## SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT O	OF THE UNITED STATES
TEXAS,	)
Plaintiff,	)
v.	) No. 141, Orig
NEW MEXICO AND COLORADO,	)
Defendants.	)

Pages: 1 through 76

Place: Washington, D.C.

Date: March 20, 2024

## HERITAGE REPORTING CORPORATION

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3	TEXAS,	)
4	Plaintiff,	)
5	v.	) No. 141, Orig.
6	NEW MEXICO AND COLORADO,	)
7	Defendants.	)
8		
9		
10	Washington, D.	.C.
11	Wednesday, March 2	20, 2024
12		
13	The above-entitled matt	ter came on for
14	oral argument before the Supre	eme Court of the
15	United States at 11:31 a.m.	
16		
17	APPEARANCES:	
18	FREDERICK LIU, Assistant to the	he Solicitor General,
19	Department of Justice, Was	shington, D.C.; on behalf
20	of the United States.	
21	LANORA C. PETTIT, Principal De	eputy Solicitor General,
22	Austin, Texas; on behalf	of Texas.
23	JEFFREY J. WECHSLER, ESQUIRE,	Santa Fe, New Mexico; on
24	behalf of New Mexico.	
25		

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1	PROCEEDINGS
2	(11:31 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear
4	argument next in Case 141 on the original
5	docket, Texas against New Mexico and Colorado.
6	Mr. Liu.
7	ORAL ARGUMENT OF FREDERICK LIU
8	ON BEHALF OF THE UNITED STATES
9	MR. LIU: Mr. Chief Justice, and may
10	it please the Court:
11	A consent decree requires consent.
12	The proposed consent decree in this case,
13	however, would dispose of the United States'
14	claims without its consent. The decree would
15	impose obligations on the United States without
16	its consent. And the decree would bind the
17	United States to an interpretation of the Rio
18	Grande Compact that is contrary to the Compact
19	itself. For each of those reasons, the proposed
20	decree should be rejected.
21	I want to emphasize why the United
22	States is here today. The Compact apportions
23	the water below Elephant Butte. The Compact
24	does so by incorporating and protecting the
25	delivery of water by the Rio Grande Project to

- 1 Mexico and to two irrigation districts, one in
- 2 New Mexico and the other in Texas. The United
- 3 States intervened in this case to enforce the
- 4 Compact's protection of the project.
- 5 As New Mexico acknowledges, the
- 6 Compact imposes on New Mexico a duty not to
- 7 interfere with the Project's delivery of water.
- 8 The United States claims that New Mexico is
- 9 violating that duty by allowing too much
- 10 groundwater pumping.
- 11 Six years ago, this Court upheld the
- 12 United States' right to pursue those Compact
- 13 claims, recognizing that the United States has
- 14 distinctively federal interests in protecting
- the supply and the allocation of Project water.
- 16 Those distinctively federal interests are why
- 17 the United States is still here today.
- In the United States' view, the
- 19 proposed decree fails to address the groundwater
- 20 pumping that precipitated this suit in the first
- 21 place. Instead, the proposed decree would allow
- that pumping to continue at unsustainable
- levels, and it would not stop that pumping from
- taking water from the Project's beneficiaries,
- 25 namely, the two irrigation districts and -- and

- 1 -- and Mexico.
- 2 The proposed decree would thus fail to
- 3 protect the Project or the Compact's
- 4 apportionment, and that is why the United States
- 5 could not give its consent to this proposed
- 6 decree.
- 7 I welcome the Court's questions.
- 8 JUSTICE THOMAS: Mr. Liu, does the
- 9 United States have a claim that's independent of
- 10 the states'?
- 11 MR. LIU: Of course we do, Justice
- 12 Thomas.
- JUSTICE THOMAS: What is -- what is
- 14 that claim?
- 15 MR. LIU: That's the claim that we've
- 16 brought since the beginning of this case. It's
- 17 the claim that this Court held in 2018 is a
- 18 claim we -- that's backed by distinctively
- 19 federal interests. It's a claim that says New
- 20 Mexico is violating its delivery obligation
- 21 under the Compact.
- JUSTICE THOMAS: Is that a claim that
- 23 we would normally look at in an original action,
- or is that a claim that could be vindicated in
- another forum?

1 MR. LIU: It's not a claim that can be 2 vindicated in another forum. I think it's 3 actually a perfect fit for this -- this Court's original jurisdiction because it is a claim 4 arising under an interstate commerce that we 5 6 have brought against another sovereign state. 7 That's precisely the sort of dispute that I think this Court has long held is appropriate 8 9 for this Court to arise -- to exercise original jurisdiction over. 10 11 JUSTICE THOMAS: You're an intervene 12 -- the U.S. is an intervenor, right? MR. LIU: Correct. 13 14 JUSTICE THOMAS: When you intervened, 15 I thought our understanding was that you were --16 your -- your interest was consistent with that 17 of the State of Texas? 18 MR. LIU: Yes. And our -- and to be 19 clear, our underlying claims are exactly the 20 same as they were --21 JUSTICE THOMAS: Well, but Texas and 2.2 New Mexico -- and it's rare that we have the 23 states who actually agree on anything -- but 24 Texas and New Mexico have agreed. So what -- if 25 your interest is the same as Texas's interest,

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then why are you still here?
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- 2 MR. LIU: No, I want to distinguish
- 3 between two things. Our claims are the same.
- 4 JUSTICE THOMAS: Yeah.
- 5 MR. LIU: The claims are the same, but
- 6 our interests have always been different. I
- 7 mean, that was the point of the 2018 decision.
- 8 If our interests were the same, then, you know,
- 9 that's basically what the states said six years
- 10 ago. The United States has the same interests,
- 11 so just let them remain as amicus in this case
- 12 --
- JUSTICE GORSUCH: Counsel --
- MR. LIU: -- supporting Texas.
- 15 JUSTICE GORSUCH: -- counsel, if I
- 16 might just follow up on that. You're -- you're
- 17 -- you're invoking the 2018 decision.
- 18 MR. LIU: Right.
- 19 JUSTICE GORSUCH: As I recall it --
- and I pulled it up because it didn't quite match
- 21 what I thought I heard you say -- we said that
- this case does not present the question whether
- the United States could initiate litigation to
- 24 force a state to perform its obligations under
- 25 the Compact or expand the scope of an existing

- 1 controversy between the states. And we
- 2 emphasized that it asserted its Compact claims
- 3 seeking substantially the same relief as Texas's
- 4 without Texas's objection.
- 5 That's no longer true. None of that's
- 6 true anymore.
- 7 MR. LIU: Well, I would respectfully
- 8 disagree, Just -- Justice Gorsuch. I think we
- 9 are -- are pursuing the same --
- 10 JUSTICE GORSUCH: Seeking
- 11 substantially the same relief as Texas? Then
- 12 how come they're on the other side?
- MR. LIU: Well, I think, if you look
- 14 at the operative complaints in this case, the --
- the relief we're seeking here is the same as the
- 16 relief that Texas is seeking. What's changed
- 17 since the 2018 decision isn't a change in the
- 18 nature of the claims. Our claims -- Texas and
- 19 the United States are still pursuing the same
- 20 claims.
- 21 What's changed is a difference in
- 22 litigating position. And I don't read the
- 23 Court's paragraph, that passage you just read,
- 24 Justice Gorsuch, as suggesting that after having
- let the United States in the case, that the

1 Court was going to continue policing --2 JUSTICE GORSUCH: I've got to say 3 you're making me regret that decision. (Laughter.) 4 MR. LIU: Well, no, Justice Gorsuch, I 5 read that -- I read that -- that paragraph as 6 7 standing for the --8 JUSTICE GORSUCH: The representation 9 we had in 2018 was we're just here because we 10 help enforce the Compact. 11 MR. LIU: Yes. 12 JUSTICE GORSUCH: And we have to administer the Compact, and we are completely 13 14 aligned with Texas. And that made sense. But 15 you didn't have -- you're -- you're not a party 16 in the sense that you have some interest here 17 other than administering the Compact. And at 18 the end of the day, it's a compact between 19 states that we're adjudicating here in an 20 original action, right? 21 MR. LIU: Yeah, just two quick 22 responses. I think, back in -- in 2018, the 23 representation before this Court was that the 24 parties' litigating positions may well diverge

as the case goes on precisely because the United

- 1 States has different interests than Texas.
- 2 That's what New Mexico told the Court, what
- 3 Colorado did, what the United States told the
- 4 Court. And we reiterated it at oral argument,
- 5 that the interests were different. Now --
- 6 JUSTICE GORSUCH: Let's say we had
- 7 denied you intervention, okay? You wouldn't
- 8 have been a party to the litigation. Do you
- 9 agree that your water deliveries under the
- 10 Compact, you -- you'd have to make them pursuant
- 11 to the consent decree?
- MR. LIU: If we hadn't intervened, no.
- 13 I mean, I think even if we weren't --
- 14 JUSTICE GORSUCH: The Compact would
- 15 bind you, wouldn't it?
- 16 MR. LIU: Even if we were not a party,
- a consent decree cannot bind any third party,
- whether they're a formal party to the case or
- 19 not. And that's just --
- 20 JUSTICE GORSUCH: But you'd have your
- 21 litigating -- you'd have the opportunity to
- 22 litigate that in federal court, federal district
- 23 court, those claims, your arguments. But,
- otherwise, the Compact is the compact, right?
- 25 MR. LIU: Yeah, I don't -- Justice

