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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
KANSAS, :
Plaintiff :
v. : No. 105, Orig.
COLORADO. :
- - - - -X

Washington, D.C.
Monday, October 4, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

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DAVID W. ROBBINS, ESQ., Denver, Colorado; on behalf of
the Defendant.
JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
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behalf of the United States.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 105 Original, Kansas v. Colorado.

Mr. Draper.

ORAL ARGUMENT OF JOHN B. DRAPER

ON BEHALF OF THE PLAINTIFF

MR. DRAPER: Mr. Chief Justice, thank you, and may it please the Court:

Kansas would like to address three issues today.

50 years of success of the Court's river master on the Delaware River and 16 years of success of the Court's river master on the Pecos River demonstrate the wisdom of appointing a river master under appropriate circumstances on a river like the Arkansas River, which is the subject of this case.

Secondly, the Court should affirm the neutral principle that prejudgment interest accrues on all damages owing at the time interest begins to run.

And third, a 1-year compliance period would be consistent with the Court's prior rulings in this case and would preserve an essential right of Kansas and its farmers under this -- this compact that would otherwise be lost under the master's recommendation of a 10-year accounting period.

1 With respect to this accounting period, I would
2 note that in both prior opinions in this case, this Court
3 has relied on the annual results of the Hydrologic-
4 Institutional Model, which is the standard for compact
5 compliance in this case.

6 In the first opinion in 1995, this Court
7 distinguished between monthly and -- and seasonal use of
8 the model, deciding that monthly use was too frequent, but
9 that seasonal reliance on the model for determining
10 useability under article IV-D of the compact was
11 reasonable.

12 When the case was back here in 2001, this Court
13 reviewed the calculation of damages, which was done on a
14 yearly basis. As you can imagine, the factors that go
15 into calculation of damages vary from year to year, and so
16 it is crucial whether the depletions calculated by the H-
17 I Model, as it's called, are accurate, sufficiently
18 accurate, and reasonable to rely upon on an annual basis.

19 JUSTICE STEVENS: Mr. Draper, correct me if I'm
20 wrong. I -- I looked at these papers a while ago. I
21 thought they did it on a 10-year basis and they just moved
22 it up each year, using a different 10 years to calculate
23 the -- the relevant amounts in the 10th year.

24 MR. DRAPER: That is correct, Your Honor. It is
25 a moving accumulation of 10 years of results.

1 JUSTICE STEVENS: So they do use 10 years of
2 figures to determine what the relevant year's water would
3 be.

4 MR. DRAPER: That's correct, Your Honor. In
5 other words, the -- the annual determination includes the
6 most current year for which there is data and the previous
7 9 years, adds all those up, nets out the pluses and
8 minuses, and that determines whether in the year in
9 question there is compliance with the compact.

10 JUSTICE SCALIA: This will begin in 2007, as I
11 recall. Is that --

12 MR. DRAPER: That is the special master's
13 proposal, yes.

14 JUSTICE SCALIA: And what I don't understand is
15 even -- even if we agree with you that it should be done
16 annually, why -- why wouldn't you propose that it be done
17 annually using the previous 7 years' experience that we
18 now have and then, you know, ultimately by 2007, we can
19 use the previous 10 years? I -- I don't understand why we
20 have to do it year by year and forego even 7 years'
21 benefit of -- of this methodology.

22 MR. DRAPER: Your Honor, I couldn't agree with
23 you more in the sense that we should begin now with the
24 accounting so that you look each year at the results of
25 this standard, which has been approved by the Court, for

1 compact compliance in that year only, and if -- if you
2 accumulate it --

3 JUSTICE SCALIA: No. That -- that's -- I said
4 just the opposite. I said I -- I don't know why we should
5 begin looking for this -- at this year only using this
6 methodology. Why shouldn't we average this methodology
7 over the previous 7 years?

8 MR. DRAPER: Your Honor, averages will tend to
9 smooth out the results and will hide the effects during
10 dry years, which is when the farmers in Kansas, who are
11 the beneficiaries that Kansas intended to benefit -- and
12 both parties realize that. They need this water --

13 JUSTICE GINSBURG: But your method -- your
14 method will over-emphasize the dry years. So either way
15 you have a -- a imperfect situation. In your case, year
16 by year, and in a dry year, Colorado perhaps must over-
17 compensate, and if you have, say, 3 dry years in a row,
18 then it's going to be -- work out to Colorado's
19 disadvantage.

20 MR. DRAPER: Your Honor, I believe the -- the
21 result is the -- is the opposite. If I may explain.

22 The model, the -- the Hydrologic-Institutional
23 Model, has been made as unbiased as possible. The one
24 aspect in which we have identified a bias is that it
25 favors Colorado during dry years. It tends to

1 underestimate the depletions that would have to be
2 replaced by Colorado.

3 JUSTICE GINSBURG: That's the method that you're
4 attacking, but if you were to do it year by year, wouldn't
5 it be just the reverse?

6 MR. DRAPER: We don't believe that aspect of the
7 model would be any different if we're doing it year by
8 year. We'd simply be taking the results that are
9 calculated each year under either approach and use those
10 in that year so that if you have a dry year, you are --
11 are calculating in that year whether there is compliance
12 and staying as close as possible to the true intent of the
13 compact, which is to provide water when the farmers need
14 it.

15 JUSTICE SCALIA: Do you -- do you dispute what
16 -- what the master found here, that the methodology is
17 more accurate on a 10-year average than it is year by
18 year?

19 MR. DRAPER: No, Your Honor. The longer the
20 period of time you take, the more the accumulated results
21 of the model will match the measured --

22 JUSTICE SCALIA: The actual year-by-year
23 results. Right?

24 MR. DRAPER: Yes, and I should point out that
25 it's impossible to know what the right answer is. You can

1 -- you can measure the flows and the diversions in the
2 river and compare that to one of the runs of this model,
3 but it's the difference between the two runs, one
4 representing the compact condition, which is supposed to
5 be met, and the other representing the situation with the
6 wells operating. And it's the difference between those
7 two whose accuracy is in question.

8 JUSTICE SCALIA: Yes, but I -- I --

9 MR. DRAPER: And no one knows what that is.

10 JUSTICE SCALIA: I understand that -- that the
11 master concluded that even as to a particular year, the
12 model will be more accurate if you use the average from
13 the previous 10 years than if you just applied the model
14 to a single year, that even as to the real results for
15 that single year, the model will be more accurate if you
16 use a 10-year average.

