

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 80 Orig.

**TITLE** STATE OF COLORADO, Plaintiff v. STATE OF NEW MEXICO, ET AL.

**PLACE** Washington, D. C.

**DATE** January 9, 1984

**PAGES** 1 thru 47



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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF COLORADO :

Plaintiff :

v. : No. 80 Orig.

STATE OF NEW MEXICO, ET AL. :

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Washington, D.C.

Monday, January 9, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

RICHARD A, SIMMS, ESQ., Santa Fe, N. Mex.; on behalf of the Defendants.

ROBERT F. WELBORN, ESQ., Special Assistant Attorney General of Colorado, Denver, Colorado; on behalf of the Plaintiff.

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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 State of Colorado against the State of New Mexico.

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

ORAL ARGUMENT OF RICHARD A. SIMMS, ESQ.,  
ON BEHALF OF THE DEFENDANTS

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

The question before the Court is whether Colorado has met the burden of establishing a basis in fact which would warrant an award of water for a future use in Colorado on a river that has been fully appropriated and used in New Mexico. The Master's Report before the Court simply adopts Colorado's case.

Colorado's case, however, does not begin to meet the standard of preponderance in ordinary civil actions much less the standard of clear and convincing evidence in original actions between states. The Master has recommended an award of 4,000 acre-feet.

The bottom line of that recommendation is his conclusion that there would be no injury in New Mexico. That conclusion depends upon three interdependent factual predicates.



1           The first of those is that the acreage in New  
2 Mexico must be cut in half. That is, the acreage that  
3 New Mexico users are ready, willing and able to irrigate  
4 must be cut in half.

5           As part of that predicate the Canadian River  
6 users of Vermejo water must not even be considered by  
7 the Court. The reduced acreage on the main stem of the  
8 Vermejo in the 1970's must not have been caused by water  
9 shortage. The New Mexico water users must not have been  
10 diligent, and the Court will, therefore, protect only  
11 5,300 acres in New Mexico instead of 9,100 acres.

12           Secondly, and additionally there must be in  
13 New Mexico reasonable conservation measures which would  
14 effectively manufacture or make available or augment the  
15 supply by 4,000 acre-feet at the diversion points in  
16 Colorado.

17           Thirdly, and again additionally the future use  
18 of the benefits that would derive therefrom must be  
19 reasonably certain and comparatively unquestionable.  
20 All three of these factual predicates are essential to  
21 the Master's Report.

22           If one of those predicates fails, Colorado's  
23 case fails and the Master's Report fails. We believe  
24 the case fails on all three predicates.

25           The bottom line I believe in this case

1 generally is that there simply is not enough water in  
2 the Vermejo River to make it possible to make an award  
3 to Colorado for a future use. In the Court's first  
4 decision in this case the Court indicated two ways in  
5 which it might be possible to apportion water: first,  
6 augmentation of supply in two ways, either through water  
7 conservation or through the effective forfeiture of  
8 water rights not diligently exercised; secondly, the  
9 Court indicated that through a balancing of benefit to  
10 the future use in Colorado against detriment to the  
11 cessation of the existing uses in New Mexico an award  
12 might be made to Colorado.

13 QUESTION: Mr. Simms, on the first point and  
14 the way in which water can be augmented, how can New  
15 Mexico legitimately claim that nonuse over a thirty-year  
16 period never becomes in effect an abandonment of the use  
17 of a certain portion of the water? Is it your position  
18 that New Mexico can never by nonuse lose the right to  
19 use the water?

20 MR. SIMMS: Not at all, and I think the  
21 Court's first instruction to the Master in the first  
22 area of evidence taking suggests the answer to the  
23 question, Justice O'Connor. The Court said that to  
24 determine the existing uses you must look at present  
25 levels of use, and balance on the one hand shortage of

1 water against the possible inference on the other hand  
2 of lack of diligence on the part of the water users.

3 We presented the evidence. Colorado did not  
4 present the evidence to do that. New Mexico did present  
5 the evidence to do it.

6 That evidence indicates that for the Vermejo  
7 Conservancy District as an example -- I presume that  
8 they are the users to whom you are referring. In there  
9 after the District was rehabilitated in 1955 there was a  
10 ten-year development period. That did not end until  
11 1965.

12 In an ordinary reclamation project you would  
13 not expect the water users during that period to have  
14 developed their water rights. They are given that  
15 period of time within which to do it.

16 Right after that as the evidence shows the  
17 water supply dropped off substantially. The way in  
18 which you instructed the Master to provide the factual  
19 information to the Court is the same way a water right  
20 entitlement is adjudicated in most every western state.

21 They will look at historic use, an  
22 adjudication court will, and balance on the one hand  
23 times of shortage so that nonuse might be excused and on  
24 the other hand the possible lack of diligence. Here you  
25 can make no inference of lack of diligence out of the

1 contractual development period.

2           Once that stopped, once that was over there is  
3 a drought on the river. Consequently, while the water  
4 users are still ready, willing and able to use the water  
5 supply, the water supply simply is not there.

6           QUESTION: Mr. Simms, let me interrupt if I  
7 may for a moment. The Master in dealing with the  
8 finding of drought says New Mexico claims that the  
9 nonuse on the part of the District is caused by the  
10 drought in the early seventies. However, the drought in  
11 the 1970's cannot be responsible for the nonuse which  
12 has existed in the District since its formation in the  
13 fifties, nonuse through a time period when all of the  
14 other users in evidence from flow tables found  
15 sufficient water available.

16           So he is finding for a substantial period  
17 before what you say was the drought.

18           MR. SIMMS: Early in the fifties. See, the  
19 Vermejo Conservancy District was rehabilitated. That  
20 was finished in 1955.

21           Prior to then there was a much larger  
22 irrigation project, nearly twice as many acres. It was  
23 all torn apart. The canals were rebuilt. Some  
24 reservoirs were taken out. New reservoirs were put in.  
25 New lands were leveled or were to be leveled. The whole



1 place was rearranged.

2 So in 1955 there began a ten-year period  
3 within which to develop up to the potential of the  
4 District. Actually it was seven years. It was later  
5 amended and became ten.

6 At the end of that development period is when  
7 the drought years began. The problem with the Master's  
8 assessment -- The Master says he looks at the flow  
9 records or the flow charts.

10 What he does is look at Table 2 in his second  
11 report to you. We invite the Court to look at Table 2.  
12 Table 2 is the average discharge for every month of  
13 every year from 1916 until now.

