ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: OKLAHOMA AND TEXAS, Petitioner

v. NEW MEXICO

CASE NO: 109 Original

PLACE: Washington, D.C.

DATE: April 16, 1991

PAGES: 1 - 48

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IN THE SUPREME COURT OF THE UNITED STATES

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OKLAHOMA AND TEXAS, :

Plaintiffs :

v. : No. 109 Original

NEW MEXICO :

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Washington, D.C.

Tuesday, April 16, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

MARIAN MATTHEWS, ESQ., Deputy Attorney General of New Mexico, Santa Fe, New Mexico; on behalf of the Defendant.

PAUL ELLIOTT, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Plaintiff Texas.

R. THOMAS LAY, ESQ., Special Counsel for Oklahoma, Oklahoma City, Oklahoma; on behalf of the Plaintiff Oklahoma.

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C O N T E N T S

ORAL ARGUMENT OF PAGE

MARIAN MATTHEWS, ESQ.

On behalf of the Defendant

PAUL ELLIOTT, JR.

On behalf of the Plaintiff Texas

R. THOMAS LAY, ESQ.

On behalf of the Plaintiff Oklahoma

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 109 Original, Oklahoma and Texas v. New Mexico.

Ms. Matthews.

ORAL ARGUMENT OF MARIAN MATTHEWS

ON BEHALF OF THE DEFENDANT

MS. MATTHEWS: Mr. Chief Justice, and may it please the Court:

This is an original proceeding involving the states of New Mexico, Texas, and Oklahoma, and it involves the Canadian River Compact, a compact negotiated and signed by the parties in 1950 and adopted by Congress in 1952. New Mexico takes exception to Part VII of the Special Master's Report. The issue is whether under the compact New Mexico is entitled to unrestricted storage of all waters of the Canadian River originating above Conchas Dam. New Mexico submits that it is entitled to such storage, unrestricted either as to quantity or as to place under the terms of the compact.

The Canadian River rises in northeast New Mexico and it flows through the panhandle of Texas eventually over into Oklahoma. There are three dams along the way which are of interest in this litigation. The first, in New Mexico, is the Conchas Dam, built in 1939, 11 years

before the compact was ever signed. 65 river miles further east is Ute Dam, or Ute Reservoir, which is also located in the State of New Mexico, and was built in 1963. And then another 165 river miles further east is Lake Meredith, which is located north of Amarillo, Texas, and was built in 1964.

There are two provisions of the compact which are at issue in this litigation to the extent that New Mexico takes exception with the Master's Report. We believe that the language of those two provisions is critical. The compact itself is set forth as an appendix either to the Special Master's Report or to New Mexico's brief.

QUESTION: Are the provisions of the compact that you are talking about in your brief?

MS. MATTHEWS: Yes. It's Appendix A to New Mexico -- excuse me, Appendix A to New Mexico's brief, Your Honor. And specifically, the part that I'm going to ask the Court to look at is on page 2a. It is Article IV(a) and Article IV(b). Article IV(a) gives New Mexico free and unrestricted use of all waters originating in the drainage basin on the Canadian River above the Conchas Dam. And Article IV(b) gives New Mexico free and unrestricted use of all waters originating below the Conchas Dam, subject to a 200,000 acre-foot conservation

storage limitation on waters originating below Conchas.

The dispute in reference to Article IV and what it means arose about a year and a half after this litigation originally began. Initially Texas and Oklahoma had sued the State of New Mexico, claiming that the size of Ute Reservoir, which was enlarged in 1984, violated Article IV(b) and Article II(d) of the compact. The Master has resolved that issue in favor of New Mexico.

Article IV(a) and (b) became a major focus after Conchas began to spill in the spring of 1987. It was the first major spill of the Conchas Dam since approximately 1941-42, which of course predates the compact. Being a spill, the water flowed over Conchas and downstream into Ute Reservoir, and approximately 100,000 acre-feet of that water, about 40 percent of the spill, was either released or went ahead and spilled into Texas, presumably most of it flowing on to Lake Meredith.

New Mexico caught about 60 percent of those Conchas spill waters at the Ute Reservoir, and it did not count those spill waters against its 200,000 acre-foot limitation on below Conchas waters, and the reason was because the spill came from waters originating above Conchas, and under Article IV(a) there was no restriction on how much water New Mexico got to store if it originated above Conchas.

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QUESTION: I suppose there wouldn't have been any argument on this point if instead of building Ute Reservoir you had enlarged Conchas Dam?

MS. MATTHEWS: That's precisely right, Your Honor.

QUESTION: And you could have caught the floodwaters in that dam and nobody could have hardly disputed your right to do that.

MS. MATTHEWS: That's right. And in fact the parties and the Master in his report agree that there is absolutely no restriction on how big New Mexico could build Ute, I'm sorry, Conchas Dam and capture every drop of water that might ever be generated in the upper basin. So the issue became whether or not it makes a difference whether or not New Mexico chose instead of enlarging Conchas to enlarge Ute, and does it make a difference now that we catch the water of the spills downstream versus upstream behind the Conchas Dam.

The result of catching the spills in the Ute Reservoir in 1987 was that as a result Ute Reservoir exceeded 200,000 acre-feet of storage. And in December of 1988 Texas and Oklahoma filed a supplemental complaint claiming that New Mexico was in violation of Article IV(b)'s storage limitation because we had more than, at least they claimed we had more than 200,000 acre-feet of

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water in Ute Reservoir.

QUESTION: But your, you claim that limitation only applies to water originating below Conchas; is that it?

MS. MATTHEWS: That's right, Your Honor. That is precisely our point. The Master agreed with Texas and Oklahoma, and he decided in effect that if New Mexico chose to store its water originating above Conchas, if New Mexico chose to store that in the downstream reservoir at Ute, then that water became subject to the 200,000 acre-foot limitation on water originating below Conchas. It became subject to Article IV(b) of the compact.

