In the

Supreme Court of the United States

CHEMEHUEVI TRIBE OF INDIANS ET AL., Petitioners v. FEDERAL POWER COMMISSION ET AL	No. 73-1380
ARIZONA PUBLIC SERVICE COMPANY ET AL, Petitioners v. CHEMEHUEVI TRIBE OF INDIANS ET AL	No. 73-1666
FEDERAL POWER COMMISSION, Petitioner v. CHEMEHUEVI TRIBE OF INDIANS ET AL	No. 73-1667

Washington, D. C.
January 13, 1975

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Washington, D. C.

Monday, January 13, 1975

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

BEFORE: [Continued]

HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, J.R., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.
For Federal Power Commission

NORTHCUTT ELY, ESQ.,Watergate 600 Building, Washington, D.C. For Arizona Public Service Company et al

JOSEPH J. BRECHER, ESQ., 1506 Broadway, Boulder, Colorado 80302 For Chemehuevi Tribe of Indians et al

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 73-1380 and 1666, 1667, Chemehuevi Tribe of Indians against the Federal Power Commission and related cases.

Mr. Wallace, you may proceed when you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF FEDERAL POWER COMMISSION

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

In this case, the Complainants, who are two Indian Tribes, two environmental organizations and several individuals have brought a proceeding in the Federal Power Commission seeking to require the intervening companies to apply for licenses for six existing and planned thermo-electric facilities in the so-called "Four Corners" area of the Southwest, all of which draw their cooling waters from various places in the Colorado River system but none of which draw their cooling waters from any project licensed by the Federal Power Commission.

The claim was made that the Commission has jurisdiction, licensing jurisdiction over these plants, both under the so-called "project works clause" and because the plants use surplus water from government dams or at least, arguably, some of them do.

The Commission dismissed the complaint on the

basis of its long-standing interpretation that Part I of the Act gives it jurisdiction to license only hydroelectric facilities and not thermoelectric facilities, whether they are fossil fuel burning facilities or atomic facilities, that the jurisdiction under both clauses of the Act is limited to the licensing of project works or the use of surplus water by hydroelectric facilities which use water power for the generation of electricity, the power of falling water.

On review, the Court of Appeals agreed with the Commission in rejecting the principal contention that was being made in the case under the project works clause, but held that the Commission does have licensing authority with respect to the use of surplus water by thermal electric plants and ordered the case remanded to the Commission to determine whether surplus water within the meaning of the statute was being used by these facilities and the relationship between the Commission's jurisdiction and the jurisdiction of other federal agencies who have the authority over the disposition of the water at the various projects involved in the Colorado system.

This Court granted cross-petitions for certiorari and by agreement of the parties, the opening briefs on all issues were filed by the Power Commission and the intervenor companies and I will be speaking for 20 minutes for the

Power Commission and Mr. Ely will be speaking for 10 minutes for the intervenor companies.

At the outset -- now, the issue, while it has not been contested in this Court before, is not a new issue in this Court. In 1965, in a case entitled Federal Power Commission against Union Electric Company, Volume 381 U.S., all nine Justices addressed the issue in the context of determining whether there was jurisdiction on the Commission to license a pump storage plant and the case was decided on the premise that the Commission has no licensing jurisdiction with respect to the thermal electric facilities, a premise that was accepted by all parties in that case.

And, previously, as the Court of Appeals pointed out, an opinion of this Court in 1953, United States against Public Utilities Commission -- and this is explained in the Appendix on page 89-a in footnote 123, that opinion of this Court by Mr. Justice Reed was written on the assumption that the Commission had no licensing jurisdiction with respect to thermal electric facilities.

Nonetheless, at the outset, the Complainants' argue in this Court that the plain meaning of the statute precludes the interpretation of the Act to which all nine Justices subscribe in the Union Electric case and which was also reflected in the opinions in the Public Utilities Commission case of Mr. Justice Reed.

This, obviously, is a difficult argument to make but it is being made in the context of the statute in which the legislative history is quite devastating to the position that they are espousing.

Now, in our brief and, more elaborately in the intervenors' brief, we have addressed the problems with the language of the Act and why the language can be construed and perhaps more reasonably should be construed on its face in favor of our interpretation of the Act and the interpretation previously reflected in the Court's opinions.

I don't propose to rehearse that during the argument because it seems to us too late in the day after 54 years of interpretation by the Commission after pronouncements and opinions of this Court, after a major reenactment by Congress in 1935 in light of the Commission's interpretations for us to think that this issue can be decided on the bare words of the statute without looking beyond them.

And I might say after widespread reliance during those 54 years by not only the industry but by all consumers of electric power.

And so I think the Court of Appeals was quite right in examining the legislative history in detail as it did with respect to the contention under the Project Works clause and basically, we are in agreement with that aspect of the

Court of Appeals' opinion and analysis which showed that the original Part I of the Federal Power Act which was called the "Federal Water Power Act" was in its antecedents and in its enactment concerned exclusively with giving federal licensing authority over the development of hydroelectric power.

The dominant concern in the enactment of that legislation was to foster the maximum development and utilization of hydroelectric power so as to minimize the extent to which fossil fuels would have to be consumed in the production of power and pollution would occur from the burning of fossil fuels.

It was assumed by everyone that the need was to give the regulatory jurisdiction with respect to the hydroelectric facilities to assure that the potential of the waters wouldn't be wasted by shortsighted development, by development at one point, it wouldn't enable maximum utilization at other points in the river system and there were also concerns that excessive profits might be made by the utilization of the hydroelectric sites because it was cheaper to produce the electric power by this method and there was also the possibility of making excessive profits at the time the licenses expired and the facilities were converted and so safeguards were placed in the law with respect to that aspect of it as well.

And to just cite the highlights from subsequent developments starting in 1921 in its first annual report to Congress and repeatedly through the series of annual reports the Commission, the Federal Power Commission indicated that its jurisdiction under the Act -- not merely under the Project Works Clause, I should say, but under the Act, was limited to hydroelectric facilities and there was indication that Congress was well-aware of this when they reenacted the Federal Water Power Act as the Part I of the Federal Power Act in 1935 and that Congress deliberately decided not to expand Commission licensing jurisdiction at that time.

This is recounted in some detail, this portion of the legislative history on page 8 of the reply brief filed by the intervenor companies.

