

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO.	65 Orig.
TITLE	STATE OF TEXAS, Plaintiff v. STATE OF NEW MEXICO
PLACE	Washington, D. C.
DATE	March 30, 1983
PAGES	1 - 48



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STATE OF TEXAS, :

4 Plaintiff :

5 v. : No. 65 Orig.

6 STATE OF NEW MEXICO :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, March 30, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:10 o'clock a.m.

13 APPEARANCES:

14 R. LAMBETH TOWNSWEND, ESQ., Assistant Attorney General of
15 Texas, Austin, Texas; on behalf of the Plaintiff.

16 CHARLOTTE URAM, ESQ., Special Assistant Attorney General
17 of New Mexico, Santa Fe, New Mexico; on behalf of the
18 Defendant.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in the original jurisdiction case, the State of Texas against the State of New Mexico.

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

ORAL ARGUMENT OF R. LAMBETH TOWNSEND, ESQ.
ON BEHALF OF PLAINTIFF

MR. TOWNSEND: Mr. Chief Justice and may it please the Court, this is a suit to enforce the Pecos River Compact. Texas and New Mexico intended the Compact to equitably apportion the waters of the Pecos River between the states. The Compact contemplates continuing administration of the Pecos River in conformity with the terms of the Compact.

The Compact imposes upon New Mexico, the upstream state, the obligation not to deplete by man's activities the state line flow below that available to Texas under the 1947 condition.

The controversy between the states as to the meaning of the 1947 condition precipitated this lawsuit. The Special Master rejected the conflicting contentions of the states concerning the 1947 condition and defined the 1947 condition in his 1979 report. His 1979 report was confirmed in all respects and his

1 definition of the 1947 condition was approved.

2 Since that time, we have been attempting to
3 translate the definition of the 1947 condition into
4 water quantities to provide a numerical standard by
5 which compliance can be measured. The states disagree
6 as to the procedure to implement the definition of the
7 1947 condition. As a result, numerous hearings have
8 been held and the Master has issued his report and
9 recommendations.

10 The Master has recommended that the New Mexico
11 motion to dismiss the suit be denied, that the Texas
12 motion to substitute the double mass analysis for the
13 river routing as the accounting procedure be denied --

14 QUESTION: But without prejudice to the --

15 MR. TOWNSEND: Without prejudice for further
16 consideration at the Commission.

17 Also, he recommended that the United States
18 representative on the Pecos Commission or some third
19 party be vested with the power to participate in
20 Commission deliberations and to vote when the states are
21 not able to agree.

22 He then recommended that the matter should be
23 returned to the Commission for the performance by it of
24 its duties and that the Court retain jurisdiction.

25 QUESTION: Mr. Counsel, do you think the

1 Master rejected Texas' motion to use the double mass
2 analysis on the merits, or did he just decide that it
3 shouldn't be decided until other issues are resolved?

4 MR. TOWNSEND: I do not believe that he
5 rejected the double mass on its merits.

6 QUESTION: The language is unclear, is it
7 not?

8 MR. TOWNSEND: It's -- the Master found the
9 double mass to be an accounting procedure useful in the
10 inflow-outflow method. However, he was concerned about
11 some language that the engineer advisors to the Compact
12 negotiators used in their report, and based on their
13 statement the allocation shouldn't be based on a
14 straight line he felt it was not proper for him to use
15 the double mass.

16 Texas contends that Texas has addressed the
17 concerns of the engineer advisors and that double mass
18 is based upon a curvilinear basis as opposed to
19 straight-line percentage. Texas believes that the
20 Master has not rejected the double mass on its merits.
21 He -- there are not sufficient findings in his report to
22 reach that conclusion.

23 The primary position of Texas is that this
24 suit not be dismissed and that the Court retain
25 jurisdiction so that the disputes between the states may

1 be resolved by whatever means the Court deems
2 appropriate. If the suit is dismissed, Texas' only
3 alternative is to take -- to try to take steps to
4 institute an equitable apportionment of the waters of
5 the Pecos River between the states.

6 However, Article XIV of the Compact provides
7 that it takes the action of the legislatures of both
8 states to terminate the Compact. So this Compact
9 provision may prevent Texas from seeking the remedy of
10 equitable apportionment. However, Texas believes that
11 this Court has jurisdiction to continue the suit to a
12 complete resolve of the disputes concerning the
13 Compact.

14 Texas accepted the Master's recommendation
15 that a tie-breaker vote be placed upon the Commission.
16 This was not a Texas idea. Texas has never argued this,
17 but Texas accepted that as a practical solution to an
18 ongoing problem. Because this is not a Texas idea, we
19 prefer to rely upon the argument of the Master contained
20 in his report for support of that recommendation.

21 Texas would like to move to its alternative
22 exceptions in the event the Court does not accept the
23 Master's recommendation that a tie-breaker vote be
24 placed upon the Commission.

25 QUESTION: In other words, you feel we have

1 the power to impose that tie-breaker proposition, even
2 though this is a compact between states?

3 MR. TOWNSEND: Yes, Your Honor. We feel that
4 you do have the power to do that because it would carry
5 out the express intent and purpose of the Compact, and
6 those primary purposes were to provide an equitable
7 apportionment of the use of the waters, and to remove
8 the causes of present and future controversies.

9 QUESTION: What is the basic trouble with the
10 Commission? Why can't the states' representatives
11 agree?

12 MR. TOWNSEND: As the Master has found, the
13 good faith differences as far as engineering judgments
14 as to the procedure to implement or to determine whether
15 or not compliance with the Compact is continuing.

16 QUESTION: Certainly the Compact is deficient,
17 isn't it, in this respect?

18 MR. TOWNSEND: It's deficient. This
19 particular compact, like many other compacts, provides
20 for a unanimous vote, and there are no mechanisms to
21 resolve impasses when the commissioners cannot agree.

22 QUESTION: So the -- either you appoint a
23 tie-breaker or you make the determination yourself that
24 the Commission should make.

