

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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1 PROCEEDINGS

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in case -- the
5 original case Number 141, Texas versus New
6 Mexico and Colorado.

7 Ms. O'Connell.

8 ORAL ARGUMENT OF ANN O'CONNELL
9 ON BEHALF OF THE UNITED STATES

10 MS. O'CONNELL: Mr. Chief Justice, and
11 may it please the Court:

12 The Rio Grande Compact is an unusual
13 interstate compact in that it does not require
14 New Mexico to deliver water to the Texas state
15 line. Instead, when the compact was adopted in
16 1939, it incorporated and relied upon an
17 existing Bureau of Reclamation project as part
18 of the equitable apportionment framework.

19 Because Reclamation controls releases
20 from the Project for delivery to contract
21 holders below the reservoir and in Mexico, the
22 State of New Mexico asserted that this case
23 could not go forward without the United States'
24 participation as a party to be bound by this
25 Court's decree.

1 To permit a full resolution of the
2 dispute, the United States intervened as a
3 plaintiff, filed a complaint that presented the
4 federal government's interests that are at
5 stake in this dispute, and explained how
6 injunctive relief against New Mexico could be
7 shaped to protect those interests.

8 In its complaint, the United States
9 did not distinguish between claims brought
10 pursuant to the compact and claims brought
11 pursuant to other laws. That distinction is at
12 issue because the Master, in his
13 recommendation, distinguished between such
14 claims.

15 JUSTICE SOTOMAYOR: I'd -- I'd like to
16 know what they are. So could you identify them
17 first and then tell me how any interests have
18 not been addressed in the New Mexico state
19 action? I know that's not an issue in this
20 discrete question before us, but I still don't
21 quite understand why you need this claim.
22 What's different -- what's different from that
23 New Mexico claim?

24 MS. O'CONNELL: You're asking about
25 the difference between a compact claim and a

1 claim brought under reclamation law, for
2 example?

3 JUSTICE SOTOMAYOR: The treaty or
4 reclamation?

5 MS. O'CONNELL: I think the -- the
6 problem we're trying to avoid here is that when
7 the United States sues somebody for a violation
8 of reclamation law, taking water from a
9 reclamation project without a contract or
10 acting in a way that undermines the United
11 States' ability to comply with a treaty, it's
12 typically suing the individual water users that
13 are violating those laws or interfering with
14 that obligation of the United States to deliver
15 water under a treaty.

16 What we're trying to avoid here is a
17 future motion to dismiss filed by New Mexico,
18 which -- which indicates or insinuates on page
19 14 of its reply brief that actions brought
20 under reclamation law or under the treaty
21 should be filed against individual water users.
22 We think we can file these claims against New
23 Mexico because of the compact. We can file
24 them against the State of New Mexico because
25 New Mexico has agreed in the compact to protect

1 the Project and to protect water that's
2 released from the Project to meet its --

3 JUSTICE GINSBURG: Well, did you or
4 did you not file a claim under the -- under
5 reclamation law? The Special Master said he
6 recognized a claim under that law, but did you
7 make any claim under that law or were you
8 staking your claim on your compact -- compact
9 claim?

10 MS. O'CONNELL: Our complaint doesn't
11 distinguish between claims brought under the
12 compact and claims brought under reclamation
13 law.

14 What -- what our complaint does, as
15 we've done in other cases where we've
16 intervened as a plaintiff, is set forth what
17 the United States' interests are and then tell
18 the Court how we think it can shape injunctive
19 relief against New Mexico to protect those
20 interests. So --

21 JUSTICE GINSBURG: Well, could you --
22 can you explain at the outset, you're not
23 claiming that every -- every time there's a
24 compact approved by Congress, you would have a
25 right to come into court as a party, right?

1 MS. O'CONNELL: That's correct.

2 We're --

3 JUSTICE GINSBURG: And so what's the
4 dividing line between when you can come in as a
5 party under a compact and when, despite a com
6 -- compact, you can't come in?

7 MS. O'CONNELL: Where -- where the
8 compact protects specific federal interests
9 that are at stake in the dispute that's been
10 filed in this Court, then we believe the United
11 States can -- can intervene as a plaintiff and
12 bring claims against New Mexico that are based
13 on that compact.

14 JUSTICE SOTOMAYOR: Well, what's the
15 federal interest that was in the compact? The
16 compact does not make any reference to your
17 treaty obligations or to how you meet those.

18 It doesn't appear to make any
19 reference to any of the federal interests that
20 you've been identifying. So do that for me.

21 MS. O'CONNELL: Okay. I --

22 JUSTICE SOTOMAYOR: Make the
23 connection.

24 MS. O'CONNELL: I think it -- it very
25 clearly does refer to our treaty obligations in

1 a way that protects them. This is -- in the
2 compact, it's page A-3 of the appendix to the
3 Master's report.

4 We're looking here at the -- the
5 definitions of project storage and of usable
6 water. So that's Article I(k) and (l) of the
7 compact. Article IV defines New Mexico's
8 obligation to deliver water into Elephant Butte
9 Reservoir, into the project.

10 Article I(k) defines project storage
11 as the combined capacity of Elephant Butte
12 Reservoir and the reservoirs below it. Those
13 are all projects operated by Reclamation.

14 In Article I(l), the definition of
15 usable water says that all -- the usable water
16 is "all water, exclusive of credit water, which
17 is in project storage and which is available
18 for release in accordance with irrigation
19 demands, including deliveries to Mexico."

20 Those -- those deliveries that Article
21 I(l) refers to, what -- what the usable water
22 that's delivered into the Project is to be used
23 for, are releases that the Bureau of
24 Reclamation makes because it operates the
25 Project, it has contracts with irrigation

1 districts below the -- the Project, and it has
2 a treaty with Mexico saying how much -- how
3 much water they are entitled to get.

4 CHIEF JUSTICE ROBERTS: What --

5 JUSTICE SOTOMAYOR: What error in the
6 format --

7 CHIEF JUSTICE ROBERTS: -- what --
8 what difference does it make -- I mean, if --
9 if you are not entitled to raise this claim as
10 a party, certainly you can participate as an
11 amicus and make whatever arguments you want
12 about how the compact should be properly
13 construed, right?

14 MS. O'CONNELL: That's correct.

15 CHIEF JUSTICE ROBERTS: So what
16 difference does it make to you which way we
17 rule on the question whether or not you're
18 entitled to raise these claims yourself?

19 MS. O'CONNELL: I think a couple of
20 reasons. First of all, we -- we've intervened
21 in this case because New Mexico asserted that
22 the United States is a required party.

23 And the United States operates this
24 reservoir that the Court will -- will be
25 deciding what is Texas's compact apportionment,

1 what is New Mex -- New Mexico's compact
2 apportionment under the reservoir. And as New
3 Mexico explained in -- in its -- its brief
4 opposing Texas's motion for leave to even file
5 this complaint in the first place, you need the
6 United States to be bound by that decree
7 because we are the entity that releases that
8 water.

9 Additionally, we have interests that
10 are at stake in delivering water to Mexico
11 pursuant to a treaty that makes sense, where --
12 where we would like to be a party presenting
13 the federal interests, rather than being an
14 amicus.

15 CHIEF JUSTICE ROBERTS: This is a
16 pretty basic question I suppose I should know,
17 but can you compromise state rights in the
18 negotiation and determination of a treaty?
19 Could you negotiate a treaty with Mexico that
20 says we're going to give you this many
21 acre-feet of water that is already appropriated
22 somewhere else? And then that treaty
23 obligation trumps whatever the prior
24 allocations are?