- 1 Gorsuch, I -- I don't think that's the under --
- 2 JUSTICE GORSUCH: Under the
- 3 Reclamation Act, your -- your responsibility is
- 4 to administer the Compact?
- 5 MR. LIU: That -- that's -- that's
- 6 correct. Under reclamation law, we have
- 7 contracts with the two irrigation districts that
- 8 are at issue in this case, and the problem with
- 9 this consent decree is that it would impose
- 10 obligations on us that are actually contrary to
- 11 those downstream contracts.
- 12 And so, when this Court said in 2018
- that the Compact implicitly incorporates, can be
- thought to implicitly incorporate the downstream
- 15 contracts, that -- that -- that's a real
- 16 problem, that the consent decree --
- 17 JUSTICE JACKSON: So, Mr. --
- 18 JUSTICE GORSUCH: Do you agree that
- 19 the Reclamation Act requires you to follow state
- 20 water law unless there's a clear congressional
- 21 directive to the contrary?
- MR. LIU: That is correct. But I -- I
- 23 will say this. This consent decree is not state
- 24 water law. This consent decree is an agreement
- 25 between two states that they wish to have

- 1 embodied in a federal judgment. And so Section
- 2 8 of the Reclamation Act has nothing to say
- 3 about whether this consent decree can be imposed
- 4 on the United States.
- 5 JUSTICE KAGAN: Mr. Liu, I -- I -- I
- 6 think I need more facts to really know what to
- 7 make of this case. I mean, you're here. The
- 8 two water districts that get water from this
- 9 Compact are still on the United States' side.
- 10 MR. LIU: Correct.
- 11 JUSTICE KAGAN: But -- but Texas has
- 12 given up the ghost, if you will.
- MR. LIU: Right.
- 14 JUSTICE KAGAN: Why? What has
- 15 happened --
- 16 MR. LIU: Right.
- 17 JUSTICE KAGAN: -- so that these
- 18 different entities have diverged?
- MR. LIU: Right.
- 20 JUSTICE KAGAN: And what do you still
- 21 want that Texas has decided is unnecessary?
- MR. LIU: Right. So here -- here's
- what we want. We want the same thing we wanted
- in 2018 when this -- this Court approved our
- 25 claim. So the easiest way to understand this is

- 1 to break down the elements of our claim, duty,
- 2 breach, remedy.
- With respect to duty, we want the
- 4 Court to recognize that New Mexico has a duty of
- 5 non-interference with respect to the Project.
- 6 The problem with this consent decree is that
- 7 instead of recognizing that duty of
- 8 non-interference, it gives the states a right to
- 9 interfere with the Project by forcing water --
- 10 JUSTICE KAGAN: Do you -- do you want
- 11 the 1938 baseline?
- 12 MR. LIU: We do. And that goes to the
- 13 second element of breach. We -- we came in --
- 14 we -- we, since -- since this Court's 2018
- decision, have litigated alongside Texas all the
- 16 way -- partway through a trial that the right
- 17 baseline against which to measure New Mexico's
- interference was a 1938 baseline.
- 19 JUSTICE KAGAN: And you want this why?
- 20 Because you think what will happen? Are your
- 21 treaty obligations at stake? Are you just
- fearful that the water districts won't have the
- 23 water that they need? What -- what's the
- 24 thought here? And -- and, again, what's your
- understanding of why you and Texas diverge?

1	MR. LIU: Yes, it's it's it's
2	our concerns here go to both the supply of
3	Project water and its allocation. We are
4	concerned that the groundwater pumping is
5	occurring at unsustainable levels, which will
6	have a devastating effect over the long term on
7	the supply of Project water, and that will mean
8	down the road that we might not have enough
9	water to meet irrigation demands in the
10	districts and in Mexico.
11	We're also concerned about the
12	allocation of water, and by that, I mean the
13	allocation is currently accomplished through the
14	downstream contracts that the government has
15	entered into and the treaty with Mexico.
16	What this consent decree does is
17	replace that division of water with a division
18	of the state's own making.
19	As to why Texas has basically
20	capitulated its position in this case, it was
21	everyone agreed in in its complaint it was
22	looking for a 1938 baseline when it filed the
23	complaint in 2013.
24	Why has it now given that up?
25	Frankly, to the United States, it is

- 1 inexplicable, but I think it only highlights the
- 2 importance of the government's intervention in
- 3 this case.
- 4 JUSTICE GORSUCH: Well, if it's
- 5 inexplicable --
- JUSTICE ALITO: Well, who --
- 7 JUSTICE GORSUCH: -- how long -- how
- 8 much water has the federal government
- 9 misallocated over the last 40 years? It hasn't
- 10 used the 1938 baseline in -- in decades.
- 11 MR. LIU: The -- the allocation of the
- water in the last 40 years has been pursuant to
- an operating agreement, but I think it's
- important to understand what that operating
- 15 agreement addresses.
- That operating agreement doesn't
- 17 address whether New Mexico is -- is complying
- 18 with the Compact. New Mexico isn't even a party
- 19 to the operating agreement, wasn't even in the
- 20 room when the operating agreement -- agreement
- 21 was consummated. Rather --
- JUSTICE ALITO: Who in -- who in
- concrete terms is being hurt by this agreement?
- Which entities here or abroad object to it?
- 25 MR. LIU: Well, we have entities right

- 1 here in this Court, the -- the two irrigation
- 2 districts.
- JUSTICE ALITO: And -- and they're in
- 4 Texas, right?
- 5 MR. LIU: No. One is in New Mexico
- 6 and one is in Texas.
- 7 JUSTICE ALITO: Okay. All right. And
- 8 so they are -- do you think they -- they have a
- 9 right to assert an interest that's inconsistent
- 10 with that that's asserted by their states?
- 11 MR. LIU: They do with respect to
- their relationship to the federal government.
- 13 This Court has long recognized that the parens
- 14 patriae principle extends only to the states'
- 15 representation of their own citizens with
- 16 respect to state interests.
- 17 JUSTICE ALITO: So that's what's
- involved? Is that what's involved? New Mexico
- 19 and Texas are not treating these particular
- 20 districts fairly?
- 21 MR. LIU: I think that's part of the
- 22 problem.
- JUSTICE ALITO: What else is -- what's
- 24 the rest of the problem?
- MR. LIU: The other part of the

- 1 problem is that the level of groundwater pumping
- 2 at the D-2 level is in our view unsustainable in
- 3 the long term, and so the -- the -- the
- 4 long-term viability of the Project itself is at
- 5 risk.
- I mean, when -- when we talk about the
- 7 districts, they're -- I want to spell out why --
- 8 why we think they're being treated unfairly. I
- 9 mean, the Reclamation Act of 1902 reflects a
- 10 basic bargain between reclamation and irrigation
- 11 districts.
- 12 On the United States' end of the
- 13 bargain, we promised to build the major
- infrastructure, the dams and the reservoirs, and
- to deliver water to meet irrigation needs in the
- 16 districts.
- 17 On the other end of the bargain, the
- 18 districts agreed to pay construction, operation,
- 19 and maintenance costs to defray the costs that
- 20 the United States invested into the Project.
- 21 And what this consent decree does is
- 22 just undermine that bargain because what happens
- 23 under the consent decree is that the district in
- New Mexico bears the brunt of any continued or
- 25 increased pumping in New Mexico.

1 What happens under the decree is, if 2 groundwater pumping remains the same or goes up, 3 what New Mexico can choose to do is to force the United States to transfer water from the New 4 Mexico district to Texas. 5 6 And so what happens is the one 7 district in New Mexico that actually has a contract with the United States, that has paid 8 9 millions of dollars in construction charges and 10 continues to pay hundreds of thousands of 11 dollars each year in operation and maintenance, 12 they bear the brunt of groundwater pumping. ones who are entitled --13 14 JUSTICE SOTOMAYOR: Mr. Liu --15 MR. LIU: -- have to give up their 16 water. JUSTICE SOTOMAYOR: -- I -- I've been 17 18 -- I've been a little bit confused by this case 19 because -- and starting with Justice Gorsuch's 20 question. I thought I remembered, and I now 21 have a copy of the appendix -- I think it's to 2.2 your exception -- on page 27A, compacts are 23 agreements by the states, but they have to be 24 consented to by the United States, correct? 25 MR. LIU: That's right.

- 1 JUSTICE SOTOMAYOR: And to the extent
- 2 that you're arguing that this Compact has been
- 3 changed, whether you're right or wrong, that
- 4 will have to be litigated, correct?
- 5 MR. LIU: Right.
- 6 JUSTICE SOTOMAYOR: I don't know if
- 7 you're right or wrong, but what you're saying
- 8 is --
- 9 MR. LIU: We would hope so, yeah.
- 10 JUSTICE SOTOMAYOR: -- this agreement
- is going to change the terms of the consent
- 12 agreement. After a trial, maybe the -- we will
- 13 think --
- MR. LIU: Maybe they're right, yeah,
- 15 after a trial.
- JUSTICE SOTOMAYOR: Yeah, maybe we'll
- 17 conclude you're right.
- 18 MR. LIU: Right.
- JUSTICE SOTOMAYOR: But what you're
- saying right now is you can't change the terms
- of this agreement without us consenting.
- MR. LIU: Correct. It is just a basic
- 23 application of the law that's governing consent
- 24 decrees.
- 25 JUSTICE SOTOMAYOR: And so whether

- 1 your claims are -- interests are the same as
- 2 Justice Gorsuch or not, your claims are the
- 3 same.
- 4 MR. LIU: Our claims are the same.
- 5 JUSTICE SOTOMAYOR: Which is that this
- 6 -- well, to the extent that the consent
- 7 agreement required certain things, the parties
- 8 have breached them. By consent, the parties
- 9 can't forgive that --
- 10 MR. LIU: Right.
- 11 JUSTICE SOTOMAYOR: -- without you
- 12 saying it's okay.
- 13 MR. LIU: That's right. When this
- 14 Court --
- JUSTICE SOTOMAYOR: When I say you, I
- don't mean you personally. I mean -- I mean the
- 17 government and whatever entity. This one was
- 18 signed by the Assistant Secretary of the
- 19 Interior, and I presume that's who -- I don't
- 20 know who you represent actually, but you
- 21 understand what I mean.
- MR. LIU: Well --
- JUSTICE SOTOMAYOR: It's the
- 24 government.
- MR. LIU: Well, I -- I think the --

