

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 65 ORIGINAL

TITLE TEXAS, Plaintiff V. NEW MEXICO

PLACE Washington, D. C.

DATE April 29, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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TEXAS, :
Plaintiff, :
V. : No. 65 Original
NEW MEXICO :

- - - - -x

Washington, D.C.
April 29, 1987

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:41 o'clock p.m.

APPEARANCES:

CHARLOTTE URAM, ESQ., San Francisco, California; on
behalf of the plaintiff.

RENEA HICKS, ESQ., Assistant Attorney General of
Texas, Austin, Texas; on behalf of the defendant.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

CHARLOTTE URAM, ESQ.,

on behalf of the plaintiff

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RENEA HICKS, ESQ.,

on behalf of the defendant

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1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear
3 argument next in No. 65 Original, Texas versus New
4 Mexico.

5 Ms. Uram, you on behalf of New Mexico, I
6 understand, may proceed whenever you are ready.

7 ORAL ARGUMENT BY CHARLOTTE URAM, ESQ.,
8 ON BEHALF OF THE DEFENDANT

9 MS. URAM: That's correct. Thank you, Mr.
10 Chief Justice.

11 Mr. Chief Justice, and may it please the
12 Court, the heart of the current controversy under the
13 Pecos River Compact lies in two issues. First, whether
14 the Court may decide the critical, the ultimate issue in
15 this case, did man's activities in New Mexico cause all
16 or part of the shortfall at the state line on the basis
17 of inference or presumption?

18 QUESTION: I take it New Mexico accepts the
19 determination of the shortage --

20 MS. URAM: Yes, Your Honor.

21 QUESTION: -- or the shortfall?1

22 MS. URAM: The master found that there were 340,000 acre
23 feet departure. We do not take exception.

24 QUESTION: So we can start there.

25 MS. URAM: That's correct. The second issue

1 is whether the Court should order New Mexico to pay in
2 the future water in excess of its compact obligation to
3 make up for a shortfall from 1950 to 1983 when New
4 Mexico's obligation was unknown.

5 As Justice White pointed out to the Court the
6 master did recommend a 340,000 acre foot shortfall be
7 determined here. We take no exception to that. What
8 New Mexico does take exception to is that the master
9 recommended that that entire amount of shortfall be
10 presumed or inferred due to man's activities in New
11 Mexico. New Mexico also takes exception to the master's
12 proposal for relief. The master proposed actually four
13 items for relief.

14 First, he proposed that there be prospective
15 relief, and we do not take exception to that. That is
16 required under the compact. But then he went on to
17 propose, to recommend that New Mexico also be required
18 to pay water and to pay in water for shortfalls from
19 1950 to 1983.

20 He recommended that New Mexico be required to
21 pay that amount of water in a maximum time period of 13
22 years when the shortfalls accrued over a 34-year
23 period. And finally, he recommended that the Court
24 order New Mexico to pay water interest at Treasury bill
25 rates if New Mexico falls too far short.

1 QUESTION: How would that be determined?

2 MS. URAM: He said it was to be determined
3 according to the Treasury bill rate on the day when New
4 Mexico is found to be --

5 QUESTION: Yes, but what would the interest
6 rate be applied to?

7 MS. URAM: It would be applied to the 340,000
8 acre foot amount, whatever had been short.

9 QUESTION: What do you do? You say 10 percent
10 of 320,000 or so many acre feet?

11 MS. URAM: That's correct, Your Honor. He
12 established a system in which --

13 QUESTION: You mean the interest would be paid
14 in water?

15 MS. URAM: The interest would be paid --

16 QUESTION: Or in money?

17 MS. URAM: -- in water. It would be an
18 interest payment in water that he recommended. And New
19 Mexico takes exception to not the prospective relief but
20 all aspects of the retroactive relief.

21 QUESTION: Why do you call this retroactive
22 relief? I find that a curious terminology for this. In
23 that sense any relief in an ordinary contract claim you
24 would consider to be retroactive relief? You break a
25 contract with me and I sue you for the breach, for the

1 damages that I have suffered. You would consider that
2 retroactive relief?

3 MS. URAM: No, Your Honor, we feel that this
4 case is different, and we do use the word "retroactive"
5 with the intention of pointing out that New Mexico's
6 obligation, exactly what that amount of water is, is not
7 known until man's activities are determined by this
8 Court. So at that point we will know the obligation.
9 It is as if --

10 QUESTION: You don't even say the same in a
11 contracts case. I mean, sometimes you don't know
12 definitely what your obligation was until there is a
13 lawsuit and the court tells you precisely what it was.
14 But you had it. It was there.

15 MS. URAM: That may very well be, Your Honor.
16 We are not -- it doesn't matter whether one calls it
17 retroactive or something else. The point is that we are
18 being asked to pay back water for shortfalls that
19 occurred over 34 years. New Mexico did not know its
20 obligation at that time.

21 QUESTION: But is your conclusion from that
22 that you shouldn't have to pay it back at all?

23 MS. URAM: That's correct, Your Honor. We
24 should not have to pay back any water under the
25 compact.

1 QUESTION: Well, what good is a compact like
2 this if, you know, you and Texas enter into an agreement
3 that says you will only use a certain amount of water
4 coming down the Pecos, and in fact New Mexico uses what
5 it probably in good faith things it has a claim to but
6 which later a master interpreting the contract says, no,
7 you didn't have a claim to. Do you say, well, we will
8 just kiss and make up, and from now on we will obey the
9 compact?

10 MS. URAM: I understand the Court's
11 difficulty. But the compact is --

12 QUESTION: It is a considerable one.

13 MS. URAM: Well, the compact does provide
14 relief, and the compact specifically provided this
15 prospective relief for two reasons, and that prospective
16 relief is real, Your Honor. The foundation of the
17 question of what good is this compact is the assumption
18 that there is no relief unless there is relief for past
19 water due.

20 QUESTION: What is the relief?

21 MS. URAM: The relief is future water. In
22 this case, for example --

23 QUESTION: Well, I know, but suppose we said
24 prospective relief is all you can get, and then New
25 Mexico promptly doesn't deliver the water again?

1 MS. URAM: Well, then New Mexico --

2 QUESTION: Then you are back in court, and you
3 say only prospective relief.

4 MS. URAM: That may be a different point, Your
5 Honor. At that point it is possible that the court
6 could order different relief, but at this point the
7 compact does not permit it.

8 QUESTION: I don't see -- well, with due
9 respect, Ms. Uram, it is just like saying, if, you know,
10 somebody's dog bites me and I try to sue and you say,
11 well, you know, you will get relief, we will prevent him
12 from biting you again. That is not relief for the first
13 bite. You are saying here the first bite is free.

14 MS. URAM: Let me sort out the stages, and
15 perhaps we will see that it is not a bite. There are
16 two stages that one is concerned with under the
17 compact. The first stage is the one that the Court is
18 now approaching. What is New Mexico's obligation? That
19 is the first stage. The compacting parties have
20 specifically considered whether at that stage they
21 should provide for retroactive relief for debit-credit
22 accounting, and they said no. They said no for two
23 reasons.