QUESTION: Didn't the Commission, in 1962, try to get from Congress the jurisdiction that you are asserting?

MR. WALLACE: They did in 1935 as well, your Honor, which is recounted there and again in 1962 they sought jurisdiction which is slightly different from what is at issue here but it is basically jurisdiction over the licensing of plant sites for thermal power plants --

QUESTION: Along the river.

MR. WALLACE: Along the river and Congress has not yet seen fit to enact this legislation.

QUESTION: Is that still the Commission's policy or

desire?

MR. WALLACE: Well, the Commission hasn't, as a body, taken a position on that in the last few years although there is still very considerable opinion on the Commission that either the Federal Power Commission or somebody should have this kind of authority to decide on the siting for thermal electric plants.

QUESTION: It is the view of some of the parties here, as I understand it, at least, of some of the amici, that with respect to this particular river the Secretary has a great deal of authority.

Do you agree with that?

MR. WALLACE: Well, the Commission -- the Council did point out in a petition for rehearing that it thought that with respect to the use of surplus water in this case there was no need for the Court of Appeals to reach that because any authorization/that might be relevant had already been given in this case.

QUESTION: To the Interior Department.

MR. WALLACE: But the Commission itself has not reached that issue. That was something that was supposed to -- under the Court of Appeals order to be decided on remand.

QUESTION: To be considered, right.

MR. WALLACE: That is correct. So I am in an ambivalent position as the Commission's counsel as to taking

a position on this.

QUESTION: That is the whole thrust of the matter, as I remember it.

MR. WALLACE: Well, it is. It is not anything we have presented in our petition for certiorari because the jurisdictional question is what we thought was worthy of this Court's review rather than the particular situation on this one river.

The jurisdictional question affects a large number of existing and planned power facilities throughout the country and that is what the Commission thought needed resolution in this court.

QUESTION: Well, the authority over the siting of thermal electric plants that the Commission has sought would be quite independent of the existence of surplus water, wouldn't it? I mean, it would be a much more generalized authority.

MR. WALLACE: It is quite independent of the jurisdiction they have sought and it is quite different in its thrust from the jurisdiction of the Court of Appeals how that the Commission has, under the Surplus Water Clause --

QUESTION: It is closer to the Project Works.

MR. WALLACE: It is much closer to the Project Works jurisdiction and the basic motivation for it as power consumption and power needs are expanding so rapidly is a

concern on the part of the Commission for adequacy and reliability of power service.

At present, there is no agency which has centralized authority to consider alternative sites for new thermal plants and to authorize a particular site to the exclusion of any other regulatory jurisdiction. As a result, you get serriatim litigation about the siting of thermal projects which can result in considerable delay in the construction of needed facilities with the risk of brown-outs and black-outs.

Under the Court of Appeals holding, the Commission would not have authority in authorizing the use of surplus water, to preempt other regulatory agencies, state or federal, from the siting question. It would merely be an additional obstacle that would have to be overcome to the resolution of where a particular plant that is needed can be built so we wouldn't be having a resolution of what the Commission sees as needed under the Surplus Water Clause.

Now, I should turn, since I think the legislative history is quite clear with respect to the first part of the Court of Appeals opinion, I should turn to their holding on the Surplus Water Clause.

The first thing to be said about it is that most of the legislative history applies equally to the Surplus Water Clause, which was in the Act from the outset and which

was included in the Commission's generic reports that lack jurisdiction over thermal electric facilities. Sometimes the reports would specify under Part I of the Federal Power Act, which obviously included the Surplus Water Clause.

Indeed, if -- and the Court of Appeals, of course, did not have the benefit of the very compendious history of that particular clause which the intervenors have compiled in their supplemental brief which is very helpful in showing the antecedents of the clause which indicate that it was tied in very specifically with hydro-electric development.

The other thing that, in our view, may have misled the Court of Appeals on this question is the fact that the litigation focused so much on Section 4(E).

In the Appendix in our brief on page 63 we have set forth Section 23(B) of the Act which probably is the section that the complaint should have been brought under because that is the section that says who is required to get a license.

Section 4(E) simply says what authority the Commission has to issue a license. Obviously the two have to be read together.

But Section 23(B) on page 63 indicates quite clearly on the face of the Act that there is very little warrant for reading the two clauses differently since it says "It shall be unlawful for any person, state or municipality for the purpose of developing electric power to construct project

work or to use surplus water," it is rather hard to see why the words "For the purpose of developing electric power" would not be read the same with respect to both clauses. It is the operational words that, in light of the legislative background, indicate a limitation of the Commission's jurisdiction to hydro-electric facilities.

Now, the argument is made that under this reading of Section 23(B) and of the similar authority in Section 4(B), the Surplus Water Clause becomes redundant and superfluous and loses any function.

In reflecting on this matter in preparing the argument, it seems to us that the most apparent function of the Surplus Water Clause on the face of the Act again is reflected in Section 23(B) on which the litigation did not focus and I am sorry this point was not made in the briefs but it is there on the face of the Act and that is the fact that Section 23(B) has a grandfathering provision for any facilities that were built under a grant prior to June 10th, 1920 that would be, by and large, statutory grants, special statutory grants for existing facilities and the Commission's long-standing position endorsed by the Court of Appeals for the District of Columbia Circuit in a case called Northwest Paper Company against the Power Commission 344 F. 2nd 47, is that the grandfathering clause is an authorization for facilities existing at that date to continue operation

without a license from the Commission so long as none of the project works are replaced, without a license under the Project Works Clause.

But then, in the event -- and the Commission has not had occasion to actually apply this -- in the event a dam would be built subsequently upstream from which surplus water would flow to this project, there would be Commission jurisdiction only under the Surplus Water Clause so that the entire river system would be brought under regulation to maximize the hydro-electric potential of the entire system because, obviously, the flow has to be regulated from one project to another to maximize the utilization of all of them.

And, similarly, the surplus water or water power seems to us just to refer to either the use of the surplus water downstream or to the surplus water power site where it is falling at the dam itself.

QUESTION: Where its use is for cooling purposes and is the water consumed or is it all returned at a higher temperature to the --

MR. WALLACE: It is consumed. Some water is consumed by thermal plants and this is the basic difference between the use of the water by thermal plants and by hydro-electric plants. Hydro-electric use is basically a non-consumptive use and the Commission has not been in the

business of being the arbiter between competing demands for consumption of water in the river system.