- 1 the Compact itself was ratified by the states,
- 2 approved by Congress, signed by the President.
- 3 And under the Compact Clause, any new compact
- 4 has to be -- has to go through the same process.
- 5 And under this Compact --
- 6 JUSTICE SOTOMAYOR: Has to come to the
- 7 government to say yes.
- 8 MR. LIU: That's correct. And
- 9 under -- and under this particular Compact, it
- 10 itself has a provision for amendment which
- 11 likewise requires the consent of Congress, and I
- 12 --
- JUSTICE JACKSON: But I guess it's the
- consent of Congress, right, not necessarily the
- 15 executive branch, correct?
- MR. LIU: Well, it's the consent of
- 17 Congress and -- and the executive. Under the
- 18 Compact Clause, the executive would also get to
- 19 weigh in.
- JUSTICE JACKSON: Would you -- I mean,
- Justice Gorsuch's point is that you're just, you
- 22 know, adjudicating it. You're not the sort of
- 23 consenting officer --
- MR. LIU: Yeah.
- JUSTICE JACKSON: -- for the purpose

- of the Compact, is that right or no?
- 2 MR. LIU: Right, right. What --
- 3 what -- what we're asking for in this case --
- 4 JUSTICE JACKSON: Yeah.
- 5 MR. LIU: -- is -- is simply a right
- 6 to pursue our claims.
- 7 JUSTICE JACKSON: All right. So let
- 8 me ask you about those claims. So what claim
- 9 exactly -- you say our claims are the same and
- 10 our interests are different.
- 11 MR. LIU: Correct.
- 12 JUSTICE JACKSON: So the claim is New
- 13 Mexico is doing too much in terms of the
- 14 groundwater.
- MR. LIU: Right.
- 16 JUSTICE JACKSON: What are the -- what
- 17 -- what is the source of the different
- interests? It's the contracts, the downstream
- 19 contracts, you say, right?
- MR. LIU: That's right.
- JUSTICE JACKSON: The treaties?
- MR. LIU: That's -- that's right as
- 23 well.
- JUSTICE JACKSON: That's as well.
- MR. LIU: Yeah.

1 JUSTICE JACKSON: Is there anything 2 I mean, is there federal law? Is it the fact that you administer the Reclamation Act? 3 Is it that the United States is a sovereign? 4 MR. LIU: Well, it's -- it's -- it's 5 6 for the reasons that appear on this Court's 7 decision on pages 413 to 415, which is the Compact is inextricably intertwined with the 8 Project's delivery of water. In fact, it is the 9 Project's delivery of water that accomplishes 10 11 the Compact's apportionment. 12 It is the fact that the United States 13 is legally responsible for that delivery of 14 water under the downstream contracts and the 15 treaty. 16 JUSTICE JACKSON: Which were -- were 17 those incorporated into the -- we said as a 18 matter of this decision that they are implicitly 19 incorporated, right? 20 MR. LIU: That -- that's correct, and -- and the reason behind that I think is pretty 21 2.2 straightforward. The -- the Project predated 23 the Compact. The Project was already in 24 existence. And one of the fundamental purposes 25 of the Compact -- and this is repeated at least

2.4

- 1 three times in Texas's own complaint -- one of
- 2 the fundamental purposes of the Compact was to
- 3 protect the Project, to make sure that the
- 4 Project had a sufficient supply of water to
- 5 fulfill the United States' obligations under the
- 6 contracts and the treaty.
- 7 Again, it would have been -- it would
- 8 have been strange for Congress and the President
- 9 to approve a compact that failed, that failed to
- 10 respect the obligations that the United States
- 11 already had or that put them at risk.
- 12 JUSTICE JACKSON: So can I just shift
- 13 you really quickly, because one of your
- 14 arguments is disposing of the claims. The other
- 15 is the impermissible imposition of duties on the
- 16 United States. And I -- and you mentioned at
- one point that, under this consent decree, the
- 18 United States would have to do certain things.
- 19 MR. LIU: Right.
- JUSTICE JACKSON: Can you just say
- 21 more about what those things are? Because I
- 22 think part of their argument is that there
- really is no change in the status of the United
- 24 States.
- 25 MR. LIU: Yeah. All the changes go to

- 1 the heart of the project's operations. I would
- 2 first point you to the provisions of the consent
- decree. This is at the addendum to the third
- 4 report, pages 12 to 17. That would allow the
- 5 states to force the United States to transfer
- 6 water from one district to another at the
- 7 state's direction.
- JUSTICE JACKSON: That's already
- 9 happening to some degree, but you're saying it's
- 10 going to be different if the consent decree goes
- 11 on?
- 12 MR. LIU: It's going to be different
- in the important sense that we are doing -- we
- 14 -- we are allocating water as -- on a consensual
- 15 basis between the United States and the two
- 16 districts, as we always have since 1906, done so
- on a consensual -- that's the meaning of a
- 18 contract, on a consensual basis.
- 19 And what this would do is force the
- 20 United States to transfer water at certain times
- 21 and places. And that just flips the -- the --
- the Project and the Compact on their head
- 23 because the original design of both was that the
- 24 determinants of how the allocation works would
- 25 be the United States and the districts. Now

- 1 what determines the allocation is what the
- 2 states tell us the allocation should be.
- JUSTICE KAGAN: Is there -- and I
- 4 think this goes back to Justice Thomas's
- 5 original question, but is there another forum in
- 6 which you can raise these arguments and get what
- 7 -- get the remedy that you're seeking?
- 8 MR. LIU: There's not. And to start
- 9 with, to think about it in terms of sources of
- 10 substantive law, as far as seeking the same
- 11 relief under the Compact, we don't read the
- 12 consent decree and no one else reads the consent
- decree as allowing us to bring any Compact
- 14 claims that would call into question the
- validity of the decree. So we would be stuck
- 16 with the decree's view of what is compliance
- 17 with the Compact.
- 18 JUSTICE KAGAN: That that would be
- 19 preclusive on the question of what the Compact
- 20 requires?
- 21 MR. LIU: Exactly. I mean, the
- 22 states' own reply in this Court says the consent
- 23 decree will be "part of the constellation of
- laws" that the United States will follow. I
- 25 think that means that we have to treat the

2.7

- 1 consent decree as if it were the Compact itself.
- Now, thinking about other sources of
- law, there's state law, there's reclamation law.
- 4 I don't think either of those bodies of law is
- 5 going to somehow compensate for the loss of our
- 6 Compact claims. Those are claims not brought
- 7 against New Mexico but against individual water
- 8 users. They are claims that hinge on a
- 9 definition of Project water.
- 10 So, for example, under state law, I
- 11 suppose we'd be in the position of arguing that
- 12 Project water has a certain definition that
- includes the water that's being taken away. But
- my guess is that if we were to try to litigate
- in that -- that in state court, the response
- 16 from the other side would be: Well, given that
- 17 the Compact doesn't protect that water under the
- 18 consent decree, it's not really your water, and
- 19 so we wouldn't have any basis for the state law
- 20 or the reclamation law claims. Those claims
- 21 rest on a -- on a -- on a concept of Project
- 22 water that would be undermined if we're stuck
- 23 with what the consent decree says.
- 24 CHIEF JUSTICE ROBERTS: Justice
- 25 Thomas?

1 JUSTICE THOMAS: Mr. Liu, if we had 2 not gone along with the United States in your 3 efforts to intervene in this, would you be able to vindicate those rights that you're talking 4 about? Because I don't remember that -- the 5 6 argument you're making now, a sort of 7 apocalyptic argument, being made in 2018. MR. LIU: No, I don't think those 8 interests could be vindicated elsewhere for the 9 10 reasons I gave Justice Kagan. I don't think the condition of this -- I don't think what I 11 12 presented here is apocalyptic. It is simply a 13 reflection of paragraph 14 of the United States' 14 original complaint in this case, which lays out 15 the -- the fairly simple chain of causation that 16 goes from groundwater being taken out of the 17 ground, leading to less water in Project 18 storage, leading to less water for the -- the 19 beneficiaries of the Project. 20 JUSTICE THOMAS: Well -- and my memory 21 could be somewhat vague on this -- I thought 2.2 that much of your argument before was that you 23 were on the same page as -- as Texas. And it 24 seems like there's a divergence of -- of 25 interests now.