17 MR. DRAPER: Your Honor, I don't understand it
18 that way. If you use 10 years, you are adding to the most
19 recent year results 9 years of pluses and minuses that's
20 going to, in most case, mask what happened during that
21 next previous year. You will be looking at a 10-year
22 accumulation of ups and downs and not analyzing what
23 happened in -- in the year in question.

24 JUSTICE KENNEDY: Is part or all of the
25 objectives of both the -- the decree and the 10-year model

1 to conserve subsurface reservoirs?

2 MR. DRAPER: Not -- not directly, Your Honor.

3 It -- it does preserve that reservoir in fact because
4 depletion of that reservoir affects the stream flows, and
5 it's the stream flows that are compacted here and that
6 have up to now --

7 JUSTICE KENNEDY: Well, then -- well, then why
8 isn't -- if -- if that's so, why isn't it that Colorado
9 shouldn't get credit for the wet years in -- in -- on an
10 average? You're concerned about the dry years. It seems
11 to me that Colorado should be given some credit for the
12 wet years when the subterranean reservoirs are -- are
13 replenished. Or am I wrong -- am I wrong about that?

14 MR. DRAPER: I think in general, Your Honor, you
15 are -- are correct. The question about there are over-
16 deliveries by Colorado, I believe is what you're
17 addressing, is there -- is there a way to give Colorado
18 credit for that. And there is a way. There is a -- a --
19 an account in John Martin Reservoir, which is 60 miles
20 above the State line, for those deliveries. When they are
21 delivered there, if there is more delivered than is
22 actually needed in that year to achieve compact
23 compliance, that can be retained there and, except for a
24 small effect of evaporation, is available to offset
25 depletions in the following year.

1 JUSTICE SCALIA: I -- I thought that the compact
2 specifically provided there shall be no allowance or
3 accumulation of credits or debits for or against either
4 State.

5 MR. DRAPER: That's correct, Your Honor.

6 JUSTICE SCALIA: Well, how does that comport
7 with what you just said?

8 MR. DRAPER: Under those circumstances, the
9 water that would be delivered to this offset account in
10 John Martin Reservoir is not a credit that's accounted
11 under the compact for that year. So it would not enter
12 into the compact accounting for that year. It would not
13 constitute a -- a credit, but it would be available as a
14 practical matter to be used as a credit in the next year
15 for current depletions. So there would be no carryover in
16 compact accounting.

17 JUSTICE SOUTER: I don't -- I don't understand
18 that statement. You say it would be available to be used
19 as a credit in a subsequent year. Do you really mean it
20 would be used as a credit, or do you mean it would simply
21 be there to be used?

22 MR. DRAPER: I think your formulation, Your
23 Honor, is -- is more correct.

24 JUSTICE SOUTER: Okay.

25 MR. DRAPER: It would be there to be used, and

1 it would not be a credit for accounting purposes. Yes.

2 JUSTICE SCALIA: Well, if it's not a credit for
3 accounting purposes, then they're going to owe you just as
4 much the next year even though -- even though you had more
5 water the previous year.

6 MR. DRAPER: This is under the assumption, Your
7 Honor, that they have already met their obligations in the
8 current year.

9 JUSTICE SCALIA: Yes.

10 MR. DRAPER: And it will be available as a
11 practical matter to meet their obligations in a subsequent
12 year and be accounted in that subsequent year.

13 I would point out that this is very important
14 for Kansas farmers that the -- the water be received when
15 it is supposed to be delivered under the compact. If
16 water is -- is not delivered, as required, in one year, it
17 cannot be recouped in a following year, certainly not 10
18 years later, as would be possible under the special
19 master --

20 JUSTICE KENNEDY: Well, then why are you using a
21 10-year model at all?

22 MR. DRAPER: It's not a 10 --

23 JUSTICE KENNEDY: It seems to me what you're --
24 what you're saying is forget the 10 years. Just do it
25 every year.

1 MR. DRAPER: That's what we are saying, Your
2 Honor. And the model is inherently a yearly model. It
3 calculates actually results on a monthly basis, and we
4 have used it -- and the Court has relied upon it -- on a
5 yearly basis up to now.

6 JUSTICE SCALIA: Why don't you do it on a
7 monthly basis? Indeed, why don't you do it on a daily
8 basis? I mean, the master found that this model really
9 works if you -- if you stretch it out over 10 years. You
10 say 1 year. Why don't you do it month by month?

11 MR. DRAPER: Well, it -- it could be done that
12 way, and in fact, Your Honor, Colorado uses parts of this
13 same model in its own administration of groundwater
14 pumping, the same groundwater pumping for purposes of
15 protecting Colorado surface water users, and it requires
16 replacement of water on a monthly basis. So it is -- it
17 is possible.

18 But we believe with the yearly accumulation that
19 -- that we have relied upon so far in this case and that
20 the Court has relied upon specifically for damages, that
21 that is an appropriate accounting period for this
22 particular purpose. And that is -- that is our proposal.
23 The proposal of Colorado is no, let's wait 10 years before
24 -- and -- and accumulate it with the other 9 years before
25 we require any replacement.

1 I would point out that the H-I Model, the
2 Hydrologic-Institutional Model, is the best tool available
3 for this purpose. It was endorsed by Colorado after the
4 Court's first opinion in this case when it -- the Court
5 approved using the model on a seasonal basis for the
6 seasonal accounting of useability. At that time, Colorado
7 gave up its own model in favor of the Hydrologic-
8 Institutional Model, and as you can see from the master's
9 report, there have been several significant improvements
10 in the model since that time.

11 I would also point out the correspondence -- the
12 close correspondence that exists between this case and the
13 Pecos River litigation in the 1980's. There you had a
14 compact that like this compact did not specify any
15 specific quantity of water in the compact itself, but
16 indicated that there was to be no depletions beyond the
17 depletions that were occurring at the time of the compact
18 with a few small amendments that I could -- I could
19 mention.

20 But the basic similarity of the compacts is that
21 the status quo at the time of the compact was maintained.
22 There was an inflow/outflow relationship that needed to be
23 observed and was required to be observed by the compact.
24 It was expressed explicitly in the Pecos River compact by
25 a reference to an inflow/outflow method. In this case, it

1 was expressed implicitly in article IV-D of the compact.