QUESTION: But this is cooling water, isn't it?

MR. WALLACE: It is cooling water but it is consumed in the process.

QUESTION: Some of it at least is returned to the river.

MR. WALLACE: Some of it is returned.

QUESTION: At a higher temperature.

MR. WALLACE: Yes and some of it is consumed.

QUESTION: Now, how is it consumed?

MR. WALLACE: Through evaporation, the heating of it.

QUESTION: Maybe it is heat loss.

MR. WALLACE: Yes.

My time has expired.

QUESTION: Right.

MR. WALLACE: I don't want to take his.

MR. CHIEF JUSTICE BURGER: Mr. Ely.

ORAL ARGUMENT OF NORTHCUTT ELY, ESQ.

ON BEHALF OF ARIZONA PUBLIC SERVICE COMPANY

MR. ELY: Mr. Chief Justice and may it Please the Court:

QUESTION: Mr. Ely, before you commence, would you inform us as to the status of these plants? At the

time the suit was brought, my understanding is that two of them were operational.

MR. ELY: They are all operational except for the Kaiparowits Plant, which is still in the planning stage, your Honor.

QUESTION: An injunction is sought, what would be the consequences of an injunction?

MR. ELY: The injunction which was sought, the order asked for in the Federal Power Commission was to halt their operation or construction until the license should be obtained and pending the determination of this case.

QUESTION: How long does it normally take to obtain a license?

MR. ELY: The licensing procedure may -- if it is contested as it would be here, may take at least two years before the Commission, another two years in litigation afterward, at least.

QUESTION: Are there alternative sources of power available if these plants were shut down?

MR. ELY: No, your Honor, there are not. These plants will develop 7,400 megawatts, some 23 percent of the total power supply for 19 million people in the Southwestern states.

The alternative use of the -- have I answered your question, sir?

QUESTION: Yes, you have.

MR. ELY: The alternative use of the 250,000 acre feet which would be consumed by these plants in the cooling process evaporation, if used in agriculture, which the states of the Colorado River Basin have a right to do in perpetuity if it is not used in industry here, that 250,000 acre feet would support the land limitation laws something under 200 farm families.

The judgment decision rests with the Secretary of the Interior and with the states as to whether the water resources shall be used for agriculture or industry, whether some 19 million people shall be protected against black-outs and brown-outs by the utilization of this coal of the Indian reservations to generate power and to use the waters of the Colorado River in the cooling process.

That decision is entrusted to the Secretary of the Interior and the water is apportioned to the states by compacts to which he is subject.

The Federal Power Commission has no jurisdiction to overrule this value judgment. If it were to grant a surplus water license, it would be a nullity because these plants have, as the statutes require, four statutes, contracts with the Secretary of the Interior for the use of the water from the government dams involved here.

QUESTION: Mr. Ely, I am not -- I think you said --

maybe I missed it, but it seemed to me you said two somewhat inconsistent things, A) that the decision was up to the states is how the water was to be used that was allocated to them and then I think you said it was up, the decision was up to the Secretary of the Interior.

MR. ELY: Well, this is understandable that there would be confusion, your Honor. The Colorado River Compact, as you may recall, apportions in perpetuity the water for consumptive use to the upper basin and the lower basin.

The statutes under which the dams are built, Hoover Dam, Glen Canyon, the Navajo, are the three involved here, prescribe that no person shall have the right to the use of the stored water except by contract with the Secretary of the Interior and he, of course, is subject to the compact that I have mentioned on the other law of the river.

QUESTION: But as to the -- let's assume that the -- a certain amount of water is allocated to the state. Then is it up to the -- is the state free to decide how that water is going to be used?

MR. ELY: Yes, the states prepare plans which are submitted to the Secretary and as a practical matter, these are worked out in concert. The statute says, designated to the Secretary superceding any authority the Commission may have once had for comprehensive planning, the job of preparing comprehensive plans for utilization of these water resources

but in concert with the states.

QUESTION: So your point is that whatever jurisdiction the Commission may or may not have in this area on other rivers, at least with respect to water from the Colorado River it has none because it has been superceded.

MR. ELY: Precisely, your Honor, superceded both with respect to the function of the surplus water license that is held now by the water contract with the Secretary, superceded as to the planning function of the Commission.

QUESTION: But it is possible, I suppose, to say that whatever the powers of the Secretary might be, they don't reach licensing a steam plant.

MR. ELY: I think -- yes.

QUESTION: And that however much the Secretary or the state might want to have a steam plant built, perhaps the Power Commission can say, we don't want a steam plant there.

MR. ELY: Yes. Your Honor, I think you are correct. The project -- the decision on the Project Works Clause in our view ends this case. If you decide that a steam plant does indeed constitute project work, then it would require a license.

QUESTION: Yes.

MR. ELY: It would get its water by contract with

the Secretary of the Interior for cooling and not by surplus water license.

If, however, you decide that a steam plant is not in the category of project works, this case ends because the Surplus Water Clause is not an alternative ground for licensing in this Colorado River case, whatever it may be elsewhere.

QUESTION: Because of the powers of the Secretary.

MR. ELY: Correct. Exactly, sir.

QUESTION: Well, it isn't just the powers of the Secretary, it is also a matter of state law and it may depend on a law of the state, I take it, as to whether a particular plan can be approved.

MR. ELY: This is correct in a sense, Mr. Justice Rehnquist. If there is a competing claim for water for industry, steam plants, water for breaking up slag in a copper smelter, whatever, as against agriculture, the state, in the first instance, would approve or disapprove this appropriation or this request for water. But neither competitor could get the water out of a government dam without a contract with the Secretary and --

QUESTION: Because of the compact.

MR. ELY: The compact reserves to the states the apportionment, the decision how to use the water. But if they want water out of the government dam, then, as this

Court held in Arizona versus California, as you will recall --

QUESTION: Yes.

MR. ELY: -- the Secretary has a final power to say which user within each state shall get water from that dam by contract.

QUESTION: Yes.

QUESTION: And the power to allocate shortages.

MR. ELY: And the power -- well, the Congress may overrule that.

QUESTION: Exactly.

MR. ELY: Yes.

QUESTION: It hasn't yet.

MR. ELY: Well, we think it has.

QUESTION: It has addressed itself to it.