1 MR. LIU: Well, we -- there was always 2 divergent interests. I mean, the parties 3 themselves -- we did, New Mexico, Colorado -pointed out that even though we were pursuing 4 the same claims, we were doing so for different 5 6 interests. In fact, the argument was, if -- if 7 we're just pursuing the same claims for the same interests, we should just be left to be amicus 8 9 in this case, and whatever Texas decides to do with its claims we would then be stuck with, 10 11 just tagging along as amicus. 12 But I -- I understood the point of the Court's decision to be -- and this is on page 13 14 413 -- that the United States has distinctively 15 federal interests, not interests that are merely 16 derivative of Texas's. 17 And I think, in this case, we kind of have run a natural experiment of what happens 18 19 when the United States' interests are cut out of 20 the picture. The results are not good. 21 result is a consent decree that really does 2.2 nothing to protect the Project, that does not 23 recognize a duty of non-interference with 24 respect to the Project, that does not reflect 25 the baseline level of protection that existed

- 1 for the Project in 1938, and that instead of
- 2 imposing an injunction on New Mexico to bring
- 3 itself into compliance with the -- with the
- 4 Compact actually requires and orders the United
- 5 States to transfer water to accomplish the --
- 6 the decree's ends.
- 7 JUSTICE THOMAS: You mentioned the
- 8 baseline. Which baseline's being used now?
- 9 MR. LIU: The baseline -- there is no
- 10 Compact baseline that the parties have agreed on
- 11 now. There is an operating agreement that the
- 12 United States uses.
- JUSTICE THOMAS: That's the one, yes.
- 14 So what is that? Is that D-2?
- MR. LIU: That is a D-2 baseline, but
- 16 I want to emphasize what that D-2 baseline
- 17 reflects. It reflects the United States and the
- 18 two districts getting together and saying to
- 19 each other: Given the existing level of
- 20 interference in New Mexico, how do we divide up
- 21 the rest of the water? And so that agreement
- 22 simply takes the world as it exists.
- 23 JUSTICE THOMAS: And how long have you
- 24 been doing -- taking the world as it exists?
- MR. LIU: Well, the operating

- 1 agreement itself has been in force since 2003.
- JUSTICE THOMAS: No, I mean the D-2
- 3 baseline.
- 4 MR. LIU: The D-2 baseline, we --
- 5 probably since the 1980s. I think the 1980s is
- 6 -- is the right reference point.
- 7 JUSTICE THOMAS: So about 40 years.
- 8 And the -- so, basically, adopting the B -- D-2
- 9 baseline is not a change from what you're doing
- 10 now?
- 11 MR. LIU: Well, it is a change even
- 12 according to the states' own briefs and their
- own experts, because they're not saying keep in
- 14 place your D-2 equation. They're saying -- and
- 15 this is at the addendum page 44 -- you need to
- 16 adopt a modified D-2 equation.
- 17 And that equation is going to require
- 18 -- if we have to modify the equation, it's going
- 19 to change the operations of the Project, not
- just numbers on some spreadsheet, but when we
- 21 actually raise the gates at Elephant Butte
- 22 Reservoir to let water through, at Caballo, at
- 23 Caballo Dam, how long -- for how long we -- we
- let that water through.
- So, you know, the -- these changes go

- 1 -- go to the very heart of the -- of the
- downstream contracts that we've had for more
- 3 than a century with the two districts.
- 4 CHIEF JUSTICE ROBERTS: Justice Alito,
- 5 anything further?
- 6 JUSTICE SOTOMAYOR: Just to be -- I'm
- 7 clear in my mind, in 2018, Texas was
- 8 articulating the same claims as you. You could
- 9 not anticipate that they would abandon you --
- 10 MR. LIU: Right.
- 11 JUSTICE SOTOMAYOR: -- in the middle
- 12 of this litigation. You did anticipate --
- that's why you wanted to intervene -- that there
- 14 were distinct federal interests that needed to
- 15 be protected?
- MR. LIU: Right.
- 17 JUSTICE SOTOMAYOR: And those
- 18 interests remain the same?
- 19 MR. LIU: Those interests remain the
- 20 same, although --
- JUSTICE SOTOMAYOR: And your claims
- 22 were based on those interests, and those haven't
- been litigated here, but they're being settled
- 24 by the states?
- 25 MR. LIU: They're being settled by the

1 states. 2 JUSTICE SOTOMAYOR: All right. 3 CHIEF JUSTICE ROBERTS: Justice Kagan? Justice Gorsuch? 4 JUSTICE GORSUCH: Mr. Liu, I quess my 5 6 concern, you know, at bottom is this, that our 7 original jurisdiction is for litigation between That's what it's -- that's what our 8 states. 9 charge is from Article III. 10 And we have a -- a -- a consent decree 11 between two states. They agree. The Special 12 Master's found that that agreement is consistent 13 with their Compact and doesn't purport to settle 14 any claims that the federal government might 15 In fact, says those are just not part of have. 16 this case, dismissed without prejudice to be 17 pursued in another forum. 18 To now say that the federal government has independent litigating authority in cases 19 20 that are supposed to be between two states and 21 not resolve the federal government's interests 2.2 seems to me a dramatic expansion of this Court's 23 original jurisdiction not just in this case but 24 potentially with ramifications going forward. 25 Thoughts?

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1
                MR. LIU: Well, I think those concerns
 2
      can be cashed out at this Court's initial
 3
      gatekeeping stage just -- so, in other words,
 4
      those concerns can be cashed out when the Court
      takes up the issue of whether the United States
 5
 6
      can intervene and pursue the claims.
 7
                JUSTICE GORSUCH: And that's -- that's
8
     kind of why you've made me regret that, because
9
      the representation then was, we're -- we're
10
      fully aligned with one of the states here and we
11
      can add material value in the understanding of
12
      the case. I get that, I do, sort of still.
13
               MR. LIU: Well, I'm just going to --
14
               JUSTICE GORSUCH: But --
15
               MR. LIU: -- I'm just going to
16
     disagree that that is --
17
               JUSTICE GORSUCH: -- but now you're
18
      saying you have independent claims that you want
19
      to pursue --
20
                MR. LIU: Right.
21
                JUSTICE GORSUCH: -- independent of
22
      any state. And that's not what our original
23
      jurisdiction's about.
               MR. LIU: Yeah, I -- I -- I think this
24
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-- I think the Court well understood in 2018

- 1 that a possible consequence of its decision was
- 2 that the states and the United States, their
- 3 positions might someday diverge on these things.
- 4 JUSTICE GORSUCH: You're asking us to
- 5 say that two states cannot resolve their
- 6 disagreement in this Court consistent with the
- 7 Compact so long as the United States objects.
- 8 That's the upshot of what we're being
- 9 asked to enforce here.
- 10 MR. LIU: I -- I don't think that's
- 11 quite right because the United States is -- is
- 12 not standing in the way of the states --
- JUSTICE GORSUCH: Settling their own
- 14 claims.
- MR. LIU: Well, they -- they can
- settle their own claims so long as they do so
- 17 consistent with the laws that govern consent
- 18 decrees.
- 19 JUSTICE GORSUCH: With -- with the
- 20 federal government's views, right?
- 21 MR. LIU: No, I think this is just --
- JUSTICE GORSUCH: They can't settle
- their own claims anymore.
- MR. LIU: I -- I think they could.
- 25 And we gave an example in -- in our briefs.

- 1 Texas, for example, could agree to dismiss its
- 2 claims, and, in return, New Mexico could agree
- 3 to either curtail the groundwater pumping or
- 4 offset it, and if you look at the -- the
- 5 declaration by -- by Hammond in -- in -- in
- 6 the -- in the record, it -- it lists a
- 7 host of ways that New Mexico could offset the
- 8 amount of groundwater pumping.
- 9 And that sort of agreement, which is
- 10 simply an agreement by New Mexico that says
- we're going to take care of groundwater pumping,
- doesn't dispose of the United States' claims in
- this case or impose any obligations on the
- 14 United States.
- JUSTICE GORSUCH: It's just one you
- 16 prefer rather than the one the parties prefer?
- 17 MR. LIU: Well, I think, if -- if
- we're thinking about who is imposing on who in
- 19 this case, it's not the United States imposing
- 20 on the states. It's actually the states
- 21 imposing on -- on us.
- JUSTICE GORSUCH: Okay.
- 23 MR. LIU: And that's because we're
- leaving the states free to do what they want.
- 25 They're the ones who are bringing us into this

- 1 by saying we're not just -- we're not just
- 2 withdrawing from the litigation, we're taking
- 3 you with us, and on the way out, we're going to
- 4 impose a host of obligations on you.
- 5 JUSTICE GORSUCH: Thank you.
- 6 CHIEF JUSTICE ROBERTS: Justice
- 7 Kavanaugh?
- 8 Justice Barrett?
- 9 JUSTICE BARRETT: No.
- 10 CHIEF JUSTICE ROBERTS: Justice
- 11 Jackson?
- 12 JUSTICE JACKSON: Just picking up
- where Justice Gorsuch left off, I guess I had
- 14 not understood that all consent decrees are
- 15 necessarily proper just because the parties
- 16 agree to them.
- I thought, in our Firefighters case,
- 18 there were some limits that you can't have a
- 19 consent decree that disposes of intervenors'
- 20 claims without their consent.
- 21 So am I misreading that or --
- MR. LIU: No, I think it's clear as
- 23 day on --
- 24 JUSTICE JACKSON: I mean, is that what
- 25 you're relying on in response to the notion that

- just because the states agree, you know, the
- 2 United States shouldn't be allowed to object or
- 3 that we have to necessarily approve this consent
- 4 decree?
- 5 MR. LIU: Yes, that's -- that's right,
- 6 Justice Jackson.
- 7 JUSTICE JACKSON: Thank you.
- 8 CHIEF JUSTICE ROBERTS: Thank you,
- 9 counsel.
- 10 Ms. Pettit.
- 11 ORAL ARGUMENT OF LANORA C. PETTIT
- 12 ON BEHALF OF TEXAS
- MS. PETTIT: Thank you, Mr. Chief
- 14 Justice, and may it please the Court:
- No one disputes that the Rio Grande
- 16 Compact divides the river's waters 57 percent to
- 17 New Mexico and 43 percent to Texas. But neither
- 18 the Compact nor the downstream contracts
- 19 specify percent of what: the river as it
- 20 existed in 1938 during the so-called D-2 period
- 21 or something else entirely.
- This Court has repeatedly admonished
- 23 states to figure out such issues amongst
- themselves because -- and I'm quoting from a
- 25 different Texas against New Mexico -- "they are

