

IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS, :
 :
 Plaintiff :
 :
 v. : No. 65 Orig.
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 STATE OF NEW MEXICO, :
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 Defendant :
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Washington, D. C.

Monday, March 24, 1980

The above-entitled matter came on for oral argument
at 2:09 o'clock, p.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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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State of Texas, P.O. Box 12548, Capitol Station,
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RICHARD A. SIMMS, ESQ., Assistant Attorney General,
State of New Mexico, New Mexico Interstate
Stream Commission, Room 101, Bataan Memorial
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of Defendant

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on behalf of Plaintiff

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on behalf of Defendant

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on behalf of Plaintiff

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Texas v. New Mexico.

Mr. Caroom, you may proceed whenever you are ready.

ORAL ARGUMENT OF DOUGLAS G. CAROOM, ESQ.,

ON BEHALF OF THE STATE OF TEXAS

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

This is an original action initiated by the State of Texas over six years ago to enforce the Pecos River Compact, an interstate agreement concerning the distribution of water on the Pecos River.

For the last four years we have been before the Special Master, the Honorable Jean S. Fraitenstein. During this time the Master has issued two reports.

The first report was in July 1977, his report on New Mexico's affirmative defenses to our action. In that report he overruled the affirmative defenses of lack of justiciable controversy, exhaustion, primary jurisdiction, estoppel and laches.

New Mexico has voiced no objection to that ruling.

The Master has filed another report, his --

QUESTION: We have never adopted it either, have we?

MR. CAROOM: You have not adopted it. It was filed,

I believe is the notation given.

New Mexico has not in this most recent round of objections objected to the original report, either.

The current report is the Master's determination of New Mexico's obligation under Article 3-A of the Pecos River Compact. This is the key provision and let me briefly read it to the Court:

"New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas State line below an amount which will give Texas a quantity of water equivalent to that available under the 1947 Condition."

Now, the key phrase here is "the 1947 Condition" which is defined by Article 2-G of the Compact. Article 2-G states:

"The 1947 Condition means that situation in the Pecos River Basin as described and defined in the report of the Engineering Advisory Committee."

It goes on to say:

"In determining any question of fact hereafter arising as to such situation reference shall be made to and decision shall be based on such report."

Now, the Engineering Advisory Report is a collection of various reports put together by a committee of

engineers that were advising the Compact negotiators prior to the adoption and ratification of the Compact.

Texas contends the two Compact provisions I have read to you must be and were intended to be applied literally, i.e. the 1947 Condition is exactly what the Compact says, it is that Condition defined in the engineering report.

New Mexico would go a step further and extrapolate the definition. New Mexico would say that because the engineering reports were intended to reflect conditions existing on the river roughly in 1947, that the 1947 Condition is not as defined by the Compact, it is not that engineering report but rather those conditions which the report was depicting.

QUESTION: Say that again?

MR. CAROOM: New Mexico would say that the 1947 Condition is not the report and the conditions it is describing but rather those conditions it was intending to describe.

QUESTION: You mean the actual conditions?

MR. CAROOM: Right.

QUESTION: And you would say that would still hold true if it turned out that there was a printing error in the engineering report?

MR. CAROOM: That would be the strict literal consequence of our case. We don't want to be unreasonable about it.

QUESTION: Yes.

MR. CAROOM: But the problem here is --

QUESTION: But you would say that even if everybody conceded the report just made an outright, obvious mistake in describing what the condition on the river was?

MR. CAROOM: I as a lawyer would say that. Our Compact Commissioners have not said that.

QUESTION: Neither has the Special Master, I take it?

MR. CAROOM: That is true.

QUESTION: Yes.

MR. CAROOM: In evaluating the State's argument --

QUESTION: You say you don't want to be unreasonable. I am disturbed about the Special Master's statement on page 48 of his report. I quote:

"The intransigent attitude of each State over the many years of this controversy suggests" --

Do you agree with that?

MR. CAROOM: This is where the Master is suggesting the Compact won't work because the States are both fairly hard headed.

QUESTION: I wouldn't have asked this except that you said you didn't want to be unreasonable.

MR. CAROOM: I don't agree with the Master's statement that the Compact appears to be unworkable or with

his concern. The States have basically been separated over the years by their different constructions of the term 1947 Condition. Because of this it was impossible for either of the States to really compromise their position and give away water they thought they were entitled to. I think once this is all resolved that we will be able to make the Compact work.

QUESTION: You mean work either way?

MR. CAROOM: If this is resolved in New Mexico's favor, all Texas has to do is attend the meetings once a year. We can make that work.

QUESTION: I am curious. Do you think the Master's statement in his report was directed at the negotiators or at counsel or respective Governors or to whom was it addressed?

MR. CAROOM: It is directed, I believe, at the Pecos River Commission, the representatives from each State. It is directed also, I think, perhaps at the lawyers in the case.