QUESTION: Ms. Matthews, is it practicable to measure how much of the water in the Ute Reservoir is from upper, above Conchas drainage and how much below?

MS. MATTHEWS: Yes, Your Honor. The focus is not on the molecules of water. Obviously there is no particular distinction in the quality of the water above and below Conchas. But from an engineering standpoint, using a doctrine called the doctrine of exchange, which I am not an engineer and I cannot explain in any detail to the Court, but using that doctrine you analogize the water to blocks of water, and it's done in other compacts; the Pecos Compact, the Rio Grande Compact, and so forth. And so it's possible, using gauges and engineering

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calculations and computer models and so forth to determine with some accuracy how much of the water in Ute originated above Conchas.

QUESTION: Now that was one of the reasons, though, that the Master construed the compact the way he did, as I understand, was the difficulty of measuring the amount of water stored below Conchas that had originated above Conchas.

MS. MATTHEWS: The Master had concern about whether the alleged difficulty would be in conflict with the goal of the negotiators to have a simple compact. But we would suggest first of all that there is no evidentiary showing at this point in this case that it is a difficult calculation. My understanding from our engineers is that it is not a difficult calculation. Secondly, Article V(c), which relates to Texas' rights relative to Oklahoma, clearly requires a fairly complex calculation not unlike that which would be required to determine above Conchas water from below Conchas water.

Third, I think that it would not be a good test of contract interpretation to decide that because it requires some engineering calculations that we're going to change and rewrite the meaning of the compact between three sovereign states; certainly not without, not with the evidentiary basis that's in the record at this point

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in this case.

QUESTION: Could I ask, is there any major concern here or any question about water originating above Conchas that is delivered directly to the Ute without going through Conchas Dam? Are there some tributaries of the Canadian that originate above Conchas and flow into the Canadian below Conchas?

MS. MATTHEWS: I understand the question, Your Honor, and in fact the geography here is very interesting and it supports the upper and lower basin distinction.

QUESTION: Well, is there, but is that -- the same argument, I suppose, would apply to those, the water arriving in the Canadian below Conchas if it originated above.

MS. MATTHEWS: Well, in fact there are no tributaries above Conchas that flow into Ute. The tributaries above Conchas flow into Conchas or the Canadian River above Conchas.

QUESTION: Oh, so there are no, no tributaries of the Canadian that originate above Conchas that flow into the Canadian below Conchas?

MS. MATTHEWS: That's my understanding of the geography. There is a map attached to the Master's Report, the appendix, and it's not -- it's a little difficult to read.

QUESTION: What do you mean above Conchas, by the way? In that particular watershed?

MS. MATTHEWS: Yes. The watershed essentially fairly well geographically breaks into three parts. There is above Conchas. Conchas is fed by tributaries above Conchas and the Canadian River that flows above Conchas.

QUESTION: Um hum.

MS. MATTHEWS: And then you go downstream to Ute, and Ute is fed by Pajarito Creek and Ute Creek, both of which come in below Conchas.

QUESTION: But they flow into the river, do they?

MS. MATTHEWS: Yes. They flow either --

QUESTION: They don't flow directly into the reservoir?

MS. MATTHEWS: No. Ute Creek, I think, flows about 3 miles from where the reservoir actually starts. But they do flow in below Conchas.

QUESTION: And their headlands are below Conchas as well?

MS. MATTHEWS: Yes. They're in the lower basin. And then in that lower basin there are a number of other creeks and waterways, most of which, or a number of which rise in New Mexico, which flow then into Lake Meredith in Texas.

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QUESTION: When you say the lower basin you mean below Ute?

MS. MATTHEWS: Below Conchas.

QUESTION: Below Conchas?

MS. MATTHEWS: Yes.

QUESTION: So there are some tributaries that arise below Conchas but above Ute that are not dammed up by Ute, that flow into the river below Ute?

QUESTION: No.

MS. MATTHEWS: I'm not sure that that's accurate. There are tributaries which arise below Conchas which flow into Ute.

QUESTION: Yeah.

MS. MATTHEWS: There are additional tributaries in the lower basin which do not flow into Ute, which flow --

QUESTION: What do you mean by the lower basin?

MS. MATTHEWS: Below Conchas. I'm sorry.

QUESTION: Okay, well then go ahead and finish your statement.

MS. MATTHEWS: Okay. There are certain tributaries which flow into Ute. And then also in the lower basin there are tributaries which, some of which flow into the Canadian River below Ute and then on to Lake Meredith, some of which rise in other parts of the state,

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flow into Texas and eventually flow into Meredith, either hooking up with the Canadian River or other tributaries.

QUESTION: Right. So the only water you're talking about is the overflow from Conchas in flood times?

MS. MATTHEWS: As a practical matter. We're talking about the spills from Conchas Dam that arise above Conchas Dam. It is New Mexico's position in this litigation that its storage rights of, and its use rights of above Conchas water are unrestricted as to either quantity or location for three reasons. First, because that's what the unambiguous language of the compact says. Secondly, that language is consistent with the geography of the area, as we have just discussed, and with the historical context of the compact. And third, any other conclusion simply leads us to some very illogical results.

I'd like to look first at the question of language. As I indicated, under IV(a) there is no restriction of any kind on New Mexico's rights to water originating above Conchas. And as I indicated in answer to Justice White's question a minute ago, New Mexico can, and the parties and the Special Master all acknowledge that New Mexico can make Conchas as big as it wants to make it. So there is clearly no restriction.

QUESTION: There was originally a contention by Texas and New Mexico, was there not, that the 200,000

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limitation applied to the structure and not to the amount of water?

MS. MATTHEWS: Texas and Oklahoma originally sued New Mexico claiming that the fact that New Mexico had enlarged Ute to be, to have a gross physical capacity of more than 200,000 acre-feet was in itself a violation of the compact regardless of how much water we actually stored in it.