25 MR. TOWNSEND: Your Honor, I believe that the

1 Court --

2 QUESTION: That's your second suggestion,
3 isn't it?

4 MR. TOWNSEND: Our second suggestion is that
5 the Court retain jurisdiction and as --

6 QUESTION: And proceed to determine the --

7 MR. TOWNSEND: Whether or not New Mexico has
8 fulfilled its obligations. That necessarily requires --

9 QUESTION: And to do that despite the fact
10 that the Compact calls for that decision to be made by
11 the Commission?

12 MR. TOWNSEND: The Commission is granted the
13 power to make certain factfindings concerning the
14 obligations.

15 QUESTION: But you think we have the authority
16 to take the place of the Commission in that respect?

17 MR. TOWNSEND: Yes, Your Honor, because --

18 QUESTION: Just like we have the authority to
19 appoint a tie-breaker, you think.

20 MR. TOWNSEND: Well, I think it's within this
21 Court's jurisdiction to fashion remedies to resolve the
22 dispute.

23 QUESTION: Yes. All right.

24 QUESTION: Well, where is -- what's the source
25 of our authority to appoint a tie-breaker? It's not the

1 compact itself by construction, is it?

2 MR. TOWNSEND: It's not -- you're right --

3 QUESTION: You can't construe the compact as
4 authorizing?

5 MR. TOWNSEND: Not any specific terms other
6 than --

7 QUESTION: Well, then, what do you think is
8 the source of our authority to appoint a tie-breaker?

9 MR. TOWNSEND: According to the Master, it's
10 your equitable powers to do the essence of equity, is to
11 do equity and fashion a mode.

12 QUESTION: Well, he cited nothing to support
13 that. Do you have anything to suggest?

14 MR. TOWNSEND: The only other thing that I
15 have to suggest that is the case of Virginia versus West
16 Virginia, which has been cited by the parties for the
17 proposition that the Court can enforce its judgments
18 even though that may require or involve state
19 governmental instrumentalities.

20 QUESTION: And you don't think that's
21 different in the case of -- don't you think that's
22 different where the states themselves have entered into
23 a compact? If this had just been a dispute between the
24 states, I could see the merit in your argument, but is
25 that true when there's a compact that the states have

1 entered into?

2 MR. TOWNSEND: Well, in Virginia versus West
3 Virginia there was a compact, and the court, in reaching
4 its conclusion, held that the congressional power to
5 consent to agreements between the states necessarily
6 implied the congressional power to legislate an
7 enforcement of that compact. But the court determined
8 that the fact that Congress can legislate a solution
9 does not prevent the court from exercising its
10 jurisdiction under Article III to resolve a controversy
11 between the states.

12 QUESTION: When you strip the form away from
13 this idea of a tie-breaker, wouldn't the tie-breaker in
14 effect be a super-special master who would merely advise
15 this Court in which way to break the tie?

16 MR. TOWNSEND: I would envision the
17 tie-breaker to be an ongoing participant in the
18 Commission.

19 QUESTION: Well, then it would be contrary to
20 Vermont against New York and to other cases from this
21 Court.

22 MR. TOWNSEND: If he's viewed as an arbiter,
23 yes.

24 QUESTION: As a super-special master
25 particularly with --

1 MR. TOWNSEND: Exactly.

2 QUESTION: Certainly then it would be outside
3 of our decisions entirely.

4 MR. TOWNSEND: I agree. I believe the
5 Master's idea is a novel one and we are not
6 necessarily --

7 QUESTION: Don't we have to declare the
8 compact unenforceable, non-enforceable?

9 MR. TOWNSEND: To do --

10 QUESTION: I don't see how we can act under
11 the compact. If you get rid of the compact, then I
12 could understand, but to say that we are a tie-breaker
13 under the compact to me is not quite correct, because
14 it's not mentioned in the compact.

15 QUESTION: Where would you find the authority
16 to -- where would you find the authority to, if we
17 didn't appoint a tie-breaker, to go ahead and exercise
18 the authority of the Commission?

19 MR. TOWNSEND: Well, I believe that it's a
20 controversy between the states, be it, even though the
21 Compact is involved, is within the Court's jurisdiction
22 under Article III, controversies between the states.

23 Texas has alleged that New Mexico has violated
24 the Compact. In order to determine whether or not New
25 Mexico has violated the Compact, there must be an

1 implementation of the Master's definition of the '47
2 condition to create the numerical standard by which
3 compliance can be measured.

4 QUESTION: Well, why would this be much
5 different -- why is what Texas is asking much different
6 than saying there is a dispute between New Mexico and
7 Texas over the apportionment of water and just like if
8 you're litigating that without a compact you would look
9 at the boundary that Congress has established between
10 Texas and New Mexico to decide, you know, where the
11 Pecos flows from New Mexico into Texas?

12 Here, in addition, you've got another statute
13 of Congress, a compact, which says something about the
14 water rights in the states. Why couldn't the Master
15 simply treat that the same way he does the boundary
16 statute and say we've got two Federal statutes here and
17 we've got to work with them?

18 MR. TOWNSEND: I believe that he can, and that
19 has been our -- that's the argument of our alternative
20 exceptions, that the determination of the measure is
21 necessary in the inquiry of has there been a violation
22 of the Compact, and in Texas' opinion that is a judicial
23 inquiry, a judicial function and was stated in Prentiss
24 versus Atlantic Coast Lines, 211 U.S. 210, a 1908 case.

25 We have not cited that, but in that case it

1 states that a judicial inquiry investigates, declares,
2 and enforces liabilities based upon past or present
3 facts and under existing law. And I believe that Texas
4 contends that that is the situation with this law suit,
5 that the Compact could have been written without a
6 Commission to make a factfinding, and it would have
7 been -- the duty would have been upon the states to do
8 their own accounting to see that there was compliance,
9 and if the states felt like there was non-compliance
10 then its remedy is exactly what it is today under the
11 Compact.

12 QUESTION: If one state accuses the other
13 state of violating the compact, the only way you can get
14 redress is for the other state to admit they did wrong.
15 Is that what the Compact says?

16 MR. TOWNSEND: Well, Your Honor, I think it
17 would also encompass us proving that the other state did
18 wrong. The Compact provides that the findings of the
19 Commission are not conclusive in any court. It
20 specifically provides that, so the Compact negotiators
21 were anticipating court action to enforce the Compact.

22 There are no enforcement powers in the Pecos
23 River Commission as enforcement powers are in the usual
24 range of federal administrative agencies and others.