If you look at the Master's July 1977 report that was accepted by this Court, he initially tried to reach a compromise and essentially told the State: "I am going to withhold rulings on three of these affirmative defenses until you all have gone back to the Pecos River Commission and tried to work this out, and I am giving you 18 months to

do that.

Now, shortly after his report came out there was a meeting of the Pecos River Commission and the State had an opportunity to file objections to that report. We filed the objections and he coincidentally received a copy of the transcript of that meeting. The combination of the transcript of the meeting and the objections filed convinced the Master that it would serve no purpose to remand the States and give them this opportunity to work it out.

QUESTION: I think there are three positions. One is New Mexico, one is Texas and the other is the Master.

MR. CAROOM: Yes, and the Master is in the middle. His decision so far as the theory of what the 1947 Condition is goes with New Mexico. It says it is now what the engineering report says but rather the conditions the engineers were trying to depict what was on the river.

QUESTION: When you say his position is in the middle are you prepared to take from that he is now recommending what he had hoped or thought the parties should have agreed to in a compromise?

MR. CAROOM: I would hesitate to speculate what the Master thought we should agree to in a compromise. He was simply telling us to go compromise. I think the Master has now presented us with what he thinks is a fair compromise. What he has done is taken New Mexico's theoretical view to

the '47 Condition question but given them less than everything they were asking for. He says if it is going to be natural conditions on the river we have to have a date to see when those actual conditions cut off. And that date is January 1, 1947.

The Master also says --

QUESTION: That does make quite a difference.

MR. CAROOM: So far as I know we have no evidence in the record to reflect that.

QUESTION: At least New Mexico thinks it makes a difference.

MR. CAROOM: New Mexico certainly thinks it makes a difference, Your Honor.

The second point that the Master did not go with New Mexico on is the question of groundwater depletion. This is a little bit more complex. The Pecos River is not simply a surface water system. There are groundwater aquifers near the river which feed the river and in times past have significantly contributed to the flow of the river. In 1947 New Mexico irrigators were over-pumping the groundwater system. They were drawing water out faster than it would recharge. Consequently if that 1947 pumping continues you have a continued decline of the groundwater aquifer and a continued decrease of the groundwater contribution to the river, based upon the pumping existing in 1947.

The Master's ruling said you did not get the ultimate effect of the 1947 pumping in terms of the depletion. All you get is the depletion which was reflected in the river January 1, 1947.

So New Mexico's is contesting those two points. We are contesting the Master's basic decision.

Now, I think it is clear that what the Master was doing was trying to reach an equitable compromise for a difficult problem. I think also that is where the Master made his mistake. The Master's job in this case was not to work equity. The Master's job in this case was to enforce the Compact. Equity had been worked, an equitable apportionment of the water had been reached by virtue of the Compact negotiation process which this Court has repeatedly recommended for that purpose. His decision to essentially divide the baby again after the Compact had fairly well pinned the 1947 Condition to that engineering report. The Master is essentially encouraging upstream States involved in interstate compacts now to come in and try for a second bite at the apple if it is working a hardship upon them.

Let me turn for just a moment to the basis for the Master's decision, the basis he advances in his report.

He says that he is convinced that the 1947 Condition refers to a tangible reality as opposed to a bunch of numbers.

Now, the Master has incorrectly characterized Texas'

position insofar as he ties it to the one page of numbers appended to his report. The routing study is considerably more than that and I have addressed that in our brief.

I believe when the Compact was drafted the negotiators had a very definite and obvious intent to eliminate the problem of what was the 1947 Condition and what was going on in the river in 1947. They added the second sentence to the definition which says in solving any question of fact pertaining to the 1947 Condition you look to the engineering report and the decision is made based upon that.

There is only one other definition in the Compact that has a second sentence to it like that and that is Article 2-E which defines deplete by man's activities. It states a definition of depletion by man's activities which essentially makes it the same thing as beneficial consumptive use. It then has a second sentence which states for purposes of this Compact it does not include diminution of flow by encroachment of salt ceclars or other like group or by a deterioration of the channel of the stream.

Now, Texas in good faith could not argue that man's activities included channel deterioration. Because of the way a reservoir was operated, although physically it is possible to make a connection in terms of causation this article clearly prohibits us from making such an argument.

Similarly, in terms of the spread of salt cedars man's activities can't encroach that but we could not begin to advance that argument. Yet Article 2-G's second sentence makes it equally clear that the 1947 Condition is to be tied to that engineering report available to the Compact negotiators upon which the Compact was based.

QUESTION: What was the Master's response in his report to your reliance on the second sentence of the definiti in 2-G?

MR. CAROOM: The Master has not responded to the second sentence of Article 2-G. New Mexico has not responded to the second sentence of Article 2-G. I have heard no satisfactory response to that.

QUESTION: Well, what is your attack on the Master's report, page 36, where he says:

"Texas contends that the 1947 Condition is immutably expressed in the routing study. The Master disagrees. That routing study is no more than a model of how the river would operate under various assumptions. It does not describe or define any situation. The Compact recognizes supplementation 'by additional data hereafter accumulated.'"