24 The first reason is that they felt that they
25 wanted to leave the compact flexible to accommodate

1 change in the future, and so when they selected a method
2 which required such complicated analysis, they said, we
3 don't know enough about this river. This is an
4 extremely difficult river. Let us leave it open in the
5 future to change, to correction of the method, to
6 replacement of the system to more accurately define the
7 obligation. And if we tie it to a debit-credit system
8 it would be impossible for the parties, it will make it
9 very difficult for the parties to make the changes that
10 are required that should happen in the future in this
11 dynamic compact.

12 So that was the first reason that they said
13 when we are arriving at New Mexico's obligation in the
14 first instance, when we are trying to define man's
15 activities, when we are coming to that point, in that
16 instance there will not be retroactive relief, and they
17 had a second reason which is related to the first. That
18 second reason is that New Mexico cannot know exactly
19 what its obligation is until the obligation is
20 determined in light of the man's activities finding. It
21 cannot know in advance exactly what that amount of water
22 will be. So there is no wrong. There is no wrong --

23 QUESTION: Excuse me. Excuse me. It doesn't
24 have to --

25 QUESTION: That is true about a requirements

1 contract or lots of other kinds of things that aren't in
2 the area of interstate compact. Someone agrees to take
3 all of his requirements. Now, there may be arguments
4 what those requirements are. Ultimately a court may
5 tell that person, your requirements were different than
6 you thought they were, but the contract would
7 nonetheless be enforced, don't you think?

8 MS. URAM: Yes, and there is enforcement here,
9 and that enforcement is prospective at this point. At a
10 later point if there is a violation of the compact which
11 we do not have here, if there is a violation of the
12 compact, perhaps other relief would be appropriate.

13 QUESTION: I don't really understand this
14 point about New Mexico not knowing what -- New Mexico is
15 supposed to be pouring water into the river if the level
16 isn't at a proper flow. The requirement was very
17 simple. Don't take any water out of it by man's
18 activities. Wasn't that the sum total of the
19 requirements imposed on New Mexico?

20 MS. URAM: Well, the requirement is actually
21 quite complicated, Justice Scalia. It is not simple to
22 administer and it is not simple to know. That is why
23 this litigation has taken so long. It is according to
24 the depletions as it appeared on the river in 1947.
25 That is the first step. You have to determine the

1 depletion on the river as it occurred in 1947.

2 The second step is, you have to determine by a
3 fairly complicated inflow, outflow method the second
4 step, the extent to which there were shortfalls. And
5 then there is the third step, which is the ultimate
6 issue in this case, the issue that sets New Mexico's
7 obligation, and that is to what extent did man's
8 activities in New Mexico cause the departure.

9 QUESTION: Yes, but as far as New Mexico's
10 obligations were concerned, what obligations did New
11 Mexico have other than not to take away from the river
12 by man's activities any more than had been taken away by
13 man's activities in 1947?

14 MS. URAM: That is the obligation, but to do
15 that you have to go through fairly complicated
16 mathematical --

17 QUESTION: No, you don't. All you have to do
18 is conduct no additional man's activities after 1947.

19 MS. URAM: No, Your Honor, that's not correct,
20 because the standard is not tied to uses in New Mexico
21 in 1947. In other words, New Mexico cannot maintain all
22 of the uses that it had on the river in 1947. It is
23 tied to depletions which had appeared on the river, and
24 rivers, particularly this river, which is tied to two
25 separate aquifer systems, don't show depletions right

1 away. It takes a while for the water to get there, and
2 different rainfalls may cause different effects, and
3 changing where a well is located may cause different
4 effects. So it is not as simple as it sounds. As a
5 factual matter it is extremely difficult to know exactly
6 how much water you need, exactly what you need to do to
7 remain in compliance with the standard.

8 And I would point out, Justice Scalia, in
9 light of your concern, didn't New Mexico know and didn't
10 New Mexico do what it needed to do, the answer is that
11 in 1961 and '62, when this commission made findings, New
12 Mexico believed that it was in compliance according to
13 those commission findings, and so it did continue to
14 administer the river according to the commission
15 findings at that period. It regulated all uses. It
16 didn't let people make new uses which would have an
17 effect on the river. It took all those steps in order
18 to assure that it would remain in compliance with the
19 commission findings.

20 QUESTION: Counsel, where is the language that
21 says this is all prospective?

22 MS. URAM: Oh, yes, Your Honor.

23 QUESTION: Where is the language?

24 MS. URAM: The language is in Senate Document
25 Number 109 at Pages -- I would refer the Court to Page

1 124 --

2 QUESTION: Is it printed here before us?

3 MS. URAM: It is stipulated Exhibit 1 in this
4 case.

5 QUESTION: Where is it? Is Exhibit 1 in any
6 of these volumes?

7 MS. URAM: I don't know if Exhibit 1 is in the
8 volumes that are before the Court, but it should have
9 been transmitted to the Court as part of the record.

10 QUESTION: You don't know whether it is here
11 or not?

12 MS. URAM: I am sorry, Your Honor. I don't
13 know if it is at --

14 QUESTION: Pages what? You started to say and
15 were interrupted.

16 MS. URAM: It is Pages 124 and 125.

17 QUESTION: Exhibit Number 1?

18 MS. URAM: Yes. And --

19 QUESTION: What about the payment of monetary
20 damages in lieu of water itself for any amount found
21 overused by New Mexico?

22 MS. URAM: Your Honor, that is an option that
23 we think the Court should consider if the Court does not
24 agree with us that --

25 QUESTION: Did you propose that or object to

1 payment in kind in water below to the master?

2 MS. URAM: Yes, Your Honor. We said that
3 retroactive relief was not permissible under this
4 particular compact at this stage.

5 QUESTION: Well, did you suggest if the master
6 wanted to impose retroactive relief that he consider
7 monetary damages?

8 MS. URAM: We stipulated to his authority to
9 do so, but he did not believe he had the authority, but,
10 Your Honor, we -- the compact, as we say, at this
11 stage --

12 QUESTION: You asked that he do so instead of
13 giving water relief? You may have stipulated that he
14 had authority to do so, but did you ask that instead of
15 giving water relief, he give monetary relief?

16 MS. URAM: We did not specifically ask. We
17 asked for a hearing on --

18 QUESTION: That is what Justice O'Connor was
19 asking.

20 QUESTION: You are asking us to -- you are
21 asking now to have damages given rather than water.

22 MS. URAM: We are asking for the alternative,
23 Your Honor, and the reason we are asking for the --

24 QUESTION: The damages.

25 MS. URAM: For the alternative.

1 QUESTION: Money. Money.

2 MS. URAM: Money. We are asking for, if the
3 Court decides that some relief must be given, and we do
4 not think such relief is appropriate in this case for
5 several reasons, but if -- and I will explain those
6 reasons, but if the Court thinks some relief is
7 appropriate, then we think that the Court should
8 consider the alternative of monetary damages. And the
9 reason is that if the Court is going beyond the compact
10 to order equitable relief in this case, then let us look
11 at the equities of this situation.

