacts are
23 agreements by the states, but they have to be
24 consented to by the United States, correct?

25 MR. LIU: That's right.

1 JUSTICE SOTOMAYOR: And to the extent
2 that you're arguing that this Compact has been
3 changed, whether you're right or wrong, that
4 will have to be litigated, correct?

5 MR. LIU: Right.

6 JUSTICE SOTOMAYOR: I don't know if
7 you're right or wrong, but what you're saying
8 is --

9 MR. LIU: We would hope so, yeah.

10 JUSTICE SOTOMAYOR: -- this agreement
11 is going to change the terms of the consent
12 agreement. After a trial, maybe the -- we will
13 think --

14 MR. LIU: Maybe they're right, yeah,
15 after a trial.

16 JUSTICE SOTOMAYOR: Yeah, maybe we'll
17 conclude you're right.

18 MR. LIU: Right.

19 JUSTICE SOTOMAYOR: But what you're
20 saying right now is you can't change the terms
21 of this agreement without us consenting.

22 MR. LIU: Correct. It is just a basic
23 application of the law that's governing consent
24 decrees.

25 JUSTICE SOTOMAYOR: And so whether

1 your claims are -- interests are the same as
2 Justice Gorsuch or not, your claims are the
3 same.

4 MR. LIU: Our claims are the same.

5 JUSTICE SOTOMAYOR: Which is that this
6 -- well, to the extent that the consent
7 agreement required certain things, the parties
8 have breached them. By consent, the parties
9 can't forgive that --

10 MR. LIU: Right.

11 JUSTICE SOTOMAYOR: -- without you
12 saying it's okay.

13 MR. LIU: That's right. When this
14 Court --

15 JUSTICE SOTOMAYOR: When I say you, I
16 don't mean you personally. I mean -- I mean the
17 government and whatever entity. This one was
18 signed by the Assistant Secretary of the
19 Interior, and I presume that's who -- I don't
20 know who you represent actually, but you
21 understand what I mean.

22 MR. LIU: Well --

23 JUSTICE SOTOMAYOR: It's the
24 government.

25 MR. LIU: Well, I -- I think the --

1 the Compact itself was ratified by the states,
2 approved by Congress, signed by the President.
3 And under the Compact Clause, any new compact
4 has to be -- has to go through the same process.
5 And under this Compact --

6 JUSTICE SOTOMAYOR: Has to come to the
7 government to say yes.

8 MR. LIU: That's correct. And
9 under -- and under this particular Compact, it
10 itself has a provision for amendment which
11 likewise requires the consent of Congress, and I
12 --

13 JUSTICE JACKSON: But I guess it's the
14 consent of Congress, right, not necessarily the
15 executive branch, correct?

16 MR. LIU: Well, it's the consent of
17 Congress and -- and the executive. Under the
18 Compact Clause, the executive would also get to
19 weigh in.

20 JUSTICE JACKSON: Would you -- I mean,
21 Justice Gorsuch's point is that you're just, you
22 know, adjudicating it. You're not the sort of
23 consenting officer --

24 MR. LIU: Yeah.

25 JUSTICE JACKSON: -- for the purpose

1 of the Compact, is that right or no?

2 MR. LIU: Right, right. What --
3 what -- what we're asking for in this case --

4 JUSTICE JACKSON: Yeah.

5 MR. LIU: -- is -- is simply a right
6 to pursue our claims.

7 JUSTICE JACKSON: All right. So let
8 me ask you about those claims. So what claim
9 exactly -- you say our claims are the same and
10 our interests are different.

11 MR. LIU: Correct.

12 JUSTICE JACKSON: So the claim is New
13 Mexico is doing too much in terms of the
14 groundwater.

15 MR. LIU: Right.

16 JUSTICE JACKSON: What are the -- what
17 -- what is the source of the different
18 interests? It's the contracts, the downstream
19 contracts, you say, right?

20 MR. LIU: That's right.

21 JUSTICE JACKSON: The treaties?

22 MR. LIU: That's -- that's right as
23 well.

24 JUSTICE JACKSON: That's as well.

25 MR. LIU: Yeah.

1 JUSTICE JACKSON: Is there anything
2 else? I mean, is there federal law? Is it the
3 fact that you administer the Reclamation Act?
4 Is it that the United States is a sovereign?

5 MR. LIU: Well, it's -- it's -- it's
6 for the reasons that appear on this Court's
7 decision on pages 413 to 415, which is the
8 Compact is inextricably intertwined with the
9 Project's delivery of water. In fact, it is the
10 Project's delivery of water that accomplishes
11 the Compact's apportionment.

12 It is the fact that the United States
13 is legally responsible for that delivery of
14 water under the downstream contracts and the
15 treaty.

16 JUSTICE JACKSON: Which were -- were
17 those incorporated into the -- we said as a
18 matter of this decision that they are implicitly
19 incorporated, right?

20 MR. LIU: That -- that's correct, and
21 -- and the reason behind that I think is pretty
22 straightforward. The -- the Project predated
23 the Compact. The Project was already in
24 existence. And one of the fundamental purposes
25 of the Compact -- and this is repeated at least

1 three times in Texas's own complaint -- one of
2 the fundamental purposes of the Compact was to
3 protect the Project, to make sure that the
4 Project had a sufficient supply of water to
5 fulfill the United States' obligations under the
6 contracts and the treaty.

7 Again, it would have been -- it would
8 have been strange for Congress and the President
9 to approve a compact that failed, that failed to
10 respect the obligations that the United States
11 already had or that put them at risk.

12 JUSTICE JACKSON: So can I just shift
13 you really quickly, because one of your
14 arguments is disposing of the claims. The other
15 is the impermissible imposition of duties on the
16 United States. And I -- and you mentioned at
17 one point that, under this consent decree, the
18 United States would have to do certain things.

19 MR. LIU: Right.

20 JUSTICE JACKSON: Can you just say
21 more about what those things are? Because I
22 think part of their argument is that there
23 really is no change in the status of the United
24 States.

25 MR. LIU: Yeah. All the changes go to

1 the heart of the project's operations. I would
2 first point you to the provisions of the consent
3 decree. This is at the addendum to the third
4 report, pages 12 to 17. That would allow the
5 states to force the United States to transfer
6 water from one district to another at the
7 state's direction.

8 JUSTICE JACKSON: That's already
9 happening to some degree, but you're saying it's
10 going to be different if the consent decree goes
11 on?

12 MR. LIU: It's going to be different
13 in the important sense that we are doing -- we
14 -- we are allocating water as -- on a consensual
15 basis between the United States and the two
16 districts, as we always have since 1906, done so
17 on a consensual -- that's the meaning of a
18 contract, on a consensual basis.

19 And what this would do is force the
20 United States to transfer water at certain times
21 and places. And that just flips the -- the --
22 the Project and the Compact on their head
23 because the original design of both was that the
24 determinants of how the allocation works would
25 be the United States and the districts. Now

1 what determines the allocation is what the
2 states tell us the allocation should be.

3 JUSTICE KAGAN: Is there -- and I
4 think this goes back to Justice Thomas's
5 original question, but is there another forum in
6 which you can raise these arguments and get what
7 -- get the remedy that you're seeking?