2 CHIEF JUSTICE REHNQUIST: The master found that
3 the role of the river master in the Pecos case was quite
4 different than the role of the river master you want to
5 have appointed here. He found that the role of the river
6 master in the Pecos cases was really ministerial.

7 MR. DRAPER: Your Honor, we do not agree with
8 that.

9 CHIEF JUSTICE REHNQUIST: You don't agree with
10 what?

11 MR. DRAPER: With the description of the Pecos
12 River master as being -- as having only ministerial
13 duties, and I can explain why.

14 CHIEF JUSTICE REHNQUIST: Please do.

15 MR. DRAPER: Yes. if -- if you refer to the
16 appendix of our -- our blue brief, on page A-22, you will
17 see that the opening section of the Pecos River master's
18 manual sets out the inflow/outflow relationship that is to
19 be observed in complying with that compact. This is the
20 form of an equation. You can see y equals a -- and a
21 number there.

22 In -- in our case, we have the -- the
23 Hydrologic-Institutional Model, which benefits from
24 several decades of increased sophistication in hydrologic
25 analysis to do the same job.

1 CHIEF JUSTICE REHNQUIST: The Pecos master can
2 simply apply this formula, can he not, and get the results
3 that the compact requires?

4 MR. DRAPER: He -- he is to apply the formula,
5 Your Honor, but there's a great deal of judgment,
6 professional, expert judgment that needs to be exercised
7 in order to apply it. For example, you have to separate
8 flood flows from base flows. When you look at the -- at
9 the results of a -- of a gauge on a river, you can see how
10 much water was in the river at particular times, but this
11 has to be separated into two different kinds of flows that
12 are treated differently under this compact.

13 CHIEF JUSTICE REHNQUIST: Well, one of the
14 reasons I'm curious is that I believe the Pecos master is
15 an engineer. He's not a lawyer.

16 MR. DRAPER: That's correct.

17 CHIEF JUSTICE REHNQUIST: He's also the cheapest
18 master we've ever had.

19 (Laughter.)

20 CHIEF JUSTICE REHNQUIST: But it seems to me
21 that the master you want appointed has got to be a lawyer
22 and make legal decisions.

23 MR. DRAPER: Your Honor, I don't believe so. I
24 think our master would be just as cheap.

25 (Laughter.)

1 JUSTICE SOUTER: What's the difference --

2 JUSTICE BREYER: No. The question was what
3 about the --

4 JUSTICE KENNEDY: What -- what relation do you
5 or -- yes -- working relation do you anticipate, if -- if
6 the river master is appointed, between the river master
7 and the commission? Does he go first to the commission
8 and try to get agreement or --

9 MR. DRAPER: Your Honor, no, he would not
10 formally interact with the commission, just as the Pecos
11 River master does not formally interact with the Pecos
12 River commission.

13 JUSTICE SOUTER: Well, what can -- what can the
14 river master do that the -- that the commission or
15 authority can't do? I -- is the difference between the
16 two of them -- call it a jurisdictional difference -- nil,
17 but there is process difference in the sense that the
18 river master could say do this or don't do that, whereas
19 your -- your fear is that the authority is simply going to
20 be deadlocked because everything has to be done
21 unanimously? Is it a process difference?

22 MR. DRAPER: It is a process difference, Your
23 Honor. The --

24 JUSTICE SOUTER: But for that, you wouldn't be
25 asking for a river master then.

1 it be set up just as you have set up the Pecos River
2 master. In other words, if there were an objection to the
3 determination, the yearly determination, of the river
4 master, it would be reviewable by this Court.

5 JUSTICE STEVENS: Directly.

6 MR. DRAPER: Directly.

7 JUSTICE GINSBURG: And the special master would
8 be out. The special master would be out of the picture,
9 as you describe it. You -- the special master would be
10 finished. The river master would take over.

11 Has there ever been -- has this Court ever
12 appointed a river master when the special master did not
13 recommend it? And as I understand both Delaware and the
14 Pecos River case, the special master recommended the
15 appointment of a river master.

16 MR. DRAPER: Your Honor, I believe in both of
17 those cases, the -- the special master was recommending
18 the appointment of a river master, but I would point out
19 that in setting out the criteria for appointing a river
20 master, the Court did not refer to that factor as -- as
21 being part of the consideration.

22 JUSTICE SCALIA: As I understand the system you
23 propose, the river master's decision would be appealable
24 to us, and we would review it de novo. Is that right?

25 MR. DRAPER: We're suggesting the same scope of

1 review as on the Pecos, which is clearly erroneous. This,
2 however, is something that the Court could decide to do
3 differently than the Pecos, but the clearly erroneous
4 standard comports with the -- the way master
5 recommendations are handled in the district court under
6 rule 53.

7 JUSTICE SCALIA: I'm very loathe to deprive
8 either of the States of their -- their right to have this
9 Court decide matters between them.

10 MR. DRAPER: Your Honor, this would not deprive
11 either State of that right. And in fact --

12 JUSTICE SCALIA: Well, it would if they can only
13 come here and -- and overturn the river master if he's
14 clearly erroneous. That's a -- that's a very high
15 standard.

16 MR. DRAPER: Well, there -- as I say, the Court
17 -- the Court may set the review threshold as it sees fit.

18 JUSTICE SCALIA: I -- I had thought that your
19 proposal was de novo review. This is -- this is new to
20 me, that -- that you want it clearly erroneous.

21 MR. DRAPER: Your Honor, I would -- I would say
22 that we have -- we have mentioned the clearly erroneous
23 review standard because it was in the Pecos framework. It
24 is not essential to our proposal. A de novo review would
25 be perfectly fine with the State of Kansas.

1 JUSTICE KENNEDY: Suppose the commission decided
2 to appoint an arbitrator. Would the special -- pardon me.
3 Would the river master then proceed independently and we'd
4 have two different recommendations?

5 MR. DRAPER: As under the Pecos, Your Honor, if
6 the -- if the compact administration, as it's called in
7 the -- in the Arkansas Basin, is able to come to a
8 resolution of an issue, then that would -- that would take
9 care of that issue. It would be -- not be necessary to
10 have the river master address that, and it would be an
11 agreement of the States because it would either be an
12 agreement because they had literally agreed before the --
13 or in the form of the Arkansas River Compact
14 Administration or that they had agreed to binding
15 arbitration and had settled it.

16 JUSTICE KENNEDY: Well, then it would seem to
17 me, procedurally at least, the river master would have if
18 not the legal, at least the practical obligation to refer
19 things first to the commission.