QUESTION: Yes.

MS. MATTHEWS: Now that was resolved against Texas and Oklahoma by the Special Master, and my understanding today is that only Oklahoma still maintains that position and took exception to that part of the report.

QUESTION: But Oklahoma has accepted?

MS. MATTHEWS: Yes, Oklahoma has. Under IV(b) of the compact, again as I indicated, there is no restriction on the use of the waters below Conchas, but there is this 200,000 acre-foot limitation of the storage of the waters originating below Conchas. And that is specifically what the language of IV(b) says.

From the standpoint of contract law, from the standpoint of statutory interpretation, because we are here dealing with both a contract and an act of Congress, I would suggest to you that the language of IV(a) and

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IV(b) has to control unless it is somehow ambiguous. The report found that there is ambiguity in part because it was unclear what the rights were between New Mexico and Colorado under IV(a). We question whether there is a true ambiguity in reading IV(a) that way, but even if it is, Colorado is not a party to the compact. Colorado is not a party to this litigation. It is at best an irrelevant ambiguity.

And I would suggest to the Court that it would be very bad precedent to rewrite compacts between sovereign states based upon alleged ambiguities which are unrelated to the dispute that has arisen among the parties. The fact is that there is no ambiguity in the language of IV(a) and IV(b), and no one has suggested a reasonable alternative meaning to the plain language of those, of that portion of the compact.

As I indicated, we feel that the distinction between Article IV(a) and IV(b), and I by shorthand refer to it as upper basin and lower basin, has a geographical, has a geographical basis, and that the basins fall, in the way they are fed and the way the dams are fed, makes sense within the context of the compact and gives meaning to the distinction made between IV(a) and IV(b). We have talked about that some.

I'd like to move now to the question of the

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historical context of this compact and how it is consistent also with New Mexico's reading of IV(a) and IV(b).

In 1950 Texas wanted Federal money to build the Sanford Project, which later became Lake Meredith. New Mexico had some powerful Senators at the time, Senator Anderson and Senator Javis, and they said no, Texas, we're not going to permit you to get the funding for the Sanford Project until and unless there is a compact which protects the rights of New Mexico in the waters of the Canadian River basin. And in fact the legislation which authorized Sanford Project was contingent upon approval of the compact being negotiated and being approved by Congress.

The parties sat down in 1950 over roughly a 6-month period, and they negotiated the Canadian River Basin Compact. As a result of those negotiations New Mexico received two things. New Mexico received the right to all the waters above Conchas without restriction. Now I think it's important to understand here that prior to that time the waters above Conchas had been fully developed, so that New Mexico, under equitable doctrines of water law, was entitled to those rights anyway. And the only issue above Conchas was the spill water. But as part of the negotiating process Texas and Oklahoma agreed, New Mexico, you will have all the waters above Conchas.

And then the second thing that New Mexico received was protection for its as yet undeveloped rights below Conchas up to the 200,000 acre-feet. This was important because at that time, though there were a few uses, below Conchas waters had really not been appropriated by anyone. And if Texas built Lake Meredith and there had not been a compact, what eventually would have happened is that Texas, under the doctrine of priority, or prior appropriation, would end up with the waters of the lower basin. New Mexico, of course, would have had the upper waters, the waters above Conchas, because it had already established rights in those.

And so what the parties did was agree that New Mexico could have up to 200,000 acre-feet of those waters which originate below Conchas so that in the future at some time it could do the development that it wanted to.

QUESTION ~~MS. MATTHEWS~~: So you in effect said we don't anticipate any need for more water below Conchas than 200,000 acre-feet. That was your best estimate of what your needs would be in the future?

MS. MATTHEWS: That was at the time of, for below Conchas, yes.

QUESTION: Well, is there any possible way that you could use 250,000 acre-feet then?

MS. MATTHEWS: Well, yes, Your Honor. As a

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practical matter what is happening out in that part of the country is the Ogallala aquifer --

QUESTION: It's drying up.

MS. MATTHEWS: It's drying up. And the predictions made in 1950, that's over 41 years ago, and there is potentially some very serious water problems out there.

QUESTION: So you could use the, if there is floodwater that you're going to store in Ute beyond 200,000 feet, you can use it?

MS. MATTHEWS: Yes. We believe that we can. I don't want to mislead the Court. We are not now at this point using that in our communities in that area. We have plans to do so. We have, projections are being made, option contracts have been signed. It is not now being used, and I don't want to leave that impression with the Court. As a result of the compact, New Mexico got --

QUESTION: Well, you know, if you don't use it sooner or later it will evaporate.

MS. MATTHEWS: Well, that's true, Your Honor. New Mexico got the right to all the waters above Conchas and we got the 200,000 acre-feet below Conchas. Texas received $90 million in funding for the Sanford Project. It received all waters of the lower basin except the 200,000 acre-feet, and subject to the restrictions that it

has in terms of Oklahoma. And that is and was a significant amount of water, and that does provide the water, a substantial portion of the water that supplies Lake Meredith.

Articles IV(a) and IV(5), we submit, simply represent the deal that was made by three sovereign states in Santa Fe, New Mexico on December 6, 1950.

The last thing I'd like to talk about briefly --

QUESTION: Excuse me, before you get off that, it really doesn't say that, though. It doesn't say that you can, that you can use 200,000 acre-feet from the lower basin. It says, to the contrary, that the amount of conservation storage available for impounding the waters from that basin, the amount of storage available for impounding those waters shall not exceed 200,000. Isn't that a quite different thing?

MS. MATTHEWS: I don't believe it's a different thing than saying --

QUESTION: I mean if they said you can use 200,000 feet, that would be different. And they could have said that, but they didn't.

MS. MATTHEWS: I'm not sure we disagree. I read this to say that we can store 200,000 acre-feet.

QUESTION: No, it doesn't say you can store it.