MR. ELY: Yes.

QUESTION: Well, it certainly doesn't mean that the Secretary owns the water.

MR. ELY: No. This is -- this is correct. The stored water, the Court says -- this was in an earlier Arizona versus California case, says in effect, Congress has, in effect, appropriated the -- unappropriated the surplus water, impounded it and directed that no person may use it save by contract. This is with respect to water in excess of that which has been appropriated, as we read it.

In any event, no matter what -- may I say that

before I -- I'd like to reserve a few minutes, if I may, for rebuttal.

We are in total accord with what the Solicitor General has said about the Project Works Clause and about the Surplus Water Clause and the merits. My point is, you won't reach the Surplus Water issue if you decide the private court below was right on the Project Works on the Colorado.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Ely.

Mr. Brecher.

ORAL ARGUMENT OF JOSEPH J. BRECHER, ESQ.,

ON BEHALF OF CHEMEHUEVI TRIBE OF INDIANS ET AL

MR. BRECHER: Mr. Chief Justice and may it Please the Court:

My name is Joe Brecher, representing the Chemehuevi,, Cocopah Tribe of Indians, the Sierra Club, several individual Navahoes and the Committee to Save Black Mesa.

This case involves perhaps the quintessential environmental nightmare that this country has experienced in the Four Corners power plants in the Black Mesa strip-mining operation and it involves also a context of one of the most blatant calls for judicial legislation I have ever witnessed on the part of the power companies and the government.

The language of the statute involved here could

be no more clear that the facilities involved in this case are covered by Section 4(E) of the Federal Power Act.

There can be no doubt that they are utilizing surplus water from the government dam for the purpose of producing electric power.

I would like to emphasize this point at the outset that this is not merely cooling water in the same sense that water in an automobile radiator cools the engine. The water that is used in an electric power plant is an essential part of the power production process itself. Without the cooling water, power production at these points would go down 20 or more percent, the plants would be inefficient and they could not be built.

So the water used in the thermal plants involved in this case is an inherent part of the production process and therefore, in a very real sense, this water is being used to produce electric power rather than to cool machines which are producing power by other means.

QUESTION: Will you just summarize that again as to the difference of how they are used other than in cooling?

MR. BRECHER: Yes. Although it is used for cooling, the cooling process itself actually results in more megawatts --

QUESTION: Yes.

MR. BRECHER: -- being produced because it makes the turbines turn -- spin faster and --

QUESTION: Yes, more efficient.

MR. BRECHER: -- more megawatts come out and you could not have a thermal plant in this day and age without cooling water.

QUESTION: How much water of the cooling water is consumed?

MR. BRECHER: All of it, your Honor, and that is an important part --

QUESTION: None is returned to the river?

MR. BRECHER: Yes, except for the Four Corners plant, all of these plants will evaporate all the water that is withdrawn from the river and that is why the Court of Appeals found below that thermal plants will have more of an effect on the navigable capacity and the hydro potential of a stream than would a hydro plant.

QUESTION: A hydro doesn't, ultimately, use any water.

MR. BRECHER: That is correct so in terms of the power potential in a stream, the operations of thermal plants actually would have much more of an effect and would actually deplete the amount of water available for down-stream hydro production.

This would not be true for a hydro plant.

QUESTION: It uses it but it doesn't consume it.

MR. BRECHER: Yes. That is correct.

QUESTION: You are directing yourself now to the Surplus Water Clause?

MR. BRECHER: Yes, as well as the --

QUESTION: Not the work projects?

MR. BRECHER: Yes, I think that they are -- I am addressing myself to both.

QUESTION: But at this point in your argument to the Surplus Water Clause, as I understand you.

MR. BRECHER: Yes. Yes, your Honor. Yes.

QUESTION: Now, we have seen -- not in this Court but in other courts there has been litigation about the use of the water for cooling purposes and one of the major complaints was that it raised the temperature, I think in one case, of the river 20 percent because the water returned to the river from which it was taken for the cooling process at a much higher temperature.

Now, are you sure that you are correct when you say that none of the water is returned after the cooling process?

MR. BRECHER: Yes. Yes, your Honor. In western rivers, especially the Colorado, which has a high salinity problem, the water, when it is used for cooling, the salts that are already in the water become more concentrated and if that water were to be released to the stream in addition to the thermal problem, which you have recognized, there

would also be a problem of increased salinity in the river and since salinity levels in the Colorado River are already at a very high level, none of these plants are permitted by the Secretary of the Interior under his water service contracts to return this water to the river.

Thus, the Colorado River, which is the most over-allocated river in the world, is further depleted by the activities in these plants.

QUESTION: Well, what do they do with the water if they don't -- with the excess if they don't return it to the river?

MR. BRECHER: They evaporate it in large cooling ponds which are located adjacent to the plants and it is evaporated by sunlight and that is a major portion of the plants' sites are devoted to cooling ponds.

QUESTION: Evaporating tanks.

MR. BRECHER: Yes.

QUESTION: And is that only to deal with the salinity problem?

MR. BRECHER: Yes, your Honor, that is the main purpose of that.

QUESTION: So that in a river -- dealing with rivers where there is no such salinity problem, there is no barrier, chemically or otherwise, to putting the water back in and that is done, is it not, generally?

MR. BRECHER: Yes, it is. That is general -- however, I think that this type of situation we'll see accelerated because many of the large new thermal power plants and the new phenomenon, the energy complex with which we are dealing here exists only in the west and salinity in rivers is a western water problem which is becoming more and more apparent and this is true not only on the Colorado but on the Yellowstone River in Montana which is another major energy complex source which will soon have problems very similar to the Colorado River and although the Northern Great Plains coal development situation has not reached the epic proportions of the Colorado River situation, it will soon if plans that are now afoot go into effect so that we will be seeing this type of operation, thermal plants which deplete water resources.

This will become much more common as western coal and energy is developed further. This problem is in its infancy and we are seeing the first blush of it now.

Now, I mentioned the fact that the power companies and the government are arguing flagrantly for judicial legislation and this is what they argue:

Although the literal language of the statute quite obviously covers the facilities involved here, there should be read into the statute a proviso that says, none of this language shall apply to steam or thermal electric power plants.

What is the basis for this additional language which they claim should be involved here?

No canon of statutory construction that I know of allows it and, in fact, several important canons to which this Court has long adhered would militate against the addition of this language.