14 The Master looks at that, but he does not do  
15 anything else. He does not compare those figures with  
16 anything.

17 That is the end of the Master's analysis.  
18 That is the beginning of New Mexico's analysis. What  
19 you have to do is take those figures and do a water  
20 accounting down the river below the Dawson gauge where  
21 he gets the figures.

22 You have to add accretions, subtract  
23 depletions and carry those figures, carry that water  
24 supply down to the farmer's land in order to find out  
25 how much water is available on the land. If, for

1 example, you look at the year 1950 -- and the Master has  
2 told the Court he finds no time of material deficiency  
3 or intermittent supply by looking at those figures --  
4 but look at 1950 in his chart.

5           If you add up the discharge for the year you  
6 will find the first figure in New Mexico's Exhibit  
7 F-29. That figure is 4,800 acre-feet. If you do a  
8 water budget and take that down the river to the land,  
9 you end up with 1,600 acre-feet.

10           The Master says that is sufficient. He is  
11 explaining to the Court that that is sufficient to  
12 irrigate 7,380 acres. We believe that is patently  
13 incorrect.

14           If you were to do it for the year 1951 you  
15 would end up with nothing on the farms. If you were to  
16 do it for 1956 you would end up with nothing on the  
17 farms.

18           Then there were some good years following  
19 1955. The problem there, though, was the development of  
20 the District.

21           Once the District development period was over  
22 you get back into drought years, and if you follow  
23 through on Exhibit F-29 and do this water budget  
24 accounting, which Colorado never provided and the Master  
25 never did, you will find out that the river is very,

1 very short in the seventies.

2 The evidence in that regard is overwhelming.  
3 It is the bulk of the evidence in the record. If you  
4 were to compare the monthly USGS flows to demand from  
5 1916 to now, that supports New Mexico.

6 The Bureau of Reclamation testified in this  
7 case, including its regional director and its area  
8 engineer. Both are personally familiar with the  
9 operation of the Vermejo Conservancy District. They  
10 testified to the shortages.

11 Their testimony is unimpeached. Indeed, in  
12 this regard it was not even cross examined. The water  
13 users, all of them, testified to this shortage.

14 QUESTION: Mr. Simms, can I ask a question  
15 about one of the Master's findings. He refers to a man  
16 named Porter on page 7, who is an individual user, as I  
17 understand, downstream of the District. He got  
18 substantially all his water as I understand what the  
19 Master found and did not complain that the -- He got 85  
20 percent I think. The difference he did not get was  
21 attributable to the shortage.

22 If he could get anything at all, does it not  
23 follow inexorably that the District itself must have  
24 gotten all it needed?

25 MR. SIMMS: No, it does not follow at all.

1 Mr. Porter is one of a number of users, Justice Stevens,  
2 who uses -- He is not a member of the Vermejo  
3 Conservancy District --

4 QUESTION: No, he is downstream.

5 MR. SIMMS: -- but he utilizes --

6 QUESTION: He is junior to them, is he not?  
7 His rights are junior to theirs.

8 MR. SIMMS: That is correct. But he utilizes  
9 their works in order to take water. He takes his water  
10 out of their works.

11 A comparison of the same flow records at the  
12 Dawson gauge that I just mentioned in our Exhibit number  
13 F-29 will reveal the same thing with respect to Mr.  
14 Porter as it does to the Vermejo Conservancy District.  
15 There simply is a shortage that averages 6,600 acre-feet  
16 per year between 1955 and 1979.

17 That figure is corroborated by Colorado's own  
18 exhibits. Their exhibit numbers 37, 38, 43, 45 --

19 QUESTION: Let me cut through because I do not  
20 have the facts nearly as well in mind as you do. Is it  
21 correct that he got all the water he needed?

22 MR. SIMMS: He may have gotten all the water  
23 he needed during that period of time. That is correct.

24 QUESTION: Is it correct that his rights are  
25 junior to the District's rights?



1           MR. SIMMS: I think the question perhaps you  
2 are asking, Justice Stevens, is whether or not he should  
3 have called priority somehow. He was not in a position  
4 to call priority because --

5           QUESTION: If he got all the water he needed  
6 could someone who had senior rights to his have  
7 preempted his water?

8           MR. SIMMS: That is true.

9           QUESTION: Including the District could have  
10 done so.

11          MR. SIMMS: The District might have done so,  
12 but if the District were to call its priority and take  
13 the water rights of somebody junior to it, you end up  
14 with the same net shortage. You have to reduce the  
15 amount that would have gone to somebody else, and then  
16 that amount is given to the District.

17          In terms of the New Mexico users in general,  
18 the same figure, 6,600 acre-feet short, is still true.  
19 There is much more evidence in the record in this  
20 regard.

21          Three New Mexico engineers testified to the  
22 shortage. The Fish and Wild Life Service, the United  
23 States Fish and Wild Life Service, testified to the  
24 shortage.

25          QUESTION: Well, Mr. Simms, how valid are

1 these points now? I can see arguing to the Master that  
2 this testimony supports such and such a finding, but the  
3 Master has rejected a lot of testimony by his findings.  
4 We do not review that de novo to decide. He is free to  
5 disbelieve any witness he wants to as I understand.

6 MR. SIMMS: I think he is free to disbelieve  
7 any witness he wants to, but it is awfully difficult for  
8 me to believe that there was any issue of credibility in  
9 this case. There was none. I think that issue is now  
10 trying to be injected in this case in order to pump up  
11 the weight that is to be given to the Master's Report,  
12 but I find it difficult to distrust the testimony of the  
13 Bureau of Reclamation.

14 I find it difficult to distrust the  
15 unimpeachable evidence of the USGS. I find it difficult  
16 to distrust the testimony of all of these people.

17 The reason the Master did what he did was  
18 because he never looked at demand. He simply stopped on  
19 the supply side.

20 He looked at that table and he just surmised,  
21 well, it seems to me there is enough water there for  
22 everybody. Had he compared that to the demand he could  
23 not have thought all of those people were not telling  
24 the truth to the Court.

25 Similarly when Congress passed legislation

1 just a few years ago to relieve the repayment obligation  
2 of the Vermejo Conservancy District, that was done upon  
3 a congressional finding of the very water shortage that  
4 the Master says does not exist. We find it hard also to  
5 believe that Congress was duped.