25 QUESTION: Well, is there anything more to it

1 than verbiage about a tie-breaker? Suppose it said that
2 I just will decide this as the Master and he had not
3 said a tie-breaker.

4 MR. TOWNSEND: We have been requesting the
5 Master to do exactly that, Your Honor.

6 QUESTION: That's what I thought.

7 MR. TOWNSEND: And we have argued that the
8 Court should make that decision, that it can make that
9 decision, but we accepted his recommendation because it
10 seemed to be a practical solution.

11 The -- Texas is, as I said --

12 QUESTION: May I ask you a question right here?

13 MR. TOWNSEND: Yes, Your Honor.

14 QUESTION: Is it correct that what the
15 tie-breaker would do would be to resolve disputes on
16 some of these underlying findings, how much water was
17 available in 1947 and so forth? Is there any issue that
18 you would submit to the tie-breaker that the Master
19 could not himself decide if he didn't suggest that he
20 wasn't -- didn't have the expertise to do so? He has
21 this rather strange paragraph in his opinion, that it's
22 an awfully tough case and he doesn't have the expertise
23 to decide it.

24 MR. TOWNSEND: That's right, Your Honor.
25 Texas believes that the Master can make any of the

1 decisions necessary in determining whether or not the
2 Compact has been violated.

3 QUESTION: It would seem to me that both sides
4 really are in agreement on that, if I'm not mistaken.
5 The only person who's balking is the Master.

6 MR. TOWNSEND: It appears to be, Your Honor.
7 That's the case. The United States has --

8 QUESTION: The United States says the same
9 thing.

10 MR. TOWNSEND: -- contends that this Court has
11 jurisdiction to continue the law suit and to make all
12 necessary determinations in that suit.

13 QUESTION: How many days has he actually spent
14 in hearings on this case since it was last here?

15 MR. TOWNSEND: Last March we had approximately
16 two weeks of hearings and I became involved in the suit
17 in 1981 and we have probably had a total of 15 days of
18 hearing.

19 QUESTION: And during those hearings have you
20 -- have they been spent receiving evidence or has a lot
21 of the time been devoted to negotiation and argument?

22 MR. TOWNSEND: The last two weeks -- the
23 two-week period in last March was receiving evidence,
24 and the evidence was that -- presented -- Texas
25 presented the double mass analysis as the accounting

1 procedure and then it submitted evidence as an
2 alternative a river routing procedure that it felt,
3 believed to be an accurate procedure that would
4 accurately depict that definition.

5 QUESTION: You didn't rest exclusively on your
6 double mass analysis, as I understood it. You had an
7 alternative theory of how to figure out the numbers,
8 don't you?

9 MR. TOWNSEND: We had an alternative theory,
10 and that's the double mass.

11 QUESTION: And that -- evidence pertaining to
12 that is in the record, but there's no resolution

13 MR. TOWNSEND: It's in the record. No
14 resolution. We were anticipating a resolution of those
15 issues in the report, but the Master has taken a
16 different tack.

17 QUESTION: Those hearings were pursuant to a
18 pre-trial order?

19 MR. TOWNSEND: Those hearings were pursuant
20 not to the original pre-trial order. Those hearings
21 were pursuant to an order that was issued, I believe, in
22 December of '81 and the hearings were in March of '82.

23 QUESTION: Mr. Townsend, the Compact itself,
24 in Article VI seems to indicate that unless and until a
25 more feasible method is devised and adopted by the

1 Commission that the inflow-outflow method will be used.
2 Would it be your position that if the Court were to
3 direct the Master to proceed, that notwithstanding that
4 clear provision of the Compact, that some other method
5 should be considered?

6 MR. TOWNSEND: Your Honor, the double mass
7 analysis is an inflow-outflow method. It is an
8 accounting procedure that can be used in --

9 QUESTION: Yes, except it says the method as
10 described in the report of the engineering advisory
11 committee will be used.

12 MR. TOWNSEND: All right. In respect to that,
13 what is described in the engineering advisory report is
14 a statement that the inflow-outflow method involves the
15 determination of the correlation between the index of
16 the inflow and the outflow from the basin. That, in the
17 view of the Master and in view of the Texas, is the
18 inflow-outflow method described and defined in the
19 report of the engineer advisors.

20 What also is contained in the report of the
21 engineer advisors is a river routing study that is what
22 we have been referring to throughout as the S.D. 109
23 river routing, which produced the Plate 2 standard of
24 measurement. In the 1979 report, the Master found that
25 river routing to be incorrect, inconsistent and

1 contained omissions.

2 Therefore, he held that river routing to be a
3 nullity and that is why he defined the 1947 condition in
4 the terms that this Court approved. So when you
5 revert -- the Compact specifically says that the 1947
6 condition is that situation described and defined in the
7 report of the engineer advisors, just like the language
8 in Article VI.

9 So by the Master's early ruling, he has made
10 that phrase, as described and defined in reference to
11 the river routing, a nullity. There is a void at that
12 point and Texas contends that the controlling language
13 is "shall use the inflow-outflow method" and then we
14 look at page 149 of S.D. 109, and that is where the
15 statement is that the inflow-outflow method involves the
16 determination that the correlation between the upstream
17 -- or the index of the inflow and outflow from the
18 basin.

19 Texas contends that if the Court were to
20 remand it back to the Master to proceed, then he is left
21 with the choice as to any inflow-outflow method to
22 depict the 1947 condition and is not restricted to a
23 river routing.

24 Texas proposed the inflow-outflow method
25 because the Master repeatedly expressed his concerns

1 about the river routing. The river routing has too
2 many, he continually said, the river routing has too
3 many unmeasured values, too many judgment-dependent
4 techniques. That has caused the problem between the
5 states and he was -- expressed his desire that some
6 other method could be used.

7 Texas proposed the double mass. The double
8 mass eliminates the judgment-dependent techniques and
9 eliminates the unmeasured values. And with that
10 understanding Texas proposed this as a solution and a
11 superior method to the laborious river routing.

12 The Pecos -- in regard to the claim that
13 continuation of the suit would require this Court to
14 perform administrative functions, Texas replies that
15 this is not -- this is a suit to enforce the Compact.
16 This is a suit to enforce Federal rights that are
17 created by the Compact, since it is the law of the
18 Union, and that it is completely a judicial function to
19 determine those rights, even though it may require
20 making those difficult decisions concerning the
21 engineering procedures.