- 1 more likely to be wisely solved through
- 2 cooperative study than in any court however
- 3 constituted."
- We heard you, we listened, and we
- 5 complied. None of the three reasons the United
- 6 States insists require Texas and New Mexico to
- 7 nonetheless continue litigating holds water.
- 8 Their objection that the Compact -- that the
- 9 consent decree violates the Compact ignores that
- 10 this Court has encouraged states to clarify
- 11 technical issues such as the baseline condition
- 12 and accept that solution so long as it is
- 13 reasonable and does not contradict the Compact's
- 14 express terms.
- We know the decree easily meets that
- standard because it merely tweaks a methodology
- 17 the United States developed in the late 1970s.
- 18 Their next objection collapses into the first
- 19 because it is the Compact that requires the
- 20 United States to deliver and account for Texas's
- 21 water. The decree merely allows the arrival of
- that water to be measured with greater
- 23 precision.
- 24 Finally -- and this is the objection
- 25 that has been the focus today -- their claims

- 1 objection would transform this entire lawsuit
- 2 from one about how much water the Compact
- 3 guarantees Texas to what New Mexico will do to
- 4 meet that guarantee.
- 5 Such disputes are not yet ripe, and,
- 6 more fundamentally, as Justice Gorsuch noted,
- 7 under the Reclamation Act of 1902, they present
- 8 complex issues of New Mexico state law that
- 9 neither interest Texas nor belong in the first
- 10 instance in this Court.
- I welcome the Court's questions.
- 12 JUSTICE THOMAS: Do we review consent
- decrees in original actions different from
- 14 consent decrees in other -- other cases?
- MS. PETTIT: I believe that's an open
- 16 question, Your Honor, in the original
- jurisdiction context. But it does make sense,
- 18 because this Court has said very specifically
- 19 that its jurisdiction is narrow, that one would
- 20 consider, as the Special Master did, whether,
- 21 for example, the obligations are the type of
- 22 obligations that would justify keeping a case in
- 23 this Court over the objection of the original
- 24 states.
- 25 JUSTICE THOMAS: The Special Master

- 1 seemed to have a different view of where the
- 2 U.S. could vindicate its rights. It indicated
- 3 that the U.S. could use another forum to do
- 4 that.
- 5 Do you have a view on that?
- 6 MS. PETTIT: We agree with the Special
- 7 Master that they can and should vindicate their
- 8 current claims in New Mexico state or federal
- 9 court.
- 10 JUSTICE KAGAN: Well, what do you say
- 11 to what Mr. Liu just said? Mr. Liu said this is
- going to be preclusive as to what the Compact
- means, what it requires, and there's no other
- way, no other body of law that's going to be
- able to get around that, so you effectively are
- 16 precluding the government's position in this
- 17 case.
- MS. PETTIT: It won't be preclusive in
- 19 the sense of claim preclusion. It will resolve
- 20 a single question, which is the baseline against
- 21 which the Compact is judged, and we do agree
- that that would be binding on the United States.
- However, I would point this Court to
- 24 its 1935 decision in Nebraska against Wyoming,
- 25 which, contrary to what my friend in the United

- 1 States said, treats the United States as
- 2 equivalent to all other appropriators for that
- 3 purpose.
- 4 The Compact agreement is binding on
- 5 them as a force of Congress's choice from --
- 6 starting from the 19th Century that the federal
- 7 law will defer to -- to state law in this unique
- 8 circumstance.
- 9 JUSTICE KAGAN: But there seemed to be
- 10 --
- 11 JUSTICE SOTOMAYOR: I'm sorry, but
- there's been no adjudication. There's a consent
- decree that fixes an answer and you're saying
- 14 the government is bound by that answer.
- 15 It -- it's different if they were
- 16 permitted, as they're asking, to litigate that
- 17 question and they lose it. Well, they've lost
- 18 it. They're bound to that now.
- 19 MS. PETTIT: The --
- JUSTICE SOTOMAYOR: But you're saying
- 21 something different. You're saying the Compact
- 22 settles that question. They're stuck with it.
- MS. PETTIT: Yes, Your Honor.
- JUSTICE SOTOMAYOR: Isn't that --
- you've given your whole case away?

1 MS. PETTIT: No, Your Honor. 2 Nebraska case was also settled, and the Court 3 did not even allow the -- the particular complaint -- the particular opinion I was citing 4 was actually an opinion saying that the United 5 6 States was not even a necessary party because, 7 under Congress's choice, that they would be bound by state law. 8 JUSTICE KAGAN: I think there are 9 10 compacts and then again there are compacts. 11 know, there are compacts that really do involve 12 only the states and don't have distinctively 13 federal interests attached to them, and this 14 contact -- Compact is not that and for all the 15 reasons we gave six years ago. 16 First, the Compact is inextricably 17 intertwined with the Rio Grande Project and the 18 downstream contracts, which, of course, are 19 federal in nature. 20 Second, the United States plays an 21 integral role in the Compact's operation. 2.2 Third, a breach of the Compact could 23 jeopardize the federal government's ability to 24 satisfy its treaty obligations. 25 So this is a Compact that really the

- 1 federal government is right in the mix of, and
- 2 that's why we allow the federal government to
- 3 participate.
- 4 MS. PETTIT: Your Honor, I would agree
- 5 that there is a spectrum of compacts, but this
- 6 is not on the far end of it. In fact, the
- 7 United States is a actual party to the Delaware
- 8 Compact because -- or the Delaware River Compact
- 9 for precisely that concern.
- 10 This falls more in the middle. And as
- 11 -- and the Michael Sullivan declaration, I
- 12 believe, gives examples all over the -- the West
- 13 about areas where compacts use reserve --
- 14 reclamation projects in the ways contemplated
- 15 here. And it -- it would be no different.
- JUSTICE KAGAN: Well, whether this is
- on the extreme end or not, what I'm suggesting
- is that federal interests are just inextricably
- bound up in the operation and the -- and the --
- 20 and the rules respecting this Compact.
- 21 And for you to say you can -- you
- 22 know, once -- after we've said there are these
- 23 distinctive federal interests and the U.S. gets
- 24 to participate as an intervenor, for you to cut
- 25 the U.S. out of the picture entirely so that the

- 1 U.S. can't ask a court to litigate those, what
- 2 -- what -- what it thinks are -- are the right
- 3 rules, I mean, I guess I don't see where that
- 4 authority comes from.
- 5 MS. PETTIT: From -- for the right
- 6 rules point, my -- I believe my friend actually
- 7 acknowledged that whether or not they were an
- 8 intervenor was irrelevant to that question. It
- 9 either complies with the Compact or it does not.
- 10 And as to their specific claims -- and
- 11 I think this really goes to focusing on how
- their claims have actually evolved since 2018,
- 13 because in -- in 2018, they were asserting a
- interference with a treaty and an interference
- 15 with Texas's apportionment.
- 16 Here, they're -- and the Special
- 17 Master recognized that there is no evidence
- about a potential interference with the treaty
- 19 at all, in part because this consent decree
- 20 takes it right off the top. The treaty's not --
- so, as a result, the treaty is not implicated.
- 22 And -- and then they're saying, well,
- 23 I'm demanding on behalf of Texas more than Texas
- 24 is going to -- is demanding for itself. That
- 25 doesn't make a lot of sense. And so what

- 1 they've really tried to do here is they've tried
- 2 to conflate the Project and the consent -- and
- 3 the Compact, and they are two analytically
- 4 separate things.
- 5 What they're asserting here is -- is
- 6 an interference with the Project in New Mexico
- 7 that is a matter of reclamation law and that is
- 8 typically resolved in the lower courts.
- 9 JUSTICE KAGAN: I -- I mean, you say
- 10 they're two separate things, and six years ago,
- 11 we said they're inextricably intertwined.
- 12 MS. PETTIT: In the sense that the --
- 13 the Project acted as a -- as a sort of agent, is
- 14 I believe the words this Court used, in term --
- but not in the sense that every single violation
- of the Project or every single potential
- 17 interference with the Project rises to the level
- 18 of a Compact violation.
- 19 For example, if there were a well in
- 20 New Mexico that was being operated in a way
- 21 inconsistent with the Project, that might be a
- violation under the Reclamation Act, but it's
- 23 not going to be a violation of the Compact. So
- 24 they can't be -- just because one serves as the
- agent of the other doesn't mean that they can't

1	that they are not analytically distinct.
2	CHIEF JUSTICE ROBERTS: This is a
3	theoretical question about how it works, and
4	maybe everybody else knows, but my understanding
5	of how this works is you have compacts and the
6	federal interest is protected because of the
7	requirement of congressional consent.
8	But what happens as they go on? I
9	mean and you have a consent decree under the
10	Compact, but at what point does the federal
11	government have the authority to step in as they
12	do when the Compact is originally enacted?
13	MS. PETTIT: In that instance, Your
14	Honor, I think it would and I'd point you to
15	the Texas against New Mexico case that I
16	originally quoted from 1983, where the Court
17	drew the line at where it is congressionally
18	ratified powers. And this is to where it is a
19	reasonable interpretation as opposed to an
20	amendment to the Compact.
21	And, here, what we have is a
22	reasonable interpretation as to how the Project
23	is going to how the Compact is going to
24	function on a day-to-day basis
25	CHIEF JUSTICE ROBERTS: Well, how does

- 1 the --
- 2 MS. PETTIT: -- because the Compact
- 3 doesn't specify it.
- 4 CHIEF JUSTICE ROBERTS: -- how does --
- 5 let's say the -- the Solicitor General
- 6 representing the federal government disagrees
- 7 with the idea that it's a reasonable
- 8 interpretation. Where do they get to have that
- 9 question addressed?
- 10 MS. PETTIT: This Court addressed that
- in Vermont against New York, where the Court
- 12 said that it does not rubber-stamp consent
- 13 decrees. It has the obligation to consider
- 14 whether or not the consent -- there's a
- 15 modification of the Compact.
- 16 Here, the Special Master looked at
- 17 every single objection that they have raised and
- 18 determined that it was a reasonable
- 19 interpretation, in part because it is the
- interpretation that, as my friend noted, both
- 21 the United States and the two districts have
- agreed upon since the late 1970s.
- 23 CHIEF JUSTICE ROBERTS: So what
- 24 happens -- the federal government says a problem
- 25 here is they're not going to be able to meet