25 MS. O'CONNELL: I'm not totally sure.

1 I -- I think probably yes. In this case, it
2 doesn't matter because the treaty preexisted
3 the compact. The treaty was enacted in 1906.
4 The compact was enacted in -- in 1939. And so
5 that treaty obligation predates the compact.

6 JUSTICE KENNEDY: Well, it -- usually
7 the latter in time prevails because Congress
8 can pass a statute after a treaty. It's not --

9 MS. O'CONNELL: Well --

10 JUSTICE KENNEDY: -- this is not a
11 completely clear area of the law, but there --
12 there is a general working rule applied in some
13 of the cases that the later-in-time controls if
14 there's a conflict between a treaty and a later
15 federal statute.

16 MS. O'CONNELL: And -- and we don't
17 think there's any kind of a conflict here. In
18 fact, Article XVI of the treaty specifically
19 disclaims any intent to affect the United
20 States' treaty obligation to Mexico.

21 So we think that article should be
22 read to mean that we're still going with 60,000
23 acre-feet, we're still going with the terms of
24 the treaty obligation which Congress, as -- as
25 you say, Justice Kennedy, could change as a

1 matter of domestic law.

2 But here the parties agreed in the
3 compact that they would protect releases from
4 the Project, that that water delivered into the
5 Project becomes usable water that Reclamation
6 releases in accordance with irrigation demands
7 and to satisfy its treaty obligation to Mexico.

8 JUSTICE KAGAN: Ms. O'Connell --

9 CHIEF JUSTICE ROBERTS: I don't
10 understand what -- what you mean when you say
11 that if you're not a party, you're not going to
12 be bound by the decree.

13 I mean, if we determine that New
14 Mexico is free to take additional water,
15 whatever it is under the -- under -- between
16 the end of the reservoir and -- and -- and the
17 borderline, what does it mean to say you're not
18 bound by that?

19 MS. O'CONNELL: Well, I think that's
20 -- it's sort of the flip side of the argument
21 that we're a required party. You -- you need
22 the United States to implement that decree, and
23 surely, I mean, if -- I don't know that if the
24 Court said here is what Texas's compact
25 apportionment is and here is what New Mexico's

1 is, that the United States would sit back and
2 say: Well, our -- our contracts still say a
3 different amount, so we're going to go with a
4 different amount, but I think that's what makes
5 us a required party. That's why New Mexico is
6 asserting that you need us here and that's why
7 we're here trying to be helpful and -- and
8 asserting in our complaint what the federal
9 interests are that we are seeking to protect.

10 So since -- since the United States
11 needs to be bound by that decree in order for
12 -- in order for there to be complete relief
13 against -- between the parties, we are here.
14 We are -- we are willing to be bound by that
15 decree. And all that we're asking is that we
16 be permitted to proceed --

17 JUSTICE KAGAN: Would I be right,
18 though, that -- that your argument would also
19 allow you to have initiated the suit in the
20 first place? In other words, even if there
21 hadn't been a suit between the states, that you
22 could have said: New Mexico is -- is taking
23 too much water and is preventing us from
24 meeting our obligations and -- and that you
25 could have initiated a suit under the compact?

1 MS. O'CONNELL: Yes. We -- we do make
2 an argument at the end of our brief in
3 opposition to New Mexico's motion to dismiss
4 that, even if -- if Texas's complaint were
5 dismissed here, the United States' claims
6 against New Mexico could go forward.

7 I don't think the Court needs to reach
8 that, because Texas's complaint is going
9 forward. This Court has denied New Mexico's
10 motion to dismiss. But that --

11 JUSTICE KAGAN: Well, what's the
12 difference? How could we say, yes, you have
13 the right to intervene, even though you don't
14 have the right to bring your own suit
15 initially?

16 MS. O'CONNELL: The Court's standard
17 for intervention is that intervention of the
18 United States is appropriate where there is
19 distinctive federal interests at stake that are
20 best presented by the United States.

21 So, I mean, I guess the Court could
22 say, you know, we don't have any claims, but we
23 could be a defendant, something like that. We
24 -- we need to be here in the case in order to
25 -- to be able to present evidence and to be

1 able to be bound by this decree.

2 But our argument that we --

3 JUSTICE GORSUCH: Ms. O'Connell, one
4 of the federal interests you've asserted is the
5 treaty with Mexico. And I'm curious how it
6 interacts with this Court's decision in
7 Medellin, where this Court distinguished
8 between self-executing treaties and treaties
9 that aren't self-executing.

10 Is the treaty here self-executing?
11 And if it's not, then how is it a federal
12 interest to seek a binding enforceable judgment
13 on the basis in domestic law of a treaty that
14 isn't enforceable under domestic law?

15 MS. O'CONNELL: I am not sure. I'm --
16 I have not -- the State Department was not
17 included in our, you know, our -- our
18 collaboration in this case, so I don't -- I
19 actually don't know the answer to whether it's
20 a self-executing treaty.

21 It was enacted in the public laws --

22 JUSTICE GINSBURG: It has been
23 executed for how many years?

24 MS. O'CONNELL: It's been in existence
25 since 1906. And the United States makes

1 deliveries pursuant to -- in its -- in the
2 Bureau of Reclamation's 2008 operating
3 agreement with the irrigation districts, it
4 calculates what the portions are that are given
5 to each of the states.

6 JUSTICE SOTOMAYOR: I'm sorry, you
7 said it was a public law. Why don't you follow
8 that up.

9 MS. O'CONNELL: I mean, it was enacted
10 in -- in the -- the Statutes at Large. It's --
11 you know, it is -- it is part of U.S. law.

12 JUSTICE BREYER: It is enacted, unlike
13 some treaties, it's enacted as a statute?

14 MS. O'CONNELL: That's correct.

15 JUSTICE BREYER: Well, that's the end
16 of that, isn't it?

17 MS. O'CONNELL: Okay. So it's -- it's
18 been enacted.

19 JUSTICE GORSUCH: Is it -- do we know
20 that that's the end of that? I mean, it sounds
21 like you haven't studied the question of
22 whether it's self-executing or not.

23 Does the government have a position on
24 that?

25 MS. O'CONNELL: I don't.

1 JUSTICE GORSUCH: Okay.

2 MS. O'CONNELL: I don't.

3 JUSTICE GORSUCH: All right.

4 MS. O'CONNELL: Justice Kagan, to get
5 back to your question, the reason why we think
6 that we can bring a claim to enforce this
7 compact against New Mexico is based on this
8 Court's line of cases, that we've cited a few
9 in our briefs, Sanitary District of Chicago
10 versus United States, and a Fourth Circuit
11 case, the County of Arlington versus United
12 States, where this Court and -- and the Fourth
13 Circuit in that case have held that the United
14 States can bring suits for injunctive relief to
15 protect federal interests that are at stake in
16 a dispute.

17 In Sanitary District of Chicago, the
18 United States sued an Illinois corporation that
19 was using too much water, water in excess of
20 its permit allocation. And the United States
21 brought a suit directly against the
22 corporation.

23 This Court said there's no statutory
24 cause of action that's required. The United
25 States can just bring that claim for injunctive

1 relief to protect.

2 JUSTICE KAGAN: And if I could return
3 -- I'm sorry -- to Justice Sotomayor's question
4 to make sure I understood the answer to it.

5 I know you're afraid that if this goes
6 forward under reclamation law, you might be
7 subject to this motion to dismiss on the ground
8 that you can't sue a state under that law.

9 But putting that aside, is the content
10 of the two suits, if you had brought the -- the
11 suit under reclamation law, and if you had
12 brought the suit under the compact, is the
13 content of the suits different or the same?