12 The master's, the relief that the master has
13 recommended would cause so much greater hardship to New
14 Mexico than --

15 QUESTION: Where would you get the water to
16 deliver this extra amount? Would you have to condemn
17 it?

18 MS. URAM: We would have to curtail the junior
19 users, all the junior users, some of which go back to
20 1890, in the Roswell basin. We would have to cut off,
21 Justice White, a minimum of 112,000 acres of land in New
22 Mexico to benefit a maximum --

23 QUESTION: Well, you wouldn't have to if you
24 went out and condemned some other water rights.

25 MS. URAM: We wouldn't have -- there are

1 alternatives, but those alternatives, Justice White, are
2 speculative. They require further --

3 QUESTION: Well, they would only cost you
4 money, but then you would be taking the water away from
5 maybe even priority users.

6 MS. URAM: That's correct, Your Honor. They
7 exact their own dislocations. Even if one could do any
8 of the alternatives, and there is substantial question
9 whether we could, they exact their own dislocations. We
10 would be closing down the earliest surface water users
11 in that basin.

12 QUESTION: Who will benefit from the water,
13 the increased water usage? Suppose you delivered the
14 extra 34,000 acre feet a year into Texas. Is that water
15 distributed according to a water system in Texas,
16 priority? Is that it?

17 MS. URAM: I assume so, Your Honor, but the
18 record does not provide any testimony of exactly how
19 Texas will use the water. The only testimony that was
20 provided was one anecdotal witness, and from her
21 testimony we can calculate that if it were applied to
22 the land, the most acreage that it could benefit is in
23 the 4,000 to 10,000 acre range. So you would be
24 shutting down a minimum of 112,000 acres in New Mexico
25 to benefit a maximum --

1 QUESTION: What about municipalities in
2 Texas? Do they need water?

3 MS. URAM: I assume they need water, Your
4 Honor, but we have heard no testimony about how Texas is
5 going to use the water, nor, would I point out, have we
6 heard testimony about what Texas's harm has been in the
7 past.

8 QUESTION: Whatever they are going to use it
9 for, it is hard to believe that they wouldn't accept a
10 certain amount of money for the water instead. I mean,
11 there is no reason you can't get out of this by paying
12 money. It is just a question of whether you are going
13 to have to buy the water from Texas or whether the
14 special master is going to have to figure out how much a
15 foot acre of water is.

16 QUESTION: Did Texas stipulate to damages if
17 the -- or did they oppose -- they want water rather than
18 money. Is that right?

19 MS. URAM: I believe Texas wants water rather
20 than money.

21 QUESTION: Well, they will only have the extra
22 water for ten years.

23 MS. URAM: That's correct, Your Honor.

24 QUESTION: They wouldn't accept any kind of --
25 any amount of money for that water? That is hard to

1 believe.

2 MS. URAM: It is not a --

3 QUESTION: That is very irrational behavior.
4 Not many economists would think that that is a possible
5 scenario.

6 QUESTION: Of course, you can still settle
7 monetarily, whatever we do here.

8 MS. URAM: We can settle if the other party is
9 settling for money.

10 QUESTION: That is right.

11 MS. URAM: And, Your Honor, it is a matter of
12 public record, although not a matter of this record,
13 that Texas is not settling for money.

14 QUESTION: Well, you two states have had a
15 chance to settle this controversy over, I don't know,
16 forever.

17 MS. URAM: That's correct.

18 QUESTION: You haven't been able to do it.

19 MS. URAM: That's correct, Your Honor, and we
20 have continued to try to settle this controversy, but
21 the controversy sticks now because the relief, the
22 relief that the master has recommended is so onerous, it
23 is such an extended hardship to New Mexico --

24 QUESTION: When you say we have tried to
25 settle, you mean New Mexico or both of you?

1 MS. URAM: Both states. Both states have tried
2 to settle, but the relief is so onerous, and that is
3 where we stand.

4 QUESTION: That is just what I can't believe.
5 I mean, I don't care how much water they are getting. I
6 am sure they will accept a monetary settlement for the
7 water. It may have been in Texas's economic interest to
8 get a water judgment first and then have New Mexico
9 bargain with Texas about how much New Mexico will pay
10 instead of the water, but I have no reason to believe
11 that Texas would behave so irrationally as not to -- if
12 in fact the water is worth more to you than to them, I
13 am sure they would come to an economic adjustment in
14 dollars.

15 MS. URAM: Justice Scalia, there was an
16 exchange that addressed the issue of monetary payment in
17 lieu of water, and there was a letter written from
18 counsel of the State of Texas in response to New
19 Mexico's offer to pay water, and the response is dated
20 October 28, 1986. It is not a matter of this record but
21 it is public knowledge and public record, and it says,
22 "Texas has considered whether any amount of money might
23 compensate Texas for the water owed us," and then it
24 continues, "We have determined that the answer must be
25 no. Only payment of the debt in water will suffice to

1 compensate Texas. The minimum acceptable payment must
2 be 340,100 acre feet coupled with specific guarantees of
3 future compact compliance."

4 We are not settling on the basis of money to
5 compensate New Mexico for that reason. But the basic
6 question is, if there were to be any equitable relief
7 for Texas, how would anyone know what it is to be? We
8 do not even know what the hardship might have been to
9 Texas in all these years for lack of water.

10 QUESTION: Of course, ordinarily if you breach
11 an agreement you don't look so much at the hardship of
12 the other party as the value of the performance of the
13 person who breached.

14 MS. URAM: You do look at both of those
15 factors. That is correct, Your Honor. But see, here
16 the relief that would be granted if it looks back is
17 equitable relief and not contract relief.

18 QUESTION: Well, but specific performance is a
19 form of equitable relief and it simply require you to do
20 what you said you would do.

21 MS. URAM: That is correct, Your Honor, but if
22 I understand correctly, you know, the analysis on the
23 payment for anything past due if there is to be such
24 payment is not within the framework of a contract,
25 because this contract, the contracting parties here

1 specifically rejected retroactive or any kind of payback
2 system. They rejected that for reasons having to do
3 with the way they wanted this compact to work, and those
4 reasons are still valid. So it is only if the Court
5 goes beyond and equity intervenes that the Court -- it
6 is within that equity authority that the Court would be
7 looking to consider any other sort of relief.

8 QUESTION: Did you make to the special master
9 this argument that the compact didn't contemplate what
10 you call retroactive relief?

11 MS. URAM: Yes.

12 QUESTION: And what did the special master say
13 about it?

14 MS. URAM: He said he believed it was without
15 foundation. But, Your Honor, we feel that the compact
16 is quite solid on this point. There is a reason why the
17 compact evolved that way, and the reason was to protect
18 these other concerns that the compacting parties had.

19 QUESTION: (Inaudible) even if the contract
20 contemplates specific performance, so to speak, it would
21 be inequitable to order it in this case.

22 MS. URAM: Yes. Yes, we did. But the --

23 QUESTION: Yes, but he said I don't have any
24 authority about damages. But did you say that -- did
25 you make this argument that nobody knew what this

1 obligation was until recently?