8 MR. LIU: There's not. And to start
9 with, to think about it in terms of sources of
10 substantive law, as far as seeking the same
11 relief under the Compact, we don't read the
12 consent decree and no one else reads the consent
13 decree as allowing us to bring any Compact
14 claims that would call into question the
15 validity of the decree. So we would be stuck
16 with the decree's view of what is compliance
17 with the Compact.

18 JUSTICE KAGAN: That that would be
19 preclusive on the question of what the Compact
20 requires?

21 MR. LIU: Exactly. I mean, the
22 states' own reply in this Court says the consent
23 decree will be "part of the constellation of
24 laws" that the United States will follow. I
25 think that means that we have to treat the

1 consent decree as if it were the Compact itself.

2 Now, thinking about other sources of
3 law, there's state law, there's reclamation law.
4 I don't think either of those bodies of law is
5 going to somehow compensate for the loss of our
6 Compact claims. Those are claims not brought
7 against New Mexico but against individual water
8 users. They are claims that hinge on a
9 definition of Project water.

10 So, for example, under state law, I
11 suppose we'd be in the position of arguing that
12 Project water has a certain definition that
13 includes the water that's being taken away. But
14 my guess is that if we were to try to litigate
15 in that -- that in state court, the response
16 from the other side would be: Well, given that
17 the Compact doesn't protect that water under the
18 consent decree, it's not really your water, and
19 so we wouldn't have any basis for the state law
20 or the reclamation law claims. Those claims
21 rest on a -- on a -- on a concept of Project
22 water that would be undermined if we're stuck
23 with what the consent decree says.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 JUSTICE THOMAS: Mr. Liu, if we had
2 not gone along with the United States in your
3 efforts to intervene in this, would you be able
4 to vindicate those rights that you're talking
5 about? Because I don't remember that -- the
6 argument you're making now, a sort of
7 apocalyptic argument, being made in 2018.

8 MR. LIU: No, I don't think those
9 interests could be vindicated elsewhere for the
10 reasons I gave Justice Kagan. I don't think the
11 condition of this -- I don't think what I
12 presented here is apocalyptic. It is simply a
13 reflection of paragraph 14 of the United States'
14 original complaint in this case, which lays out
15 the -- the fairly simple chain of causation that
16 goes from groundwater being taken out of the
17 ground, leading to less water in Project
18 storage, leading to less water for the -- the
19 beneficiaries of the Project.

20 JUSTICE THOMAS: Well -- and my memory
21 could be somewhat vague on this -- I thought
22 that much of your argument before was that you
23 were on the same page as -- as Texas. And it
24 seems like there's a divergence of -- of
25 interests now.

1 MR. LIU: Well, we -- there was always
2 divergent interests. I mean, the parties
3 themselves -- we did, New Mexico, Colorado --
4 pointed out that even though we were pursuing
5 the same claims, we were doing so for different
6 interests. In fact, the argument was, if -- if
7 we're just pursuing the same claims for the same
8 interests, we should just be left to be amicus
9 in this case, and whatever Texas decides to do
10 with its claims we would then be stuck with,
11 just tagging along as amicus.

12 But I -- I understood the point of the
13 Court's decision to be -- and this is on page
14 413 -- that the United States has distinctively
15 federal interests, not interests that are merely
16 derivative of Texas's.

17 And I think, in this case, we kind of
18 have run a natural experiment of what happens
19 when the United States' interests are cut out of
20 the picture. The results are not good. The
21 result is a consent decree that really does
22 nothing to protect the Project, that does not
23 recognize a duty of non-interference with
24 respect to the Project, that does not reflect
25 the baseline level of protection that existed

1 for the Project in 1938, and that instead of
2 imposing an injunction on New Mexico to bring
3 itself into compliance with the -- with the
4 Compact actually requires and orders the United
5 States to transfer water to accomplish the --
6 the decree's ends.

7 JUSTICE THOMAS: You mentioned the
8 baseline. Which baseline's being used now?

9 MR. LIU: The baseline -- there is no
10 Compact baseline that the parties have agreed on
11 now. There is an operating agreement that the
12 United States uses.

13 JUSTICE THOMAS: That's the one, yes.
14 So what is that? Is that D-2?

15 MR. LIU: That is a D-2 baseline, but
16 I want to emphasize what that D-2 baseline
17 reflects. It reflects the United States and the
18 two districts getting together and saying to
19 each other: Given the existing level of
20 interference in New Mexico, how do we divide up
21 the rest of the water? And so that agreement
22 simply takes the world as it exists.

23 JUSTICE THOMAS: And how long have you
24 been doing -- taking the world as it exists?

25 MR. LIU: Well, the operating

1 agreement itself has been in force since 2003.

2 JUSTICE THOMAS: No, I mean the D-2
3 baseline.

4 MR. LIU: The D-2 baseline, we --
5 probably since the 1980s. I think the 1980s is
6 -- is the right reference point.

7 JUSTICE THOMAS: So about 40 years.
8 And the -- so, basically, adopting the B -- D-2
9 baseline is not a change from what you're doing
10 now?

11 MR. LIU: Well, it is a change even
12 according to the states' own briefs and their
13 own experts, because they're not saying keep in
14 place your D-2 equation. They're saying -- and
15 this is at the addendum page 44 -- you need to
16 adopt a modified D-2 equation.

17 And that equation is going to require
18 -- if we have to modify the equation, it's going
19 to change the operations of the Project, not
20 just numbers on some spreadsheet, but when we
21 actually raise the gates at Elephant Butte
22 Reservoir to let water through, at Caballo, at
23 Caballo Dam, how long -- for how long we -- we
24 let that water through.

25 So, you know, the -- these changes go

1 -- go to the very heart of the -- of the
2 downstream contracts that we've had for more
3 than a century with the two districts.

4 CHIEF JUSTICE ROBERTS: Justice Alito,
5 anything further?

6 JUSTICE SOTOMAYOR: Just to be -- I'm
7 clear in my mind, in 2018, Texas was
8 articulating the same claims as you. You could
9 not anticipate that they would abandon you --

10 MR. LIU: Right.

11 JUSTICE SOTOMAYOR: -- in the middle
12 of this litigation. You did anticipate --
13 that's why you wanted to intervene -- that there
14 were distinct federal interests that needed to
15 be protected?

16 MR. LIU: Right.

17 JUSTICE SOTOMAYOR: And those
18 interests remain the same?

19 MR. LIU: Those interests remain the
20 same, although --

21 JUSTICE SOTOMAYOR: And your claims
22 were based on those interests, and those haven't
23 been litigated here, but they're being settled
24 by the states?

25 MR. LIU: They're being settled by the

1 states.

2 JUSTICE SOTOMAYOR: All right.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?
4 Justice Gorsuch?

5 JUSTICE GORSUCH: Mr. Liu, I guess my
6 concern, you know, at bottom is this, that our
7 original jurisdiction is for litigation between
8 states. That's what it's -- that's what our
9 charge is from Article III.

10 And we have a -- a -- a consent decree
11 between two states. They agree. The Special
12 Master's found that that agreement is consistent
13 with their Compact and doesn't purport to settle
14 any claims that the federal government might
15 have. In fact, says those are just not part of
16 this case, dismissed without prejudice to be
17 pursued in another forum.