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It said the amount of conservation storage in New Mexico available for impounding these waters shall be limited to an aggregate of 200,000 acre-feet. So if you have a storage facility that could impound more than that, even if you're only taking 200,000 acre-feet from that basin, you'd be in violation of that provision if the storage facility were too large.

MS. MATTHEWS: Well, this is the point that Oklahoma --

QUESTION: Right.

MS. MATTHEWS: -- and Texas had raised. I see.

QUESTION: You don't want to get to that now? Are you going to get to that later?

MS. MATTHEWS: No, I'd be happy to get to that now. I think that the, if you read the entire compact and you read all the articles of the compact it becomes clear that what that language is talking about there is the portion of the reservoir that is available for this storage. The definition of conservation storage includes a number of uses, some of which are not subject to the 200,000 storage limitation. So clearly it was anticipated that the reservoirs would be larger than 200,000 acre-feet. It's also just physically impossible to build a reservoir at a precise acre-footage.

QUESTION: You're a strict constructionist as to

the first clause of Part (b) and a liberal constructionist as to the second clause.

MS. MATTHEWS: Well, I don't like to look at it that way, Your Honor.

(Laughter.)

MS. MATTHEWS: I think --

QUESTION: Well, so is the Special Master.

QUESTION: Except in reverse.

QUESTION: Vice-versa.

MS. MATTHEWS: Except in reverse. Except what the Special Master did, and it did seem like an appropriate analysis, he looked at the four corners of the compact. In reading the four corners of the compact he determined that it, clearly the storage limitation related to quantities of water, not sizes of reservoirs. I think that's a somewhat different thing than what he did in rewriting IV(a), which was go outside the four corners of the document and use other sorts of sources and other sorts of concerns in order to reach the conclusion that he wanted to reach.

QUESTION: Well, if we were to say that the, section (b) applies to the capacity, to the size of the reservoir, could you come back and say well, we are still entitled to have an unlimited reservoir for waters that originate above the dam?

MS. MATTHEWS: Yes.

QUESTION: And it's -- and would you then further say it's impossible to say which is which, or --

MS. MATTHEWS: No. Well, we think it's real possible under the doctrine of exchange.

QUESTION: Not which water is which, but which reservoir is which.

MS. MATTHEWS: Oh, you're asking if we build a second reservoir?

QUESTION: Yes. How could --

QUESTION: You want to say yes to that, I think.

MS. MATTHEWS: I think I do, too. Yes. I think I would still maintain that position.

QUESTION: Does that make sense from a standpoint of water engineering and water law to say that one reservoir is for lower Conchas waters and the other is for upper Conchas waters?

MS. MATTHEWS: Well, from an economic and a practical standpoint it does not make sense, and that's part of the problem here, is it doesn't make any difference to the downstream --

QUESTION: But then it doesn't, it doesn't hurt you. If you say that they're indistinguishable, then you can build as big a reservoir as you want and say oh, well, this is for upper Conchas water.

MS. MATTHEWS: Well, in effect that's what the Master said. We could make Conchas or anything above Conchas as big as we wanted, but once it passed over the dam --

QUESTION: No, no. I'm talking about the reservoir below Conchas.

MS. MATTHEWS: I guess I'm not following your question, Your Honor.

QUESTION: Well, we're talking about whether or not capacity as opposed to actual water stored is the correct interpretation.

MS. MATTHEWS: Right.

QUESTION: And I'm asking you to assume that we say that it's capacity. I'm then asking how that could be interpreted since you can come back and say well, we're keeping this capacity for upper Conchas water which is ours. I mean, can you make that argument?

MS. MATTHEWS: I don't understand that to be the argument that Texas and Oklahoma made. Conceivably New Mexico could make that argument, sure. We could build the dam downriver from Conchas and say we're not going to put any below water in it except spills that originate above. We could conceivably make that argument under the compact, yes. But as a practical matter, I mean, that's just economic insanity. We can't build dams to hold spills

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which occur once every 40 years.

QUESTION: Well, but that's all you're entitled to under the contract.

MS. MATTHEWS: I'm sorry?

QUESTION: That's all you're entitled to, is the waters that originate above the Conchas, other than for the 200,000 feet you're given below it.

MS. MATTHEWS: Well, if you read the, if you read that as a restriction on the size of the reservoir that would be correct. But we would think that's an incorrect reading of that provision, that that refers to the portion of capacity of the reservoir, not the finite capacity of the reservoir.

QUESTION: It wouldn't serve any purpose, then. I mean, I read that provision as -- of course the object was to limit you to 200,000 acre-feet. That was surely the object. But the way of arriving at that object is to say look, we're not going to measure all the acre-feet. How do you measure them? There's no way possible to measure them all. Well, one clear way to keep you honest is to say you can't build a reservoir any bigger than that, period.

MS. MATTHEWS: Well, Your Honor, the difficulty with that is the size of reservoirs changes all the time because of sediment, and that would put us in the position

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of every time there's a foot of sediment added to the floor of the reservoir of having to go out with our brick and mortar and add a foot of capacity above it. That's not how dams are built. At least it's not how they're built in New Mexico.

QUESTION: Can you just raise the spillway in a case like that? Build a great big reservoir and just keep the spillway at the appropriate level, and as it silts up you raise the spillway up.

MS. MATTHEWS: That's a very expensive project. It cost us $14 million to increase the size of Ute in 1984. I mean, that's a very expensive project. I don't believe that's what they intended. That's not the way dams are built. They're built with the idea that sediment will fill them, and that the capacity has to be large enough to take care of that use.

My time is up. Thank you.

QUESTION: Thank you, Ms. Matthews. Mr. Elliott, we'll hear now from you.