14 MS. O'CONNELL: I think it's -- it's
15 the same, because -- and that's part of the
16 reason why we are filing an exception here to
17 the Master's recommendation that our complaint
18 has to be dismissed to the extent it states a
19 compact claim, is that the reason we think New
20 Mexico is bound by these obligations to protect
21 the Project and to have its water users not
22 violate reclamation law or undermine the treaty
23 is because New Mexico has signed onto the
24 compact agreeing to protect the Project.

25 CHIEF JUSTICE ROBERTS: Your -- your

1 -- your argument really is like an implied
2 right of action argument, isn't it? I mean,
3 the compact doesn't give you any rights and yet
4 you say because it affects your interests, you
5 have a right to sue.

6 And you make the third-party
7 beneficiary argument, which is an argument
8 that's often made to support an implied right
9 of action. But you have to approve a compact,
10 you, the federal government, before it goes
11 into effect.

12 Couldn't you have protected your
13 interests at that time?

14 MS. O'CONNELL: Well, our --

15 CHIEF JUSTICE ROBERTS: By saying
16 we're not going to approve -- we're not going
17 to approve it unless we have the right to
18 bring, you know, claims to enforce it? And you
19 could imagine a group of states or two states
20 saying: All right, I'm happy to agree with
21 this, but we don't want the United States
22 coming in and -- and, you know, mucking
23 everything up.

24 And so long as you're okay with that,
25 and -- and -- and, you know, you give your

1 consent, I don't know why you should be allowed
2 to litigate as a party.

3 MS. O'CONNELL: I'm -- I'm not aware
4 of any compacts where the United States has
5 preserved that right for itself to intervene
6 and bring suits to bring people into compliance
7 with a compact.

8 I think here, I wouldn't necessarily
9 think of it so much as a compact claim but a
10 suit for equitable relief where the relief
11 we're asking for is that New Mexico be required
12 to comply with its compact obligations.

13 That's where this -- the implied right
14 of action is coming, just from this Court's
15 cases like Sanitary District, In re Debs, the
16 San Jacinto Tin Company, it's more of just an
17 equitable action.

18 And because this Court is -- is acting
19 in equity when it's interpreting interstate
20 compacts, the relief that we're seeking is that
21 New Mexico be brought into compliance with its
22 compact obligations.

23 If I could, I'd like to reserve my
24 time for rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 General Keller.

3 ORAL ARGUMENT OF SCOTT A. KELLER,

4 SOLICITOR GENERAL OF TEXAS,

5 ON BEHALF OF THE PLAINTIFF

6 MR. KELLER: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 The U.S. can raise its own compact
9 claims because the compact creates a statutory
10 duty for the U.S. to distribute water to Texas.
11 This statutory duty arises from three key
12 facts.

13 First, the U.S. owns and operates the
14 Rio Grande Project. Second, that Project is a
15 necessary predicate for the compact's equitable
16 apportionment, to quote Nebraska versus
17 Wyoming. And, third, that Project is the sole
18 means to actually distribute the equitable
19 apportionment to Texas.

20 And so, to put it succinctly and quote
21 the Special Master, the signatory states
22 intended to use the Project as the vehicle to
23 guarantee delivery of Texas's equitable
24 apportionment. The U.S. can, therefore, sue
25 New Mexico if New Mexico's actions are

1 preventing the U.S. from fulfilling this
2 statutory duty to distribute Texas's equitable
3 apportionment.

4 JUSTICE KENNEDY: Could the United
5 States file, General Keller, an -- an action in
6 the district court in the absence of a dispute
7 between Texas and Mexico -- and -- and New
8 Mexico, and the suit would say there's a
9 violation of -- of the compact even though
10 there's no dispute between the states?

11 MR. KELLER: Yes, because of the
12 nature of this unique compact. Because the
13 water that New Mexico delivers to the federal
14 government is in the middle of New Mexico
15 instead of at the state line, the United States
16 then as a carrier or a distributor has a duty
17 to ensure that there's an equitable
18 apportionment. And so this goes to the heart
19 of the Special Master's correct conclusion that
20 when New Mexico deposits water at Elephant
21 Butte Reservoir, they must relinquish control.

22 Now, when New Mexico is relinquishing
23 control, they're relinquishing control to the
24 federal government. There'd be no other way
25 for this compact to work. And that's precisely

1 why the compact itself refers directly or
2 indirectly over 50 times to the Project. And
3 that is the federal project operated by the
4 Bureau of Reclamation.

5 And so, Justice Kennedy, the United
6 States could sue New Mexico to enforce its
7 ability to ensure that Texas receives its
8 equitable apportionment, just like the compact
9 does provide for the usable water definition
10 and the irrigation demands, including what is
11 also being delivered to Mexico. And it is the
12 long-standing practice of the parties -- and
13 this is in the Master's report at page 209 --
14 that there's a -- generally 60,000 acre-feet of
15 water being delivered to New Mexico. And
16 that's coming off the top before we get into
17 the parties' accepted 57 to 43 percent split
18 between the water.

19 But all those issues about how exactly
20 and what quantities of water will actually
21 occur, of course, will be litigated in due
22 course. But for now, the issue before the
23 Court is fairly narrow. It's under this
24 particular compact, when the water is being
25 delivered in the middle of another state and

1 yet a downstream state has an equitable
2 apportionment, can the United States bring its
3 own claims as a carrier and distributor of the
4 water? And it can.

5 JUSTICE SOTOMAYOR: Could you tell
6 me --

7 JUSTICE KENNEDY: Excuse me. Is that
8 different from saying they can -- that they're
9 bringing an action under the terms of the
10 compact?

11 MR. KELLER: No, that would be a --

12 JUSTICE KENNEDY: Or is that the same
13 -- is that just another way of saying the same
14 thing?

15 MR. KELLER: I believe it -- it is
16 another way of saying the same thing. Their
17 claims arise under the compact itself because
18 the compact is doing an interstate equitable
19 apportionment between New Mexico, Colorado, and
20 Texas.

21 Now, my friends on the other side have
22 spoken often about treaty claims and
23 reclamation law claims that would invoke state
24 law. But the central focus of this lawsuit
25 that Texas has raised here is about the compact

1 and the interstate equitable apportionment as
2 opposed to any intrastate allotment.

3 And so the Reclamation Act claims that
4 the Special Master said could go forward that
5 the United States has raised, those may not
6 necessarily be claims against another state as
7 a sovereign, and so there would be potential
8 confusion if the United States' claims were not
9 compact claims in an original action between
10 sovereigns but, rather, instead were somehow
11 reclamation law claims that were invoking state
12 law against particular water users.

13 And so I think for judicial economy,
14 the proper way for this lawsuit to go forward
15 is indeed to allow the United States and Texas
16 to bring compact interstate equitable
17 apportionment claims. And if those are
18 resolved --

19 JUSTICE SOTOMAYOR: Now I understand.
20 You are actually taking the position that the
21 federal government can't sue another state for
22 reclamation claims. They would have to sue the
23 farmers who are diverting the water.

24 MR. KELLER: That -- that is -- that
25 is probably correct because there would not

1 necessarily be a -- a state law basis under the
2 Reclamation Act to -- to invoke a lawsuit
3 against a sovereign state.

4 JUSTICE SOTOMAYOR: So unless the
5 government can claim that New Mexico has an
6 obligation and it can, therefore, sue under the
7 compact, that's why -- now I understand.

8 MR. KELLER: And -- and not only that
9 but also under Hinderlider and that line of
10 cases, when there are these disputes between
11 states, it is going to be New Mexico's duty to
12 prevent diversions of water. So even if there
13 were particular water users, under this
14 compact, New Mexico cannot allow diversions
15 that would interfere with Texas's equitable
16 apportionment, which is exactly what we're
17 pleading.