6           The second area or second way in which the  
7 Court can apportion water according to the Master in the  
8 first decision is through conservation, and the Court  
9 has indicated in its first decision that there also the  
10 burden has shifted to Colorado to prove by clear and  
11 convincing evidence that there are reasonable  
12 conservation measures available in New Mexico which  
13 would make 4,000 acre-feet at the diversion points in  
14 Colorado.

15           We submit there is not any evidence of any  
16 particular conservation measure in the record, nor is  
17 there any discussion nor any evidence put on by Colorado  
18 of the economic and physical feasibility of any given  
19 conservation measure. There is no discussion of how  
20 much water might be made at the diversion points in  
21 Colorado from any given conservation measure.

22           QUESTION: Going back to the supply side  
23 question again, Mr. Simms, for a minute, what did the  
24 Master do about the peak flows and the floods in his  
25 calculations of water availability in the Vermejo? How

1 did he resolve that question?

2 MR. SIMMS: He bought Colorado's position that  
3 all basin discharge is available as a practical matter  
4 and divertable by the water users. That is half of his  
5 mistake.

6 The other half is he never bothered to compare  
7 that gross figure, which was already wrong  
8 methodologically, with the demand. So he is patently  
9 wrong in two ways.

10 QUESTION: Well, did his use of the average  
11 availability figures in effect get used twice, once in  
12 the supply figures and once in the excused nonuse  
13 calculations?

14 MR. SIMMS: Well, what he did to determine the  
15 demand on the river in effect was to equate the short  
16 supply -- that is what you see in his Table 2 -- with  
17 the acreage that was irrigated with that supply. Now  
18 that kind of logic or that kind of reasoning precludes a  
19 determination of water shortage.

20 To know water shortage you have to know the  
21 difference between the supply and the full demand. He  
22 refused to look at the full demand.

23 The reason he did that was because Colorado  
24 knew in the beginning that the only way they could even  
25 argue that there would be no injury to New Mexico in



1 this case is to cut the water users in half to begin  
2 with and leave all of that injury behind. That is what  
3 the Special Master's Report recommends to this Court.

4 There is nearly 4,000 acres that is just  
5 pushed aside to begin with because the Master never  
6 bothered to look or compare supply and demand.

7 QUESTION: But the Master has found that New  
8 Mexico's administration of its water decrease was much  
9 looser than Colorado's. Certainly the intimation from  
10 those findings is that New Mexico could do a much better  
11 job of conserving and make better use of the water that  
12 it gets.

13 MR. SIMMS: That Master, Justice Rehnquist,  
14 did not point to one way in which administration would  
15 be able to save water in New Mexico, and I would suggest  
16 to you that that again was part of the design of  
17 Colorado's case and was necessitated by the fact that  
18 there are no reasonable conservation measures  
19 available.

20 QUESTION: But the fact that it is part of  
21 Colorado's case does not mean it is wrong. Everybody  
22 starts with a case they try to get the finder of fact to  
23 adopt, and he is going to go presumably for one or the  
24 other. So the fact that he has, as you say, bought some  
25 of your opponent's ideas does not make them wrong for

1 that reason.

2 MR. SIMMS: But the Master is most definitely  
3 wrong because he has not been able to pinpoint how it  
4 would work. He has not told us how administration would  
5 work, nor is there any testimony point on by Colorado  
6 about how you can somehow administer this river and get  
7 more water.

8 What Colorado did was to put on the testimony  
9 of his state engineer and then elicit from our state  
10 engineer the fact that there is presently no water  
11 master on the Vermejo as a whole and then  
12 argumentatively in briefs Colorado tried to explain as  
13 they managed to persuade the Master that some kind of  
14 administration would make it possible to conserve  
15 water.

16 QUESTION: You say that since the Master's  
17 finding does not meaning anything he should not only  
18 find that the New Mexico decree is loosely administered  
19 but be able to point out how tighter administration  
20 would somehow save water.

21 MR. SIMMS: Most certainly. First of all, it  
22 is not loosely administered. If you were to compare  
23 along any one of the lines that Colorado has suggested,  
24 if you compare administration in the two states, New  
25 Mexico does not come out on the short end of the stick.

1           For instance, in the Vermejo Conservancy  
2 District there is a manager there. There are two ditch  
3 riders there. All of the uses and all of the releases  
4 are metered and measured.

5           When water is taken out of the reservoirs  
6 everybody knows how much water is taken out of the  
7 reservoir. That is all of the farms in the district.  
8 That is as much administration as you find anywhere in  
9 Colorado.

10           Colorado has tried to suggest that water could  
11 be made available if the state engineer came in and  
12 administered for forfeiture. Our point is Colorado put  
13 on no evidence, and the Master can point to none,  
14 indicating any land on the entire Canadian system that  
15 is conducive to forfeiture. There is none. There are  
16 no rights that are conducive to forfeiture.

17           Also, if you were to compare the two laws in  
18 that regard, Colorado urges that theirs is much  
19 superior, that there is a list of some 34 rights on the  
20 Purgatory that has been prepared to forfeit. Well, if  
21 you look and see what happened factually and  
22 historically that list has not even gone to  
23 adjudication.

24           In New Mexico nearly 8,000 acres of water  
25 right has been judicially forfeited on the Vermejo

1 system. If you compare the reality of the two there is  
2 no discrepancy, then there is not this looseness in  
3 administration.

4 Mr. Chief Justice, I would like to retain the  
5 remainder of my time for rebuttal.

6 QUESTION: What do you suggest we do?

7 MR. SIMMS: Justice Marshall, I believe  
8 because, number one, the Master never compared supply  
9 and demand thus because his finding with respect to lack  
10 of diligence on the part of New Mexico users flies in  
11 the face of all of the testimony, because he is patently  
12 wrong it could be dismissed on that basis. It could be  
13 dismissed because Colorado did not meet its burden on  
14 putting on any evidence with respect to an economically  
15 and physically feasible conservation measure.

16 Both of those problems exist in the Master's  
17 Report. It could be dismissed for lack of having met  
18 the burden of proof on either of them.

19 CHIEF JUSTICE BURGER: Mr. Welborn.

20 ORAL ARGUMENT OF ROBERT F. WELBORN, ESQ.,

21 ON BEHALF OF THE PLAINTIFF

22 MR. WELBORN: Mr. Chief Justice, and may it  
23 please the Court:

24 This Court in its opinion in this case set  
25 forth two basic principles or considerations that apply



1 particularly to this case: first, that reasonable  
2 conservation measures in one state may offset the effect  
3 of a diversion, a new diversion, in another state;  
4 secondly, that benefits in one state may outweigh harm  
5 in another state.