20 MR. DRAPER: Your Honor, the referral of matters
21 to the commission is why we're here in the first place.
22 It cannot act without unanimity. The State of Colorado,
23 the State in possession of this resource, can veto each
24 and every action of the compact administration.

25 JUSTICE SCALIA: That was the deal.

1 JUSTICE SOUTER: Your -- yes. Your State agreed
2 to it.

3 JUSTICE SCALIA: That was the deal they came to.
4 Why should we kick it over? They came to that
5 arrangement, and it was approved by Congress, and now you
6 come back and tell us, oh, this is too cumbersome. You
7 should -- you should appoint this river master to do an
8 end run around it. I -- I -- it doesn't seem to me to be
9 fair.

10 MR. DRAPER: Your Honor, I don't believe that
11 this is an end run any more than the enforcement of the
12 compact is an end run around the administrative body that
13 is set up in many of these compacts. Those are keep-in-
14 touch type bodies. If they can agree on things, they are
15 very useful, and the Arkansas River Compact Administration
16 has been useful in areas where there can be agreement.

17 JUSTICE SOUTER: No, but you -- you agree that
18 this is the -- the authority here is more than a keep-in-
19 touch group. Your problem with it is -- is not that you
20 need something more than keep in touch, but that when you
21 ask them to do something more than keep in touch, the
22 other State has a veto. And -- and that simply gets you
23 to Justice Scalia's objection. That's the deal you made.

24 MR. DRAPER: That is the -- that is the nub of
25 our argument against reliance on the Arkansas River

1 Compact Administration, that you can't look at it to
2 settle differences about the implementation of this
3 Court's decree.

4 JUSTICE GINSBURG: What did the special --

5 MR. DRAPER: That is a --

6 JUSTICE GINSBURG: What did the special master
7 mean when he said he recognized the unanimous vote
8 problem, but he said, but the climate may be changing?
9 The compact administration under the chairmanship of the
10 United States representative may again be seen as the best
11 way to administer their compact and settle issues. What
12 was he talking about?

13 MR. DRAPER: Your Honor, I think he was talking
14 about the hope that he has that the States could work more
15 cooperatively now, despite the fact that it was on this
16 river between these two States that this Court was first
17 asked to resolve interstate river disputes between States
18 in 1901, and we are here today still in dispute over this
19 river.

20 JUSTICE GINSBURG: So there was nothing tangible
21 behind his --

22 MR. DRAPER: Nothing tangible, Your Honor.

23 We -- perhaps he was thinking of the settlement
24 that we have achieved on the Republican River. That case
25 started, was accepted by this Court. After rulings by

1 this Court, it became possible to settle that case. It
2 has now been settled. And the States involved in that
3 litigation were Kansas, Nebraska, and Colorado. It was
4 possible in that -- in that context. It has proven
5 impossible in this context.

6 And we can expect disputes to go on, as they
7 have over the last century, if we do not have an impartial
8 expert authority to resolve disputes between States that
9 are going to come up every year. Every year there are
10 questions. How do you take the data this year and put it
11 into the H-I Model? While many of those issues have been
12 settled, because different forms of replacement and other
13 different circumstances arise, you have those every year.

14 And if you follow the lead that the Pecos River
15 cases of this Court give us, there is also the possibility
16 to address the improvement of the tool for implementing
17 the agreement of the States, and that is improving the
18 Hydrologic-Institutional Model on occasion, as we have
19 seen the master do over the course of this litigation.
20 That is allowed under the Pecos River Decree, and we
21 submit that it should be allowed under this decree as
22 well. And that is when the master would be exercising the
23 most judgment in our opinion.

24 I would conclude by saying that a -- a river
25 master is needed on the Arkansas to deal impartially and

1 expertly with annual questions that must be resolved to
2 implement the H-I Model, and that a 1-year compliance
3 period will implement the intentions of the drafters of
4 the compact and the needs of Kansas farmers and is
5 consistent with the yearly reliance that this Court has
6 already placed on the H-I Model.

7 I'll reserve the rest of my time for rebuttal if
8 there are no further questions.

9 CHIEF JUSTICE REHNQUIST: Very well, Mr. Draper.

10 Mr. Robbins, we'll hear from you.

11 ORAL ARGUMENT OF DAVID W. ROBBINS

12 ON BEHALF OF THE DEFENDANT

13 MR. ROBBINS: Mr. Chief Justice, and may it
14 please the Court:

15 I think I will begin by discussing the river
16 master since that's where Mr. Draper left off.

17 I want to make it clear, first of all, that I
18 disagree with the assertion that the Pecos River Compact
19 and the Arkansas River Compact are similar in the way they
20 operate. The Pecos River Compact did, in fact,
21 specifically state that it was -- it intended to hold the
22 level of -- of depletion of the system by man's
23 development to the 1947 condition. The Arkansas River
24 Compact, to the contrary, begins the -- the limitation
25 clause by saying it is not intended to impede or prevent

1 future beneficial development of the Arkansas Basin,
2 provided that the waters of the Arkansas River are not
3 materially depleted in useable quantity for existing use
4 for the uses. So the -- the Arkansas compact contemplated
5 that there would be a -- a more flexible effort at using
6 the water of the river by water users in both States,
7 protecting the existing uses in both States from that
8 future development.

9 Now, this -- this Court has appointed a river
10 master in two circumstances. In both circumstances, as
11 pointed out by Justice Ginsburg, the -- the special master
12 recommended that because of the specific circumstances of
13 the case, that in fact a river master was appropriate.
14 That was on the Delaware River and the Pecos River. In
15 all other cases that deal with this issue where requests
16 have been made by -- by States without river -- without a
17 special master's recommendation, the Court has declined to
18 appoint a river master. There's a very good reason, I
19 think, behind that.

20 Colorado alone is the party denying interstate
21 compacts in two equitable apportionment decrees. If every
22 time a State is dissatisfied with its neighbor, is
23 dissatisfied with how a compact operates, it is able to
24 come to this Court and say, please appoint a river master,
25 we're just having trouble with our neighbor, you'll become

1 the water management -- the super water management agency
2 for the country. You have river masters if you -- it's
3 totally up to -- to your discretion. But if you were to
4 follow this line of thinking, you end up supervising water
5 distribution across the west and part of the east.

6 JUSTICE SCALIA: Well, the disputes are going to
7 come up here eventually anyway if the States are
8 intransigent. Ultimately it will be a dispute about the
9 application of the compact and it will come back here
10 anyway, won't it?