18 JUSTICE SOTOMAYOR: Your brief says
19 let the U.S. intervene but not beyond
20 addressing any legal matter beyond the compact
21 claims. I wasn't quite sure what you
22 envisioned they might try to do and -- and why
23 we would at this early stage opine on that
24 issue.

25 MR. KELLER: No, and --

1 JUSTICE SOTOMAYOR: Seems like an
2 advisory opinion to the Special Master.

3 MR. KELLER: Well, you would not
4 necessarily have to opine on precisely how the
5 litigation will go forward; however, the -- the
6 crux of this lawsuit is an interstate equitable
7 apportionment compact claim. And I believe,
8 Justice Sotomayor, that's precisely why the
9 United States is here, wanting to raise those
10 compact claims.

11 But for purposes of how that would
12 operate, knowing whether the suit would be
13 against a sovereign state or knowing if it
14 would be against individual water users, that
15 would certainly affect the interests involved
16 in how the case would proceed.

17 CHIEF JUSTICE ROBERTS: Why is that?
18 I -- I mean, is this really just a question of
19 timing? I mean, they're saying the United
20 States can't raise these claims because of our
21 view about how the compact applies. But, I
22 mean, is there any reason not to go forward
23 with the -- the litigation or at the end, if --
24 if the Master thinks they don't have a claim
25 under the Compact Clause, then they can say

1 that at that time?

2 But -- but at this point, we now have
3 to make determinations that I'm concerned about
4 the impact on other compacts and -- and what's
5 involved besides simply the timing.

6 MR. KELLER: And, Mr. Chief Justice,
7 from our perspective, the practical difference
8 is going to be minimal. The State of Texas
9 will continue to bring its compact claims, and
10 the equitable apportionment is at the center of
11 that dispute.

12 At the same time, the Court can rule
13 that the United States can bring its own
14 compact claims here because of the unique
15 nature of this compact, given that the delivery
16 of water occurs in the middle of New Mexico,
17 and then the United States is the distributor
18 and carrier, to use the language of the 1945
19 Nebraska versus Wyoming decision, to ensure
20 that that -- that Texas's equitable apportioned
21 water, while it is being relinquished control
22 in the middle of New Mexico instead of the
23 state line, does reach Texas and indeed to New
24 Mexico.

25 JUSTICE KAGAN: I think I should have

1 asked Ms. O'Connell this, but do you view the
2 United States' interests as diverging from
3 Texas's interests in any way?

4 MR. KELLER: We -- yes, we will have
5 some disputes, and this will come up later in
6 the litigation, over precisely how the
7 equitable apportionment should be calculated,
8 but for purposes of the question presented to
9 this Court today, we do not diverge and we
10 believe the United States should be able to
11 raise its own compact claims.

12 JUSTICE KAGAN: No, but I meant as the
13 litigation proceeds, would there be a
14 difference if only you were in the lawsuit
15 as -- you know, and with, presumably, the
16 United States as an amicus versus having the
17 United States in as a party?

18 MR. KELLER: Well, potentially,
19 Justice Kagan, just based on the -- the
20 arguments that would be raised as to whether
21 the equitable apportionment was actually being
22 fulfilled. But as far as the -- the main
23 thrust of the argument, the United States
24 agrees with Texas that New Mexico is allowing
25 diversions of water and therefore interfering

1 with the equitable apportioned water to Texas.
2 We're agreeing on that.

3 JUSTICE SOTOMAYOR: I'm not sure
4 you're answering Justice Kagan. She's asked --
5 go to the end of the litigation. Where would
6 the -- you and the U.S. differ?

7 MR. KELLER: Well, one issue --

8 JUSTICE SOTOMAYOR: In what -- what
9 issues? Are there issues in which there can be
10 a difference?

11 MR. KELLER: Possibly. One issue, for
12 instance, there was an -- a settlement
13 agreement, an operating agreement, that the
14 State of Texas never entered into and so it
15 could not be bound by.

16 But the current practice is to use a
17 regression analysis that was looking at dates
18 from the 1950s to the 1970s to calculate return
19 flows, which is going to affect the amount of
20 water that is going to be part of the project
21 lands, the usable water.

22 Now, our position is that it's the
23 compact in -- in the time of 1938, when the
24 compact was entered into, that should control
25 that analysis, rather than a regression

1 analysis years later. That is one example of
2 an issue where the State of Texas and the
3 United States are not exactly going to be
4 raising the same arguments.

5 However, these are going to be
6 arguments that will play out in the remainder
7 of the litigation. But for purposes of the
8 issue today, we agree that the United States
9 can raise its own compact claims.

10 JUSTICE SOTOMAYOR: And I presume
11 you'd be happier if those issues were settled
12 in one litigation rather than to have to start
13 an action against the United States?

14 MR. KELLER: Yes. And we believe that
15 this lawsuit should continue forward and -- and
16 the State of Texas be allowed to raise these
17 compact claims and -- and settle this
18 interstate equitable apportionment as soon as
19 practicable.

20 If there are no further questions.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 General.

23 MR. KELLER: Thank you, Mr. Chief
24 Justice.

25 CHIEF JUSTICE ROBERTS: General

1 Yarger.

2 ORAL ARGUMENT OF FREDERICK R. YARGER,
3 SOLICITOR GENERAL OF COLORADO,
4 ON BEHALF OF THE DEFENDANT COLORADO

5 MR. YARGER: Thank you, Mr. Chief
6 Justice, and may it please the Court:

7 I'd like to begin, if I can, by
8 discussing the United States' exception to the
9 Special Master's report and turn later to
10 Colorado's first exception. Regarding the
11 United States' exception, what the United
12 States is asking for here is both incorrect and
13 unprecedented.

14 Colorado is a party to nine interstate
15 compacts. Many of them apportion water on
16 rivers with significant federal projects.
17 Several of those compacts express -- expressly
18 mention those projects in the compacts' texts.
19 Yet in a century of Colorado negotiating,
20 administering, and litigating compacts like
21 those, including those, the United States has
22 never asserted, and this Court has never
23 recognized, the right of the United States to
24 bring an independent action under a compact --

25 JUSTICE GINSBURG: Well, if -- if the

1 United States didn't assert it, then, of
2 course, there would be no reason for this Court
3 to pass on it. But the fact that the United
4 States didn't assert it in the past doesn't
5 mean that it couldn't assert.

6 MR. YARGER: Well, it's -- it's true
7 this Court has never foreclosed such a claim,
8 but if you look back through cases, including
9 Kansas versus Nebraska, which is perhaps the
10 best, most recent example, that was a case
11 between states that resulted in a settlement
12 agreement among states. The United States
13 wasn't a party to that settlement agreement.

14 In fact, if you read the settlement
15 agreement, the United States is sort of
16 relegated to amicus status in future disputes
17 under that settlement agreement. If the United
18 States has the authority to bring independent
19 claims under a compact, how do the states have
20 the ability to settle claims once and for all
21 under a compact that the United States is not a
22 party to?

23 JUSTICE GINSBURG: Did that -- did
24 that case involve -- what seems to me special
25 about this case is the prominence of the

1 federal facility.

2 MR. YARGER: And -- and I don't agree
3 that the prominence of the federal facility in
4 this compact is substantially less than the
5 prominence of federal facilities on, for
6 example, the Republican River. If you review
7 the briefing of the United States in the
8 Republican River case from 2015, they said,
9 look, the groundwater pumping from New Mexico
10 could impede this project to the point where
11 people will start defaulting on contracts.

12 That's a pretty significant interest
13 the United States asserted there. Very similar
14 to the interests it's asserting here, and yet
15 the United States was amicus in the Republican
16 River case, not a party.