2 MS. URAM: Yes, we argued that nobody knew
3 what the obligation was, that Texas should have to
4 present --

5 QUESTION: And the fundamental argument that
6 went on for so many years when Judge Brightenstein was
7 special master was, what was the 1947 condition.

8 MS. URAM: That's correct.

9 QUESTION: And there was a major difference
10 between you two states, and that question came up here
11 twice, didn't it?

12 MS. URAM: That's correct. Let me turn
13 quickly to the question of man's activities, but let me
14 make one more point on hardship, and that is, there is
15 no evidence of any hardship in this record to Texas.
16 The sole testimony is from one anecdotal witness, and
17 her testimony suggests that in fact her hardships were
18 unrelated to any activity by New Mexico.

19 On the question of the basic man's activities
20 determination, the reason that New Mexico is before the
21 Court on this question is that this is the first time
22 that the man's activities issue is being decided, and it
23 is of critical importance to us that this precedential
24 issue be done in the way New Mexico bargained for when
25 New Mexico entered into this compact.

1 When New Mexico agreed to this compact at the
2 outset of the negotiations in 1943 New Mexico made it
3 plain that because this river was so variable, and
4 because the calculations required were so extremely
5 difficult to do correctly, New Mexico wanted to ensure
6 that it would never be charged for any losses which were
7 not found due, which were not shown due to man's
8 activities in New Mexico.

9 The problem here is that what the court, what
10 the master heard evidence on was not man's activities in
11 New Mexico. He never heard evidence, what are man's
12 activities in New Mexico and how do they affect the
13 river? Now, what would this hearing have looked like if
14 he had heard such evidence? Well, it would have --

15 QUESTION: He found that they weren't due to
16 natural causes.

17 MS. URAM: That's correct.

18 QUESTION: And so you then say, well, those
19 weren't due to natural causes, now let's have a hearing
20 to decide what they were due to?

21 MS. URAM: That's correct, because the
22 departure --

23 QUESTION: What is one of the possibilities
24 other than man if it isn't nature?

25 MS. URAM: There are unknowns, but that

1 doesn't answer your question, Justice White, because --

2 QUESTION: So there is a third category,
3 unknown?

4 MS. URAM: There is a third category but that
5 still doesn't answer the question you raise, which is,
6 if we have accounted for natural losses, why do we have
7 to consider man's activities, and the reason is that the
8 accounting for the natural losses is done on the basis,
9 as this Court noted in 1983, of speculation about what
10 some of those entries are to balance the books, and as
11 this Court also noted in 1983, the inflow-outflow
12 analysis which enables anyone to look and to make those
13 determination does not say a thing about causes. It
14 doesn't address causes.

15 It lumps everything together. So you cannot
16 tell, as this Court noted, as Judge Brightenstein noted
17 in his two previous reports, you cannot tell from
18 looking at any information through the Inflow-outflow
19 method what happened in New Mexico on man's activities.

20 QUESTION: I thought the master conducted a
21 hearing on this very question, Texas had a burden of
22 proof and submitted whatever it was, Exhibit Number 79
23 or whatever, yes, Texas Exhibit 79, which purported to
24 account for the loss in water, and New Mexico didn't
25 produce anything in opposition, and the master made his

1 decision. What is the matter with that?

2 MS. URAM: The thing that is wrong with it is
3 that what the master heard at the hearing was the second
4 stage analysis, departures and adjustments to
5 departures. In other words, he considered what was not
6 man's activities, so he said here are the departures.

7 QUESTION: That was what Texas put on. Ne
8 Mexico put on nothing of its own, and the master made
9 the decision.

10 MS. URAM: No, that's not correct, Your
11 Honor. Both parties put on evidence as to what was not
12 man's activities. New Mexico was of the understanding
13 that there was to be further consideration of New
14 Mexico's position, which is that you need to have your
15 affirmative evidence on the extent to which man's
16 activities in New Mexico might have caused these
17 departures.

18 QUESTION: If you needed that affirmative
19 evidence, would there have been any need to compute the
20 1947 flow. What was the purpose of that?

21 MS. URAM: Because the standard against which
22 everything is measured, you do the 1947 flow and all
23 those computations annually.

24 QUESTION: And the conditions.

25 MS. URAM: That's correct, you do that

1 annually, and if you see a trend of departures between
2 the two, then you look at man's activities, and that is
3 the obligation.

4 QUESTION: But why? I mean, if each of man's
5 activities has to be proven, you are wasting time to go
6 back and figure out what the -- the whole purpose of
7 computing the '47 flow was to see if there is any
8 decrease from that flow, and in order -- and when you
9 find a decrease you then find what was naturally caused,
10 and the rest is man's activities. Otherwise you are
11 going to have to show man's activities diverted so much
12 water this year, man's activities diverted so much water
13 the next year. If that must be proven, you have wasted
14 a whole lot of time figuring out what the '47 flow was,
15 haven't you?

16 MS. URAM: That's not correct, Your Honor --

17 QUESTION: Okay, tell me --

18 MS. URAM: -- because of the nature of this
19 particular river. This particular river is so
20 difficult, and if the rains come in at one place as
21 opposed to another place it has a whole different effect
22 on the river. Because of the difficulty of this
23 particular river the parties set up a very complicated
24 scheme. And they agreed at the time, and the Federal
25 representative agreed at the time that this scheme was

1 the fairest way to administer such a difficult river.

2 QUESTION: I guess I am not making myself --
3 why do you need that -- it seems to me you have said
4 that what Texas has to show is that man's activities
5 diverted so many acre feet of water each year. If Texas
6 has to show that, what difference does it make what the
7 1947 flow was? You are wasting --

8 MS. URAM: Because that is the basic standard
9 that the compact says --

10 QUESTION: But you don't need a standard. If
11 you have to prove each individual man's diversion one by
12 one, you don't need a standard.

13 MS. URAM: New Mexico recommended in the
14 negotiations that there be no standard but Texas wanted
15 a standard, and so as a consequence we do have a
16 standard, and then a further limitation to man's
17 activities under the standard.

18 QUESTION: Well, it seems to me the whole
19 purpose of the standard is to figure out what the
20 natural flow of the river was, and then you can deduct
21 from that standard whatever natural diversions had
22 occurred in the interim and all the rest would be man's
23 activities.

24 MS. URAM: The natural flow is not that
25 reliable. Even the master has recommended that there be

1 a 20 percent good faith margin set on delivery to
2 account for the variability of this river. Look at the
3 numbers in Table 2 of Texas's Exhibit 79 that is
4 attached to our brief. Variations like that do not
5 occur on a regular river with regular uses, with
6 regularly accounted for natural losses. The losses
7 here, the natural losses are estimated. If the water,
8 if the rain comes in, for example, Justice Scalia, at
9 the top of the river it will still be counted in the
10 analysis but it will never make it to the same -- to the
11 state line.

12 If it comes in toward the bottom of the river
13 it will make it to the state line and it will be counted
14 the same, so you will have two different consequences,
15 and the same numbers go in, and the only difference
16 being where does the rain fall. Natural losses account
17 for a great deal of the variation in this river.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Uram.