11 MR. ROBBINS: Justice Scalia, that is absolutely
12 correct, but the difference is where compacts have
13 mechanisms within them that are designed to work out these
14 differences, I think it is in the Court's interest -- and
15 Colorado's position is and the special master's position
16 was it was in the Court's interest -- to refer these
17 matters back to those compact administrations. You --

18 JUSTICE O'CONNOR: Counsel, do you think it's
19 any more likely today than in the past that the two States
20 will be able to work out their continued disagreements?

21 MR. ROBBINS: Justice O'Connor, I agree
22 completely with the special master. The State of Colorado
23 has proposed, as referred to in his ruling, that binding
24 arbitration be used and has committed itself to
25 participate in that. To the extent there -- there have

1 would say I'm happy to have Mr. Smith. Just don't call
2 him a river master. Call him an arbitrator. So you're
3 saying that when Kansas says they would do it except
4 there's a problem of getting unanimity, you say the only
5 problem is that you won't agree.

6 MR. ROBBINS: At the present time, that's the
7 posture --

8 JUSTICE BREYER: Now, they're the obstacle to
9 unanimity. So the keys are in their own pocket if they
10 want Mr. Smith. That's your view.

11 MR. ROBBINS: Our view is if they want to
12 arbitrate pursuant to the compact, the keys are in their
13 -- in their pocket. We do not believe --

14 JUSTICE BREYER: So the problem can't be one of
15 unanimity because your side agrees. I mean, you heard
16 what he said. So I'm -- I'm trying to see --

17 MR. ROBBINS: Our side agrees, Your -- Justice
18 Breyer, with -- with the concept that this matter should
19 be returned to the compact administration to resolve the
20 differences in that forum.

21 JUSTICE BREYER: And -- and in that forum, you
22 will agree to binding arbitration.

23 MR. ROBBINS: In that forum, we will agree to
24 binding arbitration.

25 JUSTICE SCALIA: Binding arbitration will --

1 will mercifully keep this stuff off of our desk, won't it?

2 MR. ROBBINS: Yes, it will.

3 (Laughter.)

4 MR. ROBBINS: I want -- I want to make it very
5 clear to the Court that the State of Colorado, different
6 than the situation in the Pecos River, acted very
7 aggressively to ensure that it promptly came into
8 compliance with the -- with the determination that in fact
9 depletions were occurring, impermissible depletions were
10 occurring to the Arkansas River. Within 2 years, the
11 State of Colorado's legislature had passed the appropriate
12 legislation. The State engineer had passed rules and
13 regulations, implemented them, and enforced them. The
14 State had authorized millions of dollars in loans for the
15 acquisition of replacement water, and -- and the State of
16 Colorado -- your -- your ruling was in 1995. By 1997, it
17 appears that the State of Colorado was in compliance with
18 the compact. That is a significant and very difficult
19 effort on the part of the legislature, the Governor, the
20 attorney general, and the State engineer.

21 We do not believe that this is anything like the
22 Pecos River. Your master in this case has not said to you
23 these parties are -- are torn, will not get together, and
24 you need to have a master, a river master, appointed. In
25 this instance, the State of Colorado took the exact

1 opposite approach. They did everything they could to
2 reduce the pumping of the wells sufficiently to allow
3 Colorado to meet the terms of the compact, and that is an
4 important fact you need to glean from the special master's
5 report.

6 Now, the -- the other -- the only other point I
7 want to make on this is that the -- the -- it's -- it's
8 very important, in deciding whether or not a river master
9 is the appropriate course of action to determine -- and I
10 -- I mentioned this earlier -- whether or not the Court
11 wants to be in a supervisory position. I happen to agree
12 that the States are entitled to seek redress of their
13 concerns before this Court, and as you said in -- in
14 Oklahoma v. New Mexico, you have a serious obligation to
15 adjudicate disputes between the States where there are
16 actual and existing controversies. And -- and the fact
17 that you would have a river master would not eliminate the
18 potential for those controversies. In our view, the only
19 way that you can get this matter off of your plate and
20 into the position that Congress recognized and -- and
21 directed is to follow the special master's recommendation
22 number 12.

23 I'd now like to turn, if I may, to the issue of
24 the accuracy of the model.

25 JUSTICE STEVENS: May I ask you a question,

1 because you may not bother to talk about it otherwise,
2 about punitive damages? Your opponent didn't seem to
3 think it very important, but I have this question. Is it
4 your view that the other State waived its claim to the
5 punitive damages from 1985 back either by not arguing it
6 today or by submitting the different set of figures at the
7 time the -- the issue was before the master the last time
8 around?

9 MR. ROBBINS: Justice Stevens, in response to
10 your question, we believe that in fact the issue of
11 prejudgment interest, or punitive damages, is law of the
12 case in this matter. The special master set out a formula
13 by which he proposed how the damages should be calculated.
14 Kansas argued for actual value of money, a rather rigid
15 theory of compensation, and the special master chose in
16 fact a balancing of the equities approach. He suggested
17 that the appropriate means to calculate those -- that
18 prejudgment interest on the -- the nominal damages --

19 JUSTICE STEVENS: Did he -- did he make that
20 suggestion or did the other -- did Kansas make that
21 suggestion?

22 MR. ROBBINS: The special master ruled on how he
23 believed the damages should be calculated.

24 JUSTICE STEVENS: In this time around or in the
25 preceding --

1 MR. ROBBINS: In the preceding time around. And
2 what he said was that the damages from 1950 to 1968 should
3 be -- should -- should receive a inflationary increase to
4 reflect the inflationary tendencies, but that they should
5 not be dealt with under prejudgment interest. In other
6 words, it shouldn't be compounded through prejudgment
7 interest. Only the damages from 1969 forward should be
8 compounded using prejudgment interest.

9 Kansas did not except to that methodology.
10 Kansas excepted to the fact that he didn't give them
11 prejudgment interest on the damages from 1950 forward. In
12 the opinion that you authored for the Court, you accepted
13 the master's methodology, and you did one thing and only
14 one.

15 JUSTICE STEVENS: Well, the master's methodology
16 really wasn't at issue.

17 MR. ROBBINS: The master's --

18 JUSTICE STEVENS: The only issue before us, as I
19 remember it, was the date from which the prejudgment
20 interest would run.