17 JUSTICE KENNEDY: But I'm not sure
18 they're the same because, as the government
19 pointed out in its argument I -- is it I(l) and
20 I(k), make specific -- in the compact, make
21 specific reference that this has to be
22 available for release in accordance with
23 irrigation demands, including deliveries to
24 Mexico.

25 This is an international law

1 obligation on the United States that the United
2 States would be remiss if -- if -- if it
3 ignored.

4 MR. YARGER: Absolutely. And that's
5 why we think it is perfectly appropriate for
6 the United States to bring a treaty claim in
7 this case.

8 But what the compact does not do is,
9 within the context of the apportionment among
10 the states, give the United States a right
11 under this compact. In this compact, the
12 preamble --

13 JUSTICE KENNEDY: Well, but we're used
14 to reconciling laws that -- I'm sure the United
15 States takes the position that the compact is
16 consistent with, indeed furthers, its
17 obligations under the compact.

18 MR. YARGER: The treaty does.

19 JUSTICE KENNEDY: Yes.

20 MR. YARGER: Well, I think it's a
21 question of there are multiple layers of laws
22 that are at issue in interstate water cases,
23 obviously.

24 You have state water rights. The
25 United States must obtain those state water

1 rights to operate the Project. That's as far
2 back as the Reclamation Act of 1902 which
3 preceded this compact. There's the treaty
4 claim. There's -- there's reclamation issues.

5 The question that got Colorado's
6 attention, what we're concerned about is -- is
7 this very new argument in our mind of the
8 United States being able to sue against
9 signatory states for relief, and now they're
10 even saying they can initiate litigation in
11 district courts, perhaps this Court, when the
12 -- when the states are perhaps negotiating a
13 solution to a dispute.

14 JUSTICE SOTOMAYOR: I'm sorry. Isn't
15 that Nebraska versus Wyoming? There the U.S.
16 wasn't seeking an apportionment of rights. It
17 was seeking a declaratory judgment. Basically
18 like in this case, as an operator of the
19 facility at issue.

20 Now, it was Wyoming who sued the
21 United States, but it was -- they're pretty
22 much mirrors of each other.

23 MR. YARGER: I -- I don't necessarily
24 think they're mirrors of each other. I -- I do
25 acknowledge there's some ambiguity in the way

1 those -- I think there are four or five
2 separate opinions that the Special Master
3 discusses and the briefing discusses.

4 A couple of points of difference.
5 One, the United States was made a party to that
6 equitable apportionment decree. I think that
7 is significant. The United States is not a
8 signatory to this compact.

9 So I don't think Nebraska on that
10 issue is necessarily dispositive here. I also
11 -- the Special Master found it very significant
12 that the United States never sought affirmative
13 relief. It never -- it sought defensive
14 summary judgment relief in the '93 opinion, but
15 I don't think it ever sought affirmative relief
16 under that decree. And, in fact, it disclaimed
17 that it had any obligations under that decree.

18 And in earlier decisions by this Court
19 in that same ongoing dispute, the Court said:
20 Look, federal reclamation water rights come
21 from state law. The apportionment will
22 encompass that state law.

23 And so it's sort of -- it's the tail
24 wagging the dog to say that the United States
25 by virtue of state water rights to operate a

1 project gets to sue a state outside the context
2 of a ongoing equitable apportionment case at
3 this point.

4 JUSTICE KAGAN: I take it --

5 JUSTICE BREYER: It shouldn't -- it's
6 not -- it's not surprising that in some cases
7 the United States could be a party to such a
8 suit. The Constitution says that no state
9 shall, without the consent of Congress, enter
10 into any compact. And, therefore, we need the
11 consent of Congress.

12 Obviously, the founders who wrote this
13 wouldn't want three or four or five or six
14 states to enter into some compact that might
15 wreck the Union.

16 So doesn't that suggest that they do
17 have a right, the United States, to intervene,
18 at least where there is a federal interest?
19 And now here you have seen the federal interest
20 listed, the third-party beneficiary interest,
21 the interests that they have to deal with this
22 water, the interests that they have in terms of
23 the treaty of Mexico.

24 So it seemed to me quite simple. The
25 Constitution foresees that they can intervene

1 where there's an interest. They have several
2 interests. End of case, unless there is
3 something that I don't see.

4 MR. YARGER: Well, I hope there's not
5 because I disagree with -- with -- with that.

6 JUSTICE BREYER: There is something I
7 don't see?

8 MR. YARGER: There -- the United
9 States absolutely has to approve a compact, but
10 what it approves is the terms of that compact.

11 And the terms of this compact give
12 substantive rights to Texas, and the
13 commissioners who have voting rights, the
14 United States does not have a voting right on
15 this Commission, to demand releases of water
16 to -- to carry out the equitable apportionment
17 of the compact.

18 What I will say is I think there is a
19 difference that -- that the United States
20 doesn't draw in its briefing between
21 legislation carried out under the Commerce
22 Clause or under the treaty power and choosing
23 to go a different route, which is to say,
24 telling New Mexico and Colorado and Texas back
25 in the early -- early '20s: Negotiate this

1 compact and decide the apportionment among
2 yourselves, and that will be the way that we
3 determine how this water is apportioned.

4 That's very different from the United
5 States saying: We will exercise our commerce
6 power or treaty power to determine the
7 equitable apportionment of this river --

8 JUSTICE KAGAN: Well, I take it,
9 General --

10 MR. YARGER: -- and impose it on the
11 states.

12 JUSTICE KAGAN: -- I mean, you don't
13 disagree, do you, or tell me if you do, that
14 the United States has important interests here?

15 And, you know, part of those interests
16 are international, having to do with the
17 relationship with Mexico, but part of them are
18 domestic because the United States is and was
19 even prior to this compact in a set of
20 contractual agreements that -- that give it
21 duties with respect to this water.

22 So do you agree that the interests are
23 pretty strong here?

24 MR. YARGER: Yes.

25 JUSTICE KAGAN: Okay. So how in your

1 view does the United States protect those
2 interests?

3 MR. YARGER: Well, I think it -- it --
4 two ways: First of all, with respect to the
5 treaty interests, absolutely, we think that
6 it's appropriate to include treaty claims in
7 this case.

8 Second of all, with respect to all of
9 those interests, which are identical to those
10 that are at issue in cases like Kansas versus
11 Nebraska, it does what it's always done, which
12 is --

13 JUSTICE KAGAN: I don't know what that
14 means. Do those mean the domestic issues?

15 MR. YARGER: Yes, the domestic issues
16 which Congress has said for 130 years, project
17 rights are state law water rights that are
18 subsumed within an equitable apportionment that
19 the states either negotiate or this Court sets.
20 So it's no different from the many cases the
21 United States has participated in, either as
22 amicus, which I think is a pretty strong
23 indication that in past cases at least, the
24 United States hasn't saw fit to try to
25 establish the precedent of being able to take

1 states into litigation when they're not in
2 litigation, and -- and it can assert those
3 interests and make all the arguments that it
4 needs to make.

5 And I think it gets back to the --

6 JUSTICE GORSUCH: But -- but, Mr.
7 Yarger, I'm still stuck on -- on this. I
8 understand your -- your carving out of the
9 treaty interests, but the United States has
10 preexisting contract obligations to two water
11 districts to provide a certain amount of water.

12 And the resolution of this compact
13 dispute could affect the United States' ability
14 to fulfill its contractual obligations. I
15 think you'd agree with that.

16 MR. YARGER: I -- I would agree with
17 that.

18 JUSTICE GORSUCH: Then why isn't --
19 why isn't that significant federal interest
20 right there?

21 MR. YARGER: It's -- it's not that
22 it's not a significant federal interest. It's
23 a question of what is the substantive right the
24 United States is asserting here. And it's just
25 like Hinderlider.