ORAL ARGUMENT OF PAUL ELLIOTT

ON BEHALF OF THE PLAINTIFF TEXAS

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

Texas and Oklahoma are asking this Court to adopt Part VII of the Special Master's recommendation on

the above Conchas water issue. In our view the interpretation that New Mexico is making of the compact would destroy the equitable apportionment that the states bargained for and is provided by the language of the compact. In 1987 in response --

QUESTION: Does the compact recite that they intend to equitably apportion the waters?

MR. ELLIOTT: No, it does not. It's in the congressional statute.

QUESTION: Because that's sort of a term of art in original cases, isn't it?

MR. ELLIOTT: Yes, sir, it is. In this case Congress said that when it ratified the compact, but it's not in the words of the compact itself. In 1987 in response to this lawsuit for the first time New Mexico interpreted the word originating in Article IV(b) differently and in direct conflict with the way that it was interpreting the same term in Article IV(a).

And I'd like to mention in terms of the lawsuit I disagree with, respectfully, with my opposing counsel. This lawsuit was not filed over the capacity versus water and storage issue, but was filed because New Mexico was claiming that it could store unlimited amounts of water for recreational purposes, and was in fact attempting to exempt part of the storage of Ute Reservoir for that

recreation purpose. This is set out in the Special Master's Report on pages 18 to 22.

New Mexico interpreted Article IV(a) in a totally ambiguous and, inherently ambiguous and unnecessarily ambiguous way from the way it interpreted Article IV(b). Article IV(a) sets out New Mexico's entitlement above Conchas Dam. New Mexico says that the word originating as it appears in Article IV(a) does not mean just arising. It includes -- it does not just mean waters arising in New Mexico, but includes waters that enter into New Mexico from tributaries in Colorado.

QUESTION: I thought their position on that part was more that the compact just wasn't, made no attempt to apportion anything to Colorado, that was to go to, ought to go to Colorado. It's just like a three-party lawsuit that you're carving up something, there's a fourth party, you can't bind the rights of the fourth party.

MR. ELLIOTT: Well, that's actually, Mr. Chief Justice, a different interpretation. The compact just says waters originating above Conchas Dam. And under that interpretation it could be argued that New Mexico had a claim then to waters in Colorado, since they do in fact originate above Conchas. That would be perhaps the most literal interpretation. New Mexico says that that's not correct because the compact gives them waters above

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Conchas Dam in New Mexico. But if you look at waters originating in New Mexico, they would not include, under an arising interpretation of the word originating, they would not include those waters that enter into the state from above.

That is the same interpretation that we -- we have no problem with that interpretation. We think that's correct. We think that the way the term is used in the compact, that originating means waters not only arising but also entering into that portion of the basin. We only ask that that same identical interpretation also be applied to the term originating in Article IV(b).

QUESTION: So you say the, you say the water, the overflow water from Conchas, you should say arises below Conchas?

MR. ELLIOTT: Once it -- yes, sir. Once it enters into the basin, and, below Conchas, we believe --

QUESTION: Although it came from above, it arises below?

MR. ELLIOTT: Once it enters into the basin, that's correct. And I would point out that there is seepage from Conchas every year, in a normal year several thousand acre-feet. That water has always been considered as waters originating below Conchas. It is true that the 1987 spill was the largest spill since 1942, but I would

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point out that there have been several significant spills since '42, as much as 129,000 acre-feet in 1944, spills in '48, '58, '61, '65. These were significant spills of tens of thousands of acre-feet in each of those years that were all accounted and all considered to be waters originating below Conchas Dam.

The other waters that originate below Conchas Dam are the return flows from the Tucumcari Project. This is a large irrigation project that diverts water from behind Conchas Dam and brings it down in a channel, and then uses flood irrigation to irrigate roughly 30,000 acres each year. A large percentage of that water, and the exact amount is not known, runs off and returns into the Canadian River below Conchas Dam. And again, under New Mexico's theory, that water would have to be considered theirs, their exclusive property. They have never considered it so. It has always been considered as waters originating below Conchas, and Texas has been able to use those waters as well as the other releases and spills and seepages from Conchas Dam that New Mexico is now claiming an exclusive right to.

QUESTION: Tucumcari is located in what's called the lower basin, below Conchas?

MR. ELLIOTT: That's correct. It's actually near Ute Reservoir.

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QUESTION: Under your theory it has nothing to do with, the compact has nothing to do with what water you get to use, but simply with where you ought to build your reservoirs.

MR. ELLIOTT: That's correct, Your Honor. We believe that originating means simply entering, as understood by the people that wrote it and as, as contained within the context of the compact.

QUESTION: So that New Mexico doesn't have to let anything enter the lower basin?

MR. ELLIOTT: If New Mexico could enlarge Conchas Dam, which they looked into and found it was economically infeasible, that is correct, as Justice White asked earlier. They could in fact retain those waters.

QUESTION: The waters arising above.

MR. ELLIOTT: The waters at Conchas Dam, yes, sir. They could retain those. The compact negotiators decided that there was no need to place a limit on the waters of Conchas Dam on additional storage of those waters above Conchas Dam because they had all been developed for this Tucumcari Project.

QUESTION: And floods were rare.

MR. ELLIOTT: The floods were infrequent. When the compact negotiators allocated the waters among the states they relied exclusively upon the technical studies

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of their engineer advisors. The engineer advisors, in arriving at the 200,000 acre-foot limitation on waters below Conchas, did not distinguish in any way as to the source of the waters. They routed all waters, the spills, the seepages, the return flows, everything was routed to Texas in excess of the 200,000 acre-feet below Conchas.

And the Bureau of Reclamation, which built, which planned and constructed the Sanford Project, which is now called Lake Meredith, did exactly the same thing. They routed as waters available for that project all waters in excess of 200,000 acre-feet below Conchas. And as I was saying that there were spills during the time that the Bureau and the engineer advisors were reviewing the floods, there were releases, there were seepages every year, and substantial amounts of return flow from the Tucumcari Project.

All of those waters were treated as exactly the same. Once they entered into the basin, into the watershed below Conchas, they fell within the Article II(b) restriction.