21 MR. ROBBINS: That's --

22 JUSTICE STEVENS: That's -- that's all that was
23 argued.

24 And it seemed to me that if it had been a fixed
25 sum rather than an -- a changing amount as years went by,

1 there.

2 MR. ROBBINS: I understand.

3 The -- but the -- in our view the State of
4 Kansas was obligated to take an exception if it disagreed
5 with the methodology used by the special master and
6 adopted in Justice Stevens' opinion by this Court. There
7 was a sum of damage that was calculated by that and
8 reported to the Court: \$38 million. By moving the year
9 forward from 1969 to 1985, you automatically then reduce,
10 by some degree, the amount of that damage calculation.

11 JUSTICE STEVENS: No, but did we -- your -- your
12 view is that we entirely eliminated any interest on that
13 past damage.

14 MR. ROBBINS: Prejudgment --

15 JUSTICE STEVENS: Pre-1985.

16 MR. ROBBINS: The -- the special master's
17 methodology, Justice Stevens, was that the damages in his
18 third report from 1950 to 1968 should not, under a
19 balancing of the equities, bear prejudgment interest at
20 any point in time. They should only be advanced for
21 inflation, which was a proposal Colorado made because
22 Colorado believed that it -- the changing a 1950 damage to
23 a -- to a 2002, or at that time a 1994, dollar value was
24 only fair and reasonable. We opposed the concept of
25 giving prejudgment interest because it would -- it would

1 be -- it's as if -- if this were a commercial context, we
2 would have been able to identify that there was a damage
3 going on and the theory in your prejudgment cases is we
4 could have put the money in the bank --

5 JUSTICE KENNEDY: But we rejected that as to
6 post-'85 damages.

7 MR. ROBBINS: You agreed that prejudgment
8 interest, Justice Kennedy, should be applied to post-'85
9 damages, not to pre-'85 damages.

10 JUSTICE STEVENS: Well, but our opinion didn't
11 say it was just post-'85 damages. Our -- our opinion
12 didn't -- didn't answer the question, and -- and the
13 reason, of course, is we didn't actually think about it
14 because nobody even -- nobody argued it at that time.

15 MR. ROBBINS: Our view was that -- that -- our
16 view is, Justice Stevens, that an exception needed to be
17 taken if the master's methodology was under challenge.

18 JUSTICE STEVENS: So in a way you really are
19 arguing waiver I think.

20 MR. ROBBINS: We are arguing law of the case.
21 Yes, we are.

22 JUSTICE STEVENS: Which is consistent with his
23 failure to argue it today.

24 MR. ROBBINS: That's -- that is our position,
25 Your Honor.

1 I would like to, if -- if I may, move off of
2 prejudgment interest. I would like to talk, while I still
3 have a few minutes, a little bit about this model and the
4 10-year average.

5 JUSTICE SOUTER: Can you give -- I'm -- I'm not
6 sure I understand the dispute. Can you give me in -- in
7 -- without using up all of your time, a -- basically a
8 simple example to illustrate the difference between the
9 two contending methodological positions?

10 MR. ROBBINS: Yes, I can, Justice Souter.

11 Under the -- the master's formulation, which is
12 agreed to by Colorado, the damages which occur in each
13 year, 1950 through 1984, are -- are computed at -- in --
14 as nominal damages in the year in which they occur. They
15 are then expanded by the -- by an inflationary formula
16 which allows the dollar in 1950 to be calculated in a 2002
17 dollar.

18 In 1985 and to the present, any damages that
19 occur are advanced both for inflation, but then they are
20 also awarded a prejudgment interest, which is compounded.
21 In other words, if inflation is 2 or 3 percent through the
22 period on a long-term average, but -- but investments are
23 at 6 or 7 percent --

24 JUSTICE SOUTER: I got you.

25 MR. ROBBINS: -- those damages advance.

1 Colorado's -- Kansas' view is that commencing in
2 -- in 1985, all of the damages from 1950 to the present
3 should receive prejudgment interest. The difference then
4 becomes, if you use the master's methodology, the -- the
5 current amount of money in 2002 dollars which Colorado
6 would owe Kansas is approximately \$29 million. If you use
7 the Kansas methodology -- and this is the impact of
8 prejudgment interest -- it would be \$52 million. Under
9 the original formulation that was presented to the Court,
10 the value under the master's formulation, which did not
11 charge prejudgment interest on the '50 to '68 dollars,
12 both States agreed that that would have been \$38 million.
13 So from Colorado's perspective, having succeeded in our --
14 in our exception that the year should be 1985 instead of
15 1969, we in fact, under the Kansas theory, lose some
16 \$20-some million in the proposition, which we don't
17 believe is what the Court intended.

18 Let me -- let me turn very quickly to the model,
19 if I may.

20 The -- the issue here is not Colorado's
21 obligation to deliver water to -- to the river system.
22 Colorado has both senior surface water rights and the
23 State of Kansas that it has obligations to protect.
24 Remember, the compact envisions that this subsequent
25 development can't injure water users in either Kansas or

1 Colorado. As a result, Colorado must ensure that on a
2 monthly basis, water is placed into the river so
3 depletions are -- are compensated for in the system as
4 they occur.

5 The problem here is not that process. The
6 problem here is a model that is inaccurate. Beginning in
7 your first report, you quoted with favor the special
8 master's comments about this model in dealing with the
9 winter water storage program, which was an issue which you
10 agreed should be dismissed several years ago. You
11 indicated that depletions shown were well within the range
12 of error and it could not be told if it was an impact or
13 an error that the model was describing.

14 JUSTICE KENNEDY: Counsel, your time is running
15 short. This is very important. I think you misunderstood
16 Justice Souter's question. He asked you to give us an
17 example of the Kansas versus Colorado approach as to the
18 10-year model. You answered him about the interest.
19 Could you --

20 MR. ROBBINS: I'm so sorry.

21 JUSTICE KENNEDY: -- could you tell us really --

22 MR. ROBBINS: Yes.

23 JUSTICE KENNEDY: Give us an example of the
24 difference between the two.

25 MR. ROBBINS: Yes. The difference between the

1 two is this. We believe that the model over a long period
2 of time, as it's developer, Mr. Durbin, said, is
3 reasonably accurate. We -- we agree with that, and we are
4 willing to use it like that. But that means you have to
5 use -- look at it over extended periods of time. Our view
6 is that you simply look at the model, which is predicting
7 over-deliveries and under-deliveries, predicting them.
8 They don't have any relationship to what Colorado is
9 really putting into the system. They are predictions.
10 And in some years where you -- where you look back and you
11 know from the gauges the model is over-predicting a
12 significant amount, you -- you want to be -- and you know
13 in a subsequent year it's going to under-predict, you want
14 to allow that to smooth out so that you are, in fact,
15 getting close to what's really going on. It is not an
16 effort to carry dry-year depletions into wet years or vice
17 versa. It is, in fact, an effort to allow the model's
18 inherent inaccuracies to play out so that you get a more
19 accurate result in each 10th year.