- 1 their treaty obligations with Mexico. What --
- 2 what if that happens? What -- do you have any
- 3 obligations at that point, or do you just tell
- 4 the United States to, you know, go to war with
- 5 Mexico?
- 6 MS. PETTIT: I certainly wouldn't tell
- 7 the United States to go to war with Mexico, Your
- 8 Honor. I believe, in those circumstances,
- 9 because their claims as they've articulated them
- 10 today, and they have been a little fluid, is
- 11 that New Mexico is pumping too much water, what
- they would do is bring a Reclamation Act claim
- in New Mexico.
- 14 And they are actually a party to
- ongoing litigation along those lines in the
- stream adjudication that they've been trying to
- 17 get out of for decades to -- precisely to
- determine their seniority and whether or not and
- 19 how they were going to protect that claim.
- 20 CHIEF JUSTICE ROBERTS: So that would
- 21 be your answer to the question I was -- I think
- 22 was asked earlier about what should the United
- 23 States do, and you would say they should sue New
- 24 Mexico or, presumably, they'll find you too in
- 25 -- you're not going to be in state court but in

1 federal court, and that would be resolved there? 2 MS. PETTIT: Yes, Your Honor. 3 JUSTICE JACKSON: Can I --MS. PETTIT: And --4 5 JUSTICE JACKSON: -- can I ask you, in 6 -- in such an action, wouldn't New Mexico point 7 to the consent decree and say we're not doing 8 the wrong thing because, let's say, we adopt --9 or approved the consent decree? Wouldn't the defense be here's the consent decree and it 10 11 tells us how much water we can pump? 12 MS. PETTIT: It depends on what 13 precisely their allegations are, which is why 14 the -- these claims are not yet ripe. All the 15 consent decree does is it specifies how much 16 water New Mexico is entitled to. And the treaty 17 obligation is taken out before they ever get to 18 that point. 19 JUSTICE JACKSON: But why isn't that 20 the same thing? If New Mexico is saying -- you know, if -- if the federal government's claim in 21 2.2 the Reclamation -- hypothetical Reclamation Act 23 lawsuit is that New Mexico is taking too much 24 water --

MS. PETTIT: Mm-hmm.

1	JUSTICE JACKSON: and New Mexico's
2	response is no, we're not because the consent
3	decree tells us how much water we're entitled
4	to, I guess I don't understand why that isn't
5	the consent decree doesn't impact the United
6	States' claims.
7	MS. PETTIT: And I think that I would
8	point Your Honor to the explanation that they
9	gave the Special Master in October and December
LO	of 2022 about what the nature of their claims
L1	are. And it's really a question it's not
L2	really a question of New Mexico as a whole
L3	taking too much water. It's particular New
L4	Mexicans, so people who are not Project contract
L5	users who are pumping when they shouldn't be.
L6	That's the type of claim that would be
L7	appropriate. It's a purely
L8	JUSTICE SOTOMAYOR: But it can't be
L9	because we go back to your earlier concession.
20	What the this consent decree says is the 1938
21	baseline is not how you interpret this contract.
22	Whether the Special Master will
23	ultimately disagree with their position or not,
24	if they are not able to litigate that the 1938
25	hasaline is what needs to be measured then the

- 1 pumping would be illegal.
- MS. PETTIT: Not --
- JUSTICE SOTOMAYOR: If the baseline
- 4 has been changed, then the pumping is going to
- 5 be from a different baseline. And so their
- 6 reclamation claims are being limited. The
- 7 extent of how much they can get is being limited
- 8 by you.
- 9 MS. PETTIT: Your Honor, I have two
- 10 responses. The first is that the United States
- 11 has not actually attempted to litigate the 1938
- 12 condition in this case. In fact, the Special
- 13 Master -- and this is his words, not mine, on
- page 71 of the February 6th, 2023, transcript --
- "I don't know how the U.S. is maintaining that
- with a straight face, because, as recently as
- 17 the summary judgment motion, they disclaimed the
- 18 1938 baseline.
- 19 Beyond that, the type of pumping that
- 20 they are talking about and the concerns they are
- 21 being -- are saying and one of the reasons they
- 22 raised that it was unfair was that this -- that
- 23 -- that EBID, the district in New Mexico, was
- 24 going to bear the brunt for people outside of --
- of that area, so people farther upstream. That

- 1 is the nature of the -- of the claims they are
- 2 trying to litigate now, is --
- JUSTICE SOTOMAYOR: Well, we'll see.
- 4 They'll have to get up and answer that because I
- 5 can't, but we'll see.
- 6 JUSTICE JACKSON: Can I just direct
- 7 your attention to the other objection? Because,
- 8 on the one hand, they say part of the reason
- 9 this is a problem is that you are disposing of
- 10 our claims. I also understood them to say you
- 11 are imposing obligations.
- 12 So I guess my question is, to what
- 13 extent do you see the -- the consent decree as
- 14 binding on the United States?
- MS. PETTIT: It's not binding in the
- 16 sense of a -- that we can seek contempt for
- 17 violating it. It is binding, as we were
- 18 discussing a few minutes ago, as to the
- 19 definition of the baseline.
- The obligations that they are pointing
- 21 to --
- 22 CHIEF JUSTICE ROBERTS: You could
- 23 finish your answer.
- MS. PETTIT: -- are -- are three
- 25 specific concerns. One is the gauge, which is

- 1 actually contemplated by the Compact itself in
- 2 Article II and Article V, that we can move
- 3 gauges.
- 4 The second is an accounting issue that
- 5 it -- that falls within the scope of the
- 6 accounting that already happens because what's
- 7 accounting that it's talking about here is not
- 8 the day-to-day operation of the project; it is
- 9 an end-of-the-year assessment about whether the
- 10 Compact has been violated. They're two
- 11 different things.
- 12 And the third is a transfer of
- 13 allotments between districts over -- at the end
- 14 -- the beginning of each year. That would be
- 15 enforced against the districts.
- 16 CHIEF JUSTICE ROBERTS: Thank you.
- 17 Thank you, Ms. Pettit.
- 18 Mr. Liu said it was inexplicable why
- 19 you gave up the 1938 baseline. Can you explain
- 20 that?
- MS. PETTIT: Certainly, Your Honor.
- 22 The nature of a settlement is that parties
- 23 compromise. And the -- the Special Master
- 24 determined at the summary judgment stage that
- 25 there wasn't a strict 1938 condition as the --

- 1 as Texas originally pled it. There was some
- 2 additional amount of development that had been
- 3 contemplated.
- 4 And taking -- we accepted that as a
- 5 fundamental matter, and going forward, looking
- 6 at the evidence and looking at the different
- 7 claims, we concluded that this was in Texas's
- 8 best interests.
- 9 CHIEF JUSTICE ROBERTS: Thank you.
- Justice Thomas?
- 11 JUSTICE THOMAS: The -- this may be
- 12 along the same line, but the language, it -- the
- 13 -- in Justice Gorsuch's opinion in the 2018
- case, he says, after we permitted the U.S. to
- intervene, it also filed a complaint with
- 16 allegations that parallel Texas's.
- 17 Where did you -- where -- now it
- 18 appears that you've diverged. Could you give us
- 19 an -- could you explain why that happened and on
- 20 what basis did -- did -- did this happen?
- 21 MS. PETTIT: I --
- 22 JUSTICE THOMAS: The government seems
- 23 -- the U.S. seems to put quite a bit of emphasis
- 24 on that.
- 25 MS. PETTIT: Two responses. The first

- 1 is going back to 2018, ironically, General
- 2 Keller, when he was standing at this lectern,
- 3 predicted that there would be a divergence about
- 4 the baseline, but he got the positions
- 5 backwards. He was -- he was asserting that
- 6 Texas would be asserting a 1938 condition and
- 7 the U.S. would be asserting a D-2. And that's
- 8 actually how it's been litigated up until the
- 9 exceptions. So that's -- that's changed.
- 10 The other thing that's changed is,
- 11 again, they are trying to bring into this
- 12 lawsuit intrastate issues within New Mexico that
- 13 Texas actually never agreed to that were
- 14 appropriately part of its lawsuit back in 2018.
- 15 CHIEF JUSTICE ROBERTS: Justice Alito?
- 16 JUSTICE SOTOMAYOR: Who decided how to
- do the accounting before the consent decree?
- 18 Who set up that process?
- 19 MS. PETTIT: There are two different
- 20 processes. One is run by the Rio Grande Compact
- 21 Commission. That is the Compact Compliance.
- 22 And the other is the accounting process for the
- 23 Project itself. And those run in parallel.
- 24 They only really meet at the end -- basically an
- 25 end-of-the-year meeting, where Texas and New

- 1 Mexico, as well as Colorado, would be telling
- them you need -- there's a credit or a debit
- 3 that needs to be put into your accounting system
- 4 and --
- 5 JUSTICE SOTOMAYOR: So that --
- 6 MS. PETTIT: -- it's functionally the
- 7 same thing.
- 8 JUSTICE SOTOMAYOR: -- but -- but who
- 9 set up what would be reported or how?
- MS. PETTIT: So --
- JUSTICE SOTOMAYOR: The two projects,
- 12 not the states, correct?
- MS. PETTIT: They are -- it's -- this
- is cooperative federalism. They work together
- 15 about this. And they work together on an
- 16 ongoing basis. So I can't --
- 17 JUSTICE SOTOMAYOR: The problem -- the
- 18 problem is that now you're directing the federal
- 19 government to do something different. Whether
- it's de minimis or not, I can't even figure that
- 21 out in reading the materials.
- But, when we had the opposite
- 23 situation of the federal -- one sovereign, the
- 24 federal government, telling the states to do
- 25 background checks on gun buyers, we said that's

- 1 stepping into their sovereign decision-making
- 2 and couldn't.
- I don't know why this is not the same
- 4 in reverse, that you're commanding the federal
- 5 government to do something that it had not done
- 6 previously. So where do you get the power to do
- 7 that?
- 8 You claim the power is because they've
- 9 undertaken the duty to do this, but they took a
- 10 duty to do this, get -- retaining the right to
- 11 make certain decisions. Now you're chasing that
- 12 baseline.
- MS. PETTIT: The Reclamation Act of
- 14 1902 stated that the states can put -- the
- 15 federal government takes its water rights
- subject to both the procedural and substantive
- 17 requirements of the states, and that can
- include, for example, in United States against
- 19 California in 1978, some really, really
- 20 nit-picky, like 25 different conditions
- 21 micromanaging. And that is something that
- 22 Congress has allowed for here.
- 23 Here, it's just a discussion about
- 24 slightly different numbers in a larger
- 25 accounting process that's already existed.