QUESTION: So what, what percentage of the water, of the storage in, what is it, Lake Meredith?

MR. ELLIOTT: Lake Meredith is in Texas.

QUESTION: What percentage of storage there comes from the Canadian, or comes from New Mexico, put it

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that way?

MR. ELLIOTT: Roughly half.

QUESTION: Roughly half.

MR. ELLIOTT: Right.

QUESTION: And of course there are a lot of other, a lot of tributaries flow into the Canadian below Ute.

MR. ELLIOTT: There are some fairly major tributaries that come in below Ute. One of those contains a lot of that Tucumcari return flow. A lot of the waters that are in that tributary are the return flows from the Tucumcari Project.

QUESTION: What other water besides the Canadian services Meredith?

MR. ELLIOTT: Just the Canadian and tributaries that are below the project, below Ute and below the Texas state line.

QUESTION: There are no, no other streams that flow directly into Meredith?

MR. ELLIOTT: That's correct. Just the Canadian River.

QUESTION: What's the capacity of Meredith?

MR. ELLIOTT: The capacity is 1,400,000. It currently has about 300,000 acre-feet in it. It's never filled. There has never been enough water to supply the

demand for it. The authority that operates it for the 11 cities that take water from the lake typically can only allocate about 80 percent of the request because of the lack of water. The water --

QUESTION: What city in Texas is the furthest away from the dam of the 11 cities that get the water, in order of magnitude? Does it go down to Lubbock?

MR. ELLIOTT: Lubbock is one of the first cities. The largest cities are Lubbock and Amarillo and Plainview. There are some smaller cities --

QUESTION: So you're talking about a couple hundred miles possibly?

MR. ELLIOTT: They are serviced off a canal primarily that runs from Lake Meredith, it goes south and then services several cities as it moves south. As I said, the largest users are, are Lubbock and Amarillo. Lubbock relies almost, well, predominantly upon the Canadian River. Most of the cities have had to go to some kind of supplemental source, in this case the Ogallala aquifer, although there are still a couple of towns or cities that rely almost, or exclusively upon the Canadian River.

And of course that's part of the problem, is that New Mexico is retaining this water in storage now. They are not using it. They hope to be able to use it

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someday for this water supply project that they have had on the drawing board since 1972. It's no closer to being a reality now than it was 10, 15 years ago. And it is definitely, Texas is definitely being harmed. These cities have almost half a million people in them, and --

QUESTION: But you don't question their right to keep 200,000 acre-feet there, do you?

MR. ELLIOTT: Absolutely not. They can use the spills --

QUESTION: You're just, you're mostly fighting over floodwaters?

MR. ELLIOTT: The floodwaters in '87 triggered this, and of course --

QUESTION: Well, floodwaters which I guess you concede they could capture at least at Conchas if they increase that capacity?

MR. ELLIOTT: That's correct, they could.

QUESTION: So New Mexico has the right and the means ultimately to keep all that water.

MR. ELLIOTT: Well, as a practical matter they found that they can't do it. It's not feasible. The flood flows are not frequent enough and in large enough magnitude to make it economically feasible, so they have rejected that idea. They have the legal right to do it.

QUESTION: Right. But they have the legal right

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to do just that.

MR. ELLIOTT: That's correct, Your Honor.

QUESTION: And I take it from the earlier part of your argument that the Sanford Reservoir, the Sanford Project was planned without regard to floodwaters?

MR. ELLIOTT: No. The Sanford Project relied upon all waters, including floodwaters, in excess of the 200,000 acre-feet of conservation storage below Conchas. They routed all waters to Texas for the project and they were available for the project.

QUESTION: Does the history show that in planning for the feasibility of the project they depended on floodwaters?

MR. ELLIOTT: They used the floodwaters. The only thing they didn't do was -- the reservoir is operated as what is called a firm yield, meaning what it will supply in the very driest year of record. So they actually obtained funding based on that year, and of course there were no spills in that year, although there would still be return flows from the Tucumcari Project that would have been entering Texas and would have been used, available to the project.

Our point here is simply that it's not just the spills, it's not just the major infrequent spills. It is a constant supply of water to Texas every year. New

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Mexico has developed accounting procedures for this above Conchas water that is stored in Ute that magnifies the exemption and at this point, under their accounting procedure, which is hydrologically impossible, they have determined that only 8 percent of the amount of water that is stored in Ute Reservoir is actually subject to the 200,000 acre-foot limitation. It would create an enormous hardship on Texas if New Mexico were then to start accounting for the Tucumcari return flows which they would have the legal right to do, if they could start accounting for the seepage --

QUESTION: Have they made any claim in this case that they are entitled to those waters?

MR. ELLIOTT: They have claimed that they are entitled to them. The waters have never been measured, and as a practical matter it would be very difficult to measure. And I can --

QUESTION: It would cost them more than it's worth?

MR. ELLIOTT: Well, and there would certainly be a battle over it because it would be extremely subjective.

QUESTION: So as a practical matter we're just talking about the floodwaters?

MR. ELLIOTT: That's what this fight is over. But it has the legal ramifications far beyond that, far

beyond it, including the, just the several thousand acre-feet that seep from Conchas Dam every year into the lower basin. It's, the accounting procedures are -- I again have to disagree with my opposing counsel. We believe they're very complex. They're set out in the Master, in the agreed facts at B-38, and I would invite the Court's appearance to look at that. But they include things like having to make determinations on evaporation, on seepages, on diversions, on return flows. We feel like those accounting procedures for water stored below Conchas would be extremely complex, and there would be much controversy and disagreement among the states over the results of those procedures.

And this is certainly not what was intended by the compact. The compact was said to be, by the people who wrote it, to be virtually self-executing and require minimal administration. This would require in effect the --

QUESTION: You don't say there's any, it's really very -- that it's impractical, is it, to measure the floodwaters, the amount of water that flows over the Conchas Dam? They know all that.