20 JUSTICE SOUTER: Why doesn't -- why isn't the
21 result that you -- of -- of your position that you would
22 get a more accurate set of predictions if all you were
23 making was a 10-year calculation, but you will not get a
24 more accurate set of predictions with respect to any one
25 year? And in fact, it is with respect to any one year

1 that's important under the compact. In other words, they
2 -- they plan every year, not every 10 years. So why does
3 a 10-year accuracy help you in solving the practical
4 problem you have on a year-to-year basis?

5 MR. ROBBINS: As proposed by the special master,
6 the model is not used every 10 year -- or every 10th year.
7 It's used every year. If you're looking at --

8 JUSTICE SOUTER: I know. But it's used on the
9 basis of 10-year figures which will not be accurate
10 particularly with respect to any given year even though
11 they would be -- they would be accurate if you were only
12 interested in a calculation every 10 years.

13 MR. ROBBINS: You are making --

14 JUSTICE SOUTER: Does it -- can -- can you --
15 can you get a better prediction on a year-to-year basis is
16 what I'm saying.

17 MR. ROBBINS: You get a better prediction on a
18 year-to-year basis. A -- a better prediction if you're
19 looking at the model over 10 years versus looking at the
20 model just running it in a given year. Colorado does not
21 want to be in a position, Justice Souter, where we are
22 accused of violating the compact because there is an
23 inaccuracy in the tool that is being used.

24 CHIEF JUSTICE REHNQUIST: Thank you --

25 MR. ROBBINS: It --

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
2 Robbins.

3 MR. ROBBINS: Thank you.

4 CHIEF JUSTICE REHNQUIST: Mr. Feldman, we'll
5 hear from you.

6 ORAL ARGUMENT OF JAMES A. FELDMAN

7 ON BEHALF OF THE UNITED STATES

8 MR. FELDMAN: Mr. Chief Justice, and may it
9 please the Court:

10 It's the position of the United States that --
11 that we agree with Colorado and with the special master
12 that a river master should not be appointed in this case.

13 The compact between the States of Kansas and
14 Colorado sets up a commission that is responsible for
15 implementing the obligations in that compact, which has to
16 do with Colorado's obligations to deliver a certain amount
17 of water to Kansas. The commission is also charged with
18 investigating violations of the compact, and the compact
19 includes a dispute resolution mechanism of submission to
20 binding arbitration if the -- the States agree to that.
21 The -- the commission also certainly could use other
22 dispute resolution mechanisms and certainly would have the
23 authority to do if it wanted to.

24 The States have agreed to that. Congress has
25 enacted it into law, and this Court should permit the

1 parties to use that mechanism to resolve any disputes that
2 might arise in the future rather than putting a river
3 master in place under the authority of this Court.

4 Now, the Court has -- itself has frequently
5 stated that consensual resolution of disputes of this sort
6 is preferable to litigation. As the special master
7 pointed out, in the two river basins just north of the
8 Arkansas River, the Republican River and the Platte River,
9 the parties recently, after having a dispute, including
10 these very same two States in one of them, have come to a
11 consensual resolution of the dispute that they had. And I
12 think that does show, as the special master pointed out,
13 that these -- the States can -- in fact, the disputes in
14 those cases also had to do with groundwater and the effect
15 of well pumping, among other things. As the special
16 master pointed out, I think that shows that the States can
17 use a consensual mechanism to come to a resolution, and
18 this Court ought to continue its often-stated preference
19 for consensual rather than litigative type of solutions to
20 problems of this sort.

21 If the Court were to appoint a river master in
22 this case, then I think the question would arise in any
23 future case in which you have two States that have
24 conflicting interests with regard to an ongoing activity,
25 as what happened with river compacts, equitable

1 apportionments, and in other areas, whenever there's an
2 inherently conflicting interest, the Court would have an
3 appeal that it should appoint a master to oversee a decree
4 or judgment. And I think rather than -- that -- that
5 would be directly contrary to the Court's other statement
6 in the area, which is not only that the Court prefers and
7 that it's far preferable to have consensual resolutions,
8 but also that the Court does not favor appointing agents
9 or functionaries to carry out its decrees.

10 JUSTICE SCALIA: So I guess we made a mistake
11 with respect to the Pecos River and what was the other
12 one? Delaware?

13 MR. FELDMAN: Yes. The Pecos River -- I mean,
14 there were a couple of differences, in addition to the
15 ones that Mr. Robbins pointed out. One difference is that
16 not only the special master, but the parties in the Pecos
17 River case -- neither party objected to the appointment of
18 a river master or even to the more extraordinary step of
19 clothing the master with authority to make determinations
20 that would be reviewable only under a clearly erroneous
21 standard. In this case, there is a party that objects to
22 it.

23 And I would -- I think there's another
24 difference that's important that the Court ought to keep
25 in mind. At the time the Pecos River master was

1 appointed, Federal Rule of Civil Procedure 53(e), which
2 the Court has said that the Federal rules provide a guide
3 for this Court's original cases, rule 53(e) provided that
4 findings of fact by a master appointed by a district court
5 shall be reviewed under a clearly erroneous standard, and
6 the Court, indeed, used that mechanism for the -- it
7 provided that the river master in that case would be
8 reviewed under that standard.

9 As of 2003, rule 53 -- it's now rule 53(g) --
10 provides that masters appointed by district courts said
11 their findings shall be reviewable only under a de novo
12 standard unless the parties agree otherwise. Therefore,
13 at the present time -- and again, following the Court's
14 rule 17.2 that says that the Federal Rules of Civil
15 Procedure should be guides -- and I think they are a
16 useful guide -- the appropriate course here, if the Court
17 were to appoint a river master, would be to appoint one
18 whose findings will be reviewable de novo.

19 But that itself raises problems because if the
20 findings of the river master are reviewable de novo, it's
21 really just a continuation of the current litigation and
22 it doesn't really advance things any. The parties will
23 submit the evidence to the river master. He'll make his
24 determinations, and then they'll come to the Court.
25 That's really more what the special master does at the

1 current time.