First there is the plain meaning rule. Now, the plain meaning rule is based on very sound traditions of the judicial construction.

First, the language of a statute should be understandable to and accessible by the common man and the common lawyer, I may add. The material which is relied on here to vary that meaning, as Mr. Justice Jackson pointed out eloquently throughout his career in this Court, is available only to a few legal specialists located in the larger cities.

I myself had a very difficult time working in Denver of getting my hands on the material which is cited in the supplement and what -- if the plain meaning rule is varied in this way, it means that only a few specialists are going to be able to interpret the statute which originally was designed to aid the public, to be understandable by the public and we -- we don't claim that the plain meaning rule should govern over all sense.

Obviously, if the literal language of the statute

is completely at variance with what the framers of the statute had in mind, or if it would lead to absurd or impractical consequences, then we must explicate the statute, we must go behind it to see what Congress had in mind and, indeed, this Court has recognized that.

But that is a very narrow exception to the very well-established rule and we maintain that in this present case there is no reason for applying that exception.

Obviously we don't have an absurd or impractical consequence by giving the Federal Power Commission jurisdiction, either under the Surplus Water Clause or under the Projects Work Clause over steam power plants.

In fact, the Commission itself has asked for this jurisdiction repeatedly so it certainly would not be absurd and it certainly would not be impractical and, indeed, the Commission has stated that, based on what it conceives as its present statutory mandate, this additional activity, would fit in well, would complement itself well with the statutory mandate as it now exists.

Now, do we have -- if steam plant licensing were allowed, do we have a situation where the purposes of the Act would be violated or violence would be done to them?

Again, no, because one of the -- perhaps the primary purpose of the Act, as is mentioned by the power companies and the government, was to promote hydroelectric development

and we don't quarrel with that.

We do believe that hydroelectric development was uppermost in the minds of Congress when they enacted the Federal Power Act.

But there were other social phenomena that they attempted to take care of in the very same legislation. Several threads of thought that conservationists in the early 1900's had been working on came together in the Federal Power Act and two other purposes should be borne in mind.

First was the general purpose to achieve comprehensive development of the nation's waterways. Indeed, one of the immediate statutory antecedents of the Federal Power Act was an act creating a Waterways Commission to unify the development of our rivers for purposes having nothing to do with power, having to do with irrigation and other uses and although we do not contend that the Federal Power Act deals with the use of water for other than power production purposes, definitely it was the sense of Congress that unified development of the nation's waterways was an important purpose of the Federal Power Act.

A second important purpose was to make sure that private power companies were not allowed to appropriate for themselves without the government's supervision and, in appropriate cases, without appropriate charges, the

power potential in navigable streams.

In the present case, in order to effectuate those two purposes behind the Federal Power Act, that is, comprehensive development of waterways and making sure that the public's property was protected, regulation of thermal power plants is absolutely essential.

There is going to be no more hydroelectric development in this country of any consequence and the waterways of this country used in connection with power will be used only in connection with thermal plants.

If the construction argued for by the power companies and the government is allowed to continue, the power companies will have achieved by the back door what the Congress had set out to stop them from doing in 1920.

That is, appropriate for themselves without any government supervision or control the hydro potential in navigable streams. They will do that by sucking all of the water out of the river and not making it available for downstream dams.

QUESTION: Now, where a government dam isn't involved, where there isn't a surplus water issue, you would think that the -- you would say that the Secretary of Interior has no jurisdiction either.

MR. BRECHER: No, sir, we recognize fully the Secretary's jurisdiction, but we do not think it precludes

the procedures.

QUESTION: I understand that, but what if there isn't a dam involved?

MR. BRECHER: Then we believe that the court below was wrong. We believe that the Project Works Clause would still govern and the literal language of that clause would require --

QUESTION: Yes, but how about your statement that there is no government regulation interposed between a power company and the use of the water in the navigable streams.

MR. BRECHER: That is generally true. Except for the limit of exception for the Colorado River and a few other rivers where there is special legislation dealing with it, there is no legislation and, indeed, that was recognized.

QUESTION: So that's what my question was then, except in those special -- in those circumstances, does the Secretary of the Interior have any power?

MR. BRECHER: No, your Honor, he has that power only --

QUESTION: That was my question.

MR. BRECHER: I'm sorry. He has that power only because of the Law of the Colorado River as it is developed but that is not the usual case.

QUESTION: Well, suppose you have water stored behind a dam and in the western states that isn't in the Colorado system? Don't you have to at least have a contract with the Bureau of Reclamation or approval of the Bureau to take water out from behind that dam?

MR. BRECHER: Yes, you do, in most cases, either from the Bureau of Reclamation or the Corps of Engineers or whatever the governing agency is.

QUESTION: So there is federal regulation of some sort of removal from water behind a dam, quite apart from whether it is the Colorado River or not.

MR. BRECHER: Yes, your Honor, but we believe that that type of regulation -- there are two types of regulations which have been recognized by the courts and I would call the type of regulation you are speaking of political regulation as opposed to Agency regulation.

The consequences are quite different.

There is no public participation, for example, in a decision by the Secretary to allocate water. The public cannot present witnesses. It cannot cross-examine. It cannot participate in proceedings. There is no judicial review and it is virtually unfettered discretion on the part of the federal agency.

In contrast, before the Federal Power Commission, the public has very well-defined rights to participate in

the proceedings and, in fact, if those rights had been exercised in this case, we wouldn't have the terrible Four Corners situation we have where the siting of these plants was done on a helter-skelter basis without considerations of national policy which the Federal Power Commission under the dictates of this Court in the High Mountain Sheep case has said is so important so that, although it is regulation and there is some government participation, there is no public participation and one of the main thrusts of the Federal Power Act was to make sure that the public, not just the government, had participated -- was able to participate in the decision-making as to how our water would be used.

QUESTION: Well, what about -- now, what about on the Colorado or some other place in the west, if the Secretary is going to make a decision, does he have to comply with the Environmental Protection Act?

MR. BRECHER: Yes, he does. He has to comply with the National Environmental Policy Act but the protections available to the public under that Act are far different from those under the Federal Power Commission and they are --

QUESTION: Well, they are different but it doesn't mean that the public has no participation.

MR. BRECHER: Well, they have after-the-fact

participation only. They may comment on an environmental impact statement but they can have no substantive change. There is no substantive input from that.