18 To now say that the federal government
19 has independent litigating authority in cases
20 that are supposed to be between two states and
21 not resolve the federal government's interests
22 seems to me a dramatic expansion of this Court's
23 original jurisdiction not just in this case but
24 potentially with ramifications going forward.

25 Thoughts?

1 MR. LIU: Well, I think those concerns
2 can be cashed out at this Court's initial
3 gatekeeping stage just -- so, in other words,
4 those concerns can be cashed out when the Court
5 takes up the issue of whether the United States
6 can intervene and pursue the claims.

7 JUSTICE GORSUCH: And that's -- that's
8 kind of why you've made me regret that, because
9 the representation then was, we're -- we're
10 fully aligned with one of the states here and we
11 can add material value in the understanding of
12 the case. I get that, I do, sort of still.

13 MR. LIU: Well, I'm just going to --

14 JUSTICE GORSUCH: But --

15 MR. LIU: -- I'm just going to
16 disagree that that is --

17 JUSTICE GORSUCH: -- but now you're
18 saying you have independent claims that you want
19 to pursue --

20 MR. LIU: Right.

21 JUSTICE GORSUCH: -- independent of
22 any state. And that's not what our original
23 jurisdiction's about.

24 MR. LIU: Yeah, I -- I -- I think this
25 -- I think the Court well understood in 2018

1 that a possible consequence of its decision was
2 that the states and the United States, their
3 positions might someday diverge on these things.

4 JUSTICE GORSUCH: You're asking us to
5 say that two states cannot resolve their
6 disagreement in this Court consistent with the
7 Compact so long as the United States objects.

8 That's the upshot of what we're being
9 asked to enforce here.

10 MR. LIU: I -- I don't think that's
11 quite right because the United States is -- is
12 not standing in the way of the states --

13 JUSTICE GORSUCH: Settling their own
14 claims.

15 MR. LIU: Well, they -- they can
16 settle their own claims so long as they do so
17 consistent with the laws that govern consent
18 decrees.

19 JUSTICE GORSUCH: With -- with the
20 federal government's views, right?

21 MR. LIU: No, I think this is just --

22 JUSTICE GORSUCH: They can't settle
23 their own claims anymore.

24 MR. LIU: I -- I think they could.
25 And we gave an example in -- in our briefs.

1 Texas, for example, could agree to dismiss its
2 claims, and, in return, New Mexico could agree
3 to either curtail the groundwater pumping or
4 offset it, and if you look at the -- the
5 declaration by -- by Hammond in -- in -- in
6 the -- in the record, it -- it -- it lists a
7 host of ways that New Mexico could offset the
8 amount of groundwater pumping.

9 And that sort of agreement, which is
10 simply an agreement by New Mexico that says
11 we're going to take care of groundwater pumping,
12 doesn't dispose of the United States' claims in
13 this case or impose any obligations on the
14 United States.

15 JUSTICE GORSUCH: It's just one you
16 prefer rather than the one the parties prefer?

17 MR. LIU: Well, I think, if -- if
18 we're thinking about who is imposing on who in
19 this case, it's not the United States imposing
20 on the states. It's actually the states
21 imposing on -- on us.

22 JUSTICE GORSUCH: Okay.

23 MR. LIU: And that's because we're
24 leaving the states free to do what they want.
25 They're the ones who are bringing us into this

1 by saying we're not just -- we're not just
2 withdrawing from the litigation, we're taking
3 you with us, and on the way out, we're going to
4 impose a host of obligations on you.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 Justice Barrett?

9 JUSTICE BARRETT: No.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: Just picking up
13 where Justice Gorsuch left off, I guess I had
14 not understood that all consent decrees are
15 necessarily proper just because the parties
16 agree to them.

17 I thought, in our Firefighters case,
18 there were some limits that you can't have a
19 consent decree that disposes of intervenors'
20 claims without their consent.

21 So am I misreading that or --

22 MR. LIU: No, I think it's clear as
23 day on --

24 JUSTICE JACKSON: I mean, is that what
25 you're relying on in response to the notion that

1 just because the states agree, you know, the
2 United States shouldn't be allowed to object or
3 that we have to necessarily approve this consent
4 decree?

5 MR. LIU: Yes, that's -- that's right,
6 Justice Jackson.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Ms. Pettit.

11 ORAL ARGUMENT OF LANORA C. PETTIT
12 ON BEHALF OF TEXAS

13 MS. PETTIT: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 No one disputes that the Rio Grande
16 Compact divides the river's waters 57 percent to
17 New Mexico and 43 percent to Texas. But neither
18 the Compact nor the downstream contracts
19 specify percent of what: the river as it
20 existed in 1938 during the so-called D-2 period
21 or something else entirely.

22 This Court has repeatedly admonished
23 states to figure out such issues amongst
24 themselves because -- and I'm quoting from a
25 different Texas against New Mexico -- "they are

1 more likely to be wisely solved through
2 cooperative study than in any court however
3 constituted."

4 We heard you, we listened, and we
5 complied. None of the three reasons the United
6 States insists require Texas and New Mexico to
7 nonetheless continue litigating holds water.
8 Their objection that the Compact -- that the
9 consent decree violates the Compact ignores that
10 this Court has encouraged states to clarify
11 technical issues such as the baseline condition
12 and accept that solution so long as it is
13 reasonable and does not contradict the Compact's
14 express terms.

15 We know the decree easily meets that
16 standard because it merely tweaks a methodology
17 the United States developed in the late 1970s.
18 Their next objection collapses into the first
19 because it is the Compact that requires the
20 United States to deliver and account for Texas's
21 water. The decree merely allows the arrival of
22 that water to be measured with greater
23 precision.

24 Finally -- and this is the objection
25 that has been the focus today -- their claims

1 objection would transform this entire lawsuit
2 from one about how much water the Compact
3 guarantees Texas to what New Mexico will do to
4 meet that guarantee.

5 Such disputes are not yet ripe, and,
6 more fundamentally, as Justice Gorsuch noted,
7 under the Reclamation Act of 1902, they present
8 complex issues of New Mexico state law that
9 neither interest Texas nor belong in the first
10 instance in this Court.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Do we review consent
13 decrees in original actions different from
14 consent decrees in other -- other cases?

15 MS. PETTIT: I believe that's an open
16 question, Your Honor, in the original
17 jurisdiction context. But it does make sense,
18 because this Court has said very specifically
19 that its jurisdiction is narrow, that one would
20 consider, as the Special Master did, whether,
21 for example, the obligations are the type of
22 obligations that would justify keeping a case in
23 this Court over the objection of the original
24 states.

25 JUSTICE THOMAS: The Special Master

1 seemed to have a different view of where the
2 U.S. could vindicate its rights. It indicated
3 that the U.S. could use another forum to do
4 that.

5 Do you have a view on that?

6 MS. PETTIT: We agree with the Special
7 Master that they can and should vindicate their
8 current claims in New Mexico state or federal
9 court.

10 JUSTICE KAGAN: Well, what do you say
11 to what Mr. Liu just said? Mr. Liu said this is
12 going to be preclusive as to what the Compact
13 means, what it requires, and there's no other
14 way, no other body of law that's going to be
15 able to get around that, so you effectively are
16 precluding the government's position in this
17 case.

