

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 P R O C E E D I N G S

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 is
17 in project storage and which is available for
18 release in accordance with irrigation demands,
19 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 JUSTICE SOTOMAYOR: What error in the
5 format --

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

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

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

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

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

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

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

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

24 MS. O'CONNELL: I'm not totally sure.
25 I -- I think probably yes. In this case, it

1 doesn't matter because the treaty preexisted
2 the compact. The treaty was enacted in 1906.
3 The compact was enacted in -- in 1939. And so
4 that treaty obligation predates the compact.

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

8 MS. O'CONNELL: Well --

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

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

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

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

7 JUSTICE KAGAN: Ms. O'Connell --

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

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

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

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

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

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

25 MS. O'CONNELL: Yes. We -- we do make

1 an argument at the end of our brief in
2 opposition to New Mexico's motion to dismiss
3 that, even if Texas's complaint were dismissed
4 here, the United States' claims against New
5 Mexico could go forward.

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

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

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

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

1 But our argument that we --

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

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

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

19 It was enacted in the public laws --

20 JUSTICE GINSBURG: It has been
21 executed for how many years?

22 MS. O'CONNELL: It's been in existence
23 since 1906. And the United States makes
24 deliveries pursuant to -- in its -- in the
25 Bureau of Reclamation's 2008 operating

1 agreement with the irrigation districts, it
2 calculates what the portions are that are given
3 to each of the states.

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

7 MS. O'CONNELL: I mean, it was enacted
8 in -- in the -- the statutes at large. It's --
9 you know, it is -- it is part of U.S. law.

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

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

13 JUSTICE BREYER: Well, that's the end
14 of that, isn't it?

15 MS. O'CONNELL: Okay. So it's -- it's
16 been enacted.

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

21 Does the government have a position on
22 that?

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

24 JUSTICE GORSUCH: Okay.

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

1 JUSTICE GORSUCH: All right.

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

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

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

25 JUSTICE KAGAN: And if I could return

1 -- I'm sorry -- to Justice Sotomayor's question
2 to make sure I understood the answer to it.

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

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

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

23 CHIEF JUSTICE ROBERTS: Your -- your
24 -- your argument really is like an implied
25 right of action argument, isn't it? I mean,

1 the compact doesn't give you any rights and yet
2 you say because it affects your interests, you
3 have a right to sue.

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

10 Couldn't you have protected your
11 interests at that time?

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

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

22 And so long as you're okay with that,
23 and -- and -- and, you know, you give your
24 consent, I don't know why you should be allowed
25 to litigate as a party.

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

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

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

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

21 If I could, I'd like to reserve my
22 time for rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 General Keller.

1 ORAL ARGUMENT OF SCOTT A. KELLER,
2 SOLICITOR GENERAL OF TEXAS,
3 ON BEHALF OF THE PLAINTIFF

4 GENERAL KELLER: Thank you, Mr. Chief
5 Justice, and may it please the Court:

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

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

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

1 appportionment.

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

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

20 Now, when New Mexico is relinquishing
21 control, they're relinquishing control to the
22 federal government. There'd be no other way
23 for this compact to work. And that's precisely
24 why the compact itself refers directly or
25 indirectly over 50 times to the project. And

1 that is the federal project operated by the
2 Bureau of Reclamation.

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

17 But all those issues about how exactly
18 and what quantities of water will actually
19 occur, of course, will be litigated in due
20 course. But for now, the issue before the
21 Court is fairly narrow. It's under this
22 particular compact, when the water is being
23 delivered in the middle of another state and
24 yet a downstream state has an equitable
25 apportionment, can the United States bring its

1 own claims as a carrier and distributor of the
2 water? And it can.

3 JUSTICE SOTOMAYOR: Could you tell
4 me --

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

9 GENERAL KELLER: No, that would be a
10 --

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

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

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

1 opposed to any intrastate allotment.