All that is required is that an impact statement be filed under NEPA but once the statement details the environmental disaster, the Secretary is free to go ahead regardless of the consequences under NEPA and that is an important distinction.

QUESTION: What was the timing with respect to the bringing of this suit in relation to the building of the plants?

MR. BRECHER: When the suit was filed, one plant was in full operation. Four of the other plants were just beginning construction and that is why we asked for an injunction originally.

Obviously, at this point, we are not going to ask that these power plants that are so important in producing power for the west be shut down.

QUESTION: What are you asking?

MR. BRECHER: At this point we would ask that the Kaiparowits plant, which is in the planning stage, should be held up until a license is granted and that operations of the other plants could go on while the licensing proceedings took place.

You see, under the Federal Power Act --

QUESTION: But you would oppose the granting of the licenses?

MR. BRECHER: Yes, we would, or at least we would -- we would advocate that conditions be attached to the license to clean up some of the environmental mess which has been associated with these plants and which the so-called "regulation" of the other federal agencies has not obtained at all. The Environmental Protection Agency has found at one time or another that every single one of these plants is violating clean air statutes.

There have been massive outcries by virtually every government agency about one or another environmental defect.

Nonetheless, the plants go forward and this shows the difference in quality between the so-called "regulation" of the Secretary under his contract authority and the kind of regulation one would have if the Federal Power Commission were involved because there are sub --

QUESTION: Well, if the plants violate clean air statutes, can't they be prosecuted under those statutes?

MR. BRECHER: Well, they have been but the go on, the plants continue violating the standards and so far there has been remarkably little action. The Mojave plant, for example, has been given four or five variances so far and the end of that process is nowhere in sight.

It is being contested but nothing is being done.

QUESTION: Well, there is no question about what the construction of the act has been insofar as the Federal Power Commission is concerned up to this date.

MR. BRECHER: Yes, your Honor, that is correct.

QUESTION: And if somebody applied to them for a license, they wouldn't give them a license because they said we have no power to give a license.

MR. BRECHER: Yes.

QUESTION: And people go forward on that assumption and would you suggest the plant could then be required to get a license and then, perhaps, it be denied and the plant closed down?

MR. BRECHER: I think that is a theoretical possibility, your Honor but very unlikely under the circumstances of these cases.

QUESTION: Well, I didn't ask whether it was unlikely. I asked whether that was your contention, that it could be closed down without some kind of compensation or something.

MR. BRECHER: Yes, your Honor, that is correct.

QUESTION: What is correct?

MR. BRECHER: The assumption that you stated that the plants could be closed down if the Commission found that a license should not be granted under the Federal Power Act.

However, we have many -- this Court has come up with many situations where the law changed and retroactive licensing was reauired and we believe that this would be just another case of the same kind.

A private individual is not allowed to rely on a misconstruction of the statute by an agency and if that misconstruction is corrected, then it must abide by the law regardless of whatever reliance it placed in the law if it was wrong.

QUESTION: Even to the point of dismantling the plant, to get down to the hard realities?

Or terminating its use?

MR. BRECHER: I suppose so, your Honor, although, frankly, I don't think any of the parties in this particular case would argue for that result. Obviously, we are realists here, too and we are not out to disappoint the Southwest.

QUESTION: Well, but you are arguing some legal principles here. We have to deal with it on that basis, don't we, not on the basis of what some people might do.

MR. BRECHER: Yes, I think that is correct; that legal principle, although it sounds hard, that is the correct one to be argued here, that, even though they had this reliance on this improper interpretation of the law, they would be liable, in any event, to have their plants

dismantled if that were required.

Now, when we turn to the legislative history which is supposed to preclude the plain meaning of the statute, we find that that history consists of a negative rather than a positive. Nowhere have they pointed to a single instance in which any member of Congress said that steam plants are not to be licensed.

Instead, they point to the fact that steam plants were not mentioned or, if they were, they were mentioned in other contexts and they draw from that the inference that, therefore, steam plants are not to be licensed under the Act.

We believe that this violates a premise that Chief Justice Marshall stated way back in the 1830's which is that, if you have a situation that appears to be covered by statutory language and that particular situation was not mentioned by Congress, it is not enough to say that it was not mentioned.

There must be an affirmative showing that Congress, had it been confronted with the facts involved in the case, would have said, no, we do not want to regulate.

Now, I would like to ask this Court to imagine the Conservationists' Congress of 1919 and 1920 being confronted with the Kaiparowits power plant using 102,000 acre feet of scarce Colorado River water, water which would then not be available at four downstream federal hydroelectric projects,

water which would be depleted forever from the river system, water which would be necessary for the intelligent planning of that system and ask whether, in view of the purpose of Congress to promote comprehensive development of waterways and to assure that private power interests do not appropriate public resources, whether the Congress would have said -- whether we can say with assurance, Congress would have said no, we do not want to regulate this power plant.

And I maintain that we cannot say that on the strength of the legislative history that has been offered to us.

Now, it is argued that the Secretary's power on the Colorado River supercedes any power that the Federal Power Commission could have. We believe that this is the weakest argument that has been advanced by the power companies for a number of reasons.

One, the two main statutes relied on by them, the Boulder Canyon Project Act and the Colorado River Storage Project Act both take away FPC jurisdiction, either for a limited time on the Colorado or for limited space on the Colorado but, by implication would retain jurisdiction on the rest of the river.

The Boulder Canyon Project Act says that the Commission's jurisdiction on the Colorado shall temporarily

cease until the Act shall have been ratified.

That Act, of course, was ratified in 1921 and so by implication, FPC jurisdiction continues.

In the Colorado Storage Project Act, the Congress went to the trouble of excluding FPC jurisdiction on the short stretch of the river between the Grand Canyon and Lake Mead. If there were no jurisdiction there originally, why would it be necessary to take the jurisdiction away in the statutory context?

Furthermore, the Commission itself has held hearings, licensing hearings and those hearings have been participated in by the Secretary concerning this very portion of the Colorado River involved here.

The proposed Marble Canyon Dam in 1962 was on this very stretch of the river.

QUESTION: That was a hydroelectric proposal.

MR. BRECHER: Yes, but their contention, your Honor, is that there is no FPC jurisdiction, period and, obviously, there is because both of the parties involved have, in fact, participated in that kind of proceeding.