The master at that portion of his report essentially advances four reasons for rejecting Texas' position. The first, I have addressed briefly, that the routing study

does not define or describe any situation. The Master at another portion of his report says it must refer to a tangible reality, it can't be synthetic imagery. I think the second sentence of Article 2-G is the clear answer to that, it says it is the report and it is not up to the Master now to change it.

Now, the second basis the Master criticized --

QUESTION: But somebody has to be able to understand the report and he says the report is full of mistakes, uncertainties and omissions, by itself.

MR. CAROOM: He also says in his report that he didn't understand the engineering involved in this and that he was trying to make --

QUESTION: And he also indicated that none of the engineers-- well, some of the engineers didn't, too, apparently. They certainly disagreed with each other mightily.

MR. CAROOM: There were serious disagreements between the engineers about the report. What the evidence reflects basically -- let me back up for just a second.

The Master was faced with essentially this question, the legal interpretation of the 1947 Condition when he made his report on affirmative defenses. We urged him to answer it at that time. He said he did not want to decide the case in a factual vacuum, he wanted to hear all about the engineering questions involved. So we have over 3,000 pages of

transcripts by engineers' highly technical testimony, walking through the routing study of Senate Document 109 step by step, walking through a substitute routing study that was later done by the Commission called the Review of Basic Data Study step by step.

QUESTION: These are the two exhibits attached to --

MR. CAROOM: Those are.

It is important to realize these exhibits are simply summary documents which reflect the routing study that was done. They are not the routing study themselves. Now, the Master does not make that clear in his report. This is simply the summary.

I have tried to explain in my brief on a step by step basis what a routing study is and how it works. There is more to it than simply the annual summary.

QUESTION: When you say the Compact refers to the 1947 Condition you say it incorporates the 1947 statistics on the routing study?

MR. CAROOM: Yes, Your Honor.

QUESTION: Not the average which appears below the 1947 but the 1947 itself?

MR. CAROOM: Oh, not that year; no. Let me back up and make this clear.

What happened in the Compact negotiations was the

engineering committee performed a number of routing studies such as the one you are looking at now or each resulted in summaries like that. What a routing study is is essentially taking the natural conditions on the river, the virgin flow before there is any development. And by "development," I mean irrigation, reservoirs, uses of the water. Now, using that virgin condition as a simplistic model the engineers would then superimpose upon it stages of development of uses on the river. So they would impose the reservoirs that existed in 1947, they would the irrigation projects that were being irrigated in 1947, and so forth.

And then for each year they ran the water down the river, adding and subtracting for each of these gains and losses on the river.

QUESTION: What about the growths of those salt cedars?

MR. CAROOM: Under the 1947 Condition they took the salt cedar growth which was existing roughly in 1947 and imposed that on the river for the historic period. So that the routing study shows looking at the historic period how much water would have come down the river each year had those conditions been existing.

QUESTION: Well had the same number of salt cedars existed?

MR. CAROOM: No, the salt cedars grew tremendously

in the late 'Thirties and the 'Forties. But in the routing study it shows them existing back to 1905 and how much water would have come down the river in 1905 with them there.

QUESTION: So the number of salt cedars is assumed to remain constant throughout this period?

MR. CAROOM: All of the 1947 Conditions that are imposed upon the river in the routing study are assumed to remain constant. They vary according to weather, how much rainfall there was that year, how much water is available. But those are the conditions imposed in this engineering study upon the river.

QUESTION: But that suggests to me that the Master is quite right when he says the routing study -- the report doesn't describe any actual condition.

MR. CAROOM: The Master is quite right when he says that. I mean it is not a precise description of what existed in 1947. It was not intended to be. It was intended to show the major developments and uses that were existing at the time. And it was thought to accurately depict the performance of the river with things actually on it in 1947.

QUESTION: May I just ask another point of inquiry.

On this rather elaborate chart which I guess we are talking about Exhibit 8 of the Master's report there are figures for each year from 1905 through 1946. Do I correctly understand that in making the calculations say for

1905 or 1906 they assumed that the cedars would have been those that were in effect 1947 and then extrapolated back to what the river flow would have been had that condition existed.

MR. CAROOM: That is correct.

QUESTION: And they did that for everything that was present in 1947, they computed back to a hypothetical set of facts for the earlier years and then did the arithmetic on what they thought the water would have been?

MR. CAROOM: They did that, precisely.

QUESTION: Why did they do that?

MR. CAROOM: They compared a number of different conditions. They compared for example 1905 conditions. They compared 1915 to 1939 conditions. They took different stages of development on the Pecos River and tried to see what water was available under each of those.

One of the conditions they did was called the 1947-A Condition which was based upon an offer of Compact made by New Mexico which showed the groundwater contribution to the river entirely depleted. That was another routing study. There was another routing study which showed the groundwater entirely depleted and the salt cedars entirely cleared out.