18 MS. PETTIT: It won't be preclusive in
19 the sense of claim preclusion. It will resolve
20 a single question, which is the baseline against
21 which the Compact is judged, and we do agree
22 that that would be binding on the United States.

23 However, I would point this Court to
24 its 1935 decision in Nebraska against Wyoming,
25 which, contrary to what my friend in the United

1 States said, treats the United States as
2 equivalent to all other appropriators for that
3 purpose.

4 The Compact agreement is binding on
5 them as a force of Congress's choice from --
6 starting from the 19th Century that the federal
7 law will defer to -- to state law in this unique
8 circumstance.

9 JUSTICE KAGAN: But there seemed to be
10 --

11 JUSTICE SOTOMAYOR: I'm sorry, but
12 there's been no adjudication. There's a consent
13 decree that fixes an answer and you're saying
14 the government is bound by that answer.

15 It -- it's different if they were
16 permitted, as they're asking, to litigate that
17 question and they lose it. Well, they've lost
18 it. They're bound to that now.

19 MS. PETTIT: The --

20 JUSTICE SOTOMAYOR: But you're saying
21 something different. You're saying the Compact
22 settles that question. They're stuck with it.

23 MS. PETTIT: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: Isn't that --
25 you've given your whole case away?

1 MS. PETTIT: No, Your Honor. The
2 Nebraska case was also settled, and the Court
3 did not even allow the -- the particular
4 complaint -- the particular opinion I was citing
5 was actually an opinion saying that the United
6 States was not even a necessary party because,
7 under Congress's choice, that they would be
8 bound by state law.

9 JUSTICE KAGAN: I think there are
10 compacts and then again there are compacts. You
11 know, there are compacts that really do involve
12 only the states and don't have distinctively
13 federal interests attached to them, and this
14 contact -- Compact is not that and for all the
15 reasons we gave six years ago.

16 First, the Compact is inextricably
17 intertwined with the Rio Grande Project and the
18 downstream contracts, which, of course, are
19 federal in nature.

20 Second, the United States plays an
21 integral role in the Compact's operation.

22 Third, a breach of the Compact could
23 jeopardize the federal government's ability to
24 satisfy its treaty obligations.

25 So this is a Compact that really the

1 federal government is right in the mix of, and
2 that's why we allow the federal government to
3 participate.

4 MS. PETTIT: Your Honor, I would agree
5 that there is a spectrum of compacts, but this
6 is not on the far end of it. In fact, the
7 United States is a actual party to the Delaware
8 Compact because -- or the Delaware River Compact
9 for precisely that concern.

10 This falls more in the middle. And as
11 -- and the Michael Sullivan declaration, I
12 believe, gives examples all over the -- the West
13 about areas where compacts use reserve --
14 reclamation projects in the ways contemplated
15 here. And it -- it would be no different.

16 JUSTICE KAGAN: Well, whether this is
17 on the extreme end or not, what I'm suggesting
18 is that federal interests are just inextricably
19 bound up in the operation and the -- and the --
20 and the rules respecting this Compact.

21 And for you to say you can -- you
22 know, once -- after we've said there are these
23 distinctive federal interests and the U.S. gets
24 to participate as an intervenor, for you to cut
25 the U.S. out of the picture entirely so that the

1 U.S. can't ask a court to litigate those, what
2 -- what -- what it thinks are -- are the right
3 rules, I mean, I guess I don't see where that
4 authority comes from.

5 MS. PETTIT: From -- for the right
6 rules point, my -- I believe my friend actually
7 acknowledged that whether or not they were an
8 intervenor was irrelevant to that question. It
9 either complies with the Compact or it does not.

10 And as to their specific claims -- and
11 I think this really goes to focusing on how
12 their claims have actually evolved since 2018,
13 because in -- in 2018, they were asserting a
14 interference with a treaty and an interference
15 with Texas's apportionment.

16 Here, they're -- and the Special
17 Master recognized that there is no evidence
18 about a potential interference with the treaty
19 at all, in part because this consent decree
20 takes it right off the top. The treaty's not --
21 so, as a result, the treaty is not implicated.

22 And -- and then they're saying, well,
23 I'm demanding on behalf of Texas more than Texas
24 is going to -- is demanding for itself. That
25 doesn't make a lot of sense. And so what

1 they've really tried to do here is they've tried
2 to conflate the Project and the consent -- and
3 the Compact, and they are two analytically
4 separate things.

5 What they're asserting here is -- is
6 an interference with the Project in New Mexico
7 that is a matter of reclamation law and that is
8 typically resolved in the lower courts.

9 JUSTICE KAGAN: I -- I mean, you say
10 they're two separate things, and six years ago,
11 we said they're inextricably intertwined.

12 MS. PETTIT: In the sense that the --
13 the Project acted as a -- as a sort of agent, is
14 I believe the words this Court used, in term --
15 but not in the sense that every single violation
16 of the Project or every single potential
17 interference with the Project rises to the level
18 of a Compact violation.

19 For example, if there were a well in
20 New Mexico that was being operated in a way
21 inconsistent with the Project, that might be a
22 violation under the Reclamation Act, but it's
23 not going to be a violation of the Compact. So
24 they can't be -- just because one serves as the
25 agent of the other doesn't mean that they can't

1 -- that they are not analytically distinct.

2 CHIEF JUSTICE ROBERTS: This is a
3 theoretical question about how it works, and
4 maybe everybody else knows, but my understanding
5 of how this works is you have compacts and the
6 federal interest is protected because of the
7 requirement of congressional consent.

8 But what happens as they go on? I
9 mean -- and you have a consent decree under the
10 Compact, but at what point does the federal
11 government have the authority to step in as they
12 do when the Compact is originally enacted?

13 MS. PETTIT: In that instance, Your
14 Honor, I think it would -- and I'd point you to
15 the Texas against New Mexico case that I
16 originally quoted from 1983, where the Court
17 drew the line at where it is congressionally
18 ratified powers. And this is to where it is a
19 reasonable interpretation as opposed to an
20 amendment to the Compact.

21 And, here, what we have is a
22 reasonable interpretation as to how the Project
23 is going to -- how the Compact is going to
24 function on a day-to-day basis --

25 CHIEF JUSTICE ROBERTS: Well, how does

1 the --

2 MS. PETTIT: -- because the Compact
3 doesn't specify it.

4 CHIEF JUSTICE ROBERTS: -- how does --
5 let's say the -- the Solicitor General
6 representing the federal government disagrees
7 with the idea that it's a reasonable
8 interpretation. Where do they get to have that
9 question addressed?

10 MS. PETTIT: This Court addressed that
11 in Vermont against New York, where the Court
12 said that it does not rubber-stamp consent
13 decrees. It has the obligation to consider
14 whether or not the consent -- there's a
15 modification of the Compact.

16 Here, the Special Master looked at
17 every single objection that they have raised and
18 determined that it was a reasonable
19 interpretation, in part because it is the
20 interpretation that, as my friend noted, both
21 the United States and the two districts have
22 agreed upon since the late 1970s.