1	CHIEF JUSTICE ROBERTS: Justice Kagan?
2	Justice Gorsuch?
3	JUSTICE GORSUCH: Let me just see if
4	I've got it right.
5	So we have a consent decree that we
6	have to approve or or disapprove. And the
7	big change is the baseline. That's been a big
8	subject of dispute, and that's what the
9	government says it's most worried about.
10	MS. PETTIT: Yes, Your Honor.
11	JUSTICE GORSUCH: But it's the same
12	baseline that's been used for 40 years.
13	MS. PETTIT: Yes, Your Honor, ever
14	since the the the Project went from
15	delivering at individual farms to delivering at
16	a district level. It's used the same baseline.
17	JUSTICE GORSUCH: And the other
18	concern that we've heard mentioned is the
19	treaty, but the Special Master found that
20	there's no treaty problem here.
21	MS. PETTIT: Yes. The Special Master
22	found there's not even a serious argument
23	there's a treaty problem.
24	JUSTICE GORSUCH: It might be
25	different in terms of approving a consent decree

- if there were a treaty problem.
- MS. PETTIT: Absolutely.
- 3 JUSTICE GORSUCH: Okay. And then the
- 4 other set of issues has to do with
- 5 administration, where the -- where the gauge --
- 6 water gauge is going to be. And you're getting
- 7 a benefit out of this deal because, instead of
- 8 the water gauge being at Elephant Butte -- I
- 9 don't know how many miles, over a hundred miles
- 10 from the border -- you're getting a measure now
- 11 at the Texas border.
- MS. PETTIT: I'd tweak that just a
- 13 little. The gauge that is still going -- the
- 14 gauge that's at Elephant Butte is still at
- 15 Elephant Butte.
- JUSTICE GORSUCH: Yeah, no --
- MS. PETTIT: We're getting a separate
- 18 -- the gauge that we are -- is being in El Paso
- is -- had been gauges that had been canal
- 20 headings within Texas, but we are measuring at
- 21 Texas.
- What we are getting -- we're
- 23 definitely getting a benefit in the sense that
- 24 the -- the Project is now considering and
- 25 freezing in the 1978 level the -- the pumping

- 1 that had been happening. 2 And I do want to point out that that 3 is requiring New Mexico to reduce pumping to get 4 down to 1978, and I think they've already spent 5 something like \$60 million on it. 6 JUSTICE GORSUCH: Okay. Thank you. 7 CHIEF JUSTICE ROBERTS: Justice 8 Kavanaugh? 9 Justice --10 JUSTICE JACKSON: So do you dispute 11 that the downstream contracts are still in 12 effect and bind the United States with respect 13 to the allotment and their obligations regarding 14 t.hat.? 15 MS. PETTIT: We don't dispute it, but 16 under Hinderlider, the contractors' rights rise 17 no higher than the states. And so, if Texas 18 only gives them 43 out of a hundred gallons, the 19 Texas District can't claim --20 JUSTICE JACKSON: I understand, but 21 the contracts do talk about their transfer
- obligations as between EBID and EP1, right?

  MS. PETTIT: No, Your Honor. The -
  JUSTICE JACKSON: They don't? Okay.

  MS. PETTIT: -- the 1938 contracts

- 1 that are incorporated into the Compact --
- JUSTICE JACKSON: Yeah.
- 3 MS. PETTIT: -- do not discuss a
- 4 transfer obligation. That is something that the
- 5 United States came up with in 20 -- in 2008
- 6 without the Compacting states whose rights are
- 7 at issue even being in the room, as my colleague
- 8 put it.
- 9 JUSTICE JACKSON: Final question. If
- 10 the United States decides not to transfer water
- 11 pursuant to the consent decree, let's say it
- 12 goes through, you mentioned earlier that that
- would be enforced against the states and not the
- 14 United States. In other words, you're not
- 15 binding them necessarily legally. Is that -- is
- 16 that your position?
- 17 MS. PETTIT: The districts, yes. That
- 18 would be enforced --
- 19 JUSTICE JACKSON: Enforced -- excuse
- 20 me -- against the districts. Is that in the
- 21 Compact -- or in the consent decree? Is that --
- or is that just something you're saying here
- 23 now?
- 24 MS. PETTIT: That's not specifically
- 25 in the consent decree. That is, however -- the

- 1 way that the transfers work is, to take a
- 2 specific example, if a negative departure
- 3 transfer were triggered, that would mean over a
- 4 period of years, EBID, the New Mexico District,
- 5 has received far, far more water than it was
- 6 entitled to, and that would be a transfer --
- 7 that would be transferred to Texas as a -- the
- 8 Texas District as a way of a remedy.
- 9 If the EBID were to continue to take
- 10 more water than it was entitled to even after
- 11 that, that would be enforced through a New
- 12 Mexico state administrative process that's part
- of the larger constellation of laws that my
- friend mentioned and is not specifically in the
- 15 consent decree.
- 16 JUSTICE JACKSON: Thank you.
- 17 CHIEF JUSTICE ROBERTS: Thank you,
- 18 counsel.
- Mr. Wechsler.
- 20 ORAL ARGUMENT OF JEFFREY J. WECHSLER
- ON BEHALF OF NEW MEXICO
- MR. WECHSLER: Mr. Chief Justice, and
- 23 may it please the Court:
- 24 The question of whether the United
- 25 States can veto the settlement of the Compacting

- 1 states can be resolved by the application of
- 2 four principles.
- First, the distinctively federal
- 4 interests of the United States do not include an
- 5 interest in the equitable apportionment of Rio
- 6 Grande water. That is undisputed. Because the
- 7 only issue resolved by the consent decree is the
- 8 equitable apportionment, the United States'
- 9 interests are not implicated.
- 10 Second, the Compact establishes the
- 11 apportionment. The Rio Grande Project must then
- 12 conform its operations to ensure that the
- 13 Compact apportionment is delivered.
- 14 Third, this Court has recognized the
- right of states to clarify an ambiguity in an
- 16 interstate compact so long as the clarification
- is consistent with the Compact. Here, the
- 18 consent decree measures Texas's share of the
- 19 Article IV delivery in a manner that is
- 20 expressly contemplated by the Compact.
- 21 And, fourth, there are other available
- 22 fora for the United States to resolve its
- 23 remaining claims. The Special Master observed
- that "it is difficult to envision a resolution
- 25 to this matter that might be superior to the

- 1 consent decree."
- 2 The Court should overrule the United
- 3 States' exception and enter the consent decree.
- 4 I welcome the Court's questions.
- 5 JUSTICE THOMAS: Could you -- the --
- one of the -- the State of Texas -- the United
- 7 States seemed to suggest that Texas and the --
- 8 the states have changed their views from early
- 9 -- from 2018, and we've had some discussion of
- 10 that. I'd like to hear your comments on that.
- 11 MR. WECHSLER: Well, United -- New
- 12 Mexico has been consistent about its position in
- 13 terms of the D-2 baseline. What I -- what we
- 14 understood the 2018 decision to be doing is
- 15 essentially saying Texas had a claim to the
- 16 apportionment. That is an interstate
- 17 apportionment as between Texas and New Mexico.
- 18 Only those states are in the -- the Compact
- 19 itself.
- 20 And what the United States had brought
- 21 was a claim for interference; that is, this
- 22 Court said that there were obligations that
- 23 arose under the Compact and that it was -- it
- 24 had a claim to be free from interference with
- 25 those duties and obligations.

1	The consent decree doesn't address
2	that interference claim. All it does is say
3	is define what the equitable apportionment is as
4	between Texas and New Mexico. And the United
5	States is free to bring as the Special Master
6	indicated in in his in his third report,
7	they're free to bring all of those claims of
8	interference in other fora. And that would be
9	consistent with the way this Court has handled
LO	other cases.
L1	JUSTICE THOMAS: What is the nature of
L2	the disagreement about the groundwater pumping?
L3	MR. WECHSLER: So I would understand
L4	that to be Texas and New Mexico have resolved
L5	the apportionment, the amount of water that each
L6	state is entitled to. What the United States is
L7	really arguing about is, how does New Mexico
L8	satisfy its obligations? That is, which
L9	specific water users within New Mexico must shut
20	down wells, how New Mexico should be
21	administering water, and those sorts of
22	intrastate issues that this Court has held are
23	are purely intramural disputes between
24	competing water users within the state.
25	And in other cases where there are