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

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

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

23 GENERAL KELLER: That -- that is --
24 that is probably correct because there would
25 not necessarily be a -- a state law basis under

1 the Reclamation Act to -- to invoke a lawsuit
2 against a sovereign state.

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

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

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

24 GENERAL KELLER: No, and --

25 JUSTICE SOTOMAYOR: Seems like an

1 advisory opinion to the Special Master.

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

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

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

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

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

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

24 JUSTICE KAGAN: I think I should have
25 asked Ms. O'Connell this, but do you view the

1 United States' interests as diverging from
2 Texas's interests in any way?

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

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

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

1 We're agreeing on that.

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

6 GENERAL KELLER: Well, one issue --

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

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

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

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

1 an issue where the State of Texas and the
2 United States are not exactly going to be
3 raising the same arguments.

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

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

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

19 If there are no further questions.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 General.

22 GENERAL KELLER: Thank you, Mr. Chief
23 Justice.

24 CHIEF JUSTICE ROBERTS: General
25 Yarger.

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

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

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

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

24 JUSTICE GINSBURG: Well, if -- if the
25 United States didn't assert it, then, of

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

5 GENERAL YARGER: Well, it's -- it's
6 true this Court has never foreclosed such a
7 claim, but if you look back through cases,
8 including Kansas versus Nebraska, which is
9 perhaps the best, most recent example, that was
10 a case between states that resulted in a
11 settlement agreement among states. The United
12 States wasn't a party to that settlement
13 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 GENERAL YARGER: And -- and I don't
3 agree that the prominence of the federal
4 facility in this compact is substantially less
5 than the prominence of federal facilities on,
6 for example, the Republican River. If you
7 review 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, one, is it I(l)
20 and 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 GENERAL YARGER: Absolutely. And
5 that's why we think it is perfectly appropriate
6 for the United States to bring a treaty claim
7 in 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 GENERAL YARGER: The treaty does.

19 JUSTICE KENNEDY: Yes.

20 GENERAL 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 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 --
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 GENERAL YARGER: I -- I don't
24 necessarily think they're mirrors of each
25 other. I -- I do acknowledge there's some

1 ambiguity in the way those -- I think there are
2 four or five separate opinions that the Special
3 Master 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: Now, it's not -- it's
6 not surprising that in some cases the United
7 States could be a party to such a suit. The
8 Constitution says that no state shall, without
9 the consent of Congress, enter into any
10 compact. And, therefore, we need the consent
11 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 GENERAL YARGER: Well, I hope there's
5 not because I disagree with -- with -- with
6 that.

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

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

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

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

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

5 That's very different from the United
6 States saying we will exercise our commerce
7 power or treaty power to determine the
8 equitable apportionment of this river and
9 impose it on the states.

10 JUSTICE KAGAN: Well, I take it,
11 General, I mean, you don't disagree, do you, or
12 tell me if you do, that the United States has
13 important interests here?

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

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

23 GENERAL YARGER: Yes.

24 JUSTICE KAGAN: Okay. So how in your
25 view does the United States protect those

1 interests?

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

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

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

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

1 litigation, and -- and it can assert those
2 interests and make all the arguments that it
3 needs to make.

4 And I think it gets back to the --

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

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

15 GENERAL YARGER: I -- I would agree
16 with that.

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

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

25 The United States' rights to this

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

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

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

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

1 that contract --

2 GENERAL YARGER: Well, we're --

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

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

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

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

23 Now, how could it have approved that
24 compact unless it said we took a look at this
25 compact and we think it will allow us to

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

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

21 So I think it's a question of where --
22 how does the Court -- does the United States
23 protect those interests and what is the
24 substantive body of law under which it can do
25 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 GENERAL 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 GENERAL YARGER: I think that again
19 flips 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 GENERAL YARGER: And we don't dispute
9 it 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 GENERAL YARGER: Bring the states into
15 the --

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 GENERAL YARGER: Well, I don't think
21 so, 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 GENERAL YARGER: -- and what Congress
8 --

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

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

21 JUSTICE GINSBURG: But as was pointed
22 out by Ms. O'Connell, the United States was
23 told what -- wasn't there -- I don't know if it
24 was a Colorado jointed or it was just New
25 Mexico, that said the United States is a

1 necessary party to this litigation. And you're
2 saying not only are they not necessary, they're
3 not even permitted to be a party.