1 The United States' rights to this
2 water arise under New Mexico law, in fact, New
3 Mexico territorial law back in '06 and '08. To
4 the extent the equitable apportionment of the
5 compact affects those rights, that was
6 consistent with the scheme that Congress put in
7 place when it said, U.S., go to state court and
8 get water rights.

9 That's how we will affect these
10 projects.

11 JUSTICE SOTOMAYOR: I'm sorry, let's
12 take a situation in which the contract is
13 clear. All right? Forget about surface water.
14 You have to deliver X cubic feet of water every
15 year. And the compact is just like this one.
16 It authorizes the United States to -- or
17 there's a federal law that authorizes the
18 United States to distribute that water in a
19 certain way.

20 Now you breach. It's your position
21 that the government couldn't come in and say to
22 you: Deliver the water because I have a
23 federal interest in ensuring that the contracts
24 that I signed, dependent on your clear
25 contractual obligation, doesn't give me a right

1 either to sue you or to bring a claim under
2 that contract --

3 MR. YARGER: Well, we're --

4 JUSTICE SOTOMAYOR: -- and obligated
5 you to do something to the -- for -- to the --
6 for the United States?

7 MR. YARGER: Justice Sotomayor, we're
8 not taking a position on any other type of
9 claim the United States may or may not have
10 under other substantive bodies of law,
11 including state law, treaties, and reclamation
12 law.

13 All we're saying is that this, as
14 Texas said I think several times during
15 argument, at the heart of this case is an
16 apportionment between the states.

17 JUSTICE KAGAN: But think about this.
18 This goes back -- Justice Breyer said, look,
19 Congress approved this compact. Now, it did so
20 against a backdrop in which the United States
21 already had obligations, obligations to Mexico,
22 but also contractual obligations to domestic
23 parties.

24 Now, how could it have approved that
25 compact unless it said we took a look at this

1 compact and we think it will allow us to
2 fulfill all of our obligations, both domestic
3 and international? You have to think in a case
4 like this that the approval of the compact was
5 premised on an understanding that it would
6 protect the United States' own interests, which
7 is exactly what the United States is trying to
8 assert here.

9 MR. YARGER: And -- and I think the
10 question is how does the United States protect
11 that interest, because the premise of the
12 compact was also the 1902 Reclamation Act,
13 which was in effect for 36 years before this
14 compact was signed and said very clearly:
15 Federal government, go to state court, go to
16 state administrative mechanisms to get your
17 water right. And then this Court in
18 Hinderlider said: And by the way, whatever
19 right you get under state law will always be
20 subservient to and contained within either a
21 compact or a decree set by this Court.

22 So I think it's a question of where --
23 how does the -- does the United States protect
24 those interests and what is the substantive
25 body of law under which it can do so?

1 We don't object to the United States
2 bringing arguments into this case or
3 participating, but we want to be very careful
4 about what precedent this sets for other
5 compact disputes in the future. We're very
6 concerned about that.

7 And --

8 CHIEF JUSTICE ROBERTS: Well, the
9 United States says one reason they need to
10 participate as a party, rather than an amicus,
11 is because otherwise they would not be bound by
12 the decree. Aren't you worried about that?

13 MR. YARGER: I -- I --

14 CHIEF JUSTICE ROBERTS: In other
15 words, you're going -- if -- if you prevail,
16 it's not going to mean much, because the United
17 States doesn't feel bound by it.

18 MR. YARGER: I think that again flips
19 the -- the legal regime on its head. Of
20 course, they'll be bound. They have a state
21 law water right that rises no higher than this
22 compact.

23 And so, they will certainly be bound
24 to the extent that this compact informs the
25 scope of water rights that New Mexico can grant

1 and administer under its law and same with
2 Texas.

3 One of the things that I --

4 JUSTICE KENNEDY: Seems to me that's
5 the best argument -- argument you can make for
6 the fact that the United States has a vital
7 interest here.

8 MR. YARGER: And we don't dispute it
9 has an interest in this case and ought to
10 participate in this case. Our concern is under
11 what substantive law and what it -- what it
12 will be able to do in the future.

13 JUSTICE GINSBURG: In this case --

14 MR. YARGER: Bring the states into the
15 --

16 JUSTICE GINSBURG: -- if -- if -- if a
17 party is bound, but not permitted to be a
18 party, that -- there's something wrong with
19 that.

20 MR. YARGER: Well, I don't think so,
21 Justice Ginsburg. It's not just the United
22 States who has -- have rights at stake in this
23 case. Every water user in Texas and New Mexico
24 that receives project water is very keen on
25 this case and will ultimately be bound by it

1 under parens patriae. And that's, of course,
2 the whole point of this regime. The states
3 apportion water among themselves. Water rights
4 within those states must be administered
5 consistent with that --

6 JUSTICE KAGAN: Well, it's one --

7 MR. YARGER: -- and what Congress --

8 JUSTICE KAGAN: -- it's one thing to
9 say that state litigation can bind its own
10 citizens; and it's another thing to say that
11 state litigation can bind the federal
12 government without the federal government being
13 allowed to participate in that litigation.

14 MR. YARGER: Well, and -- and the
15 United States, for -- for many years,
16 litigating these cases, has participated in
17 these suits despite strong federal interests
18 without being a party and asserting claims
19 under the compact.

20 JUSTICE GINSBURG: But as was pointed
21 out by Ms. O'Connell, the United States was
22 told what -- wasn't there -- I don't know
23 whether Colorado joined it or it was just New
24 Mexico, that said the United States is a
25 necessary party to this litigation. And you're

1 saying not only are they not necessary, they're
2 not even permitted to be a party.

3 MR. YARGER: I -- no, that -- that's
4 certainly not what we're saying. We certainly
5 think that they are a necessary party here at
6 least under the treaty claims. And that
7 question has been decided. The United States
8 is a party to this case. The intervention has
9 been granted. We don't dispute that and never
10 have. The question is: What substantive right
11 is the United States asserting?

12 I -- I would like to go back to the
13 Chief Justice's question, if I could, and the
14 question is: What difference does it make here
15 to recognize for the first time this right
16 which Colorado is very concerned about in this
17 litigation?

18 We don't necessarily think that's
19 necessary. We think the Court can reserve the
20 question. I think that some of the justices
21 have observed here the issue of deliveries to
22 Texas will be litigated through Texas's compact
23 claim. The issue of deliveries to Mexico will
24 be litigated through the treaty claim. So to
25 recognize this right for the first time here,

1 in the context of a case where we don't think
2 it's necessary, I think establishes precedent
3 that -- that just simply isn't necessary to
4 establish in -- in the context of this case.

5 I -- if I could turn very briefly to
6 Colorado's first exception, our point here is
7 -- is just really an echo of what the other
8 states have raised concerns about, which is
9 that this is an apportionment case.
10 Reclamation law claims can introduce a lot of
11 extraneous issues into this litigation that
12 aren't necessarily needed for the apportionment
13 decision to -- to be accomplished by this
14 Court.

15 What I would point you to is to look
16 at New Mexico's district court complaint that
17 they brought against the U.S. and the water
18 districts in 2011, raising reclamation law
19 claims regarding the 2008 operating agreement.

20 There are all kinds of claims in that
21 case. I -- I think if the apportionment is
22 decided by this Court, that will certainly
23 inform state law water rights in the state
24 adjudication. It will also inform reclamation
25 law claims that can then be sorted out in the

1 lower courts as necessary.