Furthermore, even if we are to accept this argument, two of the power plants involved in this case, the Four Corners and Huntington Canyon plants are not covered by the contract with the Secretary. They do not have water service contracts with the Secretary. They have obtained

their water by the usual methods from the states involved so that the Secretary's jurisdiction, even if it existed, could not supercede FPC jurisdiction as to those two power plants.

In short, there is very -- and, finally, I may add, if this Court will accept the Nantahala Power case which involved the TVA and the Federal Power Commission, we have had a situation very similar.

As you are aware, the Tennessee Valley Authority has very, very broad authority over the allocation and distribution of water in the Tennessee VAlley, far more power than the Secretary of Interior exercises in the Colorado.

Nonetheless, it was held in the Nantahala Power case that the Federal Power Commission still had a voice in deciding the allocation of that water, at least as far as power plants were concerned.

Even more important, the type of regulation being done by the Secretary, the scope and concerns the Secretary has, is different from that of the Federal Power Commission.

For one thing, the Commission is a national commission and it can take into account and, indeed, is required to take into account, more than the Secretary is in awarding his contracts.

QUESTION: Well, isn't the Secretary a National

Secretary, too?

MR. BRECHER: Yes, he is, your Honor, but he hasn't acted as one in the context of these cases because he is allowed -- he hasn't, for example, ever done what the Commission could do, namely saying, yes, you may have the water but don't locate the plants at this particular spot. Move them some place where the area is less scenic.

QUESTION: But that is just a complaint about the way the authority has been exercised. I don't see how that bears on the existence of the authority.

MR. BRECHER: Well --

QUESTION: I mean, to say that one is national and the other isn't, you have got a Secretary appointed by the President. You have got Federal Power Commissioners appointed by the President.

MR. BRECHER: Well, the difference is that the Secretary's authority is confined to the Colorado River Basin whereas the Federal Power Commission oversees the entire power industry throughout the nation and the Federal Power Commission may well say, for example, yes, we should mine western coal, we should use it for producing electric power but let's not put it in the Colorado River system, let's use some other river system which isn't so badly overburdened and --

QUESTION: What river system would you use, other

than the Colorado to supply the people in the Southwestern states?

MR. BRECHER: There are a number of alternative sources such as using seawater, for example or using the Great Salt Lake or, as a matter of fact, there are several power plants now being planned in southeastern Utah which will use ground water and agricultural run-off rather than water from the mainstream of the Colorado River.

And these are alternatives that could have been applied back in the 1960's when the Secretary was making his decision as to these power plants and if there had been an FPC proceeding, those alternatives could have been developed by public intervenors such as we are and perhaps a system that was --

QUESTION: How exactly do you return waters that weren't used in the river -- in the plant?

MR. BRECHER: The return water?

QUESTION: From irrigation.

MR. BRECHER: A lot of it goes back into the river and contributes to the salinity problem and now it is, under the plans that are now being formulated, it will be evaporated and so salinity will be decreased.

QUESTION: But the water is still used up.

MR. BRECHER: Yes, that is correct.

QUESTION: What authority is there that precludes

the return of that cooling water to the Colorado River? Is it state, federal, Secretary of the Interior, Federal Power Commission? Who stops them from returning it?

MR. BRECHER: Well, for these particular plants, it is a condition of the Water Service contracts that the Secretary entered into with the power plants.

Presumably, the Environmental Protection Agency would have adopted similar regulations under its general water pollution control authority, under the Water Pollution Control Act.

QUESTION: The return of this water, which you have said is a matter peculiar to the Colorado River, the return of it would not impair its function for producing new power downstream, would it?

MR. BRECHER: If the water were returned?

QUESTION: Yes.

MR. BRECHER: That would depend on how or where it were returned. For example, if the water by-passed the government dam, which is a conceivable situation, and that water were not allowed to flow over in an intermediate dam, yes, it would -- it would --

QUESTION: Well, the salinity problem is -- is it not entirely a pollution problem?

MR. BRECHER: Yes.

QUESTION: Well, the salinity problem is basically

not pollution in the ordinary sense but it is the obligation of the United States to deliver a certain amount of water to Mexico of a certain standard and because of all the salinity, the Mexicans complain that the water isn't up to standard.

MR. BRECHER: Yes, but our clients are also --

QUESTION: It isn't aesthetic. Water that is too saline is no good for irrigation.

MR. BRECHER: That's right and, in fact, our clients are vitally affected by that. The Cocopah Tribe is located just above the Mexican border and the water that they receive down the river, by the time it gets to them is so saline that a lot of crops are already precluded from growth there so they have a vital interest in that, too.

I think it is a particularly deadly kind of pollution in the southwest. It is the most deadly kind because other types of pollution can be dealt with by treatment but dealing with salinity is a very difficult and expensive problem, almost insurmountable.

QUESTION: Yet, it doesn't affect the drinking quality of the water. People drink saline water.

MR. BRECHER: Well, if you have ever tasted Los Angeles water, you know that it is --

QUESTION: Well, there are 20 million of them drinking it.

QUESTION: A lot of people do taste it every day.

MR. BRECHER: That is true for the Colorado River water probably above the Parker Dam, but below the Parker Dam, you can't drink it. I don't think anybody drinks it there and bottled water is -- in Yuma, bottled water is the rule rather than the exception. I know my clients rarely drink that stuff.

QUESTION: Yuma has a city waterworks that certainly takes water out of the river.

MR. BRECHER: But I think it is treated for salinity.

MR. CHIEF JUSTICE BURGER: Mr. Ely, you have about three minutes left.

REBUTTAL ARGUMENT OF NORTHCUTT ELY, ESQ.

MR. ELY: Your Honor, to dispose first of some of the questions last asked about salinity, I will ask your attention to page 114s of the supplement to our brief which quotes from the findings of fact in the case called Jicarilla.

QUESTION: Well, give us a little time to find it.

MR. ELY: Yes, sir.

QUESTION: Mr. Ely, 114?

MR. ELY: 114s of the Supplement to the brief.

QUESTION: Yes.

MR. ELY: This quote from the findings of fact of the District Court in a case in which all of the Complainants here were were parties except the two Indian

tribes and it points out that the effect on salinity of the Colorado River by the small quantities of water which will be consumed here is not measurable.

QUESTION: What paragraph?