6           It is Colorado's position that the Special  
7 Master has found and that the evidence fully supports  
8 the conclusion that reasonable conservation measures in  
9 New Mexico in the Vermejo Conservancy District, for  
10 example, would and in fact already have offset the  
11 effect of a Colorado diversion and further that if there  
12 should be any residual harm to New Mexico, which  
13 Colorado does not believe there would be, that this harm  
14 would be outweighed by benefits to Colorado.

15           The conservation measure that has already been  
16 completed is one of the most blatant cases of waste that  
17 there could be. It results from the District stock  
18 water system procedure.

19           That procedure is fully described in our  
20 briefs, of course, and in New Mexico's own Exhibit E-3.  
21 The District released annually over 2,000 acre-feet of  
22 water from its reservoirs for the purpose of supplying  
23 water for livestock.

24           The livestock consumed about 35 acre-feet of  
25 water a year. So as you can see there was over a 98

1 percent loss of water.

2           This waste continued during the period that  
3 the District complained of a water shortage. It has now  
4 as of last year been eliminated by the installation of a  
5 closed stock water system -- I should say closed water  
6 system -- because the main thrust really of this new  
7 water system as explained in this New Mexico Exhibit E-3  
8 is to supply domestic water. That was how it apparently  
9 got started, to supply water to 20 homes and then it  
10 expanded.

11           But this saving of 2,000 acre-feet of water at  
12 the reservoirs will completely offset the effect of the  
13 Colorado diversion of 4,000 acre-feet at the river. The  
14 reason for that is mathematically very simple. It's  
15 based on testimony of New Mexico officials, uncontested  
16 testimony, uncontested evidence, that the losses from  
17 the reservoirs to the farm headgates are approximately  
18 one-third. The losses from the river to the farm  
19 headgates due to the system going through the  
20 reservoirs, the canal system from the river to the  
21 reservoirs, the losses there are approximately  
22 two-thirds so that you can see 2,000 acre-feet with a  
23 one-third loss is equivalent to 4,000 acre-feet with a  
24 two-thirds loss.

25           This extreme waste of this water in this

1 method of supplying water to livestock over the entire  
2 period of the District's existence until last year did  
3 not even constitute under law a beneficial use, an  
4 existing use which should be recognized. The Jicarilla  
5 case which we cite in our brief dealt with a 93 percent  
6 loss, an incredible loss of water at the Elephant Butte  
7 Reservoir below the city of Albuquerque.

8           The Tenth Circuit applied New Mexico law and  
9 found that that 93 percent loss did not constitute a  
10 beneficial use. This Court in this case Justice  
11 O'Connor has referred to the need for reasonable and  
12 beneficial use of a water right.

13           In Washington v. Oregon the Court said before  
14 they concluded that Oregon should have this water said,  
15 "We better look at this use and see if there is waste."  
16 They looked specifically. They used the words  
17 "beneficial use".

18           So here we have a conservation measure that is  
19 complete. The feasibility of it is proved. Now the  
20 Special Master was completely correct in placing  
21 emphasis on water administration.

22           Water administration is the key to water in  
23 the western states. It is the other half. A water  
24 right is one half, but it is not worth anything really  
25 if there is not water administration to back it up.

1           That is why the Special Master, an experienced  
2 judge, an experienced water attorney, really, who  
3 represented the State of Wyoming in Wyoming v. Colorado  
4 in one phase of that case, that is why he focused in all  
5 of these respects on this matter of administration.

6           QUESTION: Mr. Welborn, let's assume that the  
7 Master was justified in finding that Colorado was  
8 entitled to some allocation out of the Vermejo. Now as  
9 I understand the decree it basically gives Colorado  
10 4,000 acre-feet.

11           MR. WELBORN: Yes, sir.

12           QUESTION: How is that going to work, say, if  
13 another year like 1974 comes along which Table 2 to the  
14 Master's Report shows that the annual flow at the Dawson  
15 checkpoint was 3,040?

16           MR. WELBORN: Well, the Colorado diversion --  
17 There are two or three factors there, Justice  
18 Rehnquist. The Colorado diversion would take place at a  
19 point within the Colorado production which would mean  
20 that Colorado would take only approximately one half of  
21 its production so that it would be only take a half of  
22 the Colorado production and as the Special Master found  
23 only about a third or a fourth of the total Vermejo  
24 River production.

25           QUESTION: But isn't the Dawson checkpoint



1 made up largely of water that you would call the  
2 Colorado production?

3 MR. WELBORN: Well, it is, yes, but it is made  
4 up also of water coming in below the border, and as I  
5 say Colorado contributes roughly half to the total  
6 figure. For example, the New Mexico witness, Mr. Moots,  
7 testified that the Colorado production was approximately  
8 5,500 acre-feet a year on the average, and you relate  
9 that with the Dawson gauge with an average of some  
10 11,000 acre-feet a year.

11 QUESTION: How about a year where the Dawson  
12 gauge says 3,040?

13 MR. WELBORN: In such a year from here on,  
14 Justice Rehnquist, the District will be completely  
15 protected for this reason, the stock water situation,  
16 which has now as a result of recent developments come to  
17 fruition, but the District gave first priority according -  
18 to its own witness, Mr. Moots, in his testimony gave  
19 first priority to the stock water. They save water in  
20 their reservoirs. They release water from their  
21 reservoirs first for the stock water.

22 They held water in the reservoirs as against  
23 irrigation usage so that they would have enough for the  
24 stock water usage. So this conservation measure that  
25 has taken place would completely protect, as against the

1 past situation, completely protect even in a low year.

2 QUESTION: Are you saying then that you think  
3 the records supports the finding that New Mexico's  
4 demand could be satisfied with 3,000 acre-feet?

5 MR. WELBORN: Well, I would suggest this,  
6 Justice Rehnquist. The District -- this gets to another  
7 point that has been made here -- deals entirely with  
8 reservoirs, and the District is entitled to take all of  
9 the water in the Vermejo River at its diversion point  
10 and indeed has taken most of the water in the river  
11 during the 30-year period.

12 So there have not been significant spills from  
13 1950 to 1979. The reservoir system of the District as  
14 shown by New Mexico's own exhibits allows the carry over  
15 of water from one year to the next.