QUESTION: Those were different alternatives that they studied before they agreed upon using 1947 as the base point; is that right?

MR. CAROOM: That is correct.

QUESTION: May I ask you this: Under the Master's understanding of the proper definition of 1947 Condition what function will this chart play?

MR. CAROOM: There are two charts. The first one is the 1947 Condition routing which was performed when the Compact was negotiated. If Texas' position is adopted, then this chart indirectly and the studies which underly it will form the basis for a standard by which New Mexico's State line deliveries are judged.

QUESTION: I understand that is Texas' -- but I am saying that under the Master's definition what function will this chart perform?

MR. CAROOM: Oh, excuse me. Under the Master's it just gets thrown out.

QUESTION: It was just a total useless exercise under his definition?

MR. CAROOM: It was entirely discarded, as is the rest of the original engineering report.

With the Court's permission I would like to reserve the rest of my time for rebuttal.

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

Mr. Simms, I think you may proceed when you are ready.

ORAL ARGUMENT OF RICHARD A. SIMMS, ESQ.,

ON BEHALF OF THE DEFENDANT

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

I would like to respond quickly to your concern, Mr. Justice Stevens, and try to explain to you just what that 41-column routing study is and its relation to the question of whether or not the 1947 Condition is real or artificial.

That question appears as Item No. 4-A in the Master's pre-trial order of October 31, 1977. Under Item 4-B of that pre-trial order there were 11 additional issues that were raised, each of which related to whether or not the original 1947 Condition study as it appears in Appendix A in the Special Master's report should have been corrected factually and engineeringly.

The first one of those issues related to the use by the Pecos River Commission in its restudy of the Condition in the 'Fifties of revised USGS stream flow records. The stream flow data that was originally available did not change but the USGS had determined that it was improperly reported. The accuracy of the revised data was not disputed by the parties. Well, the errors in the original study show up most conspicuously in Appendix A in columns 1, column 13, column 25 and column 35. Those are the columns which were designed to describe, in effect, the rainfall and the snow

melt. To give you an example of the magnitude of the difficulty, New Mexico's Exhibit No. 37 before the Master shows that 54 percent of the monthly calculations in column 1 in the original study were significantly in error.

Well, the net effect of that was to mathematically put more water in the river into Stateline than would have gotten there under the 1947 Condition for each of the historic years that they attempted to route water down the river through that Condition. And that Condition is all of the reservoirs on the stream, three major reservoirs, the channel losses between the reservoirs, all of the diversion works and the irrigation depletions that actually existed in the Basin in '47.

Another of those 4-B issues that are still back before the Master relates to column 12 in the routing study in Appendix A. That is artesian inflow and that relates to that part of the study that attempted to describe channel gains and losses between Alamogordo Reservoir to the north and McMillan Reservoir to the south, while the Pecos River Commission determined that the original study put about 9,600 acre-feet per year too much into the river resulting in a corresponding Stateline exaggeration of New Mexico's delivery obligation of approximately 4,300 acre-feet.

In other words, if the agreement embodies in the Compact is the actual 1947 Condition as opposed to its first attempted

description the use of the erroneous description would administratively add about 4,800 acre-feet annually to New Mexico's obligation.

Another of those 4-B issues relates to column 10 in Appendix A and that relates to channel loss between Alamogordo Reservoir to the north and a gage called Acme.

QUESTION: Alamogordo is up by Fort Sumner?

MR. CAROOM: That is correct.

The Pecos River Commission in its study in the 'Fifties determined that the original Appendix A study showed that the losses were about 16,500 acre-feet per year too small. Well, that had the corresponding effect of inflating New Mexico's obligation under the Compact. If you look to column 16, that relates to salt cedar depletion in a delta area above McMillan Reservoir. There the Pecos River Commission and the engineer advisors to the Commission determined that the original study understated the depletion by 23,900 acre-feet a year. Just above that on the Exhibit -- stipulated Exhibit No. 2 is column 14. That relates to farmers pumping water out of the river. There the Pecos River Commission and the engineer advisors determined that the original study -- in the original study the wrong acreage was used and also the wrong depletion rate was used. That had the mathematical effect of deflating column 14 by about 6,500 acre-feet a year and inflating column 41 at the

State line by a corresponding amount.

QUESTION: General Simms, I understand that -- I think everyone agrees that had the true facts been known and been reflected on the chart here the net effect would have been favorable to New Mexico rather than Texas, which I guess is the burden of what you are saying, if they had not made mistakes in some of their estimates and projections and so forth.

But how does that meet the argument that the purpose of the chart was to define a point of reference which is specifically referred to in the Compact?

MR. SIMMS: The purpose of the routing study was twofold. It serves one purpose in the administration of the compact. There it becomes the backbone of what is called the inflow-outflow technique. In the negotiation period what they did was finally decide to freeze conditions in New Mexico as of 1947. That is all thoroughly explained by Royce Tipton.