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

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

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

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

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

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

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

1 law claims that can then be sorted out in the
2 lower courts as necessary.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General.

6 Mr. Rael.

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

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

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

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

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

1 -- does not arise under the -- under the
2 compact, but under the treaty itself.

3 JUSTICE SOTOMAYOR: Are you --

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

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

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

23 JUSTICE KAGAN: And -- and what about
24 these other obligations that the United States
25 has? You said that you can bring reclamation

1 law claims for those. What's the difference
2 there?

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

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

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

1 JUSTICE GINSBURG: This --

2 JUSTICE KAGAN: Right, but --

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

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

21 JUSTICE KAGAN: How --

22 CHIEF JUSTICE ROBERTS: I suppose one
23 reason the United States may be interested is
24 if it has compact claims that -- that are
25 litigated here. If they're under the

1 Reclamation Act, they're litigated in a complex
2 proceeding in state court, right?

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

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

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

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

24 Therefore, this Court has already
25 placed those protections in place so -- so that

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

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

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

13 MR. RAEL: Yes, Your Honor, we did
14 argue that.

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

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

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

6 And as far as rights it's trying to
7 enforce as far as its water rights and other
8 interests, those would be brought under the
9 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. New Mexico backed away from
22 that position when we acceded to the fact that
23 the project is incorporated into the -- into
24 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
3 signatory and whose apportion of water has any
4 claims or rights, rights of enforcement, under
5 the compact itself. That's between three
6 sovereign entities: the State of Texas, the
7 State of New 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 we --
5 we can't be sued because we weren't apportioned
6 any water. And yet here the United States is
7 saying we can sue New Mexico even though we
8 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 -- I mean, 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: I mean, under the
5 compact?

6 CHIEF JUSTICE ROBERTS: Sure. Please.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. RAEL: Thank you for this honor.

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

24

25

1 REBUTTAL ARGUMENT OF ANN O'CONNELL
2 ON BEHALF OF UNITED STATES AS INTERVENOR

3 MS. O'CONNELL: Thank you, Mr. Chief
4 Justice. Three points in rebuttal.

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

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

18 In other cases, we've cited some in
19 our briefs, Texas versus New Mexico, the Pecos
20 River case, and also Texas and New Mexico
21 versus Colorado, a prior case brought in order
22 to enforce this same compact, the Rio Grande
23 Compact, in both of those cases the defendant
24 state, so in the Pecos River case, New Mexico,
25 and in -- in Texas versus Colorado, Colorado,

1 asserted that the United States was a required
2 party to the action.

3 And so, to be helpful, we intervened
4 as a plaintiff in each of those cases,
5 presented what the United States' interests
6 were, and then asked for general equitable
7 relief, whatever relief would protect our
8 interests.

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

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

19 MS. O'CONNELL: No.

20 JUSTICE SOTOMAYOR: To the compacts I
21 mean?

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

1 The second point, just reiterating
2 that -- or answering the question whether there
3 is a difference between the claims asserted by
4 Texas and the United States, their interests
5 are not necessarily completely aligned in this
6 case. This is an interstate project that has
7 delivery obligations both in New Mexico and
8 Texas. So the United States couldn't be
9 expected to rely on Texas to assert its
10 interests here.

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

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

23 Finally, just on this point of, as
24 Justice Kagan put it, why everybody cares so
25 much about whether these are compact claims or

1 reclamation law claims, the Master said that we
2 could bring reclamation law claims. We're not
3 totally sure that that's enough to bring claims
4 against the State of New Mexico.

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

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

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

21 (Whereupon, at 11:04 a.m., the case
22 was submitted.)

23
24
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