MR. ELY: It starts at the top of the page, 114s.

All of the water consumed here will affect salinity at the Imperial Dam, the lower end of the river, by .8 to 1.2 percent. It will be nearly if not impossible to detect these increments with standard measurements of chemical water quality.

The quality of water there now is low. It has 869 parts per million.

QUESTION: This is because the water is not going to be returned to the river, isn't it?

MR. ELY: Yes. Let me clear that up, your Honor. The quantity --

QUESTION: I would think if water is taken out and not returned, then I don't see how anybody could possibly conjecture that the salinity would be increased.

MR. ELY: Exactly. The burning up of the water in the evaporating process in the cooling towers doesn't add any salt to the river.

QUESTION: It just takes the water out of the river.

MR. ELY: It takes it out of the river and leaves

it in the evaporating ponds as salt cake. It is taken out of the river but the water is taken out, too and so there is less fluid to dilute the salt that comes into the river downstream from the irrigation projects.

QUESTION: Well, that is self-evident, I would think, Mr. Ely.

MR. ELY: Yes. I mean, there is nothing to argue about and besides, if you are really going to determine the right --

QUESTION: What would be the effect on salinity if the water was returned to the stream and not evaporated?

MR. ELY: Virtually the same, your Honor.

QUESTION: Well, then, what underlies the condition in the Secretary's contract?

MR. ELY: Because the environmentalists were concerned about the heating effect of the water that would come back from the cooling towers.

QUESTION: So you say it is not a chemical problem at all, it is just a heat problem.

MR. ELY: Exactly so. Heat is named as a contaminant in the Environmental Act. They didn't want the water heated up and at Navajo we spent $5 million to avoid returning this water to the stream, which is the cheapest thing to do.

Our reply brief points out that the cooling water used in the United States, the greater part of it still is a

once-through flow as it goes back to the stream so in 1971, the last year for which the Commission published data, over 99.2 percent of the water diverted for cooling was returned to the stream, but heated up.

In some areas, they don't want this hot water and the pressure is put on the power plants to build cooling towers. At great expense, we have done that.

So this is, if I may say so, a rabbit trail. If you were going to truly litigate quality of water here, the right of a user in the Lower Basin to complain of uses by these five power plants in the Upper Basin, even though the five plants were within the apportionments made by the Colorado River Compact, you would have to have the states that are parties to that Compact here to respond to the charge that even though you are within your quantities, you are affecting our quality. You can't have what was apportioned to you.

QUESTION: All this is very far afield from the issues in this case.

MR. ELY: Oh, it is.

QUESTION: And I grant you that the --

MR. ELY: It is, indeed.

QUESTION: -- Bench here has invited this detour and frolic.

MR. ELY: Yes, it is, your Honor.

QUESTION: Yes.

MR. ELY: The -- let me come to another point, on the literal wording matter.

We, in our briefs, we have traced some 16 places in the statute where the language selected relates only too obviously to hydroelectric projects, totally inappropriate for steam plants.

The definition of project works, you'd have to include references to ash handling plants, coal pipelines and so on. None of it is there. Everything is for hydro. There is, in their legislative history, at least one statement by Congressman Taylor, later chairman of the Appropriations Committee, that, "Of course, we are not including steam plants in this Bill, are we?" and the answer was, "You are right."

This is discredited because the man answering was a utility executive but what of it?

In 1920, when this Act was passed, virtually all of the -- the greater part of the power production was by steam, as it is now.

By the time the 1935 Congress rejected the Commission's request for authority to license steam plants, there were more than four times the capacity there was in 1920.

In 1972, when Congress last rejected Chairman

Oseka's request for this very authority, capacity of steam plants had grown by 35 times what it was in 1920. Everybody knows they use cooling water.

Now, the cooling water that is used from the sea, it was referred here, obviously wouldn't be -- put the plant within the jurisdiction of the Federal Power Commission.

If it was used from wells you don't get under the authority of the Federal Water Power Act and consequently the fact that the cooling water is taken here from the navigable streams, it is a farfetched detour to say that this tiny use of cooling water somehow four miles -- by a plant four miles from the stream somehow brings that by the intent of Congress into the scope of an act intended to regulate water power as this -- both the majority and the minority pointed out in the Tom Saw case, you are dealing with the Federal Power Act with the hydroelectric potential in falling water and the teaching of the Tom Saw case is it makes no difference whether the water comes to the head of the pen stocks by nature or by act of man through a pump. It is the falling water.

QUESTION: Is this case the same as the Union Electric case?

MR. ELY: Yes, yes, Union Electric.

QUESTION: Union Electric case.

MR. ELY: We think, your Honor, that that case

controls this. You cannot reach a contrary conclusion here on the licensing of steam plants without abandoning the rationale of the majority opinion written by Mr. Justice White nor the minority opinion of Mr. Justice Goldberg in which Mr. Justice Stewart joined.

There is a logical difference between the two. Congress legislated in one field but not the other and the arguments made here might very appropriately be made to Congress. Opinion might well differ and many parties should be heard there who are not here in this Court.

One final point.

The point was made that in 1968, Congress, in enacting the Colorado River Project Act, placed an embargo upon the licensing of projects between the Glen Canyon Dam and Hoover Dam.

So it did, but these were hydroelectric projects. The projects at Bridge Canyon or Marble Canyon that had been intended to provide power for the central Arizona project and cash registers to help finance it and that the Sierra Club and other conservationists opposed and said, no, use thermal power for this pumping.

Whereupon, Congress put into the 1968 Act authority for the Secretary to buy an interest in the plant attacked here, the Navajo plant on Lake Paul and the United States has appropriated some $200 million to buy a 24 percent

interest in that plant to pump water into the Central Arizona Acqueduct.

That is one of the plants that our opponents now say would have to be licensed, not withstanding this Act of Congress.

As to the Four Corners plant, it is below the Navajo dam on the San Juan. An Act of Congress in 1962 said not only that you must have a contract to take water from that dam, but if yours is a long-term contract, it must be validated by special act of Congress.

Consequently, one plant below the Navajo dam does have such a contract. It was validated. If the Four Corners plant is found, indeed, to be using water out of that stream instead of under state law appropriations, it must get a contract which must go to Congress for approval and the Federal Power Commission can't grant it by a surplus water license.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ely.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:10 o'clock a.m., the case was submitted.]