23 CHIEF JUSTICE ROBERTS: So what
24 happens -- the federal government says a problem
25 here is they're not going to be able to meet

1 their treaty obligations with Mexico. What --
2 what if that happens? What -- do you have any
3 obligations at that point, or do you just tell
4 the United States to, you know, go to war with
5 Mexico?

6 MS. PETTIT: I certainly wouldn't tell
7 the United States to go to war with Mexico, Your
8 Honor. I believe, in those circumstances,
9 because their claims as they've articulated them
10 today, and they have been a little fluid, is
11 that New Mexico is pumping too much water, what
12 they would do is bring a Reclamation Act claim
13 in New Mexico.

14 And they are actually a party to
15 ongoing litigation along those lines in the
16 stream adjudication that they've been trying to
17 get out of for decades to -- precisely to
18 determine their seniority and whether or not and
19 how they were going to protect that claim.

20 CHIEF JUSTICE ROBERTS: So that would
21 be your answer to the question I was -- I think
22 was asked earlier about what should the United
23 States do, and you would say they should sue New
24 Mexico or, presumably, they'll find you too in
25 -- you're not going to be in state court but in

1 federal court, and that would be resolved there?

2 MS. PETTIT: Yes, Your Honor.

3 JUSTICE JACKSON: Can I --

4 MS. PETTIT: And --

5 JUSTICE JACKSON: -- can I ask you, in
6 -- in such an action, wouldn't New Mexico point
7 to the consent decree and say we're not doing
8 the wrong thing because, let's say, we adopt --
9 or approved the consent decree? Wouldn't the
10 defense be here's the consent decree and it
11 tells us how much water we can pump?

12 MS. PETTIT: It depends on what
13 precisely their allegations are, which is why
14 the -- these claims are not yet ripe. All the
15 consent decree does is it specifies how much
16 water New Mexico is entitled to. And the treaty
17 obligation is taken out before they ever get to
18 that point.

19 JUSTICE JACKSON: But why isn't that
20 the same thing? If New Mexico is saying -- you
21 know, if -- if the federal government's claim in
22 the Reclamation -- hypothetical Reclamation Act
23 lawsuit is that New Mexico is taking too much
24 water --

25 MS. PETTIT: Mm-hmm.

1 JUSTICE JACKSON: -- and New Mexico's
2 response is no, we're not because the consent
3 decree tells us how much water we're entitled
4 to, I guess I don't understand why that isn't --
5 the consent decree doesn't impact the United
6 States' claims.

7 MS. PETTIT: And I think that I would
8 point Your Honor to the explanation that they
9 gave the Special Master in October and December
10 of 2022 about what the nature of their claims
11 are. And it's really a question -- it's not
12 really a question of New Mexico as a whole
13 taking too much water. It's particular New
14 Mexicans, so people who are not Project contract
15 users who are pumping when they shouldn't be.
16 That's the type of claim that would be
17 appropriate. It's a purely --

18 JUSTICE SOTOMAYOR: But it can't be
19 because we go back to your earlier concession.
20 What the -- this consent decree says is the 1938
21 baseline is not how you interpret this contract.

22 Whether the Special Master will
23 ultimately disagree with their position or not,
24 if they are not able to litigate that the 1938
25 baseline is what needs to be measured, then the

1 pumping would be illegal.

2 MS. PETTIT: Not --

3 JUSTICE SOTOMAYOR: If the baseline
4 has been changed, then the pumping is going to
5 be from a different baseline. And so their
6 reclamation claims are being limited. The
7 extent of how much they can get is being limited
8 by you.

9 MS. PETTIT: Your Honor, I have two
10 responses. The first is that the United States
11 has not actually attempted to litigate the 1938
12 condition in this case. In fact, the Special
13 Master -- and this is his words, not mine, on
14 page 71 of the February 6th, 2023, transcript --
15 "I don't know how the U.S. is maintaining that
16 with a straight face," because, as recently as
17 the summary judgment motion, they disclaimed the
18 1938 baseline.

19 Beyond that, the type of pumping that
20 they are talking about and the concerns they are
21 being -- are saying and one of the reasons they
22 raised that it was unfair was that this -- that
23 -- that EBID, the district in New Mexico, was
24 going to bear the brunt for people outside of --
25 of that area, so people farther upstream. That

1 is the nature of the -- of the claims they are
2 trying to litigate now, is --

3 JUSTICE SOTOMAYOR: Well, we'll see.
4 They'll have to get up and answer that because I
5 can't, but we'll see.

6 JUSTICE JACKSON: Can I just direct
7 your attention to the other objection? Because,
8 on the one hand, they say part of the reason
9 this is a problem is that you are disposing of
10 our claims. I also understood them to say you
11 are imposing obligations.

12 So I guess my question is, to what
13 extent do you see the -- the consent decree as
14 binding on the United States?

15 MS. PETTIT: It's not binding in the
16 sense of a -- that we can seek contempt for
17 violating it. It is binding, as we were
18 discussing a few minutes ago, as to the
19 definition of the baseline.

20 The obligations that they are pointing
21 to --

22 CHIEF JUSTICE ROBERTS: You could
23 finish your answer.

24 MS. PETTIT: -- are -- are three
25 specific concerns. One is the gauge, which is

1 actually contemplated by the Compact itself in
2 Article II and Article V, that we can move
3 gauges.

4 The second is an accounting issue that
5 it -- that falls within the scope of the
6 accounting that already happens because what's
7 accounting that it's talking about here is not
8 the day-to-day operation of the project; it is
9 an end-of-the-year assessment about whether the
10 Compact has been violated. They're two
11 different things.

12 And the third is a transfer of
13 allotments between districts over -- at the end
14 -- the beginning of each year. That would be
15 enforced against the districts.

16 CHIEF JUSTICE ROBERTS: Thank you.
17 Thank you, Ms. Pettit.

18 Mr. Liu said it was inexplicable why
19 you gave up the 1938 baseline. Can you explain
20 that?

21 MS. PETTIT: Certainly, Your Honor.
22 The nature of a settlement is that parties
23 compromise. And the -- the Special Master
24 determined at the summary judgment stage that
25 there wasn't a strict 1938 condition as the --

1 as Texas originally pled it. There was some
2 additional amount of development that had been
3 contemplated.

4 And taking -- we accepted that as a
5 fundamental matter, and going forward, looking
6 at the evidence and looking at the different
7 claims, we concluded that this was in Texas's
8 best interests.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas?

11 JUSTICE THOMAS: The -- this may be
12 along the same line, but the language, it -- the
13 -- in Justice Gorsuch's opinion in the 2018
14 case, he says, after we permitted the U.S. to
15 intervene, it also filed a complaint with
16 allegations that parallel Texas's.

17 Where did you -- where -- now it
18 appears that you've diverged. Could you give us
19 an -- could you explain why that happened and on
20 what basis did -- did -- did this happen?

21 MS. PETTIT: I --

22 JUSTICE THOMAS: The government seems
23 -- the U.S. seems to put quite a bit of emphasis
24 on that.

25 MS. PETTIT: Two responses. The first

1 is going back to 2018, ironically, General
2 Keller, when he was standing at this lectern,
3 predicted that there would be a divergence about
4 the baseline, but he got the positions
5 backwards. He was -- he was asserting that
6 Texas would be asserting a 1938 condition and
7 the U.S. would be asserting a D-2. And that's
8 actually how it's been litigated up until the
9 exceptions. So that's -- that's changed.