16 Now at the last hearing in this case Justice  
17 White asked if there were a five-year period of low  
18 water would that not be a problem. I suggest to you  
19 that, first, again I cannot emphasize strongly enough  
20 the conservation measures that have been now perfected  
21 by the District, but even if there were a period of over  
22 one year of low flow the District would not be suffering  
23 as compared with what it has in the past because it has  
24 now conserved this water.

25 Another element of conservation as far as the

1 District is concerned is revealed in Exhibit 41, and the  
2 Special Master alludes to this, and that is the loss of  
3 water in its canals in its lateral system. Exhibit 41  
4 is a Bureau of Reclamation report on a meeting between  
5 state and district officials, and they were discussing  
6 -- this was in the later part of the seventies -- they  
7 were discussing the possibility of administration on the  
8 Vermejo River and specifically in the Vermejo  
9 Conservancy District.

10 They did not go ahead with administration, but  
11 in that report it is said that if there were  
12 administration the District would have to be charged  
13 with waste as a result of the loss of water in its  
14 canals and laterals. The definite plan report put out  
15 by the Bureau before this thing got started showed --  
16 Their estimate was a loss of 25 percent in the canals  
17 and laterals.

18 QUESTION: Is that because they are not lined  
19 with concrete or something?

20 MR. WELBORN: There is no particular testimony  
21 except that the silting in the canals and the debris  
22 that seems to collect in the canals. I do not think  
23 that there is any requirement that they be lined with  
24 concrete.

25 QUESTION: That might be quite uneconomical.

1           MR. WELBORN: No, there is no suggestion of  
2 that, and in this report it is simply the matter of  
3 cleaning up the canals.

4           But the District usage which has been referred  
5 to earlier and which the Special Master found was really  
6 basic -- it is basically its average usage -- is  
7 supported by the record. Mr. Simms suggests that the  
8 District was just getting going up to 1965, but as shown  
9 by New Mexico's own exhibit which is at page 12 of New  
10 Mexico's last brief the year of highest irrigation was  
11 prior to 1965.

12           Now New Mexico in its brief on remand  
13 represented to the Special Master -- this was after it  
14 was remanded to him for the additional findings --  
15 represented to the Special Master that the period prior  
16 to the seventies was a period of stable supply for  
17 irrigation. Those are New Mexico's very words in its  
18 brief.

19           So the Special Master was eminently justified  
20 in noting in his additional findings that New Mexico  
21 contended that the period of the seventies was a drought  
22 period. He did not necessarily accept that, but he  
23 noted that even prior to that period the District did  
24 not irrigate substantially more water.

25           The average acreage irrigated for the total



1 period of the District operation was 4,379. For the  
2 1960's I think it was about 4,500, and for the 1950's it  
3 was about 4,400 so that you can see -

4 QUESTION: Mr. Welborn, what about Mr. Simms'  
5 point that their underutilization in the sixties or from  
6 '55 for ten years was excusable because it was a period  
7 of development?

8 MR. WELBORN: Well, I suggest, Justice White,  
9 that there was not -- According to this table, this New  
10 Mexico exhibit, there was not any underutilization then  
11 as compared with the later period based on the acreage  
12 irrigated. There is an exhibit, a Bureau of Reclamation  
13 exhibit --

14 QUESTION: Well, let's assume that there was a  
15 good deal more water available than was being used for  
16 the first ten years after the District was rejuvenated  
17 or whatever word is proper, would there have been an  
18 excuse for the District not using it because of the fact  
19 that it was just being developed? That is Mr. Simms'  
20 point as I understand.

21 MR. WELBORN: During all this period they  
22 were, as I say, giving preference to be sure they had at  
23 least 2,000 acre-feet to release --

24 QUESTION: I understand that. Assume that  
25 from '55 to '65 there was plenty of water to meet the

1 District's supposed demand, but they did not use it.  
2 That is what you are saying is the case. Mr. Simms'  
3 response is, as I understand it, that the District was  
4 in a period of development so that is excusable. Is  
5 that his point do you think?

6 MR. WELBORN: I believe that is his point, but  
7 their own exhibit which is on page 12 of their brief  
8 shows they irrigated as much prior to '65 as they did  
9 after '65. The Dawson gauge figures -- The Dawson gauge  
10 it has been suggested is an average figure and so forth,  
11 but it gives monthly figures --

12 QUESTION: Say from the time this grace period  
13 ended up until the drought period they were not  
14 irrigating any more than they did before.

15 MR. WELBORN: No. No, they were not  
16 appreciably. The total average was 4,379. The average  
17 for the sixties was, I think, around 4,500, and for the  
18 fifties it was around 4,400. The Dawson gauge figures,  
19 which are a real guide mark as to the water available to  
20 the District because the District can take all the water  
21 below the Dawson gauge with the exception of the senior  
22 priorities of Phelps Dodge and those five people that  
23 take off the District canal -- The testimony is that  
24 those diverters all of whom are senior to the District  
25 with the one exception of Mr. Porter take about as much

1 as the accretion from the Dawson, below the Dawson gauge  
2 to the District point of diversion.

3           Considering the fact that the District has  
4 these reservoirs, that there were no appreciable spills  
5 past the District head gauge in the thirty-year period  
6 from '50 to '79 except in two years, considering that,  
7 the Dawson gauge figure tells you what the District not  
8 only should have gotten but what the District did get.  
9 Now the Dawson gauge average for the fifties was  
10 something, 9,900 acre-feet a year. The average for the  
11 sixties was 11,000 acre-feet per year. The average for  
12 the seventies was 8,000 acre-feet per year.

13           So you can see there is not a great variation  
14 there.

15           QUESTION: Mr. Welborn, another point.  
16 Suppose that there is really a severe drought period,  
17 and I take it if Colorado wins this case if there are  
18 4,000 acre-feet of water in the river in Colorado  
19 above -- at the point of your hoped-for diversion you  
20 would get that 4,000 feet no matter what the consequence  
21 was on lower river users. In short, you would never  
22 have to share the drought effect. Is that right?

23           MR. WELBORN: That is correct.

24           QUESTION: That is because there would be that  
25 much water for you to take.

1                   MR. WELBORN: On the assumption that during  
2 the drought there would be 4,000 acre-feet at the  
3 diversion point, but if there were a drought there would  
4 not be 4,000 acre-feet, I suggest, at the Colorado  
5 diversion point because everyone would share in the  
6 lower figure as well as the higher figure.

7                   QUESTION: I do not quite understand that.  
8 How much average water is in the Vermejo at your  
9 diversion point?