20 We will hear now from you, Mr. Hicks.

21 ORAL ARGUMENT BY RENE A HICKS, ESQ.,

22 ON BEHALF OF THE DEFENDANT

23 MR. HICKS: Mr. Chief Justice, and may it
24 please the Court, I think on the question of what New
25 Mexico has termed retroactive relief, which is really

1 giving Texas the water that it failed to deliver over
2 all those years, the 1983 unanimous decision of this
3 Court has already settled that question. New Mexico has
4 offered the Court no reason to revisit that decision.

5 In 1983, at the conclusion of the opinion, the
6 Court returned the case to the special master to
7 conclude the proceedings, which is what this special
8 master now has done, and said determine first -- there
9 are two subsidiary questions that you need to
10 determine. First, for each year of the period in
11 dispute, and it is 1950 to 1983, under the 1947
12 condition, what is the difference between the -- well,
13 what is the difference between the amount of water New
14 Mexico is supposed to deliver under the 1947 condition
15 and the amount it actually delivered.

16 And the second question is, to what extent
17 were any underdeliveries under that, in the answer to
18 that question due to man's activities.

19 The special master and the parties have spent
20 the four years since then answering these questions, and
21 New Mexico has asked you all now to turn that into
22 nothing but a very expensive academic exercise that is
23 just to train people in hydrology or something. I am
24 not sure why they want it that way. This is water that
25 Texas bargained for in the compact in 1950 or in 1949

1 when the compact was approved by Congress. If Texas had
2 wanted --

3 QUESTION: Mr. Hicks, do you say that the
4 master can and that this Court can consider the equities
5 involved in ordering any relief by virtue of the
6 shortfall? Is this a case in which equities can be
7 considered in determining what is to be done about the
8 shortfall?

9 MR. HICKS: I want to give the careful answer
10 to that, and it is important. This is compact case, not
11 an equitable apportionment case. And in determining
12 what the extent of the shortfalls is, this Court --
13 there are no equities involved. This case has been to
14 determine those amounts. And it has now been done.

15 QUESTION: What about the remedy stage?

16 MR. HICKS: Now, at the remedy stage I suppose
17 that Texas could have tried to insist that it is our
18 water, it has been determined that it is our water,
19 deliver every bit of it right now in New Mexico. Texas
20 has not chosen to push that issue.

21 QUESTION: No, I am asking whether the Court
22 in your view and the master have power to consider the
23 equities in determining the remedies.

24 MR. HICKS: Only to a limited extent. There
25 is a realistic geographical, geological limitation on

1 how much can come down in one year, and in fact how much
2 can be used in one year, I suppose. If all 340,000 acre
3 feet came down in one year, I don't think it could
4 happen, first, and secondly, if it did, you would wipe
5 out --

6 QUESTION: There isn't that much water in the
7 river.

8 MR. HICKS: Excuse me?

9 QUESTION: There isn't that much water in the
10 river.

11 MR. HICKS: That's right, so to that extent
12 the equities can be taken into account in ordering the
13 relief. The equities, I think, have been taken into
14 account in the recommendations made by the special
15 master. He gave very careful consideration to those.

16 QUESTION: Well, I mean, let's suppose, and
17 this isn't your situation, I guess, but let's suppose
18 that we have existing, preexisting uses in New Mexico
19 and land being farmed for many generations, and
20 dependent upon the water, and we have land in Texas
21 which has never received the water that it says it was
22 entitled to receive, and it has no immediate consequence
23 of a delay in receiving the shortfall.

24 Now, is that a concern that we can be
25 considering in determining what to do about it?

1 MR. HICKS: No, I don't think so.

2 QUESTION: I would have thought we had some
3 residual equitable power to be concerned about this.

4 MR. HICKS: In the courts -- I think the only
5 equitable considerations that the Court can give are
6 realistically how much time should New Mexico be given
7 to get this water down given the circumstances in the
8 basin, and it isn't the individual economic
9 circumstances of the people that live along the river,
10 because you have to remember there used to be farmers in
11 Texas farming this land. After the compact was entered
12 the water has essentially quit flowing. They still do
13 some farming. They are there and ready to come back.
14 There is testimony to that effect. So any harm that the
15 Court sees --

16 QUESTION: Up to a maximum of 10,000 acres
17 ready to receive it, right?

18 MR. HICKS: They are ready to receive for the
19 past, the payback, the debt, 34,000 acre feet a year.
20 And this would be over 17 years, essentially, not over
21 ten, as New Mexico has depicted it. On top of that, it
22 is very important to Texas, and I think it is the only
23 way this case can ever end is that there be an
24 injunction against New Mexico for the future to abide by
25 the compact, a very specific injunction, and --

1 QUESTION: How about monetary damages in lieu
2 of water to make up the shortfall?

3 MR. HICKS: I don't think the compact allows
4 that. Texas, as Justice Scalia --

5 QUESTION: Why not?

6 MR. HICKS: Well, water in the west is a
7 unique resource, and --

8 QUESTION: It has a value. It has a monetary
9 value.

10 MR. HICKS: It is very difficult to determine,
11 and when you begin looking over 34 years of failure to
12 deliver, the hearing, the evidentiary hearing which
13 would be required and which New Mexico has waited until
14 after the proceedings are over to ask for so that it
15 would further delay the case, the hearing would be
16 extremely complicated to determine what the value was in
17 1950 of the water they failed to deliver, the water in
18 '51, in '52, the consequential damages not just to the
19 Pecos River basin in Texas but to all of Texas.

20 I think there are just unbelievable
21 difficulties in that. I think --

22 QUESTION: Of course, it doesn't really solve
23 that problem, because in fact giving you however many
24 hundred thousand acre feet of water in 1995 is not the
25 same as giving you the same number in 1933. It may be

1 worth much more in 1995 than it was in 1932. I mean,
2 superficially it looks as though the fairest way is to
3 give you the water you didn't get, but in fact when you
4 didn't get it back in 1952 it may not have been worth
5 nearly what it is going to be worth when you finally do
6 get it.

7 MR. HICKS: But it may be worth more, too.

8 QUESTION: May be.

9 MR. HICKS: And I think the observation you
10 made that the opportunity at the end of this case --
11 there is a three-year grace period under the
12 recommendation of the special master. There is an
13 opportunity for Texas and New Mexico to negotiate, to
14 substitute --

15 QUESTION: I was wondering about that. I
16 thought Texans had had sort of a reputation of being
17 enterprising, let's cut a deal kind of folks, and have
18 you really said that you would not, no matter what, you
19 want the water and you won't take any kind of money for
20 the water? That seems --

21 MR. HICKS: I wrote the letter that Ms. Uram
22 read. I can answer the question that way. I said what
23 she said. I suppose everything has its price. That is
24 what economists say. And I don't know what may happen.

25 QUESTION: That's what the French say, too.

1 QUESTION: But the annual -- forget about the
2 damages or forget about the payback. The amount that
3 you are supposed to deliver under the compact, that was
4 increased over, well, the 340 -- the annual delivery is
5 higher than New Mexico thought it was by about what,
6 10,000 acre feet?