22 Texas submits that this process is easier than
23 the difficult processes involved in an equitable
24 apportionment suit, because the Compact limits your
25 inquiry to a certain extent. Admittedly, it's not

1 simple, but it is not as difficult as an equitable
2 apportionment.

3 QUESTION: Did the Commission adopt the river
4 routing method ever?

5 MR. TOWNSEND: The Compact, yes, Your Honor,
6 they did. The Compact negotiators used the river
7 routing, and that was going to be the basis. And the
8 RBD -- excuse me.

9 QUESTION: That wasn't stated in the Compact.

10 MR. TOWNSEND: The Compact stated that the
11 1947 condition is that situation described and defined
12 in the report of the engineer advisors, and when you
13 look at the report of the engineer advisors there is a
14 river routing.

15 QUESTION: And has the Commission proceeded
16 on, purported to proceed on that basis?

17 MR. TOWNSEND: The Commission has not
18 proceeded very far, Your Honor, but they were attempting
19 to utilize the river routing in S.D. 109 from the
20 beginning of the Compact administration.

21 QUESTION: Well, why is it consistent with the
22 Compact to adopt another method for determining the 1947
23 condition?

24 MR. TOWNSEND: Because the Compact requires
25 the use of an inflow-outflow method and there are more

1 inflow-outflow methods than the river routing.

2 QUESTION: Although you say the legislative
3 history of the Compact indicates that the river routing
4 was anticipated to be the method to be employed.

5 MR. TOWNSEND: That was the method at that
6 time, in 1949. The double mass is an outgrowth -- I
7 think is a method that has been used by engineers, but
8 the present-day superiority of it is due to the fact of
9 the advancement and statistical analysis and to
10 computers and to the present day we believe that the
11 Commission should not necessarily be saddled with an
12 antiquated approach when there is something else
13 available.

14 QUESTION: May I ask, do you understand the
15 result of the first report in this Court's decision, the
16 last time the case was here, that entirely repudiated
17 the report of the Engineering Advisory Committee or just
18 said it shouldn't be controlling?

19 MR. TOWNSEND: I agree with the Master, Your
20 Honor, that he has found the RBD to have been adopted by
21 the Commission solely for the purposes of finding facts
22 between 1950 and 1961 and then, I think, '62, and not
23 used -- adopted by the Commission for future purposes,
24 accounting purposes.

25 So Texas submits that RBD has been utilized

1 for a limited period but not accepted as the standard
2 for the future and that the Master is correct in his
3 finding.

4 I have retained a few minutes for rebuttal and
5 if there are no further questions, I will --

6 CHIEF JUSTICE BURGER: Very well, Mr. Townsend.
7 Miss Uram.

8 ORAL ARGUMENT OF CHARLOTTE URAM, ESQ.

9 ON BEHALF OF DEFENDANT

10 MS. URAM: Mr. Chief Justice and may it please
11 the Court, Justice Stevens, you asked whether all sides
12 agreed that the Master could make all the necessary
13 determinations, and Mr. Townsend answered yes, and
14 that's correct, except that the parties disagree on the
15 nature of the Court's review and the extent to which it
16 can take action on behalf of the Commission or action
17 that's delegated to the Commission.

18 The Court here is presented --

19 QUESTION: But isn't it true that one of the
20 problems is getting an understanding of some of the
21 basic underlying facts -- how much water -- how much of
22 the water was flowing in 1947 and so forth? And the
23 Commission is supposed to make some of those findings
24 and has been unable to do so.

25 Is it not correct the Master could make those

1 factual findings if he would decide between the
2 contending parties?

3 MS. URAM: No, Your Honor. That is where we
4 disagree.

5 QUESTION: I see.

6 MS. URAM: The Court in this case is presented
7 with two very different ways of dealing with disputes
8 from interstate compact agencies. One way, New Mexico's
9 way, takes a standard administrative and statutory law
10 approach. The compact is a law. The commission is a
11 statutory agency and the Court's review is structured,
12 it is limited accordingly.

13 The other approach, Texas' approach, would
14 require the Court to get into the detail of disputes
15 between compact agencies and in instances rewrite
16 compacts, write rules and methods under compacts.

17 QUESTION: I take it from your brief and what
18 you say that you say we have no more authority to do
19 what Texas suggests or the Master has, that he has no
20 more authority to go forward than we have to appoint a
21 tie-breaker.

22 MS. URAM: That's correct -- not to do the
23 things that Texas asked. The Master can review the
24 decision that the Commission made. There is a
25 particular decision that the Commission made that

1 brought the parties to the court and was the subject of
2 this dispute for the first eight years of the case.

3 QUESTION: Well, then, how is this problem
4 going to be resolved? You say they can't agree. The
5 Master has no authority, and we have no authority to
6 appoint a tie-breaker.

7 MS. URAM: There is something for the Court to
8 review to resolve the dispute. Justice Blackmun asked
9 what the problem was here, and the problem here is that
10 the Commission made a decision. That decision, the
11 adoption of the review of basic data, is not a finding
12 of fact. And that decision is similar to an
13 administrative rule, a rulemaking by an administrative
14 agency.

15 It sets the standard to be applied to make
16 findings of fact and those findings of fact go to
17 whether New Mexico is delivering the correct amount of
18 water to Texas. So the Commission unanimously -- Texas
19 and New Mexico agree -- adopted this review of basic
20 data.

21 In 1974, over a decade after the Commission
22 had adopted it and begun drafting further documents
23 based on it, the State of Texas repudiated the review of
24 basic data and brought this law suit. The Court then
25 went on to determine -- to make various determinations

1 regarding the Commission's authority to adopt the review
2 of basic data after the Court in 1980 decided the
3 Commission had authority to make such a change. Texas
4 then raised dispute as to specific items in the review
5 of basic data. She complained about eleven specific
6 decisions. We are now down to four. We have only four
7 items remaining in that dispute.

8 New Mexico urges the Court to direct the
9 Master that his role is to review those four remaining
10 items as the Court reviews an administrative decision.