10                  MR. WELBORN: At the diversion point the New  
11 Mexico testimony was that it is 3,360 acre-feet a year  
12 on the average. The Colorado testimony was that it was  
13 4,700 acre-feet a year.

14                  QUESTION: And you would want to take 4,000  
15 acre-feet of that?

16                  MR. WELBORN: At the diversion point.

17                  QUESTION: Leaving on the average 700  
18 acre-feet in the river?

19                  MR. WELBORN: That is right. At the diversion  
20 point. Then there is an accumulation in Colorado below  
21 the diversion point.

22                  QUESTION: I understand. In any event, as  
23 long as there is more than 4,000 -- Well, whatever water  
24 is in the Vermejo at your diversion point you can take  
25 4,000 feet of it.



1 MR. WELBORN: That is correct.

2 QUESTION: You can take it all if there is  
3 only 3,000.

4 MR. WELBORN: That is correct. That is  
5 correct. We do not deny that. We simply point out that  
6 with these conservation measures and considering that  
7 Colorado would be taking only one-fourth of the flow in  
8 the Vermejo River, another factor as far as the District  
9 is concerned, there is no question but what these other  
10 diverters are going to get their water.

11 The monthly figures at the Dawson gauge show  
12 that. They are all senior to the District --

13 QUESTION: Mr. Welborn, you say you are only  
14 taking one-fourth of the flow in the Colorado River.  
15 That is fine -- in the Vermejo. That is fine in a year  
16 when they get 16,000. But '74 was a year when they did  
17 not even get 4,000.

18 MR. WELBORN: Well, I was going to get to the  
19 point, Justice Rehnquist, that the figures that the  
20 Special Master set forth in his report in his additional  
21 findings as to the amount of water coming to the  
22 District from other sources were about 45 percent. The  
23 District, in other words, gets about 35 percent of its  
24 water from the Chico Ricco and 10 percent from creeks  
25 which flow into the District's system.

1           So the water that the District gets from the  
2 Vermejo is only a little over half of its total supply.  
3 Those other sources, of course, would not be affected in  
4 any way by the Colorado diversion, but I wanted to  
5 suggest this again that the diverters on the Vermejo  
6 other than the District would not be affected even in a  
7 low flow year because all but one are irrigators and the  
8 monthly figures at the Dawson gauge even in the low flow  
9 years show that there is sufficient water for that  
10 purpose.

11           QUESTION: Mr. Welborn, why did the Master  
12 refuse to admit into evidence recent USGS stream flow  
13 measurements so that there could be a clearer picture of  
14 the available water?

15           MR. WELBORN: Well, I suggest that the Special  
16 Master very properly recognized that as being cumulative  
17 and cumulative in a way of minor significance. New  
18 Mexico's exhibit F-29 gave a thirty-year picture of the  
19 spills at the Vermejo Conservancy District headgate. It  
20 showed that in only two years in a thirty-year period  
21 were there significant spills.

22           Now, the new evidence that New Mexico proposed  
23 to the Special Master covered the years '81 and '82, and  
24 that evidence according to their offer of proof would  
25 have shown more than 4,000 acre-feet of water spilling

1 past the District headgate in each of those years. That  
2 is particular significant because that is more than the  
3 Colorado entitlement.

4 They got the evidence in in effect because it  
5 is at page 50 of their brief, one of these charts. It  
6 shows that on only one day in 1981 did the spills exceed  
7 the capacity of the District canal, 600 cubic feet per  
8 second.

9 Now Mr. Moots has testified that the District  
10 will start to spill at 450 cubic feet per second, but  
11 this evidence showed that the spills exceeded -- the  
12 amount of water there exceeded 450 cubic feet per second  
13 on only one day. So this was water that the District  
14 was entitled to take and it could have taken presumably  
15 if its diversion system had been efficient according to  
16 its own testimony.

17 So I suggest that that is the basic reason  
18 that the Special Master did not take that, the basic  
19 reason being that it was simply cumulative. It was a  
20 two year period --

21 QUESTION: I take it that is the reason you  
22 objected to it, or did you object?

23 MR. WELBORN: We objected. We did not object  
24 vehemently. New Mexico said we screamed and hollered,  
25 but we did not. We objected. We asked leave to present

1 additional testimony, but we had had 16 days of trial,  
2 many exhibits.

3 It was clearly cumulative. The other two  
4 areas that they wanted to go into, one of them was this  
5 closed stock water system, and they put that in their  
6 brief on remand to the Special Master.

7 There was just one factor there and that was  
8 that the closed stock water system -- really, domestic  
9 water system was completed. There was no denying that.

10 QUESTION: Mr. Welborn, what about Mr. Simms'  
11 argument that the Special Master's analysis, he just  
12 looked at the supply side and really did not follow the  
13 water down the river to the District, did not deal with  
14 the demand?

15 MR. WELBORN: Well, the District demand I  
16 suggest is revealed particularly by the amount of  
17 acreage that the District irrigated as shown by their  
18 own exhibit, by the fact that they chose to continue  
19 with this wasting 2,000 acre-feet a year on this stock  
20 water business instead of using that for irrigation the  
21 District picture, I suggest, Justice White, is a relaxed  
22 one.

23 They chose -- As shown, as I mentioned, by  
24 Exhibit 41 after a conference when the state officials  
25 said they would have to be charged with waste if there



1 was administration -- they chose apparently not to have  
2 administration. It was a relaxed situation. Much more  
3 than half of the people in the District -- The farms  
4 were part-time farmers, absentee owners.

5 This is discussed in detail in the Bureau  
6 documents, Exhibit 36, which the District witness  
7 testified was currently the situation. I think this is  
8 what the Special Master concluded. It was a relaxed  
9 situation.

10 QUESTION: You are not suggesting that New  
11 Mexico water laws require to disallow water rights to  
12 part-time farmers are you?

13 MR. WELBORN: No, I am suggesting that that  
14 was the picture. I am suggesting, though, that a New  
15 Mexico water law is interpreted by the Jicarilla case  
16 and another case that is cited in that require  
17 beneficial and reasonable use of water. The Special  
18 Master contrasted the New Mexico picture with the  
19 Colorado administration.

20 I suggest that this brings into play the  
21 Wyoming v. Colorado concept and the concept suggested in  
22 this case that wasteful uses will not be protected and  
23 that each state has a duty to preserve the common  
24 supply. Now in Colorado as testified to by its state  
25 engineer there is daily surveillance in the Arkansas

1 River Division, Division II, where this falls, the  
2 Purgatory falls, of water diversions of the amount of  
3 acreage irrigated.