MR. ELLIOTT: In 1972 the gauge below Conchas was discontinued, and there really is not any flow measurement of the water below Conchas.

QUESTION: Well, I know there may not be, but it wouldn't be easy to, it wouldn't be hard to have it.

MR. ELLIOTT: There could be a new gauge installed, I suppose.

QUESTION: Well, yeah, and it wouldn't cost a fortune either, would it?

MR. ELLIOTT: The gauge itself would not, no.

QUESTION: Yeah, all right.

MR. ELLIOTT: But there would still have to be an accounting for what happened to that water after it passed the gauge --

QUESTION: That's right.

MR. ELLIOTT: -- in terms of losses and evaporation. It's the, it would amount to the kind of flow accounting that the people who wrote this compact thought they had avoided by this capacity or this water, even waters and storage limitation.

QUESTION: How many miles does the river travel between Conchas and Ute, approximately?

MR. ELLIOTT: In river miles --

QUESTION: River miles.

MR. ELLIOTT: River miles? I know it's over 100, but I'm just not sure how far it is. And I may be way off on that. The point on the accounting is that we would then be getting into flow accounting. We would be

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getting into measurements of water with gauges and getting into arguments over losses. This is the kind of flow accounting that New Mexico and Texas have been battling over for years on the Pecos River Compact, and it's exactly what the writers of this compact tried to avoid. And indeed we think it's important that that be avoided.

It's -- New Mexico bargained for protection for all its waters above Conchas, and primarily the Tucumcari Project and an additional 200,000 acre-feet of conservation storage below Conchas. We're satisfied with that bargain, and until 1987 New Mexico was too. What they're asking for now would in effect be an unlimited allocation. The 200,000 acre-foot limitation would be replaced by one that would have no limit. It would just be a matter of every year trying to account for all these different waters from the Tucumcari Project and from Conchas that are in the basin below Conchas, and then adding to that 200,000 acre-feet.

We feel like, that it was extremely important to Texas. We did not, as was implied, bargain away in order to get Sanford Dam our ability to obtain flows from New Mexico since, as I said earlier, about half the flows that are entering, that we get into Lake Meredith are from New Mexico. It was critical to Texas that there be a defined limitation on New Mexico's right to construct storage and

impound waters below Conchas. That was critical. That was the one thing we could never have bargained away.

QUESTION: Mr. Elliott, how do you respond to the argument that you can't really compute a capacity that precisely, 200,000, and also that it keeps changing as it silts up, and it's so exorbitantly expensive to increase the capacity that it's not reasonable to think that that's what they bargained about?

MR. ELLIOTT: We believe that there are some practical implications of limiting the, their right to a capacity limitation. We think that some of that can be overcome by creative means. You can build a reservoir that is far in excess and then you would have a sediment reserve pool, for instance, that you could use to collect sediment. Again on the capacity issue, it was Texas' view that unlike the Conchas issue it did not destroy the equitable apportionment that was set out in the compact and clearly intended, clearly intended by the negotiators.

But we do agree that a plain reading of Article IV and Article II(d) do, does say that it's a capacity limitation.

QUESTION: Thank you, Mr. Elliott. Mr. Lay, we'll hear now from you.

ORAL ARGUMENT OF R. THOMAS LAY

ON BEHALF OF THE PLAINTIFF OKLAHOMA

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

Oklahoma concurs with the exceptions which have been taken and advanced by the State of Texas, and we are here to raise the additional exception relating to Section VI of the Special Master's Report wherein the Special Master recommends that this Court interpret Article IV(b) of the compact to impose a water in storage or quantity of water limitation on New Mexico, as opposed to a capacity limitation. Article IV(b) of the compact clearly states that it is a limitation upon the amount of conservation storage available for impounding. Any question about that referring to capacity and sounding in capacity is resolved by Article II(d) of the compact which defines conservation storage. It defines conservation storage as that portion of the, that portion of reservoir capacity available for the storage of water.

One thing I do wish to stress, I take --

QUESTION: It doesn't use the word capacity. II(d), the term conservation means that portion of the capacity of reservoirs. You say it's just like it said reservoir's capacity.

MR. LAY: Yes, Your Honor. In my description I turned those two words around. One thing I do wish to stress, which I had the impression my honorable opposing

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counsel was urging this morning, is that Oklahoma is trying to convince this Court that under the capacity limitation there is a total limit on the total size of reservoirs that can be built in New Mexico. That is not the position we have urged before the Special Master, nor the position that we urge here. The only limitation, capacity limitation which Oklahoma is talking about is that that pertains to conservation storage. Above and beyond that capacity there may be in the same reservoir multipurposes, there may be navigation storage, there may be sediment control storage.

QUESTION: Wouldn't that present some very difficult problems of measurement, if you have all those different kinds of storage behind the same dam undifferentiated?

MR. LAY: Mr. Chief Justice, as we understand it, it's not, and again it gets into an engineering question. As we understand it the capacities that are allocated to reservoirs are basically established when the reservoir is planned and designed. That is to say it will be designed to have a useful life over a given period of time, 50 to 100 years, and in that process it will have allocated between certain elevations water for conservation purposes, water for flood control, water for other purposes. That kind of data is fixed, I think, in

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the planning and design process of the reservoir.

QUESTION: But Oklahoma's position is not that its interpretation limits the size of the structure?

MR. LAY: Not the total size of the structure. Just that portion, Mr. Chief Justice, that relates to conservation storage.

QUESTION: But can you say that any one part of a structure like a dam relates to conservation storage?

MR. LAY: I think we can, Your Honor, and I think as developed in this case, the way it turns out is that at Ute Reservoir at a given elevation you have outlet works. Below that you have dead storage and above that you have some quantity of water to the top of the lake. Within that quantity there is a limit of 200,000 acre-feet for conservation storage, and then there is water above that. On inquiry we can ask New Mexico what is this additional storage used for. We hear things like a desilt pool. We hear things like recreation storage, and things of that nature.