11 QUESTION: Miss Uram, the Master found that
12 the review of basic data was developed only for the
13 period of 1950 to 1961 and so it does not answer the
14 questions for the future. I mean, that was the Master's
15 determination.

16 MS. URAM: That's what the Master said, and
17 the first time he said it was in 1979 in his last
18 report, but at the time that he said it then he also he
19 had not yet reached the consequence of that decision or
20 that issue and indeed there had been no discussion of it
21 before 1979.

22 QUESTION: The United States in its brief
23 also, if I remember correctly, indicated that we
24 certainly can't decide everything based on the review of
25 basic data, that maybe it's a guideline to be employed

1 but that it won't solve all the problems.

2 MS. URAM: The review of basic data may not
3 solve all the problems, but the Master's understanding
4 or ruling that the review of basic data was not to be
5 applied in the future was wrong.

6 The Compact is set up so that there should
7 never be a time when there is not a method to be
8 applied. It established a method in the first place.
9 It said that you're supposed to use the method as to the
10 inflow-outflow method, as described in the report of the
11 Engineering Advisory Committee. That method should
12 continue to be used until the Commission changes it.
13 The Commission has authority to change it.

14 So that method continues until the Commission
15 changes it. The next method continues until the
16 Commission changes it again, and the Compact does not
17 envision adoption of a method to be applied only for a
18 limited period. It is an ongoing administrative
19 measure, a technique, and in fact, when you look at what
20 the Commission did here, the Commission did not say we
21 adopt the review of basic data to be used for findings
22 of fact for a 12-year period.

23 They had worked a decade making the
24 corrections in the review of basic data so that the
25 routing method could work. After they worked a decade,

1 they said we adopt it for use in all actions and
2 findings, for all actions and findings of the
3 Commission. And then they went on, clearly explaining
4 their intention to use it that way.

5 They told the Committees to go ahead and
6 prepare the next set of findings and prepare a draft
7 inflow-outflow manual, both based on the review of basic
8 data. So the Master erred when he said that the review
9 of basic data was intended to be used only until 1962
10 and certainly the first eight years of this litigation
11 indicate that everyone understood that the review of
12 basic data was still the subject of this suit.

13 It was -- the entire pre-trial order is
14 written toward the early phases, the question whether
15 the Commission acted within its authority to adopt it,
16 and then whether certain technical portions are valid.

17 QUESTION: Basically are you requesting that
18 the Master quantify the water as of 1947 and then
19 provide for annual distribution techniques?

20 MS. URAM: No. Texas is asking that the
21 Master come in and make those kinds of determinations.
22 The determinations of how you translate the 1947
23 condition, what standard or method you use, are
24 contained in the review of basic data.

25 The Master's role in an administrative law

1 context, which is the one New Mexico urges as the
2 appropriate one here, is to review the method and say
3 whether it is valid within the statute -- a standard,
4 traditional type of judicial function.

5 Instead --

6 QUESTION: Well, Miss Uram, what is the
7 authority for your position that the Master and,
8 ultimately, this Court can sit as a reviewing court to
9 review the findings of the Compact agency? Ordinarily,
10 those sort of things are set out in the statute, that
11 the agency does certain things and then a court does
12 certain other things, and here you're just kind of
13 superimposing this Court on the agency without any
14 statutory structure.

15 MS. URAM: You're correct, Your Honor.
16 Ordinarily --

17 QUESTION: Doesn't the Compact itself say that
18 the determinations of the Commission are reviewable in
19 the Court?

20 MS. URAM: Yes. It says findings of fact are
21 reviewable in court.

22 QUESTION: Does it say in what court?

23 MS. URAM: No. It says in courts or in
24 administrative agencies findings of fact are prima facie
25 evidence.

1 QUESTION: Well, this would be the first
2 agency, I think, that had its findings directly
3 reviewable in the Supreme Court.

4 MS. URAM: That's probably true, Your Honor.
5 But the -- this Compact, you will recall, was signed in
6 1948 and the Administrative Procedure Act was signed
7 only two years -- was enacted only two years before. In
8 modern compacts one will see a good deal of the type of
9 language one sees in the Administrative Procedure Act,
10 with specifications as to period for review and so forth.

11 But certainly in an early compact like this,
12 the language will be somewhat different. But the basic
13 framework is the same. The -- since World War II
14 particularly we have been seeing an increase in the
15 growth of compacts and these compacts have had
16 interstate agencies charged with positive powers. Those
17 compacts have not simply been an adjustment of a
18 one-time dispute.

19 They have positive inter-governmental powers,
20 and the question is how is the Court going to deal with
21 disputes from these agencies.

22 QUESTION: Do these more recent compacts that
23 you refer to which specify agency authority and court
24 review specify the court in which the review shall take
25 place?

1 MS. URAM: In some instances, they do. For
2 example, the Washington Metropolitan Area Transit
3 Authority Compact, the one that governs transportation
4 here in the District of Columbia, specifies that review
5 from certain types of things shall go to one type of
6 court and review from other types of things will go to
7 another type of court.

8 QUESTION: Neither specify this Court, I take
9 it.

10 MS. URAM: I don't recall that they do.

11 But what we have here is we have a situation
12 where undoubtedly there will be disputes between states
13 on how these -- on decisions that these agencies make,
14 and if those disputes are brought to this Court, the
15 question is how should the Court deal with this. Should
16 the Court be called upon to jump in and make all the
17 findings that are delegated by the compacts to
18 commissions? Is that the correct role of the Court?

19 Or is it, rather, to take that great body of
20 administrative law which has been developed in the last
21 40 or 50 years and use the principles there to --

22 QUESTION: What standard of review? What
23 standard of review by the Court?

24 MS. URAM: Well, the standard -- I would think
25 the appropriate standard would be the one that the Court

1 used to apply before it had statutes such as the
2 Administrative Procedure Act. The Court would look to
3 whether the action is constitutional, whether it
4 complies with the statute, whether it was done properly
5 under the procedures in the statute, and whether it was
6 reasonable.

7 So there are -- there are standards to look
8 to. They are basically in the Compact, and we urge the
9 Court that the states here, they agreed to shoulder
10 these responsibilities themselves.