7 MR. HICKS: It is higher than New Mexico
8 delivered. There is no evidence in the record --

9 QUESTION: All right, let's take it that way.
10 They are going to have to, even without the payback they
11 are going to have to send more water down than they have
12 been delivering.

13 MR. HICKS: Yes.

14 QUESTION: And so they are going to have to
15 get that somewhere.

16 MR. HICKS: Yes.

17 QUESTION: And where are they going to get
18 that?

19 MR. HICKS: From the same place, I suppose,
20 that they can get the water they have to pay back.

21 QUESTION: Didn't the special master say that
22 is about 10,000 acre feet?

23 MR. HICKS: You can't predict exactly --

24 QUESTION: No, I know, but it --

25 MR. HICKS: -- but if you look over the

1 34-year period --

2 QUESTION: But that is what he said.

3 MR. HICKS: -- it would average 10,000 feet a
4 year extra in addition to the payback. Yes.

5 QUESTION: Yes, so --

6 MR. HICKS: But it is really difficult to
7 tell, but they have the same sources to obtain that
8 water that they have to obtain the water that they have
9 kept from us all these years.

10 QUESTION: They are going to have to start
11 doing that right away, aren't they --

12 MR. HICKS: Yes.

13 QUESTION: -- as soon as we affirm the special
14 master if we do?

15 MR. HICKS: Yes. They will have to do it --

16 QUESTION: That three-year grace period
17 doesn't apply to that.

18 MR. HICKS: That's right, it does not. These
19 numbers are computed, by the way, on three-year running
20 averages --

21 QUESTION: Yes.

22 MR. HICKS: -- so it can average out over
23 three years that that -- it is hard to discuss this
24 simply and make any sense with it. That 10,000 acre
25 feet, maybe it would just be 4,000 acre feet the first

1 year. It may be 12,000 acre feet the next year and
2 3,000 acre feet the next year. It is really -- it is
3 hard to tell in advance on the future deliveries.

4 QUESTION: Mr. Hicks, I gather that Texas
5 doesn't want damages, it wants specific performance,
6 doesn't it?

7 MR. HICKS: Yes.

8 QUESTION: And usually aren't equitable
9 considerations appropriate in connection with the remedy
10 of specific performance?

11 MR. HICKS: It is an equitable remedy, but I
12 don't think the courts that order specific performance
13 in contract cases, for instance, decide how long you
14 have to pay back what you owe. It is a decision that
15 equity demands specific performance in this case because
16 of the particularly unique resource, and that is the
17 situation here. It isn't an equitable decision to say
18 New Mexico has 50 years to pay it back.

19 QUESTION: Well, I take it the master's time
20 table, the three years and all the rest of it, smacks
21 somewhat of equitable considerations, doesn't it?

22 MR. HICKS: I am in somewhat of a box here,
23 because it is true, just as a realistic matter it all
24 can't come down in one year and we don't want it to come
25 down in one year. We couldn't use it. The farmers

1 there couldn't use it. As much as farmers in the west
2 would take any kind of rain they can get, they don't
3 want it all at once.

4 QUESTION: What are you going to do with
5 34,000 acre feet a year for ten years and then you won't
6 have it?

7 MR. HICKS: I think what I just said is a good
8 example. There is no farmer anywhere in the west that
9 would turn down ten good years of rain knowing that in
10 the eleventh year they may not get as much rain, and
11 that is the --

12 QUESTION: They may have to go on to Oregon.
13 Is that it?

14 MR. HICKS: They might move back up to New
15 Mexico to get that 34,000 acre feet that quit coming
16 down. I don't know.

17 QUESTION: As a matter of fact, that is not
18 economically very efficient, to tell New Mexico farmers
19 who will be able to use it after the payoff is done that
20 they have to get out and come back 15 years later, or
21 whenever the -- 17 years later, okay, and to tell Texas
22 farmers you can come in and farm for ten years but
23 you've got to know you can set up this farm but after
24 ten years there is just not going to be water for it.
25 That just isn't very efficient and I wouldn't - I

1 frankly wouldn't favor it if I didn't think that if it
2 is that senseless it wouldn't be economically favorable
3 for the two of you to get together and work it out in
4 money.

5 MR. HICKS: I don't think the Court has a
6 choice on that. Otherwise, New Mexico is put in the
7 position where it can always violate the compact if
8 every time we come back here after going through these
9 very complicated mathematical formulas to get the
10 answers they can always say, but it isn't economically
11 efficient for us to pay it.

12 QUESTION: We could make up a money figure.
13 We could make up a money figure.

14 MR. HICKS: I think that as you suggested,
15 economic reality, if it is all that difficult and all
16 that inefficient, I am not an economist, but the theory
17 is --

18 QUESTION: There has to be a price.

19 MR. HICKS: -- that there is a price, and it
20 is going to be a price that both New Mexico and Texas
21 somewhere along the way their value of the water --

22 QUESTION: Well, I take it that the special
23 master has got some -- for some things they are going to
24 have to determine good faith.

25 MR. HICKS: In his recommended decree he said

1 an 80 percent level for good faith.

2 QUESTION: Yes, good faith. Good faith. Good
3 faith.

4 MR. HICKS: Yes. It could have been another
5 term, but I think he just used good faith. I don't know
6 if it is an easy term to use.

7 QUESTION: Well, if it is possible to
8 determine good faith, then I suppose it would be
9 possible to say that anybody who isn't in good faith is
10 going to be held in contempt.

11 MR. HICKS: But he -- I am not sure I
12 understand the question, but --

13 QUESTION: What is wrong with -- there is some
14 way of -- there is certainly some way of enforcing an
15 injunction besides giving water, giving more water.

16 MR. HICKS: I suppose the New Mexico Water
17 Authority person could be put in jail until they start
18 delivering it, but he could be in jail at least a year.

19 QUESTION: Don't you think that has any force
20 at all? That is usually the way courts enforce
21 injunctions.

22 MR. HICKS: I don't think it realistically
23 does because I don't think anybody in New Mexico
24 realistically expects that somebody would be kept in
25 jail a year while we do the calculations to find out if

1 he should be, and I just don't think that is realistic,
2 and I think that is what New Mexico has counted on all
3 along in this case, go be quite honest, is that they
4 have thought that when the judiciary's back is against
5 the wall to order relief in this, it is going to be so
6 massive in their view, as they are going to depict it,
7 that it is going to hurt to do it, and the court is
8 going to see that and say let's find an easier way.

9 Th special master has found a very fair way.

10 QUESTION: What is the remedy? What does the
11 special master recommend as a remedy if the State of New
12 Mexico just doesn't deliver the underlying annual
13 amount?

14 MR. HICKS: The future compliance question.

15 QUESTION: Let's assume that 15 years from now
16 New Mexico has paid back all the shortfall, and then it
17 just begins not to deliver the annual amount that the
18 decree calls for. What is the remedy then?

19 MR. HICKS: Well, they would be -- if the
20 decree were entered that he recommended, they would
21 under an injunction to vote at the commission meeting
22 for the formulas that they have stipulated to.