- 1 those sorts of competing uses for -- between
- 2 interstate users, the Court has sent the case
- 3 back to those -- to the states. So, for
- 4 example, in the case of United States versus
- 5 Nevada, once the interstate matter was resolved
- 6 as between California and Nevada, the case was
- 7 -- this Court said, well, the remaining claims
- 8 can be resolved within the State of Nevada
- 9 because it only has to do with competing
- 10 interests of New Mexico -- of Nevada water
- 11 users.
- 12 CHIEF JUSTICE ROBERTS: So you would
- send the United States to, presumably, a federal
- 14 court in New Mexico to sort out the concerns
- they have and would prefer to raise here?
- MR. WECHSLER: That's correct, Your
- 17 Honor. For any reclamation claims, those would
- 18 be in federal district court in New Mexico. As
- 19 to the reclamation -- the definition of Project
- 20 rights, that's a New Mexico state adjudication
- 21 court matter pursuant to the McCarran Act
- 22 amendment and the Reclamation Act that Justice
- 23 Gorsuch referred to earlier.
- 24 CHIEF JUSTICE ROBERTS: And is it
- 25 possible that the New Mexico courts would issue

- 1 decisions concerning the allocation of water
- 2 that would be contrary to the consent decree?
- 3 MR. WECHSLER: No. We think the
- 4 consent decree only resolves the issue of the
- 5 interstate apportionment. And -- and to Justice
- 6 Jackson's question earlier, the remaining
- 7 questions about depletions within the State of
- 8 New Mexico, how New Mexico water users could be
- 9 done, for example, protection of the treaty, all
- 10 of those claims could be available to the United
- 11 States, as the Special Master indicated, in the
- 12 lower fora.
- 13 CHIEF JUSTICE ROBERTS: And it
- 14 wouldn't be the case --
- JUSTICE SOTOMAYOR: But they're
- 16 bound -- they're bound against arguing that New
- 17 Mexico has to use a 1938 baseline, correct?
- MR. WECHSLER: No, I don't think
- 19 that's right, Justice Sotomayor.
- JUSTICE SOTOMAYOR: Well, that's what
- 21 your co-counsel said.
- MR. WECHSLER: Well, I don't think
- 23 that's -- that's not how I understood my
- 24 co-counsel. What -- what is -- what is -- has a
- 25 preclusive effect is the apportionment itself.

- 1 So the baseline would apply as to the amount of
- 2 water that Texas is entitled to receive.
- What it doesn't preclude the United
- 4 States from arguing, which is really their --
- 5 their argument here, is how should the project
- 6 operate? How can the project be free from
- 7 interference from New Mexico water users? And
- 8 that really is a question of how does New Mexico
- 9 use its share of the apportionment.
- 10 And that question they could raise --
- 11 they could -- they actually could seek to limit
- depletions all the way back to their priority
- date, which is, I believe, a 1903 priority date.
- 14 And so they would have the ability to protect
- their project from groundwater depletions.
- So the only thing really here is
- 17 being resolved is the equitable apportionment as
- 18 between the two states.
- 19 JUSTICE JACKSON: But why aren't these
- 20 all connected? I mean, you seem to be drawing a
- 21 line between arguments that the United States
- 22 can make related to internal use of the water by
- New Mexico but not the apportionment as between
- 24 states.
- 25 And maybe I'm confused, but I thought

- 1 that this is one water system that works its way
- 2 all the way down. And so, to the extent that
- 3 New Mexico is taking too much internally to New
- 4 Mexico or not allowing it to continue on to the
- 5 dam, doesn't that affect ultimately the Project,
- 6 et cetera? I mean, how can you separate these
- 7 two out in the way that you are?
- 8 MR. WECHSLER: Well, I think it's just
- 9 a matter of understanding what the hierarchy
- 10 here is. So, as the Special Master indicated in
- 11 cases like Hinderlider, California versus United
- 12 States, the Court has established that the
- Compact -- the -- the apportionment as between
- 14 the two states is established by the Compact
- itself, not the operation of the Project.
- And once that apportionment is set,
- 17 now the Project must operate within that
- 18 apportionment. And so the amounts that the
- 19 districts are entitled to, for example, the New
- 20 Mexico District, that amount, to use the
- 21 language from Nebraska versus Wyoming, can rise
- 22 no higher than New Mexico's apportionment
- 23 itself.
- 24 And so, to the extent that the -- the
- 25 Project -- or the United States has a claim

- 1 concerned about, like, are there New Mexico
- 2 water users taking water, that is purely an
- 3 interstate matter. It's a matter of how is the
- 4 New Mexico apportionment being used.
- 5 And that's a matter that this Court
- 6 has held, and the Special Master also is
- 7 recommending, that those questions can be
- 8 resolved in the lower courts, courts that are
- 9 more appropriate or -- or more used to
- 10 addressing questions having to do with New
- 11 Mexico water administration, New Mexico water
- 12 use, which New Mexico water users should be shut
- down, how to reduce depletions.
- JUSTICE GORSUCH: Let's see if I've
- 15 got it. The gist of this Compact is that
- 16 43 percent of what's in Elephant Butte has to go
- 17 to Texas using the D-2 baseline. That's the --
- 18 MR. WECHSLER: That's right.
- 19 JUSTICE GORSUCH: -- gist of it. Now,
- 20 if New Mexico water users are interfering with a
- 21 federal reclamation project, that's a different
- 22 question.
- MR. WECHSLER: That's --
- 24 JUSTICE GORSUCH: And -- and the
- 25 Reclamation Act says that gets resolved

1 according to state law internally, intramurally 2 in New Mexico? 3 MR. WECHSLER: Yes, that's exactly right, Justice Gorsuch. And all the consent 4 decree does is define more precisely what was 5 6 determined in the Compact in 1938 that Congress 7 consented to, and that is the Project must be 8 operated in a manner that the equitable 9 apportionment is delivered, that is, the 10 43 percent that Texas is entitled to actually 11 arrives at the border in Texas because, of 12 course, otherwise, they have no ability to enjoy 13 it. And all the consent decree does is --14 15 is provide a measurement, a way to measure and 16 enforce Texas's share of that Article IV 17 delivery, and it does so in a manner that is 18 expressly contemplated by the Compact in 19 Articles II and XII. 20 CHIEF JUSTICE ROBERTS: If you have 21 nothing further? Justice Thomas? 2.2 Justice Kavanaugh? No? 23 All right. 24 MR. WECHSLER: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you,

1	counsel.
2	Rebuttal, Mr. Liu?
3	REBUTTAL ARGUMENT OF FREDERICK LIU
4	ON BEHALF OF THE UNITED STATES
5	MR. LIU: Thank you, Mr. Chief
6	Justice. Just four quick points.
7	First, I think I heard my friend from
8	Texas acknowledge that the consent decree would
9	be binding on the United States with respect to
10	its claims in this case. I think that's just
11	game over under under the Firefighters
12	decision, which couldn't be clearer that a
13	consent decree can't bind the can't
14	distinguish extinguish the the claims of a
15	non-consenting intervenor.
16	Second, on the nature of the of the
17	United States' claims, Justice Jackson, I think
18	you're exactly right, the the my
19	friends' attempt to kind of divide these claims
20	into an intrastate portion or an interstate
21	portion just doesn't make any sense given what
22	this Court has already said about how this
23	how this this water system works. The
24	Project is intertwined with with the Compact.
25	And and and we have been here

- all along protecting the Project's delivery of
- 2 water to the districts and Mexico. That
- 3 delivery of water is the Compact's
- 4 apportionment. So, insofar as we are trying to
- 5 enforce the protection of that delivery of
- 6 water, we are trying to enforce the Compact's
- 7 apportionment as -- as it -- as it is specified.
- 8 I think the clearest way to -- to
- 9 appreciate this point that our claims are -- are
- 10 the -- are the parallel to the Compact claims
- 11 that have been in this case from the beginning
- 12 is to just look at Texas's complaint. On page
- 13 16 of its complaint in this case, it asks for an
- injunction that would command New Mexico to stop
- interfering and impeding the authority of the
- 16 Rio Grande Project. That's Exhibit A for why
- there's no way to -- to untangle the --
- 18 the project's delivery of water from the
- 19 Compact's apportionment. They're both the same
- 20 thing.
- 21 My friend from New Mexico said, well,
- the United States will be free to argue about
- whether certain users of New Mexico are properly
- 24 divvying up New Mexico's share under the consent
- 25 decree. But our entire claim in this case is

- 1 about the definition of the share itself. It's
- 2 not about how people in New Mexico should divide
- 3 up the eventual share. It's about the delivery
- 4 of water to the two irrigation districts and
- 5 Mexico -- Mexico, and -- and it's not about the
- 6 -- the interstate issue.
- 7 Third, on the -- on the obligations,
- 8 my friend from Texas wanted to characterize the
- 9 obligations that this consent decree would
- 10 impose as minor obligations. As an initial
- 11 matter, under Firefighters, that just doesn't
- 12 matter. I mean, this is just Contracts 101.
- 13 Two people cannot contract together and impose
- any obligations on a non-consenting third party.
- There's no exception to that rule in
- this Court's original jurisdiction docket. In
- 17 fact, I would have thought that in this
- 18 scenario, that that -- that rule is most
- important because the United States is not
- 20 standing here before you as an ordinary
- 21 litigant. We are the federal sovereign.
- 22 And so, in addition to the rule in
- 23 Firefighters, there are rules about sovereign
- immunity, sovereign immunity, intergovernment
- 25 immunity. All these rules protect the federal

Т	government from being what is an essential
2	essentially a direct regulation by the states.
3	And the last point I'll make is is
4	about this this idea that the states can just
5	come together and resolve ambiguities in
6	ambiguities in the Compact and then impose them
7	on the United States. This just conflates the
8	consent decree with the Compact.
9	The the the whole point of
10	Firefighters was that states by their mere
11	consent cannot impose on non-consenting parties
12	their view of the law. Rather, that view of the
13	law has to be litigated on the merits by the
14	non-consenting party.
15	And so, for all those reasons, we
16	would ask this Court to deny the states' motion
17	to enter the proposed consent decree.
18	CHIEF JUSTICE ROBERTS: Thank you,
19	counsel. The case is submitted.
20	(Whereupon, at 12:41 p.m., the case
21	was submitted.)
22	
23	
24	
25	

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