2 If there are no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 General.

5 Mr. Rael.

6 ORAL ARGUMENT OF MARCUS J. RAEL, JR.,
7 ON BEHALF OF THE DEFENDANT NEW MEXICO

8 MR. RAEL: Mr. Chief Justice, and may
9 it please the Court:

10 I have three points -- main points
11 that I'd like to make on behalf of the State of
12 New Mexico today, the first of which is that
13 New Mexico agrees with the Special Master and
14 Colorado that the United States cannot raise
15 compact claims in this matter.

16 Secondly, New Mexico has not taken
17 exception to the Special Master's
18 recommendation that the United States be
19 allowed to raise a claim under reclamation law
20 in order to protect its interests.

21 Finally, New Mexico does not dispute
22 that the United States can bring a claim for
23 alleged interference with its 1906 treaty with
24 Mexico. It's just that that claim also arises
25 -- does not arise under the -- under the

1 compact, but under the treaty itself.

2 JUSTICE SOTOMAYOR: Are you --

3 JUSTICE KAGAN: And how do you think
4 those claims would differ from claims that are
5 brought under the compact?

6 MR. RAEL: Well, Justice Kagan, the --
7 the -- the treaty itself has a mechanism which
8 allows the United States to enforce the
9 treaty -- its treaty obligations at any time.

10 And the -- and the -- I think the main
11 difference is that if you -- if -- if -- and as
12 this Court has already deemed, that if the
13 United States is allowed to enforce its treaty
14 obligation of the 60,000 acre-feet a year under
15 the treaty, then you don't open that door under
16 the compact claim that my colleague was just
17 speaking about, which would allow the United
18 States to -- to -- to, for the first time ever,
19 raise a -- a compact claim in a -- in a -- in a
20 compact under which it receives no allocation
21 of water.

22 JUSTICE KAGAN: And -- and what about
23 these other obligations that the United States
24 has? You said that you can bring reclamation
25 law claims for those. What's the difference

1 there?

2 I mean, I'm trying to figure out why
3 everybody cares so much that this is a claim
4 under the compact, rather than under these
5 other bodies of law.

6 MR. RAEL: I -- Justice Kagan, I -- I
7 think everybody cares so much because the --
8 the Reclamation Act of 1902 is a very
9 comprehensive body of law, and it allows the
10 United States to accomplish almost anything
11 that it's looking to do here.

12 That -- it's important to note that
13 there's no claim -- there's no remedy that the
14 United States is seeking in this litigation
15 that it can't -- under the compact, that it
16 can't receive under that comprehensive body of
17 law that is the Reclamation Act. But the
18 reason why, I think, New Mexico cares, and I
19 think -- and Colorado as well, is this Court
20 has never allowed the United States to raise a
21 claim under a compact to which it was not a
22 party -- I mean to which it was -- received no
23 allocation of water and to which it was not a
24 signatory.

25 JUSTICE GINSBURG: This --

1 JUSTICE KAGAN: Right, but --

2 JUSTICE GINSBURG: -- this Court has
3 never had occasion to pass on that question.
4 You said "never allowed." It didn't disallow.
5 It just hasn't ruled on it.

6 MR. RAEL: Well, Your Honor, I think
7 that's -- that's correct, but I think -- I
8 think what the danger that we're facing here is
9 that if you -- if you read an -- an implicit
10 right here for the United States to raise a
11 claim under a compact which -- which provides
12 it no explicit protections, if you -- if you
13 allow them to -- to -- if you -- if you allow
14 the United States to read that implicit right,
15 then I think you're -- you're opening up a
16 dangerous door in which the United States can
17 raise -- can try to raise implicit rights not
18 only in -- in this compact but in every compact
19 across the country.

20 JUSTICE SOTOMAYOR: How --

21 CHIEF JUSTICE ROBERTS: I suppose one
22 reason the United States may be interested is
23 if it has compact claims that are litigated
24 here. If they're under the Reclamation Act,
25 they're litigated in a complex proceeding in

1 state court, right?

2 MR. RAEL: No, Your Honor. I -- I
3 think the -- the Special Master in this case
4 found a very elegant solution, and that's why
5 we don't oppose it. In -- in allowing them to
6 participate in this case under the Reclamation
7 Act, as I said, there's no remedy that they've
8 sought in their complaint in this case that --
9 that they can't get under the Reclamation Act
10 of 1902 that they can get under the compact.

11 And so it would be litigated here, in
12 this Court, for purposes of judicial economy
13 and to avoid inconsistent rules.

14 JUSTICE KAGAN: And not under state
15 law but under federal law?

16 MR. RAEL: Under the -- under the
17 McCarran Amendment, the -- the -- the United
18 States' water rights are subject to state law,
19 but New Mexico would -- would -- and -- and any
20 -- any compacting state administers the water
21 rights, but we can't do so in a manner which is
22 inconsistent with the compact.

23 Therefore, this Court has already
24 placed those protections in place so -- so that
25 the United States' reclamation law claim and --

1 and, indeed, in this case, its reclamation
2 project, is protected in the sense that we
3 cannot administer our state water rights, our
4 sovereign water in such a manner that it
5 interferes with the compact.

6 JUSTICE SOTOMAYOR: I'm sorry, let's
7 go --

8 JUSTICE GINSBURG: Am I right that --
9 that New Mexico had argued at an earlier stage
10 that the United States was a necessary party to
11 this litigation?

12 MR. RAEL: Yes, Your Honor, we did
13 argue that, and --

14 JUSTICE GINSBURG: And I will ask you
15 the same question I asked before. You argued
16 that the United States was a necessary party in
17 this very litigation. And now you're saying
18 they're not even a permitted party.

19 MR. RAEL: Justice Ginsburg, I -- I
20 apologize. I'm not saying that. What I'm
21 saying is that New Mexico is arguing that the
22 United States is a necessary party, but their
23 claims arise under the Reclamation Act of 1902
24 and not under the compact.

25 And so the Special Master was correct

1 in his recommendation that the United States
2 should participate in order to enforce its
3 treaty obligations, but it does so under the
4 treaty, which it can bring in -- in this
5 litigation.

6 And as far as rights it's trying to
7 enforce, as far as its -- its water rights and
8 other interests, those would be brought under
9 the Reclamation Act of 1902 in this litigation.

10 So they are a necessary party, just
11 not -- not a -- not -- they're just not allowed
12 to bring compact claims in our opinion.

13 I'd like to point real quickly to the
14 third --

15 JUSTICE GINSBURG: But the -- but when
16 you made that claim it was only a compact, this
17 case was about a compact between New Mexico and
18 Texas, and it was in that setting that you said
19 the United States was necessary.

20 MR. RAEL: You -- you are correct,
21 Justice Ginsburg -- Ginsburg. New Mexico
22 backed away from that position when we acceded
23 to the fact that the Project is incorporated
24 into the -- into the compact.

25 It's just in the incorporation of that

1 Project, we're not acceding to the fact that --
2 that the United States, who's not a signatory
3 and whose apportionment of water has any claims or
4 rights -- rights of enforcement under the
5 compact itself. That's between three sovereign
6 entities: the State of Texas, the State of New
7 Mexico, and the State of Colorado.

8 What we're saying is that we -- we --
9 we -- the Special Master found a very elegant
10 solution which we support and think that they
11 still need to participate, but participating
12 under the Reclamation Act and under the treaty
13 itself is -- is the manner in which the United
14 States can -- can find its remedies.

15 JUSTICE SOTOMAYOR: Are you differing
16 from Texas and acknowledging that the U.S.
17 could sue New Mexico for a reclamation claim so
18 that it doesn't have to sue the individual
19 water users?