23 QUESTION: Right.

24 MR. HICKS: And if they refuse to vote --

25 QUESTION: Right.

1 MR. HICKS: -- I suppose we could say hold
2 them in contempt, please, and make them vote that way.
3 The next question is, can you make them turn off the
4 spigots to the farms --

5 QUESTION: Well, anyway, those are the normal
6 ways to enforce an injunction.

7 MR. HICKS: But if we have to wait so long
8 Texas will never get this water. It will be a few years
9 until we can find out, and I don't think the Court wants
10 us running back after every year to say they missed it
11 by a little bit, hold them in contempt.

12 QUESTION: I know, but if the payback were not
13 in water but in money, then you would be starting out
14 now from the point I hypothesized of 15 years later, and
15 New Mexico would just have the obligation to pay the
16 annual amount and if it didn't, you would have to find
17 some way of enforcing the injunction.

18 MR. HICKS: I can't -- a payback in money is
19 much easier for this Court to administer and for
20 everyone to administer. I don't know what the taxpayers
21 at large in New Mexico might think about that, and I
22 don't know what the farmers that wouldn't get the water
23 and only part of the money most likely in Texas would
24 think about that, and I don't think --

25 QUESTION: We would know what they had thought

1 about it if they had the choice of either doing it the
2 way the special master recommends or paying an amount of
3 damages that the special master might recommend.

4 MR. HICKS: The difficulty with this is, New
5 Mexico waited until the case was over to -- it didn't
6 even raise this issue until it wrote a brief to you all
7 in this case.

8 QUESTION: What, on money?

9 MR. HICKS: Yes. The special master said what
10 about money, and we all scratched our heads and said it
11 would be difficult, and nobody said, yes, money. New
12 Mexico -- the first time they asked was after the case
13 is over.

14 QUESTION: Well, now, they said they
15 stipulated that the master had that power.

16 MR. HICKS: But they -- they did --

17 QUESTION: And the master said he didn't.

18 MR. HICKS: -- but they didn't do it.

19 QUESTION: The master, though, as I read him
20 in his recommendation, thought that he did not have the
21 power, and I really read him, his report as wishing he
22 did.

23 MR. HICKS: Your Honor, Texas in some sense
24 wishes he did. That is -- in some sense. It is a
25 difficult question.

1 QUESTION: Did you have that impression, that
2 the master thought he just lacked the power to consider
3 money damages but wished he did? Would you agree with
4 that?

5 MR. HICKS: Yes, I agree. The problem with
6 that is, it is going to delay Texas ever getting any
7 relief by at least five years. It would take five years
8 to adjudicate this, I am convinced, and New Mexico
9 waited until the end. It would delay further for a
10 reason that is independent of the two states in a way
11 that would only harm Texas. It would delay our relief
12 when, on the other hand, if the Court ordered that water
13 be repaid, then it puts for the next three years while
14 New Mexico is getting its house in order to do the
15 payback, it puts us in a position where each state has
16 to begin to evaluate how much is it --

17 QUESTION: Wait a minute. You would be
18 getting -- the river would be coming up to the 47
19 agreement immediately. I mean, that part of all of this
20 would be affirmed, right?

21 MR. HICKS: That is what they were suppose to
22 have been doing for the last 34 years and they haven't
23 done it.

24 QUESTION: All right, but the level would now
25 be established and that would be squared away. You

1 might be getting the money payment -- let's assume you
2 get the money payment five years from now, but you would
3 get it all at once. You can consume all the money at
4 once. You can't consume -- the water, the final water
5 payment you say won't be in until 17 years. Maybe you'd
6 rather have all the money in five rather than the water
7 trickled out, so to speak, over 17 years.

8 MR. HICKS: I don't disagree with your
9 evaluation of it. I don't disagree with the difficult
10 position I think the Court finds itself in in seeing
11 that in a way it is less painless to give money.

12 QUESTION: It isn't our water, it is --

13 MR. HICKS: I know, but I suspect the Court is
14 reluctant to order a State to disrupt --

15 QUESTION: You wouldn't have any tougher time
16 distributing money than you would the water. How do you
17 know who is entitled to this water? What would you do
18 with the money if you got money?

19 MR. HICKS: On the question about who is
20 entitled to the water, there is an adjudication that has
21 gone through the administrative process on the river and
22 has determined who has the water rights there, so that
23 settles that question. As to the money, it is very
24 difficult to determine, because in a sense it is because
25 of all the consequential damage questions. Does the

1 fact that the farmers --

2 QUESTION: It would be a lot of money, would
3 it?

4 MR. HICKS: Excuse me?

5 QUESTION: It would be a lot of money?

6 MR. HICKS: It would be -- another problem
7 with this is, I think it would be so much money that New
8 Mexico couldn't pay it. It would bankrupt New Mexico.

9 QUESTION: I gather Texas could use it these
10 days.

11 MR. HICKS: These days we would love to have
12 it, and don't think there hasn't been a debate in the
13 state government about this issue. There has been.

14 QUESTION: Is there any claim on the part of
15 individual landowners to this money, or can Texas just
16 plant a bunch of tree farms over around Marshall with it
17 if they want to?

18 MR. HICKS: This is -- I don't know. I simply
19 don't how how this would be done. It would be like one
20 of the most complicated class action distributions you
21 can imagine.

22 QUESTION: Well, if it is too much money, of
23 course, they could -- I guess New Mexico could offer to
24 sell you water from the Pecos River instead.

25 MR. HICKS: I agree -- I don't disagree with

1 any of these speculations. It is just that I don't see
2 what standards the Court has about it. I think if the
3 pressure is put on through the order of the repayment of
4 water, as the compact requires --

5 QUESTION: Why not do what you did with the
6 oil money in Alaska? They gave it to everybody.

7 MR. HICKS: That also is difficult, because I
8 think this Court had to hear a constitutional case on
9 the way that was distributed.

10 QUESTION: Yes, but they added it up, they got
11 it.

12 MR. HICKS: I want in the short amount of time
13 I have --

14 QUESTION: I hesitate to say the ingenuity of
15 people cannot find a way of spending money.

16 MR. HICKS: It would be no trouble. I have a
17 fear that my paycheck won't be coming in September if
18 the deficit continues.

19 On the question of whether there was a hearing
20 on man's activities, which is the second crucial issue
21 New Mexico raises, it is clear there was a hearing on
22 man's activities. It could not be clearer in the
23 record. The special master in a discussion with the
24 attorney for New Mexico at the conclusion of all these
25 hearings on May 21st observed to that counsel that he

1 had told them over a year ago of how this particular
2 exhibit, 79, the crucial exhibit, would be treated, how
3 he viewed its working, and Exhibit 79 is kind of the end
4 of an evolutionary process, because the parties
5 exchanged documents, as New Mexico says in its brief,
6 the precursors to this exhibit, for a year before the
7 final hearing. New Mexico was on notice. On May 22nd
8 of 1985 the special master entered an order that in
9 Paragraph 7 said in November there is going to be a
10 hearing on man's activities, and there was a hearing in
11 November on man's activities.