4 The Colorado statute specifically requires the  
5 state officials to shut down water if it is not being  
6 put to beneficial use, if it is being wasted. This was  
7 the picture that the Special Master had.

8 As said in, I believe, Wyoming v. Colorado or  
9 Nebraska v. Wyoming, it is not what a state should do  
10 for the other state, but --

11 QUESTION: Mr. Welborn, was that not all  
12 argued before when this case was here?

13 MR. WELBORN: I beg your pardon?

14 QUESTION: Was that not all argued before when  
15 the case was here?

16 MR. WELBORN: The question of duty and so  
17 forth, yes, Justice Marshall, was --

18 QUESTION: Was it not decided?

19 MR. WELBORN: Yes, it was.

20 QUESTION: Why are you presenting it now?

21 MR. WELBORN: I am relating it, Justice  
22 Marshall, to the question of conservation which I  
23 believe is up here. We felt that the pronouncements of  
24 this Court regarding protecting wasteful practices were  
25 particularly relevant to this question of conservation.

1           Now there is another area that administration  
2 would have protected and dealt with that would have been  
3 a benefit to the Vermejo Conservancy District, and that  
4 is the overuse of water by other diverters. There was  
5 no administration and no surveillance.

6           These other diverters were senior, had senior  
7 priorities, and there were not any records -- the  
8 Special Master noted that -- because of the absence of  
9 administration, but the interesting thing was that when  
10 one measurement was made as shown by a New Mexico  
11 exhibit, A-130, the seepage run on the Vermejo had shown  
12 the Phelps Dodge lessee irrigating after what New  
13 Mexico's own exhibit had said was the irrigation season,  
14 after September 15th, and using an amount of water, 300  
15 acre-feet, which would have been equivalent to the total  
16 annual entitlement of that diverter.

17           So this is the sort of thing that could have  
18 been dealt with and would have been dealt with by proper  
19 administration certainly in Colorado. All of these  
20 factors, I suggest, are ones that the Special Master  
21 took into account.

22           He noted also, and I would like to emphasize  
23 this in closing, the great benefits to Colorado and the  
24 Purgatory, the fact that the City of Trinidad needed  
25 water -- the City of Trinidad put a moratorium on water

1 taps -- the fact that there was 29,000 acres of land,  
2 irrigable land, in the Purgatory Valley, 19,000 in the  
3 District and 10,000 above the district that needed  
4 water. The water was needed for coal washing purposes,  
5 for industrial development.

6 He put that together with the picture of water  
7 administration. One of the questions this Court  
8 propounded was, would there be conservation in Colorado,  
9 and he concluded that there would be because of the  
10 Colorado picture on water administration.

11 So the benefits to Colorado, it is our  
12 position, of course, that with conservation measures  
13 dealing with the overuse, with the silting in the  
14 District canals and particularly this conservation  
15 measure that has been completed with the domestic water  
16 system which eliminates the 2,000 acre-foot waste, it is  
17 our contention that there will be no harm to New Mexico  
18 resulting from the Colorado diversion.

19 But if there should be, the Special Master  
20 eminently concluded that any such harm would be  
21 outweighed by these benefits to Colorado, and that, we  
22 feel, Justice Marshall, fits into both the concepts and,  
23 as I say, the principles that were announced in the last  
24 paragraph of the Court's decision.

25 Thank you very much.



1                   QUESTION: Can I ask one question, Mr.  
2 Welborn? At the end of your brief you suggested maybe  
3 the decree should be rewritten in a couple of minor  
4 respects, or maybe they are not so minor. Did you take  
5 any exceptions to the Master's report yourself?

6                   MR. WELBORN: No, we did not. We did not  
7 consider that to be an exception, Justice Stevens. We  
8 suggested -- We felt that the main thrust of the Special  
9 Master's original reports and his additional findings  
10 that Colorado should have 4,000 acre-feet of water a  
11 year, and his report did not specifically limit the  
12 Colorado points of diversion as being the points where  
13 this water should be taken out of above those points.  
14 So we suggested that there be that limitation that  
15 Colorado could not take anything below the points of  
16 diversion specified in the Colorado decree, and that  
17 along with that there be this ten-year running average  
18 which is used in Nebraska v. Wyoming, for example, and  
19 also used in the Colorado River compact.

20                   QUESTION: Why won't that ten-year progressive  
21 average you suggest increase the divertable quantity to  
22 Colorado beyond the Master's recommendation? It looks  
23 to me like it would.

24                   MR. WELBORN: Justice O'Connor, if Colorado  
25 was specifically limited to the points of diversion in

1 the Colorado decree it could. You are absolutely  
2 right.

3 If, however, Colorado is free to take water  
4 any place in Colorado then it would be a corollary to  
5 the protection that would be given by limiting Colorado  
6 to these points of diversion.

7 CHIEF JUSTICE BURGER: Mr. Simms, do you have  
8 anything further?

9 ORAL ARGUMENT OF RICHARD A. SIMMS, ESQ.,  
10 ON BEHALF OF THE DEFENDANTS -- REBUTTAL

11 MR. SIMMS: There is an extremely important  
12 point with regard to this 2,000 acre-feet that Colorado  
13 has talked about a great deal being conserved from the  
14 closed pipeline that was put in by New Mexico users, two  
15 very critical points. First of all, Colorado says that  
16 there is an Exhibit E-3. That exhibit has in it a  
17 figure of 2,000 acre-feet that could be saved if a  
18 closed stock water pipeline were put in.

19 If you translate that 2,000 acre-feet in the  
20 reservoirs of the Vermejo Conservancy District into  
21 4,000 acre-feet through all of the efficiency  
22 coefficients in route to 4,000 acre-feet at the  
23 diversion points in Colorado. As a matter of fact, that  
24 2,000 figure is 2,145.

25 It was estimated in that exhibit by taking the

1 month of November, finding out how much water was  
2 released then after the irrigation season was over and  
3 when all of the canals were dry and multiplying it by  
4 nine. You get a very inflated figure designed to  
5 support this project.

6           The fact of the matter is and according to the  
7 unimpeached testimony of Colorado if you look at their  
8 Table 4 of their exhibit number 6 the average amount of  
9 water released during the period of the life of the  
10 District has been 790 acre-feet, not 2,000 acre-feet.  
11 That is Colorado's testimony. That is based on  
12 Colorado's discussion with the people that manage the  
13 Vermejo Conservancy District.