11 QUESTION: But isn't it true that all the
12 examples you give are situations in which there is a
13 neutral factfinder or a neutral administrative law judge
14 of some kind to start with? Here you have a situation
15 in which there are two parties, either of which can veto
16 the findings, and if you have a situation in which one
17 decides to be obstinant -- and I'm not suggesting either
18 has -- and just doesn't agree to anything, you simply
19 can't apply the principles you describe.

20 MS. URAM: Well, we have here a special
21 situation. That's correct, Your Honor. But we have a
22 decision to be reviewed and there doesn't seem to be any
23 reason --

24 QUESTION: It seems to me one of the initial
25 problems is you have a lot of decisions that haven't

1 even been made in the first instance.

2 MS. URAM: Oh, well, you see, Your Honor, the
3 situation is really a little simpler than it looks.
4 There is a lot of detail in the case and it does give
5 one the impression that the situation's more complicated
6 than it appears to be.

7 QUESTION: You identified four specific
8 controversies that remain unresolved.

9 MS. URAM: Yes.

10 QUESTION: Now is it possible that the Master
11 could, if he felt himself qualified to do so, could have
12 decided each of those four issues?

13 MS. URAM: Yes. The Master --

14 QUESTION: Well, why do we have to worry about
15 administrative review? Isn't it just a question of
16 somebody going ahead and making the decisions?

17 MS. URAM: Well, because Texas says that --
18 Texas tells the Court not to look at those four issues
19 any more but to choose another method.

20 QUESTION: Well, he agreed a few minutes ago
21 that the Master simply hadn't decided some things that
22 would have moved the case along.

23 MS. URAM: That's correct.

24 QUESTION: You seem to be saying the same
25 thing.

1 MS. URAM: We say the Master --

2 QUESTION: You identify different issues. I

3 understand that, but apparently he hasn't decided any of

4 these issues.

5 MS. URAM: We agree on the same four issues.

6 The place where we part is that Texas says the Master

7 can substitute another method, one that's never been

8 brought before the Commission, for the method that the

9 Commission decided on.

10 QUESTION: But they also have an alternative

11 position, that even if he doesn't buy the double mass

12 analysis argument, go ahead and use the routing

13 approach.

14 MS. URAM: That's correct. But then we part

15 again.

16 QUESTION: And you won't get either.

17 MS. URAM: Because New Mexico says after

18 you've made this basic decision the dispute will be

19 resolved and the matter should go back to the Commission

20 for administration. The appropriate body to make

21 corrections in the review of basic data is the

22 Commission. The Court says what is invalid, if

23 anything's invalid in those four remaining disputes, and

24 then sends it back to the Commission for correction.

25 Texas --

1 QUESTION: Well, has the Commission already
2 decided all those four? Has the Commission already
3 addressed those four issues?

4 MS. URAM: The Commission adopted the review
5 of basic data. These four issues are challenges to the
6 review of basic data.

7 QUESTION: Yes.

8 MS. URAM: And, Justice White, I don't even
9 know if these four issues remain, because Texas in open
10 court before the Master said that if she had a hearing
11 on the double mass method she would waive any remaining
12 issues on the review of basic data.

13 So if this case goes back to the Master and
14 takes an administrative law rather than an open-ended
15 approach, the Master would not then have to go on and
16 make findings of fact and determine how much water was
17 at a certain point at a certain time. That would not be
18 his responsibility. That would be the responsibility of
19 the Commission.

20 The matter should then be remanded to the
21 Commission.

22 QUESTION: What if they continue in their
23 present state of mind? How is this matter going to be
24 resolved?

25 MS. URAM: Let's take the -- if the matter is

1 remanded to the Commission, in 1980 Texas counsel said
2 that if New Mexico prevailed on the review of basic data
3 there would be no problem working things out because
4 Texas would abide by that decision. So all the
5 Commission would have to do, if everything works as it
6 should, is proceed with the -- to apply the review of
7 basic data to make findings of fact to the present.

8 It could also proceed to consider the double
9 mass diagram if Texas chooses to bring it before the
10 Commission.

11 QUESTION: But it would require the Commission
12 to go back and quantify the datas based on the
13 principles established in the review of basic data.

14 MS. URAM: That's correct. There would be
15 additional engineering and other types of decisions that
16 would need to be made.

17 Now let's take --

18 QUESTION: And at this point they've been
19 unable to agree for some years.

20 MS. URAM: They had a dis -- it's not a
21 situation where they've been unable to agree. The
22 language of impasse and deadlock has made the problem
23 sound as if it is an extraordinary problem we have here,
24 and certainly unanimity does cause some additional
25 delays and problems, but the problem here is --

1 QUESTION: Is the problem that two of you
2 couldn't agree and they had to put a tie-breaker in? Is
3 that the problem that's here now?

4 MS. URAM: The problem here is --

5 QUESTION: Is that the problem?

6 MS. URAM: Yes and no.

7 QUESTION: Well, assuming that it is, does it
8 make any sense to send it back to those same two people?

9 MS. URAM: Yes.

10 QUESTION: On the same point?

11 MS. URAM: Yes, because what happened --

12 QUESTION: Well, what makes you think they'll
13 agree now?

14 MS. URAM: Because one of them questioned the
15 Commission's authority to do what it had done, and
16 questioned the validity of what was done. If the Court
17 completes judicial review and it completed the first
18 phase -- yes, there is authority -- the second phase is,
19 is it otherwise valid.

20 If the Court completes it, the Commission has
21 its answer. This is what the Commission fell into
22 dispute about. The Commission agreed to something. It
23 continued to operate that something for a time. Then
24 one of the parties decided that in fact it no longer
25 agreed with its earlier agreement, and it brought

1 various claims that were legitimate legal claims to the
2 Court.

3 The Court should review those legitimate legal
4 claims. In the meantime, the Commission hasn't acted
5 and it has been a long suit. So increasingly, as time
6 goes on, everyone gets more concerned about the impasse
7 and the deadlock on the Commission.

8 Well, the problem's a fundamental one. If we
9 could resolve this fundamental problem, which is nearly
10 completed, the Commission would at least have its answer
11 to the first phase, to the thing that blocked the
12 Commission. They worked for 20 years. They were able
13 to agree for 20 years, and they had problems then. But
14 they were able to agree. They came to the review of
15 basic data and they agreed upon it.