20 MR. RAEL: I -- I -- I am, Your Honor,
21 in -- in the sense that -- that the -- the
22 Reclamation Act of 1902 is so comprehensive
23 that the United States under -- under all of
24 the different portions of the Reclamation Act
25 can sue, in our opinion, the State of New

1 Mexico.

2 And I think it's important to note
3 that in -- in -- in Nebraska v. Wyoming, the
4 United States was saying -- actually said:
5 We -- we can't be sued because we weren't
6 apportioned any water. And yet here the United
7 States is saying: We can sue New Mexico even
8 though we haven't been apportioned any water.

9 And so that -- that -- that's
10 inconsistent in my opinion. When they -- when
11 they sought their defensive motion for summary
12 judgment, that -- that was their -- their
13 argument.

14 JUSTICE KAGAN: Do you think a state
15 could sue the United States under this compact
16 if the United States started acting in a way
17 that was inconsistent with its terms?

18 MR. RAEL: Justice Kagan, yes, I do --
19 I do believe so. I believe that -- that a
20 state has the -- the opportunity to try and sue
21 the United States, for example, if we were to
22 say -- if New Mexico was to say: Your -- your
23 operation of the Project is interfering with
24 our ability to meet our compact obligations to
25 the State of Texas, I believe that we could do

1 that.

2 JUSTICE KAGAN: So, if the United
3 States is so integrally a part of this system
4 that a state could sue the federal government,
5 why can't the same be true back again the other
6 way?

7 MR. RAEL: Because the United States
8 doesn't own any -- any right -- any water, any
9 rights under -- under the compact, or even
10 under the project. Those water rights are
11 owned by the landowners themselves who are
12 represented by their individual states as
13 *parens patriae*.

14 And so the United States has an
15 interest in the -- in the Project, and it can
16 certainly sue to enforce to make sure that
17 we're meeting our -- our -- that we're not
18 interfering with its project obligations, but
19 it -- it -- it can't sue us -- under the
20 compact, that's being done by Texas right now.

21 And -- and the -- the -- it's
22 important to note that both Texas's claims and
23 the United States' claims arise under the same
24 operative facts. And -- and so Texas will be
25 able to -- and I believe both Texas and the

1 United States agree that, later in the
2 litigation, they're not sure, as you -- as you
3 heard the -- the General say, they're not sure
4 whether or not their interests are going to be
5 the same at the -- at the end of this. But to
6 the --

7 JUSTICE SOTOMAYOR: I'm sorry, did you
8 say the United States could sue under the
9 project?

10 MR. RAEL: They can -- they can sue to
11 enforce, in -- in my opinion, if -- if -- if
12 New Mexico is interfering with their project
13 obligations, they can certainly sue to -- to --

14 JUSTICE SOTOMAYOR: But not under the
15 contact -- not under the compact?

16 MR. RAEL: Correct. They're not a
17 party --

18 JUSTICE SOTOMAYOR: I just don't
19 understand that. If the compact requires New
20 Mexico to deliver a certain amount of water to
21 the United States and not to touch that water,
22 that's the government's action, you -- you're
23 -- you're not acceding that that's what the
24 compact says, and it's breaching -- and that
25 lack of delivery is breaching other federal

1 contracts, why can't they sue under the
2 project?

3 MR. RAEL: Mr. Chief Justice, may I?

4 JUSTICE SOTOMAYOR: Under the compact?

5 CHIEF JUSTICE ROBERTS: Sure. Please.

6 MR. RAEL: The -- the -- the United --
7 the compact doesn't require the United -- I
8 mean New Mexico to deliver any portion of water
9 to -- to the United States. The -- the -- the
10 -- the Project is simply a delivery vehicle.

11 The water is already allocated amongst
12 the three states itself. And while the United
13 States uses the -- the vehicle as a means to
14 meet its -- its treaty obligations with the
15 Republic of Mexico, it's important to note that
16 they have first entitlement to that water and
17 they deliver that water first every year.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. RAEL: Thank you for this honor.

21 CHIEF JUSTICE ROBERTS: Ms. O'Connell,
22 you have four minutes remaining.

23 REBUTTAL ARGUMENT OF ANN O'CONNELL

24 ON BEHALF OF UNITED STATES AS INTERVENOR

25 MS. O'CONNELL: Thank you, Mr. Chief

1 Justice. Three points in rebuttal.

2 The first is in response to Colorado's
3 argument that the complaint filed by the United
4 States in this case is unprecedented. It's
5 not.

6 The case that Colorado is -- is
7 relying upon, Kansas versus Nebraska, was a
8 case where there was an admitted violation of a
9 compact by Nebraska. The states were just
10 talking about what the damages were. The
11 United States' operations of any projects in
12 that region were not going to be affected by
13 what the damages were. That's why we
14 participated in this case as an amicus.

15 In other cases, we've cited some in
16 our briefs, Texas versus New Mexico, the Pecos
17 River case, and also Texas and New Mexico
18 versus Colorado, a prior case brought in order
19 to enforce this same compact, the Rio Grande
20 Compact, in both of those cases the defendant
21 state, so in the Pecos River case, New Mexico,
22 and in -- in Texas versus Colorado, Colorado,
23 asserted that the United States was a required
24 party to the action.

25 And so, to be helpful, we intervened

1 as a plaintiff in each of those cases,
2 presented what the United States' interests
3 were, and then asked for general equitable
4 relief, whatever relief would protect our
5 interests.

6 In the Texas versus Colorado, the
7 United States specifically explained that even
8 though it has no apportionment of water under
9 the Rio Grande Compact, it acknowledged that
10 the compact could be interpreted in such a way
11 as to affect the United States' interests and
12 it believed its interests would be protected by
13 Colorado's compliance with the compact.

14 JUSTICE SOTOMAYOR: You weren't
15 signatures in either of those two cases, right?

16 MS. O'CONNELL: No.

17 JUSTICE SOTOMAYOR: To the compacts I
18 mean?

19 MS. O'CONNELL: That's correct. And
20 in both cases, we were permitted to intervene.
21 We filed complaints against the defendant
22 state.

23 The second point, just reiterating
24 that -- or answering the question whether there
25 is a difference between the claims asserted by

1 Texas and the United States, their interests
2 are not necessarily completely aligned in this
3 case. This is an interstate project that has
4 delivery obligations both in New Mexico and
5 Texas. So the United States couldn't be
6 expected to rely on Texas to assert its
7 interests here.

8 The Project also has international
9 obligations to Mexico, as we have discussed
10 quite a bit, and I'll point out that under
11 Article II of that treaty with Mexico, if
12 there's not enough water for the irrigation
13 districts in the United States, the -- the
14 amount that we send to Mexico becomes less.

15 And so the United States has quite an
16 interest that we couldn't be expected to rely
17 on Texas to protect, in making sure that --
18 that Mexico is not being shorted because of the
19 way that the compact is interpreted.

20 Finally, just on this point of, as
21 Justice Kagan put it, why everybody cares so
22 much about whether these are compact claims or
23 reclamation law claims, the Master said that we
24 could bring reclamation law claims. We're not
25 totally sure that that's enough to bring claims

1 against the State of New Mexico.

2 The reason why New Mexico is a proper
3 defendant against such claims is because of the
4 compact, because the compact has bound New
5 Mexico to protect the Project and to allow the
6 United States to release water in -- in order
7 to -- to meet its contract obligations and its
8 treaty obligations to Mexico.

9 And so we don't want there to be any
10 confusion going forward when the United -- when
11 the Master says the United States' complaint
12 has to be dismissed to the extent it brings
13 claims under the compact, what that means. We
14 think we sort of need the compact to make those
15 other claims work. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:04 a.m., the case
19 was submitted.)

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