QUESTION: But why, for example, did they extrapolate as to what they thought the conditions were in 1905 and 1906, thought those conditions would have been if the physical developments that were in place in 1947 had been in place earlier. Why did they do that? Why didn't they just leave it open and say let's figure these things out as we go along.

MR. SIMMS: They did it first of all because all of the engineer advisors thought it would be unwise to predicate this Compact on what is called a schedule, that is, you know, so much water coming in up here that means that so much water has got to go out here. You simply right that down and you enter an agreement. The hydrology of the river is too complicated largely because of all of the phreatophytes on the river and the difficulty they were having there, which we will discuss in a moment.

What they did was use the Condition as a way of freezing development in the State of New Mexico and then they ran that Condition of frozen development through year historically between 1905 through 1946 when they ran out of data at the time and attempted to assess by doing that how the river would have behaved historically given the existence of the '47 Condition. It was that real live Condition on the stream that they wanted to look at and they wanted to get some idea of how the river would behave in future years.

QUESTION: Looking backward they felt would give them some added capacity to predict as to the future behavior?

MR. SIMMS: That is correct.

But importantly though the nature of the agreement was not the first routing study that described it but rather the Condition that described the frozen conditions as of 1947.

Royce Tipton was the engineering advisor to the Federal representative during the negotiations. That is precisely the way in which he explained the final compromise in the litigation.

What the Pecos River did though, it started out and had difficulty trying to make the Compact work, in effect. There was a large difficulty with what is called the inflow-outflow manual which is an administrative tool used to engineeringly arrive at inflows for administrative years and then to come back and plug them into a curve that was created as a result of the 41-column study.

Before we take the exhibit out let me point out one area on the map and that is between Roswell and Artesia. You will notice there an area shaded in green. That area is supported by groundwater pumping that has a lot to do with the second half of this case and that is the problem of base flow diminution and the difficulties with water salvage.

QUESTION: Is it correct that this Exhibit 8 of the Master's report is a part of the report of the Engineering Advisory Committee?

MR. SIMMS: It is. And I was going to go straight to your question about Article 2-G.

QUESTION: Right. I want to know what your view of the significance of the second sentence in the article is

and I don't find the Master as satisfactorily explaining that.

MR. SIMMS: The second sentence reads, I believe: The term 1947 Condition means that situation in the Pecos River Basin as described in the report to the Engineering Advisory Committee.

QUESTION: No, the next sentence.

"In determining any question of fact hereafter arising as to such situation reference shall be made to and decision shall be based on such report."

MR. SIMMS: That is true.

QUESTION: Now, he is not doing that, is he?

MR. SIMMS: No. He is, precisely. Texas is not doing it. What Texas does is to look at the report and then say examination of the report of the Engineering Advisory Committees shows that the 1947 Condition is just the name of that routing study. That is not true. Article 2-G defines the report. It is much more than that routing study. Indeed, the first statement in the report of the Engineering Advisory Committee about the 1947 Condition is, and I am quoting:

"The 1947 Condition is all actual present conditions on the river."

That statement was made on January 14, 1948.

Article 2-F defines the breadth of the report.

It is much more than Appendix A. It says:

"The 1948 report of the Engineering Advisory Committee includes that report, the appendices thereto, the basic data and processes and analyses used in preparing it, all of which were reviewed, adopted and approved as shown in the minutes of the meeting of December 3, 1948."

There Royce Tipton explained this Compact to the negotiators and to the Commissioners. Each provision of the Pecos River Compact was explicitly adopted subject to his explanation. In explaining Article 2-G he said the 1947 Condition relates to a condition on the stream. There were certain conditions of the river such as the diversionary requirements of the Carlsbad project, the salt cedar consumption, the reservoir capacities that existed in 1947, the operation of the Fort Sumner project up to 6,500 acres and the operation of all other projects on the stream as they actually existed in 1947.

I don't think there is a clearer statement that the 1947 Condition as envisaged by the engineer advisors and the Commissioners who finally signed the Compact was indeed the reality on the stream.

Perhaps the most compelling bit of evidence that should persuade the Court that New Mexico's view of the 1947

Condition and the Master's view of the 1947 Condition is correct is the fact that the Pecos River Commissioners, all of the engineer advisors involved in the negotiation of the Compact themselves sought to correct that description before they personally believed that they should do any administration under the Compact.

I would point out that the people that corrected it, the deadwood is called the review of basic data and ended up with what is shown as Appendix B in the Master's report a second description of the 1947 Condition. Those were the same actors working on the Commission -- working for the Pecos River Commission in the 'Fifties as were there negotiating and adopting the Compact in 1949.

Well, the legal side of this question relates to the power of the Pecos River Commission to make the corrections it actually made. We feel that that is answered clearly and conclusively by Article 6-C of the Compact and that reads:

"Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method as described in the report of the Engineering Advisory Committee shall be used to determine the effect on the State line flow of any change in depletion by man's activities or otherwise."