QUESTION: Well, do you determine it by the actual use that is made from time to time, or the intent with which it was stored, or the design, the design features of the dam, or all three?

MR. LAY: Justice Kennedy, I think all three may come into play. I think you are certainly correct in

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saying that it is the actual use. We think it's not necessarily what New Mexico may choose to call it, but the actual use to which it is placing the waters. It will also be in the design criteria of the reservoir where these elevations are, where these different capacities are allocated. All those --

QUESTION: Do you cite some treatises or some history where the term conservation storage is contrasted and compared with other types of storage?

MR. LAY: Your Honor, off the top of my tongue I cannot cite you a treatise. We did have in the record admitted certain treatises on sediment control and multipurpose design criteria where it did talk about how reservoirs are allocated certain different types of storages if it is a multipurpose reservoir. Now, if you were a sole purpose conservation storage reservoir, obviously it would be limited to 200,000 acre-feet capacity under our reading of Article IV(b).

QUESTION: How do you administer it on your theory? Let's assume New Mexico has decided to use the gross storage capacity of the Ute Dam by storing, in addition to its 200,000 acre-feet, an X-hundred thousand acre-feet for recreational purposes. Do you in effect take that as some kind of a benchmark so that when the, when there is a spillover that comes down the river you in

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effect say you've got to let it all spill out at the other end? Is it as simple as that on your theory?

MR. LAY: I think under our theory, Justice Souter, it is simply that once New Mexico has conservation storage capacity in excess of 200,000 acre-feet, that capacity, that excess water that might be represented in that excess capacity is required to be released to the downstream states, because the extent of the stream flow depletion by New Mexico was clearly intended to be limited to 200,000 acre-feet.

QUESTION: You might let them -- I take it on your theory it would be, it would be consistent with the compact if they in good faith said well, we want to raise the water level three more feet for recreational purposes. You'd say that's all right. But you'd say once that is done, once you get to whatever the bonafide recreational level capacity is, anything more that flows into that dam has got to flow out of that dam?

MR. LAY: That is our theory. That's correct, Your Honor.

QUESTION: Okay.

MR. LAY: And to clarify, we certainly --

QUESTION: What if they say okay, we're going to add on another four feet for recreation? But there is no limit on how much they can add for recreational capacity,

right?

MR. LAY: Justice Scalia, we have interpreted recreation use as being a consumptive use under the compact. The Special Master has in effect ruled that recreation is chargeable against conservation storage where it is held in place and kept within the state and not released. We concur with that theory, and my reason for pointing that out is if you had 200,000 acre-feet of conservation storage, 100,000 acre-feet on top of that for recreation, you've got 300,000 acre-feet of conservation storage under our reading of the compact.

QUESTION: So you, so there's no such thing as conservation storage, then, you're saying, right? Or recreation storage? It's just recreation use. There's no such thing as recreation storage.

MR. LAY: That would be a correct analogy with what I'm saying, Your Honor. That's correct. It would be a recreation use of the water, although New Mexico has tried to advance the theory that it's recreation storage and not conservation storage. That has been rejected by the Special Master.

QUESTION: Well then let me go back to my question, because I don't think I understood, or I may have misled you. I take it your answer now is that regardless of what they may do with or for recreational

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purposes in the Ute Reservoir, they can only store 200,000 acre-feet in the Ute Reservoir. And anything that spills in to raise the level above that has got to spill back out?

MR. LAY: If I may clarify, Your Honor, they can only store 200,000 acre-feet for what are deemed to be conservation storage uses and purposes.

QUESTION: But I thought your answer to Justice Scalia's question was that they couldn't store anything more for any other purpose. They could use their conservation water for recreation, but they couldn't increase their storage for recreational purposes.

MR. LAY: They could not increase their storage capacity for conservation purposes. But in addition to that they may have temporary storage for flood control, for example, that is not conservation storage. They may have temporary storage for navigation, which is not conservation storage. They may have temporary storage for some type of hydropower that would not be a conservation storage. And the reason they're not conservation storage is that typically those waters will ultimately be released from the reservoir to the downstream states, given the very nature of their uses.

The conservation storage uses, municipal-industrial water supply, we have included

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recreation, irrigation, those types of uses are conservation storage uses which come out of the conservation storage capacity section of the reservoir.

QUESTION: Well, I suspect that sediment control requires that the water sit there and not be released, and that's another exception to the storage.

MR. LAY: That is correct, Justice O'Connor. Sediment control storage is not part of conservation storage --

QUESTION: Right.

MR. LAY: -- and not chargeable against the 200,000.

QUESTION: And not chargeable against the 200,000. And in that instance it isn't released, it's kept so that the silt can settle out.

MR. LAY: That is correct, Your Honor. That is correct.

QUESTION: Would it be too crude to say, then, to summarize what you have said, that the capacity can be increased for any purpose which is realized ultimately by releasing the water over the dam?

MR. LAY: I think that is consistent with the theory, Justice Souter.

QUESTION: Okay.

MR. LAY: Again, I would want to articulate and

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qualify it. Any additional capacity can exist which does not constitute conservation storage capacity, or nonconservation uses. There can be additional capacities to that.

QUESTION: Each of those capacities, as I understand you to have described them, requires by its very nature the release of the water?

MR. LAY: That is correct, Your Honor.

QUESTION: Well, you just said sediment control did not require release. And surely it doesn't.

MR. LAY: Your Honor, that -- may I finish my answer, Your Honor?

QUESTION: Yes, you may.

MR. LAY: Yes, Your Honor, that is correct. And my choice of words was not articulate at that point. Sediment control is special in that it's unused water. It's not released, but it is unused but necessary for sediment deposition.

QUESTION: Thank you, Mr. Lay.

MR. LAY: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)

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