10 The other thing that's changed is,
11 again, they are trying to bring into this
12 lawsuit intrastate issues within New Mexico that
13 Texas actually never agreed to that were
14 appropriately part of its lawsuit back in 2018.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE SOTOMAYOR: Who decided how to
17 do the accounting before the consent decree?
18 Who set up that process?

19 MS. PETTIT: There are two different
20 processes. One is run by the Rio Grande Compact
21 Commission. That is the Compact Compliance.
22 And the other is the accounting process for the
23 Project itself. And those run in parallel.
24 They only really meet at the end -- basically an
25 end-of-the-year meeting, where Texas and New

1 Mexico, as well as Colorado, would be telling
2 them you need -- there's a credit or a debit
3 that needs to be put into your accounting system
4 and --

5 JUSTICE SOTOMAYOR: So that --

6 MS. PETTIT: -- it's functionally the
7 same thing.

8 JUSTICE SOTOMAYOR: -- but -- but who
9 set up what would be reported or how?

10 MS. PETTIT: So --

11 JUSTICE SOTOMAYOR: The two projects,
12 not the states, correct?

13 MS. PETTIT: They are -- it's -- this
14 is cooperative federalism. They work together
15 about this. And they work together on an
16 ongoing basis. So I can't --

17 JUSTICE SOTOMAYOR: The problem -- the
18 problem is that now you're directing the federal
19 government to do something different. Whether
20 it's de minimis or not, I can't even figure that
21 out in reading the materials.

22 But, when we had the opposite
23 situation of the federal -- one sovereign, the
24 federal government, telling the states to do
25 background checks on gun buyers, we said that's

1 stepping into their sovereign decision-making
2 and couldn't.

3 I don't know why this is not the same
4 in reverse, that you're commanding the federal
5 government to do something that it had not done
6 previously. So where do you get the power to do
7 that?

8 You claim the power is because they've
9 undertaken the duty to do this, but they took a
10 duty to do this, get -- retaining the right to
11 make certain decisions. Now you're chasing that
12 baseline.

13 MS. PETTIT: The Reclamation Act of
14 1902 stated that the states can put -- the
15 federal government takes its water rights
16 subject to both the procedural and substantive
17 requirements of the states, and that can
18 include, for example, in United States against
19 California in 1978, some really, really
20 nit-picky, like 25 different conditions
21 micromanaging. And that is something that
22 Congress has allowed for here.

23 Here, it's just a discussion about
24 slightly different numbers in a larger
25 accounting process that's already existed.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?

3 JUSTICE GORSUCH: Let me just see if
4 I've got it right.

5 So we have a consent decree that we
6 have to approve or -- or disapprove. And the
7 big change is the baseline. That's been a big
8 subject of dispute, and that's what the
9 government says it's most worried about.

10 MS. PETTIT: Yes, Your Honor.

11 JUSTICE GORSUCH: But it's the same
12 baseline that's been used for 40 years.

13 MS. PETTIT: Yes, Your Honor, ever
14 since the -- the -- the Project went from
15 delivering at individual farms to delivering at
16 a district level. It's used the same baseline.

17 JUSTICE GORSUCH: And the other
18 concern that we've heard mentioned is the
19 treaty, but the Special Master found that
20 there's no treaty problem here.

21 MS. PETTIT: Yes. The Special Master
22 found there's not even a serious argument
23 there's a treaty problem.

24 JUSTICE GORSUCH: It might be
25 different in terms of approving a consent decree

1 if there were a treaty problem.

2 MS. PETTIT: Absolutely.

3 JUSTICE GORSUCH: Okay. And then the
4 other set of issues has to do with
5 administration, where the -- where the gauge --
6 water gauge is going to be. And you're getting
7 a benefit out of this deal because, instead of
8 the water gauge being at Elephant Butte -- I
9 don't know how many miles, over a hundred miles
10 from the border -- you're getting a measure now
11 at the Texas border.

12 MS. PETTIT: I'd tweak that just a
13 little. The gauge that is still going -- the
14 gauge that's at Elephant Butte is still at
15 Elephant Butte.

16 JUSTICE GORSUCH: Yeah, no --

17 MS. PETTIT: We're getting a separate
18 -- the gauge that we are -- is being in El Paso
19 is -- had been gauges that had been canal
20 headings within Texas, but we are measuring at
21 Texas.

22 What we are getting -- we're
23 definitely getting a benefit in the sense that
24 the -- the Project is now considering and
25 freezing in the 1978 level the -- the pumping

1 that had been happening.

2 And I do want to point out that that
3 is requiring New Mexico to reduce pumping to get
4 down to 1978, and I think they've already spent
5 something like \$60 million on it.

6 JUSTICE GORSUCH: Okay. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 Justice --

10 JUSTICE JACKSON: So do you dispute
11 that the downstream contracts are still in
12 effect and bind the United States with respect
13 to the allotment and their obligations regarding
14 that?

15 MS. PETTIT: We don't dispute it, but
16 under Hinderlider, the contractors' rights rise
17 no higher than the states. And so, if Texas
18 only gives them 43 out of a hundred gallons, the
19 Texas District can't claim --

20 JUSTICE JACKSON: I understand, but
21 the contracts do talk about their transfer
22 obligations as between EBID and EP1, right?

23 MS. PETTIT: No, Your Honor. The --

24 JUSTICE JACKSON: They don't? Okay.

25 MS. PETTIT: -- the 1938 contracts

1 that are incorporated into the Compact --

2 JUSTICE JACKSON: Yeah.

3 MS. PETTIT: -- do not discuss a
4 transfer obligation. That is something that the
5 United States came up with in 20 -- in 2008
6 without the Compacting states whose rights are
7 at issue even being in the room, as my colleague
8 put it.

9 JUSTICE JACKSON: Final question. If
10 the United States decides not to transfer water
11 pursuant to the consent decree, let's say it
12 goes through, you mentioned earlier that that
13 would be enforced against the states and not the
14 United States. In other words, you're not
15 binding them necessarily legally. Is that -- is
16 that your position?

17 MS. PETTIT: The districts, yes. That
18 would be enforced --

19 JUSTICE JACKSON: Enforced -- excuse
20 me -- against the districts. Is that in the
21 Compact -- or in the consent decree? Is that --
22 or is that just something you're saying here
23 now?

24 MS. PETTIT: That's not specifically
25 in the consent decree. That is, however -- the

1 way that the transfers work is, to take a
2 specific example, if a negative departure
3 transfer were triggered, that would mean over a
4 period of years, EBID, the New Mexico District,
5 has received far, far more water than it was
6 entitled to, and that would be a transfer --
7 that would be transferred to Texas as a -- the
8 Texas District as a way of a remedy.

9 If the EBID were to continue to take
10 more water than it was entitled to even after
11 that, that would be enforced through a New
12 Mexico state administrative process that's part
13 of the larger constellation of laws that my
14 friend mentioned and is not specifically in the
15 consent decree.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Wechsler.