12 QUESTION: They may have put it that way but I
13 think their real complaint was not that there was not a
14 hearing, but that the hearing was not one at which the
15 master said, okay, show me what man's activities have
16 taken out of the river. Rather, the hearing was one in
17 which he said, you show me why when you deduct all the
18 natural diversions from the original flow everything
19 else isn't man's activities. It is really a burden of
20 proof complaint they have, isn't it?

21 MR. HICKS: The special master's
22 recommendations are that you find that Texas met --
23 shouldered the burden of proof and met it, and it did.
24 There is testimony to that effect. New Mexico's real
25 complaint is that it failed to put on any evidence and

1 it wants a second chance. It had the opportunity. It
2 was on notice and it did nothing. I don't know why it
3 did nothing.

4 QUESTION: It didn't have the opportunity in
5 November, did it?

6 MR. HICKS: It did have the opportunity in
7 November. That is when --

8 QUESTION: I thought the master said, we are
9 just going to hear kind of oral argument from lawyers.

10 MR. HICKS: No, November 18th and 19th and
11 December 3rd and 4th were the days of the hearings on
12 the causes of depletions, all of the causes of
13 depletions, man's activities, natural causes, and also
14 the legal adjustments that had to be made. The parties
15 went out as the record demonstrates, and we spent all
16 day on December 18th reaching agreement on numerous
17 technical matters that have to do with the man's
18 activities question, and we --

19 QUESTION: Well, in theory Texas had the
20 burden of proof?

21 MR. HICKS: I don't think Texas had the burden
22 of proof. I think the --

23 QUESTION: Texas wasn't the claimant below?

24 MR. HICKS: Texas was the claimant, but I
25 think the burden of proof on man's activities should

1 shift to New Mexico, but I think the Court doesn't
2 have --

3 QUESTION: Is that how it was handled in
4 effect?

5 MR. HICKS: No.

6 QUESTION: Texas didn't shoulder the burden of
7 proof on man's activities.

8 MR. HICKS: No. Texas did -- what I was going
9 to say is, Texas did shoulder the burden of proof,
10 notwithstanding its view that it didn't have to. It
11 shouldered the burden of proof --

12 QUESTION: You did it in a negative sort of
13 way. You said here are the natural causes, and
14 everything else has to be a fortiori man's activities?

15 MR. HICKS: That is true, and there is no
16 other way to do it. What New Mexico wants is something
17 that is irrelevant under the compact, and that is, it
18 wants not a generic determination of whether man's
19 activities caused the depletions, which is what Texas
20 did through Exhibit 79.

21 What it wants is to be able to trace each
22 activity of man to its origin, to see if Farmer Jones
23 when he irrigated his alfalfa crop caused X amount of
24 depletion. That is irrelevant under the compact. It
25 might be helpful to New Mexico in deciding how it wants

1 to readjust the flows to Texas.

2 It might be helpful to determine that, but it
3 is irrelevant to the proceeding before this Court. It
4 has nothing to do with the case. That is what this
5 problem about unknowns is. It is like a sinister force
6 or something. There is no -- it has to be either nature
7 or man's activities. New Mexico -- Texas has proven
8 that it is man's activities. New Mexico in essence
9 really wants to say it is this activity of man.

10 QUESTION: You didn't prove anything unless
11 you proved it in the 1947 assessment, because all you
12 came in and proved was the natural causes that you know
13 of, but the natural causes that you know of, but the
14 natural causes -- that is nonproof.

15 MR. HICKS: That is proof.

16 QUESTION: Suppose you hadn't put on any
17 natural causes. Then you would have proven even more
18 man's activities, wouldn't you?

19 MR. HICKS: No, because our proof was, we have
20 take care of every known natural cause that there is.
21 In fact, it is all based on stipulations. And there is
22 nothing left by logic except human causes, and that is
23 not a failure of proof. That is a proof. It is the way
24 a lot of things are proved. And I don't think there is
25 anything wrong with it. There is no other way to ever

1 have this compact work except that way. I don't think
2 it is at all improper.

3 On the water interest I wanted to mention that
4 the water interest, if New Mexico fails to act in good
5 faith as defined under the special master's recommended
6 decree, the water interest does not run on the whole
7 340,100 acre feet. It runs on the undelivered balance
8 remaining, and it also never starts running until at
9 least 12 years --

10 QUESTION: (Inaudible) any shortfall on the
11 1947 condition delivery, interest doesn't run on that,
12 does it?

13 MR. HICKS: I am sorry, if there is any
14 shortfall --

15 QUESTION: Let's assume --

16 MR. HICKS: Yes, the future -- for the future
17 there is no interest running, so Texas -- the equities,
18 I think, in terms of delivery of the payback, the
19 equities have been so fairly balanced. Texas doesn't
20 get any interest if New Mexico acts in good faith. It
21 is only a contingent interest. Even if they get
22 interest it doesn't start running until 12 years after
23 the last adjudicated violation.

24 On top of that, New Mexico has known for at
25 least 13 years since the litigation began that Texas is

1 challenging what they have done, and they have taken
2 absolutely no steps to adjust the activities along that
3 river. Their chief water authority testified that he
4 wouldn't do it unless you all ordered him to.

5 QUESTION: By what percentage did the
6 determination of the amount owed under the compact each
7 year under the '47 condition, by how much will that
8 increase the flow at the state line? By what
9 percentage? Half? How much --

10 MR. HICKS: I think the average flow is
11 approximately 75,000 acre feet over the last 30 years,
12 and this would increase it on an average of 10,000 --

13 QUESTION: Yes, on 10,000 acre feet. All
14 right.

15 MR. HICKS: So one-seventh.

16 QUESTION: But then if you add on top of that
17 adding 34,000 acre feet a year, 34,000 acre feet isn't
18 far from half of the average annual flow.

19 MR. HICKS: That is true.

20 QUESTION: You add ten onto that, so you are
21 going to be -- it is going to be quite a different
22 river, isn't it, at the state line?

23 MR. HICKS: It should be because it would then
24 be the river that we bargained for. It wouldn't be the
25 river as New Mexico has configured it for the last 34

1 years.

2 That is the reason it is so important for the
3 Court to keep in mind that this is not an equitable
4 apportionment case but a compact case. If Texas had
5 come before the Court in 1920, as it started to, and
6 sought an equitable apportionment, and let's say the
7 order had been entered that would divide the river up as
8 we ultimately did in the compact, there wouldn't be any
9 question right now about is it fair to New Mexico to
10 have to pay back water it withheld.

11 What you, Justice White, are comparing the
12 situation in the future to if they have to comply with
13 the compact is to a situation where they weren't
14 complying with the compact.

15 QUESTION: I am not making an argument. I am
16 just asking for information.

17 MR. HICKS: I understand. I guess I got too
18 involved in the argument.

19 I have no further --

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Hicks. The case is submitted.

22 (Whereupon, at 2:41 o'clock p.m., the case in
23 the above-entitled matter was submitted.)
24
25

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BY Paul A. Richardson

(REPORTER)