14           QUESTION: What did the Special Master find?

15           MR. SIMMS: The Special Master never looked at  
16 that exhibit.

17           QUESTION: Did he ever find how much had been  
18 diverted to the stock water system or how much might be  
19 saved by a closed system?

20           MR. SIMMS: He did not. He made no specific  
21 finding in that regard. Colorado is arguing that this  
22 one measure, and it is the only one they can point to,  
23 is going to offset the new diversion in Colorado.

24           To do that he has to be correct. Colorado has  
25 to be correct that it is going to make 4,000 acre-feet

1 in Colorado. It will not. Seven hundred ninety  
2 acre-feet diversion on the average. Bear in mind this  
3 was because that is what the Bureau of Reclamation gave  
4 them to use.

5 QUESTION: How much water upstream would  
6 790 --

7 MR. SIMMS: 1,500 acre-feet.

8 QUESTION: So you agree with his formula.

9 MR. SIMMS: We would we agree with -- No, we  
10 don't agree with that methodology, but utilizing  
11 Colorado's methodology in backing up the river you would  
12 have an offset only of 1,500 acre-feet. What that nets  
13 out to be is cutting into the New Mexico uses, not only  
14 the ones we already threw out, half of the entitlement.  
15 Now you cut into the ones that are left by an additional  
16 2,500 acre-feet.

17 QUESTION: May I ask, you say that the 2,000  
18 figure should really be 790.

19 MR. SIMMS: That is correct.

20 QUESTION: What is your view of the correct  
21 ratio if you do not accept their two-for-one figure?

22 MR. SIMMS: Justice Stevens, I do not think I  
23 can answer that without the help of an engineer. The  
24 reason is --

25 QUESTION: Is it somewhat larger than 790



1     though?

2                   MR. SIMMS:  No.  The figure would be about the  
3     same.  We agree with the 790 figure.  The only  
4     difference is how you translate that 790 at the  
5     reservoir --

6                   QUESTION:  Do you take the position that 790  
7     feet saved down in the reservoir is the equivalent of  
8     790 feet diverted up in Colorado?

9                   MR. SIMMS:  No.  It is the equivalent of  
10    somewhere in the neighborhood of 1,500 acre-feet.

11                  QUESTION:  So you do then agree with their  
12    two-for-one ratio if I understand.  Maybe I  
13    misunderstand it.

14                  MR. SIMMS:  We do not exactly agree with it.  
15    There is no dispute over it insofar as this point is  
16    concerned.

17                  QUESTION:  Thank you.

18                  MR. SIMMS:  Secondly, the conservation measure  
19    that is being discussed was undertaken long before this  
20    litigation began.  It was undertaken because the water  
21    users themselves recognized that what the Bureau of  
22    Reclamation gave them to work with was not very good,  
23    and they worked awfully hard to put together the money.

24                  They went to every state and federal agency  
25    you can conceive of to get that money.  They finally put

1 the package together and built the system.

2 It seems to me that the question is not  
3 whether CF&I should vicariously be awarded the benefits  
4 of their labors, but rather whether this Court is going  
5 to protect the kind of conservation measure, ongoing  
6 conservation measure, that it has said the states on an  
7 interstate stream are obliged to do.

8 QUESTION: Well, you do not suggest, I am  
9 sure, that a conservation measure would increase your  
10 water allocation.

11 MR. SIMMS: No. What the evidence shows  
12 without contradiction, and it is the evidence of the  
13 Bureau of Reclamation. It is the evidence of the USGS.  
14 The evidence shows that there is no economically or  
15 physically feasible conservation measure, any further  
16 ones, available in New Mexico. We have the ultimate  
17 conservation measure down at the bottom of the Canadian  
18 system.

19 There are two major reservoirs down there that  
20 impound nearly 500,000 acre-feet of water. The Vermejo  
21 dumps into that. Colorado would have you believe that  
22 the river channel that runs from the point of diversion  
23 at the Vermejo Conservancy District down into Conscious  
24 Reservoir does not exist.

25 QUESTION: Is part of your argument that the

1 uses of Vermejo water in the Canadian river should  
2 prevent an allocation to Colorado?

3 MR. SIMMS: Those uses have to be thrown out  
4 entirely in order to reach the conclusion of no injury.

5 QUESTION: Well, I understand that. That does  
6 not answer my question.

7 MR. SIMMS: Justice White, they along with the  
8 4,000 acres that you would throw out along with the  
9 additional undercutting of New Mexico uses by 2,500 acre  
10 feet plus the 13 percent shortage of the Canadian river  
11 users and their historic reliance on the Vermejo, yes,  
12 they all add up.

13 QUESTION: They may have a historic reliance,  
14 but that is only because there is water running past the  
15 District. Yet the Vermejo is completely adjudicated.

16 MR. SIMMS: It is completely adjudicated, but  
17 there are spills and they get down there frequently as  
18 the USGS data show. If you look at the entire period of  
19 record and not the mean daily flows on the exhibit to  
20 which Mr. Welborn has referred you to, you will find an  
21 average flowing past that diversion point of 7,700  
22 acre-feet over the long haul. That is a lot of water  
23 getting down to the Canadian river.

24 QUESTION: That includes the flood periods.

25 MR. SIMMS: Yes. That is essentially flood

1 flow.

2 One final point, even if the Court were to buy  
3 everything that the Master did, which we believe is  
4 patently incorrect because he never compared demand to  
5 supply and because he never identified a conservation  
6 measure, he has not shown you one reason either in law  
7 or in equity why priority should be varied even if  
8 Colorado were to be awarded the water.

9 Thank you.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.

11 The case is submitted.

12 (Whereupon, at 11:03 a.m., the case in the  
13 above-entitled matter was submitted.)

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CERTIFICATION

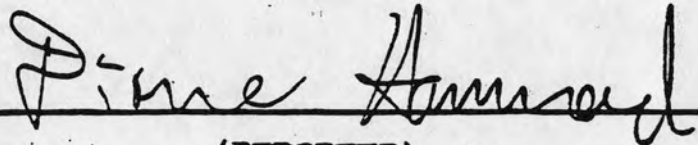
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No. 80 Orig. - - STATE OF COLORADO, Plaintiff v. STATE OF NEW MEXICO, ET AL.

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