When Mr. Tipton talked of that article he said

the way the Pecos Compact is written the Commission has full authority to change the method or perfect the technique so long as what is done by the Commission is something directed at the determination under Article 3-A. To avoid or to obviate the significance of Article 6-C, what Texas tries to do is draw a distinction between the routing study as it is used administratively in the Compact and what is called the inflow-outflow technique of administration.

Well, you can't do that. The only utility of that routing study in the actual administration of the Compact is to construct an inflow-outflow plate, a plate that you can -- in administrative years you go out on the river, you gather up inflow data for three years running, you go back to this plate and plug into the inflow side of the plate and you come out with an indicated outflow that should define New Mexico's obligation. Well, the routing study for administrative purposes is as integral a part of the technique as is the gathering of data during administrative years. Indeed, it is the very backbone of the inflow-outflow method.

Well, if you throw out the inflow-outflow method as the Commission is expressly authorized to do by Article 6-C you throw out the whole inflow-outflow manual. You also throw out Plate 2 and you also throw out the routing study, at least for administrative purposes.

What you are left with is the 1947 Condition on the stream which is precisely the same condition that the engineering advisors tried to better ascertain by attempting to correct the engineering input into the inflow-outflow method instead of totally abandoning the method and starting off with something else.

This answer that I am giving you is precisely the same answer that the Attorney General of Texas gave to the Texas Water Rights Commission in 1969. The cooperative work of the Pecos River Commission was sought to be repudiated unilaterally by the Texas River Commissioner not until 1974. But to start his efforts he requested that the Texas Water Rights Commission put this very question to the Attorney General of Texas. He answered it in precisely the same way I just answered it for the Court.

The legal advisors to the Pecos --

QUESTION: Is that --

MR. SIMMS: Yes, it is. It appears -- it is Texas Attorney General M-535, it is dated December 5, 1969. I would refer you to pages 2547 to 2551 of that.

Texas also tries to rely on Article 6-A. There Article 6-A reads:

"The report of the Engineering Advisory Committee supplemented by additional data hereafter accumulated shall be used in making

administrative determinations."

Well, Texas emphasizes the phrase "in making administrative determinations." If you look at the simple grammar of that article what is supplemented is the original report, not the data, that is picked up and gathered during the administrative period. That also comports with Mr. Tipton's explanation that the Pecos River Commission, and I am quoting him, "as time goes on may more nearly perfect the curves which appear in the Engineering Advisory Committee report.

Well, the administrative history we think is clear. Texas tries to distinguish somehow between what happened before 1957 and what happened after 1957. We don't think that distinction is tenable and there the record will not support it. We would refer you to pages 11 through 26 of our reply brief and 20 through 41 of the brief in support of our objections.

Also to agree with Texas' objection in this regard would be to condone the attempted unilateral repudiation of bilateral Compact action. I believe this Court has consistently though it has only had a couple of occasions on which to do it, but it has consistently voided any unilateral State action designed to define obligations under Compact.

In *Dyer v. Sims* the West Virginia Supreme Court tried to relieve West Virginia of its obligations under a multi-

State Compact.

Here no coordinate branch of the Texas State government tried to do it; the Texas Pecos Commissioner tried to do it himself. He never made a motion before the Commission and certainly no effort was made to revoke the Compact pursuant to Article 14 of its terms by seeking the State's revocation of their ratification.

Texas has argued we believe wrongly on the law that well, both States are simply stuck for the study. I would point out another error in the inflow-outflow manual that if we were stuck with, as the Master has ruled, that needs to be corrected as well. If we were stuck with that, it would by Texas' own analysis cost them 42,000 acre-feet per year.

I think the answer to the fact that we aren't stuck with the study derives simply from the fact that the 1947 Condition is not what you see in Appendix A.

Well, the other half of this case relates to base flow diminution and the problem of water salvage. And I think that is really why we are here. We aren't here because there has been a bunch of gluttonous development in New Mexico since 1947, we aren't here because of changes in depletions in New Mexico since 1947. We are here because of the failure to offset anticipated declines in the flow of the river by water salvage.

Toward the end of Compact negotiations the engineer advisors advised the Commissioners of two facts, essentially, that in the McMillan Delta above that reservoir was a huge floodway of phreatophytes, phreatophytes that were non-beneficially consuming about 39,000 acre-feet of water each year. They knew that there was some likelihood of salvaging water from that ratification.

On the other hand, they knew that the pumping in the area that I showed you on the map, the area between Roswell and Artesia, if continued at the depletion rate of 1947 would ultimately decrease the base flow of the river just below there approximately 40,000 acre-feet a year.

Well, what they attempted to do was come up with a mechanism, a remedial mechanism to keep the river whole over time.

Well, the real reason we are here today is because there has not been effected any water salvage, and that is the problem. The whole scheme was to make it so that according to Article 1 of the Compact we could maintain the uses not just in New Mexico but in both States.