20 ORAL ARGUMENT OF JEFFREY J. WECHSLER
21 ON BEHALF OF NEW MEXICO

22 MR. WECHSLER: Mr. Chief Justice, and
23 may it please the Court:

24 The question of whether the United
25 States can veto the settlement of the Compacting

1 states can be resolved by the application of
2 four principles.

3 First, the distinctively federal
4 interests of the United States do not include an
5 interest in the equitable apportionment of Rio
6 Grande water. That is undisputed. Because the
7 only issue resolved by the consent decree is the
8 equitable apportionment, the United States'
9 interests are not implicated.

10 Second, the Compact establishes the
11 apportionment. The Rio Grande Project must then
12 conform its operations to ensure that the
13 Compact apportionment is delivered.

14 Third, this Court has recognized the
15 right of states to clarify an ambiguity in an
16 interstate compact so long as the clarification
17 is consistent with the Compact. Here, the
18 consent decree measures Texas's share of the
19 Article IV delivery in a manner that is
20 expressly contemplated by the Compact.

21 And, fourth, there are other available
22 fora for the United States to resolve its
23 remaining claims. The Special Master observed
24 that "it is difficult to envision a resolution
25 to this matter that might be superior to the

1 consent decree."

2 The Court should overrule the United
3 States' exception and enter the consent decree.
4 I welcome the Court's questions.

5 JUSTICE THOMAS: Could you -- the --
6 one of the -- the State of Texas -- the United
7 States seemed to suggest that Texas and the --
8 the states have changed their views from early
9 -- from 2018, and we've had some discussion of
10 that. I'd like to hear your comments on that.

11 MR. WECHSLER: Well, United -- New
12 Mexico has been consistent about its position in
13 terms of the D-2 baseline. What I -- what we
14 understood the 2018 decision to be doing is
15 essentially saying Texas had a claim to the
16 apportionment. That is an interstate
17 apportionment as between Texas and New Mexico.
18 Only those states are in the -- the Compact
19 itself.

20 And what the United States had brought
21 was a claim for interference; that is, this
22 Court said that there were obligations that
23 arose under the Compact and that it was -- it
24 had a claim to be free from interference with
25 those duties and obligations.

1 The consent decree doesn't address
2 that interference claim. All it does is say --
3 is define what the equitable apportionment is as
4 between Texas and New Mexico. And the United
5 States is free to bring -- as the Special Master
6 indicated in -- in his -- in his third report,
7 they're free to bring all of those claims of
8 interference in other fora. And that would be
9 consistent with the way this Court has handled
10 other cases.

11 JUSTICE THOMAS: What is the nature of
12 the disagreement about the groundwater pumping?

13 MR. WECHSLER: So I would understand
14 that to be Texas and New Mexico have resolved
15 the apportionment, the amount of water that each
16 state is entitled to. What the United States is
17 really arguing about is, how does New Mexico
18 satisfy its obligations? That is, which
19 specific water users within New Mexico must shut
20 down wells, how New Mexico should be
21 administering water, and those sorts of
22 intrastate issues that this Court has held are
23 -- are purely intramural disputes between
24 competing water users within the state.

25 And in other cases where there are

1 those sorts of competing uses for -- between
2 interstate users, the Court has sent the case
3 back to those -- to the states. So, for
4 example, in the case of United States versus
5 Nevada, once the interstate matter was resolved
6 as between California and Nevada, the case was
7 -- this Court said, well, the remaining claims
8 can be resolved within the State of Nevada
9 because it only has to do with competing
10 interests of New Mexico -- of Nevada water
11 users.

12 CHIEF JUSTICE ROBERTS: So you would
13 send the United States to, presumably, a federal
14 court in New Mexico to sort out the concerns
15 they have and would prefer to raise here?

16 MR. WECHSLER: That's correct, Your
17 Honor. For any reclamation claims, those would
18 be in federal district court in New Mexico. As
19 to the reclamation -- the definition of Project
20 rights, that's a New Mexico state adjudication
21 court matter pursuant to the McCarran Act
22 amendment and the Reclamation Act that Justice
23 Gorsuch referred to earlier.

24 CHIEF JUSTICE ROBERTS: And is it
25 possible that the New Mexico courts would issue

1 decisions concerning the allocation of water
2 that would be contrary to the consent decree?

3 MR. WECHSLER: No. We think the
4 consent decree only resolves the issue of the
5 interstate apportionment. And -- and to Justice
6 Jackson's question earlier, the remaining
7 questions about depletions within the State of
8 New Mexico, how New Mexico water users could be
9 done, for example, protection of the treaty, all
10 of those claims could be available to the United
11 States, as the Special Master indicated, in the
12 lower fora.

13 CHIEF JUSTICE ROBERTS: And it
14 wouldn't be the case --

15 JUSTICE SOTOMAYOR: But they're
16 bound -- they're bound against arguing that New
17 Mexico has to use a 1938 baseline, correct?

18 MR. WECHSLER: No, I don't think
19 that's right, Justice Sotomayor.

20 JUSTICE SOTOMAYOR: Well, that's what
21 your co-counsel said.

22 MR. WECHSLER: Well, I don't think
23 that's -- that's not how I understood my
24 co-counsel. What -- what is -- what is -- has a
25 preclusive effect is the apportionment itself.

1 So the baseline would apply as to the amount of
2 water that Texas is entitled to receive.

3 What it doesn't preclude the United
4 States from arguing, which is really their --
5 their argument here, is how should the project
6 operate? How can the project be free from
7 interference from New Mexico water users? And
8 that really is a question of how does New Mexico
9 use its share of the apportionment.

10 And that question they could raise --
11 they could -- they actually could seek to limit
12 depletions all the way back to their priority
13 date, which is, I believe, a 1903 priority date.
14 And so they would have the ability to protect
15 their project from groundwater depletions.

16 So the only thing really here is
17 being resolved is the equitable apportionment as
18 between the two states.

19 JUSTICE JACKSON: But why aren't these
20 all connected? I mean, you seem to be drawing a
21 line between arguments that the United States
22 can make related to internal use of the water by
23 New Mexico but not the apportionment as between
24 states.

25 And maybe I'm confused, but I thought

1 that this is one water system that works its way
2 all the way down. And so, to the extent that
3 New Mexico is taking too much internally to New
4 Mexico or not allowing it to continue on to the
5 dam, doesn't that affect ultimately the Project,
6 et cetera? I mean, how can you separate these
7 two out in the way that you are?

8 MR. WECHSLER: Well, I think it's just
9 a matter of understanding what the hierarchy
10 here is. So, as the Special Master indicated in
11 cases like Hinderlider, California versus United
12 States, the Court has established that the
13 Compact -- the -- the apportionment as between
14 the two states is established by the Compact
15 itself, not the operation of the Project.

16 And once that apportionment is set,
17 now the Project must operate within that
18 apportionment. And so the amounts that the
19 districts are entitled to, for example, the New
20 Mexico District, that amount, to use the
21 language from Nebraska versus Wyoming, can rise
22 no higher than New Mexico's apportionment
23 itself.

24 And so, to the extent that the -- the
25 Project -- or the United States has a claim

1 concerned about, like, are there New Mexico
2 water users taking water, that is purely an
3 interstate matter. It's a matter of how is the
4 New Mexico apportionment being used.