2 So I think that under all of those
3 circumstances, both the Court's preference for a
4 consensual resolution of disputes, its disfavoring of
5 appointments of agents to carry out its decrees, the
6 Court's recognition that it's the Court's obligation to
7 decide cases of this sort and it can't -- it's not the
8 obligation of other parties to do that, and the commission
9 that Congress has put into place specifically to deal with
10 this kind of problem, and with a specific recognition that
11 there could be disputes and a provision for a dispute
12 resolution, I think that the Court should not appoint a
13 river master in this case.

14 As far as the prejudgment interest issue, it's
15 the position of the United States also that the special
16 master and Colorado are correct, and prejudgment interest
17 should not be awarded. I think it's a familiar principle
18 in -- to this Court in litigation that if a party -- when
19 the time comes to make objections, a party has to make all
20 of its objections if it wants the Court to hear them.

21 In this case, the special master came up with a
22 recommendation in his third report about how to -- what
23 should happen with prejudgment interest, under which the
24 early years -- the -- the amount of the damages in those
25 early years would never be subject to prejudgment

1 interest.

2 Now, Kansas objected to that and said we should
3 move the year back to 1950. We should get prejudgment
4 interest on everything back to year one. But they never
5 made the objection that if you -- if the Court disagrees
6 with that, which it did, that the method that the master
7 had used to deal with the prejudgment interest as of 1969
8 was incorrect. That was the time that Kansas should have
9 brought it to the Court and Kansas didn't do that.

10 JUSTICE STEVENS: So you're arguing they've
11 waived the -- your argument is they waived the objection
12 basically.

13 MR. FELDMAN: Yes. I think --

14 JUSTICE STEVENS: I don't think you used the
15 word waiver in your brief, and I don't think that Colorado
16 did either. But I guess that's the essence of your
17 argument.

18 MR. FELDMAN: I -- I actually think it's a
19 combination of two things. On the one hand, what the
20 Court actually said in its opinion was that the special
21 master had awarded damages only insofar as necessary to
22 satisfy the demands of equity, something to that effect.

23 JUSTICE STEVENS: Would you not agree that if it
24 was a one-shot injury, not an ongoing injury, that the
25 normal reading would be the injury -- the interest should

1 run on the laws?

2 MR. FELDMAN: I think in the normal contract
3 case that doesn't have the kinds of equities that this
4 case had, that is the current rule, that prejudgment
5 interest would run. But this kind of case involves
6 damages that go back 50-odd years. It could have been --

7 JUSTICE STEVENS: And it involves continuing,
8 ongoing --

9 MR. FELDMAN: And they're -- they're ongoing
10 that are different in amount in every year, that it's not
11 merely that Colorado was violating the compact as of 1950,
12 although it probably didn't know it at that time, but that
13 Kansas didn't bring a suit until 1985 and the fact, I
14 think, that Colorado has always agreed to pay -- to adjust
15 the damages for inflation. So, in essence, Kansas is
16 getting a portion of what the prejudgment interest would
17 normally cover for those early years. I think if all
18 that's put together, I think the Court's conclusion that
19 the master's conclusion was just the amount that equity
20 dictates was correct, and that if Kansas didn't like that,
21 it should --

22 JUSTICE SCALIA: Mr. Feldman, the Government
23 takes no position on this 1-year versus 10-year
24 computation?

25 MR. FELDMAN: No, the Government doesn't have a

1 position on that.

2 JUSTICE SCALIA: Too hard for you?

3 (Laughter.)

4 MR. FELDMAN: That issue involves the
5 particularities of this case and the Government doesn't
6 really have a particular interest in how that gets
7 resolved.

8 If there's no further questions, that concludes
9 the argument.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Feldman.

12 Mr. Draper, you have 2 minutes remaining.

13 REBUTTAL ARGUMENT OF JOHN B. DRAPER

14 ON BEHALF OF THE PLAINTIFF

15 MR. DRAPER: Thank you, Mr. Chief Justice, and
16 may it please the Court:

17 I want to state that we do not believe that we
18 waived our position on the interest calculation as was
19 just suggested in the -- in the last colloquy. The reason
20 that we didn't do that is because we filed an exception
21 last time against every respect in which the special
22 master was not recommending full interest. And it turned
23 out that the Court chose the -- the test that we now have,
24 which is a relatively easy test to apply. It has certain
25 incentives that grow out of it that make sense. And we

1 believe that we sufficiently excepted to that. If look at
2 our brief from that exception, the one in -- in support of
3 our exceptions, in particular -- particularly to page 25,
4 footnote 8, we specifically addressed the issue that the
5 -- the master was not allowing any interest in that 1950
6 through 1968 period.

7 CHIEF JUSTICE REHNQUIST: You're talking about
8 the brief in the earlier case.

9 MR. DRAPER: In the earlier case, to the third
10 report of the special master.

11 I would -- also, on the other points that were
12 raised, you need to be --

13 JUSTICE SCALIA: This is a lot of money
14 involved, and -- and you certainly didn't argue it here.
15 I don't recall that point being argued. And with all that
16 money being involved, I would have thought it would have
17 been argued.

18 MR. DRAPER: Well, we were -- we were arguing
19 the larger issues on interest, but we were asking that
20 interest not be denied to us during that '50 through 1968
21 period. That was very clear from our briefs, and we
22 specifically singled out that part of it in that footnote.
23 So I don't believe it's appropriate that -- to conclude
24 that we have waived that argument.

25 And I would point out also that the only reason

1 that it was done that way -- and the calculations of the
2 parties did -- did in connection with that review -- is
3 because the special master required it. There is no other
4 reason that we did it. We did not volunteer to do it that
5 way. We did not like doing it that way. The master said
6 that's the way it's going to be in my recommendation. How
7 much would that amount to? We did not agree in any way to
8 that part of the calculation.

9 I would also point out that with respect to the
10 amounts involved, that you need to be careful. The
11 amounts cited by Mr. Robbins are not from the same year.

12 CHIEF JUSTICE REHNQUIST: Thank you. Thank you,
13 Mr. Draper.

14 MR. DRAPER: Thank you, Your Honor.

15 CHIEF JUSTICE REHNQUIST: The case is submitted.

16 (Whereupon, at 11:01 a.m., the case in the
17 above-entitled matter was submitted.)
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