16 Now we have --

17 QUESTION: You certainly do suggest that Judge
18 Breitenstein really had no conception of what the case
19 was all about, that he should just have referred it back
20 to the Commission.

21 MS. URAM: Judge, this has been a very
22 difficult case for the Special Master. The parties have
23 been pulling the Special Master in many directions and
24 I'm sure with the degree of detail it's been frustrating
25 for him. But we have had some conceptual difficulties

1 in recent times, but particularly with where the case is
2 going.

3 Part of the problem is the issue of unanimity,
4 and the Court has indicated a concern as well. What
5 does unanimity do here? Why is it in the Compact?
6 Isn't it going to create distortions in the way these
7 compacts work? And perhaps I can take just a moment to
8 discuss the two reasons for having unanimity in the
9 Compact and then discuss a worst case situation -- what
10 happens if the states simply do not agree when you get
11 back to it.

12 The obvious reason for having a unanimity
13 requirement in the Compact and, as counsel for Texas
14 correctly pointed out, that's a common requirement in
15 interstate water compacts. But the common reason is
16 that the states here are delegating to an administrative
17 body the authority to make decisions that will affect
18 those states in the future, and they will agree to do
19 this interstate cooperation. It is in everyone's
20 interest, but at the same time they want to protect
21 their citizens and their sovereignty.

22 So the way that they retain control of the
23 obvious state protection is in this unanimity
24 requirement. The delegation here to the Commission was
25 unusual for its time. In its day, it was unusual to

1 have a commission given the authority to change the
2 method for administering the compact. So one can see
3 that the states had some concern that they not be bound
4 in ten or 20 or 50 years by something they have no say
5 over.

6 The other reason for unanimity requirement is
7 one suggested by the scholars in the field. Interstate
8 relations are different from other kinds of relations,
9 and to the extent that they succeed, they succeed on the
10 basis of cooperation. So what compacts try to do when
11 they require unanimity is to set up a way that the
12 compact will work.

13 Now Texas has said that there's no enforcement
14 mechanism here. The legislative history in Senate
15 Document 109 at page 124 indicates that it was
16 anticipated that when the states came to a finding the
17 upstream state, New Mexico, if it was not delivering
18 sufficient water, would then proceed voluntarily,
19 without any court enforcement, to go and make the
20 necessary decisions under the Compact to shut certain
21 users down.

22 The unanimity requirement is tied with other
23 measures to push the states to come to such agreement,
24 and the measures here are the binding nature of the
25 compact and the difficulty of getting out of it. The

1 states had had disputes for 30 years --

2 QUESTION: Well, of course, if nothing ever
3 happens under the compact, probably no one wants to get
4 out.

5 MS. URAM: If -- I'm sorry. I don't quite
6 understand.

7 QUESTION: Well, if there isn't any
8 enforcement mechanism and, as you say, the procedures
9 are voluntary, then a party who feels that the compact
10 isn't giving that state the fair share that the
11 agreement provided for may feel very strongly something
12 should be done but the party which feels that it's
13 really getting the lion's share, which I suspect may
14 more often than not be the upstream state, may be
15 perfectly content with a rather ineffectual compact
16 organization.

17 MS. URAM: Well, let's apply it to this
18 specific situation, and I disagree with the
19 characterization, Your Honor, that it is ineffectual. I
20 think it's set up to function in a different way than
21 modern statutes because of the interstate nature of the
22 disputes.

23 But applying the notion to this particular
24 situation, is New Mexico, as an upstream state, in an
25 position where she should be happy with the Compact.

1 She is satisfied with the Compact, but lest the Court be
2 confused about what New Mexico's doing under the
3 Compact, she limited her uses to the 1947 condition.
4 She made a compromise and she has been shutting down
5 users.

6 She has been controlling use on that river.
7 She shut down about 14,000 acres in the 1950s and '60s
8 to comply with the Compact. When people use water
9 illegally we have a Special Master, we have metered
10 wells in that area. That is an unusual requirement. We
11 go out and we track violation and we enforce this
12 requirement.

13 We take our statutory obligation very
14 seriously and we -- that is why we are before the Court
15 asking for it and trying to explain our view that the
16 Court really can't change a requirement on us 50 years
17 down the road or 40 years down the road, doesn't have
18 the authority to do that. Only the Commission can
19 change a requirement.

20 What the Court's role is is to review the
21 Commission dispute that brought the parties to the
22 Court.

23 QUESTION: But having said all that -- and I'm
24 sure the state is acting in good faith -- it
25 nevertheless remains true that even in good faith you

1 may be shortchanging the downstream state, because they
2 obviously in good faith think they're getting less water
3 than the Compact calls for.

4 MS. URAM: And the --

5 QUESTION: And if there's a stalemate, that
6 can't help them.

7 MS. URAM: That's correct, Your Honor. The
8 stalemate is something that may cause a problem to
9 Texas. It may shortchange Texas if New Mexico is not
10 delivering the correct amount of water to Texas.

11 We are not taking advantage of that situation,
12 though, Your Honor. I assure you that New Mexico has
13 continued to enforce the 1947 condition obligation as
14 she understands it, and if the Commission -- and as the
15 Commission decided, you know, we're relying on the
16 Commission's earlier decision which we have been
17 defending all through the law suit.

18 QUESTION: That decision showed there had been
19 some shortage, 5,300 acre feet, and that --

20 MS. URAM: It's a total of 5,000 acre feet,
21 but it did not go on to decide that New Mexico was
22 responsible for that shortage.

23 QUESTION: Was it attributable to man's
24 activities?

25 MS. URAM: Well, they didn't make a decision

1 one way or the other. That's an unusually small amount
2 of deficiency, but that indicated to New Mexico that she
3 was doing something right. If upon completion of
4 judicial review it turns out that New Mexico was doing
5 something wrong, New Mexico -- let's say the Master
6 reviews the remaining issues and says that certain
7 things were done improperly.

8 The Commission then goes on, having the
9 benefit of judicial resolution of that particular
10 dispute. Let's say the Commission goes on to make the
11 further determinations. Then the situation would be one
12 where New Mexico would say all right, we have a deficit
13 of this amount and would then proceed to take the
14 necessary action to shut down users on the river, as
15 required by the deficit.