Our objection to the Master's report in this regard goes to his failure, in our view, to really appreciate the issue. He did not weigh in the balance the water salvage provisions on the one hand and the base flow diminution problem on the other hand.

In response to our objections before him in that regard he said that salvage has nothing to do with the 1947 Condition. Well, quite the contrary, Article 3-A says that New Mexico shall not deplete the flow of the Pecos River at the State line below an amount which will give to Texas a quantity of water equivalent to that available under the 1947 Condition.

Now, it is that concept of equivalence that facilitates the substitution of source of supply in New Mexico as base flow declines with water salvaged. The intent again was to keep the river whole over time and the Compact, as I say, is essentially remedial in nature.

The question of what happens when salvage is not effected to offset that base flow diminution is not addressed by the Compact. There is testimony on it by John Erickson. He was asked the question of what happened and he said, "I don't think they ever considered it. If the Compact worked as anticipated, you wouldn't get to the problem."

Well, all you can do is look to the salvage provisions of the Compact. They mandate in Article 4 cooperative salvage. When Mr. Tipton explained the Compact he said that the Compact by its terms mandates salvage in order to make it work.

Also I would point out that the record shows that the New Mexico legislature would not have ratified the

Compact if that burden is not shared. The alternative would have been an immediate and very drastic cutback in irrigated acreage in New Mexico.

While Texas has referred to our construction of the Compact as ludicrous in saying that it removes salvage from the realm of possibility, well, that was precisely the design of the Compact over time, 40 years from when the Compact was ratified, that is exactly what they contemplated, they would have salvaged enough water from eradicating phreadophytes to offset the base flow diminution. And from that point on everybody would have lived happily ever after. Well, the consequences unfortunately are that both States are suffering. Texas is not bearing this burden alone. There has been a drastic water shortage in the State of New Mexico and continues to be. Shortage is a fact that crosses the State line and I think obviously transcends the sovereignty that generated this litigation.

Finally, there is one other matter in issue, one other matter to which we objected, and that is the Master's conclusion that the 1947 Condition though albeit reality should have ended December 31, 1946. Well, he reached that as a supposition. He said because in the original study they only used the period 1905 to 1946 the engineers must have intended to exclude the year 1947. Well, in this regard we would like to rely on our briefs but I do want to

respond very quickly to six items in Texas' reply brief.

First, Texas argues that phrases like "in 1947" and "during 1947" were simply loose references or convenient shorthand. Well, they are very anomalous loose references and convenient shorthand. On the contrary, if they wanted a 1946 Condition they would have so named it.

Texas also states that there is no evidence in the record to support the fact that the 1946 photographs that we talked about were interpolated against 1946 photographs to better ascertain the 1947 Condition. Texas argues aside from the accusation that they were really after salt cedar acreage and salt cedar acreage alone. Well, the fact of the existence of the photographs to which we referred you will find in stipulated Exhibit No. 4 and the fact that they were interpolating to determine irrigation in 1947 as well as salt cedar acreage you will find in stipulated Exhibit No. 6 both of them.

QUESTION: Do you think the '47 Condition referred to a certain day?

MR. SIMMS: It did not refer to a certain day but the engineer advisors and the Commission itself in doing the review of basic data used all of the '47 Condition -- or I mean all of the 1947 data that actually became available when they did the final review --

QUESTION: So you think it is December 31 --

MR. SIMMS: That is right. They used data --

QUESTION: -- '47?

MR. SIMMS: Not through the water year. Well, they themselves used data in the calendar year 1947. That has to tell you that 1947 was indeed a part of the 1947 Condition.

If you will look --

QUESTION: If you took the view that it is an artificial condition as defined in the report, the date really is immaterial.

MR. SIMMS: I am sorry, I did not hear the question.

QUESTION: I am sorry.

I say if one took your opponent's view that the condition is that defined by the report and the exhibits, then it doesn't really matter what the date is.

MR. SIMMS: That is correct.

QUESTION: Yes.

MR. SIMMS: Then all the errors, the erroneous description and everything else as it were is the Compact. The parties to the Compact themselves however did not have that view, as their actions we think unequivocally demonstrate.

Texas also says that in Plates 5 through 10 in the inflow-outflow manual the inclusion of 1947 data was insignificant. Well, those plates were reach by reach inflow-outflow routing studies to determine the 1947 Condition.

They did indeed include the year 1947 in those individual curves. If they did not want the year 1947 to be a part of the base line curve against which you would later make administrative determinations there is no reason why you would have included that data except to conclude that the year '47 is a part of it.

Also in the review of basic data itself undertaken over a number of years Texas simply says the review of basic data on this point is dubious. Well, it is not dubious at all. It shows the contemporaneous understanding of the parties. They are the same actors involved in all of this, the entire review was orchestrated by Royce Tipton who was an internationally famous hydrologist and the advisor to the Federal representative on this Commission.