5 And that's a matter that this Court
6 has held, and the Special Master also is
7 recommending, that those questions can be
8 resolved in the lower courts, courts that are
9 more appropriate or -- or more used to
10 addressing questions having to do with New
11 Mexico water administration, New Mexico water
12 use, which New Mexico water users should be shut
13 down, how to reduce depletions.

14 JUSTICE GORSUCH: Let's see if I've
15 got it. The gist of this Compact is that
16 43 percent of what's in Elephant Butte has to go
17 to Texas using the D-2 baseline. That's the --

18 MR. WECHSLER: That's right.

19 JUSTICE GORSUCH: -- gist of it. Now,
20 if New Mexico water users are interfering with a
21 federal reclamation project, that's a different
22 question.

23 MR. WECHSLER: That's --

24 JUSTICE GORSUCH: And -- and the
25 Reclamation Act says that gets resolved

1 according to state law internally, intramurally
2 in New Mexico?

3 MR. WECHSLER: Yes, that's exactly
4 right, Justice Gorsuch. And all the consent
5 decree does is define more precisely what was
6 determined in the Compact in 1938 that Congress
7 consented to, and that is the Project must be
8 operated in a manner that the equitable
9 apportionment is delivered, that is, the
10 43 percent that Texas is entitled to actually
11 arrives at the border in Texas because, of
12 course, otherwise, they have no ability to enjoy
13 it.

14 And all the consent decree does is --
15 is provide a measurement, a way to measure and
16 enforce Texas's share of that Article IV
17 delivery, and it does so in a manner that is
18 expressly contemplated by the Compact in
19 Articles II and XII.

20 CHIEF JUSTICE ROBERTS: If you have
21 nothing further? Justice Thomas?

22 Justice Kavanaugh? No?

23 All right.

24 MR. WECHSLER: Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Rebuttal, Mr. Liu?

3 REBUTTAL ARGUMENT OF FREDERICK LIU

4 ON BEHALF OF THE UNITED STATES

5 MR. LIU: Thank you, Mr. Chief

6 Justice. Just four quick points.

7 First, I think I heard my friend from
8 Texas acknowledge that the consent decree would
9 be binding on the United States with respect to
10 its claims in this case. I think that's just
11 game over under -- under the Firefighters
12 decision, which couldn't be clearer that a
13 consent decree can't bind the -- can't
14 distinguish -- extinguish the -- the claims of a
15 non-consenting intervenor.

16 Second, on the nature of the -- of the
17 United States' claims, Justice Jackson, I think
18 you're exactly right, the -- the -- the -- my
19 friends' attempt to kind of divide these claims
20 into an intrastate portion or an interstate
21 portion just doesn't make any sense given what
22 this Court has already said about how this --
23 how this -- this water system works. The
24 Project is intertwined with -- with the Compact.

25 And -- and -- and we have been here

1 all along protecting the Project's delivery of
2 water to the districts and Mexico. That
3 delivery of water is the Compact's
4 apportionment. So, insofar as we are trying to
5 enforce the protection of that delivery of
6 water, we are trying to enforce the Compact's
7 apportionment as -- as it -- as it is specified.

8 I think the clearest way to -- to
9 appreciate this point that our claims are -- are
10 the -- are the parallel to the Compact claims
11 that have been in this case from the beginning
12 is to just look at Texas's complaint. On page
13 16 of its complaint in this case, it asks for an
14 injunction that would command New Mexico to stop
15 interfering and impeding the authority of the
16 Rio Grande Project. That's Exhibit A for why
17 there's no way to -- to -- to untangle the --
18 the project's delivery of water from the
19 Compact's apportionment. They're both the same
20 thing.

21 My friend from New Mexico said, well,
22 the United States will be free to argue about
23 whether certain users of New Mexico are properly
24 divvying up New Mexico's share under the consent
25 decree. But our entire claim in this case is

1 about the definition of the share itself. It's
2 not about how people in New Mexico should divide
3 up the eventual share. It's about the delivery
4 of water to the two irrigation districts and
5 Mexico -- Mexico, and -- and it's not about the
6 -- the interstate issue.

7 Third, on the -- on the obligations,
8 my friend from Texas wanted to characterize the
9 obligations that this consent decree would
10 impose as minor obligations. As an initial
11 matter, under Firefighters, that just doesn't
12 matter. I mean, this is just Contracts 101.
13 Two people cannot contract together and impose
14 any obligations on a non-consenting third party.

15 There's no exception to that rule in
16 this Court's original jurisdiction docket. In
17 fact, I would have thought that in this
18 scenario, that that -- that rule is most
19 important because the United States is not
20 standing here before you as an ordinary
21 litigant. We are the federal sovereign.

22 And so, in addition to the rule in
23 Firefighters, there are rules about sovereign
24 immunity, sovereign immunity, intergovernment
25 immunity. All these rules protect the federal

1 government from being what is an essential --
2 essentially a direct regulation by the states.

3 And the last point I'll make is -- is
4 about this -- this idea that the states can just
5 come together and resolve ambiguities in --
6 ambiguities in the Compact and then impose them
7 on the United States. This just conflates the
8 consent decree with the Compact.

9 The -- the -- the whole point of
10 Firefighters was that states by their mere
11 consent cannot impose on non-consenting parties
12 their view of the law. Rather, that view of the
13 law has to be litigated on the merits by the
14 non-consenting party.

15 And so, for all those reasons, we
16 would ask this Court to deny the states' motion
17 to enter the proposed consent decree.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel. The case is submitted.

20 (Whereupon, at 12:41 p.m., the case
21 was submitted.)

22

23

24

25

Official - Subject to Final Review

<p>defense ^[1] 50:10 defer ^[1] 42:7 define ^[2] 66:3 72:5 definitely ^[1] 60:23 definition ^[5] 27:9,12 53:19 67:19 75:1 defray ^[1] 17:19 degree ^[1] 25:9 Delaware ^[2] 44:7,8 deliver ^[2] 17:15 39:20 delivered ^[2] 64:13 72:9 deliveries ^[1] 10:9 delivering ^[2] 59:15,15 delivery ^[13] 3:25 4:7 5:20 23:9,10, 13 64:19 72:17 74:1,3,5,18 75:3 demanding ^[2] 45:23,24 demands ^[1] 14:9 denied ^[1] 10:7 deny ^[1] 76:16 Department ^[1] 1:19 departure ^[1] 63:2 depends ^[1] 50:12 depletions ^[4] 68:7 69:12,15 71:13 Deputy ^[1] 1:21 derivative ^[1] 29:16 design ^[1] 25:23 determinants ^[1] 25:24 determine ^[1] 49:18 determined ^[3] 48:18 54:24 72:6 determines ^[1] 26:1 devastating ^[1] 14:6 developed ^[1] 39:17 development ^[1] 55:2 difference ^[1] 8:21 different ^[24] 7:6 10:1,5 12:18 22:10,17 25:10,12 29:5 38:25 40:13 41:1 42:15,21 44:15 52:5 54:11 55:6 56:19 57:19 58:20,24 59:25 71:21 difficult ^[1] 64:24 direct ^[2] 53:6 76:2 directing ^[1] 57:18 direction ^[1] 25:7 directive ^[1] 11:21 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