16 QUESTION: May I ask one other question? Your
17 basic position is the Court can't rewrite the Compact,
18 in your exception.

19 MS. URAM: That's correct.

20 QUESTION: Didn't the Court do exactly that a
21 few years ago?

22 MS. URAM: I'm sorry. I didn't hear the rest.

23 QUESTION: Didn't the Court do exactly that a
24 few years ago in accepting the Master's redefinition of
25 the 1947 condition?

1 MS. URAM: No, Your Honor, I don't think they
2 did. The difference here -- we had a term to be
3 interpreted there, a 1947 condition, and there was a
4 question of when it began and whether it was a real or
5 artificial condition. Did it begin on December 1,
6 December 30, March 20? Was it a condition that was
7 meant to be reflected on the river, or was it a
8 condition technically defined somewhere regardless of
9 what the real condition was?

10 So there the Court was defining a particular
11 term. The difference here is that Texas is asking the
12 Court not to define a particular term in a statute but
13 go to into uncharted areas and regardless of what the
14 Compact requires require a tie-breaker or require a new
15 method or make certain findings that are delegated to
16 the Commission.

17 So it's not a matter of interpreting, which is
18 a standard judicial function. It is a matter of taking
19 on the entire administration of the Compact and
20 rewriting it, as Texas sees fit as well. So that is the
21 basic dichotomy in the presentation of the two states.
22 It's two completely different ways of -- two completely
23 different ideas of what the Court's role should be in
24 interstate compact commission disputes.

25 New Mexico asks the Court not to take that

1 broader role and throw itself into the suit as if this
2 were an equitable apportionment suit, when it is in fact
3 a compact suit, to recognize that the states agreed to
4 shoulder that responsibility under the Compact. They
5 agreed to do that. They agreed that the Compact would
6 be binding and that agreement is something which New
7 Mexico, as I indicated before, has tried to honor
8 through all the years of this dispute.

9 New Mexico asks the Court to put this case
10 back on course first by recognizing the binding nature
11 of the interstate Compact, secondly by giving structure
12 and form to judicial review in interstate compact
13 commission cases and, third, by returning the
14 appropriate responsibility to the administrative compact
15 -- by returning the responsibility under the Compact to
16 the appropriate administrative body, which is the
17 Commission.

18 Thank you.

19 CHIEF JUSTICE BURGER: Do you have anything
20 further, Mr. Townsend?

21 ORAL ARGUMENT OF R. LAMBETH TOWNSEND, ESQ.

22 ON BEHALF OF PLAINTIFF - REBUTTAL

23 Mr. Townsend: Thank you, Mr. Chief Justice.

24 The upstream state benefits from delay in
25 decision and confusion in the Commission. Such injures

1 Texas. This is not a suit to review administrative
2 actions, and I believe counsel for New Mexico misspoke
3 herself about the Compact providing for a review.

4 It clearly states that the findings of fact
5 made by the Commission shall not be conclusive in any
6 court but shall constitute prima facie evidence. That
7 is not the language used in the conventional standard of
8 review, the conventional standard of review being that
9 the administrative decisions are conclusive if they are
10 supported by substantial evidence and not the result of
11 arbitrary and capricious actions.

12 That is the standard that New Mexico is trying
13 to impose upon this particular Compact, and this Compact
14 Commission is quite different. First, it's not a
15 Federal agency. Second, it does not use the language of
16 -- the conventional language of substantial evidence
17 review. It has no enforcement powers, and the Court in
18 Dyer versus Sims recognizes that this Court finally
19 determines the nature and scope and enforcement of these
20 compacts.

21 QUESTION: So you think any determination of
22 the Commission would be subject to de novo determination
23 in a court.

24 MR. TOWNSEND: According to its express terms,
25 it would be prima facie evidence and the party would

1 have an opportunity to rebut and to contradict findings
2 of the Commission.

3 QUESTION: So you wouldn't review it on the
4 record?

5 MR. TOWNSEND: You would not review it on the
6 record. There's no due process procedural mechanism to
7 protect and to present a record as Mr. Justice Stevens,
8 I believe, pointed out. There's not an objective,
9 non-biased body that's reviewing the facts, that can
10 take the testimony of both sides, and make a decision.

11 QUESTION: Tell me. Your opposition says that
12 the Commission adopted the BRD or whatever it is, and
13 directed that a manual be prepared, and then what
14 happened? When did all this so-called disagreement
15 start?

16 MR. TOWNSEND: The disagreement started --

17 QUESTION: This deadlock.

18 MR. TOWNSEND: -- I believe after the RBD was
19 used for findings of the delivery between 1950 and 1961.

20 QUESTION: Yes.

21 MR. TOWNSEND: For that period it directed
22 them to continue to perfect and to iron out problems
23 that were even in that.

24 QUESTION: The Commission anticipated that
25 that method be used in the future, didn't it?

1 MR. TOWNSEND: Well, it anticipated that a
2 river routing be used and that the river routing for the
3 findings for that period be continually perfected, so it
4 was not saying here is the yardstick and this is the
5 yardstick we're using forever. It said keep on working
6 on it. And that's where disagreement came and there has
7 been --

8 QUESTION: A disagreement ever since.

9 MR. TOWNSEND: -- there is not a decision
10 since then.

11 QUESTION: Since '61?

12 MR. TOWNSEND: Since '61. And, as a matter of
13 fact, using RBD, the findings did find a substantially
14 more than 5,000 acre feet as being under-delivered, but
15 Texas excused a substantial portion -- I believe 40,000
16 or something in that neighborhood -- but excused it.

17 And so the result was this 5,000 that they
18 didn't go forward with. So it was not a complete -- a
19 small amount.

20 Thank you, Your Honor.

21 CHIEF JUSTICE BURGER: Very well. Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 11:11 o'clock a.m., the case in
24 the above-entitled matter was submitted.)

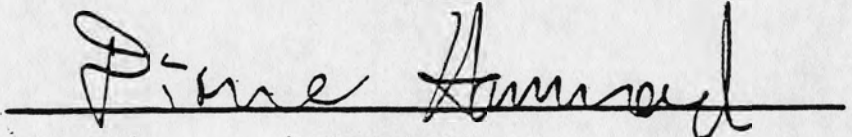
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