Texas makes a fifth point saying that well, the first administrative years, the first administrative determinations were done through the three-year period 1947 to 1949. Well, the simple answer to that is the Pecos River Commission later determined that they should not have done that.

One final point, Your Honors, New Mexico tendered evidence on this subject and the Master concluded that that evidence was speculative. Our witness was John Erickson. New Mexico's advisor, engineering advisor to the negotiating Commission. He said the simple reason they didn't use it

then was because they didn't have it. If they did have it they would have used it.

We would suggest quite the contrary, that it was the Master's supposition that it was speculative and not at all with John Erickson whose testimony the Master described as speculative.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Caroom?

REBUTTAL ARGUMENT OF DOUGLAS G. CAROOM, ESQ.,
ON BEHALF OF THE PLAINTIFF

MR. CAROOM: Yes, Mr. Chief Justice.

Let me initially touch upon a point Mr. Simms has recently made saying that the players in the review of basic data, the people who conducted the restudy of the 1947 Condition routing study were the negotiators, the same people who did the Compact and that this has some special significance. That is simply wrong. The players up until 1957 were very much the same. Now, in my brief I go through the history up to 1957. But what we have basically is a document called the in flow-out flow manual that gives you directions for figuring out each year whether or not New Mexico has complied with their obligation. That document has some mistakes in it. It wasn't even drafted and available until after the Compact was signed. Now, that

document, the in flow-out flow manual caused problems in the early administration of the Compact. And the engineers, the same ones who worked on the Compact, participated in an effort to review that document and to rewrite it and conduct an accounting as it should have been done under the original report. That was done by a subcommittee of the Engineers Committee in 1957. It showed New Mexico 128,000 acre-feet behind in deliveries and it was turned down by the Engineering Advisory Committee.

Now, it was turned down because the New Mexico representative voted against it. The New Mexico representative was a State engineer who had recently come in and had nothing whatsoever to do with the negotiation of the Compact.

The subsequent engineering study which took place from '57 to '60 was so far as New Mexico was concerned directed by that same State engineer. The Texas engineer who had worked on the original studies did not participate in it and in fact he died mid-way through it.

QUESTION: I take it that the Special Master was aware of these factors. Perhaps he didn't give them the significance you think they deserved. But he was aware of all of them?

MR. CAROOM: He was.

I think the key to the Special Master's treatment

of the engineering report is to his own admission very forthrightly in his report that he doesn't understand this. He says this is a legal question, I am going to rely on my technical assistant to solve the engineering questions. I am treating this as a legal question.

But in spite of that it appears that a major factor in the Master's decision was his perception that something was wrong with the original report. Now, we had a witness, Frank Dowell, who was head of USGS in the Western United States, or assistant head, who testified he independently reviewed it, it was a good study, it was workable, it was checked by the engineers who did it at the time and it looked good. It was independently checked by Mr. Bell subsequently when he was retained by the State of Texas and he was convinced it was a sound, workable study.

The subsequent engineering study has more bells than whistles, it is fancier, the engineers think it is a better product. But it is definitely biased; it is definitely biased to reduce deliveries to New Mexico.

Now, let me respond briefly. Mr. Simms attempted to give an explanation for the second sentence of Article 2-G. He said the Engineer Advisors Committee report includes more than the routing study. Now, this is discussed at a little bit of length in my brief but the only part of the Engineer Advisors report that defines the 1947 Condition.

is the routing study. There is the inflow-outflow manual that was adopted after the Compact.

QUESTION: That by the way is the only matter attached to the Master's report that has any 1947 data in it. The routing study doesn't have any '47 data in it, does it?

MR. CAROOM: There are two documents attached to the Master's report.

QUESTION: Yes.

MR. CAROOM: The first is the summary of operations under the original river routing study by the engineers in 1948. The second document which is attached to his report is the counterpart of that exhibit which was produced by the review of basic data in 1960 or '61.

QUESTION: Yes.

The Master says that none of the river routing studies presented to the Compact negotiators covered 1947 data.

MR. CAROOM: That is correct.

QUESTION: And that is primarily why he chose the first of the year?

MR. CAROOM: That is correct. That data was not available to them when they did it and none of the studies have any '46 data whatsoever.

QUESTION: Right.

MR. CAROOM: And the condition was agreed upon without it.

Let me make one other brief point. Mr. Simms said this in flow-out flow manual cannot be separated from the routing study and he apparently sold Judge Breitenstein on this idea. And it is just flat wrong. The in flow-out flow manual is an instruction manual that tells you how to do the annual computation. It tells you what the steps are to use the 1947 Condition routing study and compare the annual deliveries on the river to see if there has been compliance. The in flow-out flow manual has errors in it, it left out part of the water coming in below, the Alamogordo Reservoir down to Acme; it just flat left out that part. It was a mistake and it made other mistakes.

But the standard is there in the routing study without the in flow-out flow manual.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

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