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IN THE SUPREME COURT OF THE UNITED STATES

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VIRGINIA, :

Plaintiff :

v. : No. 129 Orig.

MARYLAND. :

- - - - -X

Washington, D. C.

Tuesday, October 7, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

ANDREW H. BAIDA, Baltimore, Maryland; on behalf of the Plaintiff.

STUART A. RAPHAEL, ESQ., McLean, Virginia; on behalf of the Defendant.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ANDREW H. BAIDA, ESQ.	
4	On behalf of the Plaintiff	3
5	STUART A. RAPHAEL, ESQ.	
6	On behalf of the Defendant	28
7	REBUTTAL ARGUMENT OF	
8	ANDREW H. BAIDA, ESQ.	
9	On behalf of the Plaintiff	58
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 129 Original, Virginia v. Maryland.

Mr. Baida.

ORAL ARGUMENT OF ANDREW H. BAIDA
ON BEHALF OF THE PLAINTIFF

MR. BAIDA: Thank you, Mr. Chief Justice, and may it please the Court:

There are two reasons why the State of Maryland has the authority to regulate Virginia and its citizens when they seek to place structures in and withdraw water from the Potomac River.

First, as confirmed by the Black-Jenkins Award of 1877 and this Court's decision in Morris v. United States, the State of Maryland is and has been the owner of the Potomac River since 1632, and Maryland has never --

QUESTION: Mr. Baida, before you get into your argument, can I just ask you a preliminary question? I made the mistake of reading the Master's report before I read the briefs. There's an awful lot of discussion of the entire river issue in there. Is that -- you're no longer making that point?

MR. BAIDA: Correct, we are not.

Maryland is and has been the owner of the river,

1 and it has never relinquished the sovereign authority that
2 its title to the river gives it to regulate what takes
3 place on and over the bed.

4 And the second reason --

5 QUESTION: Do you think the compact covers
6 withdrawals of water by Virginia? I mean, does it
7 directly cover that at all?

8 MR. BAIDA: It's not the privilege of making and
9 carrying out orders, Justice O'Connor, although that
10 privilege would seem to apply to building something into
11 the river to exercise a riparian right, and there is a
12 riparian right to withdraw water.

13 QUESTION: Well, do you -- do you take the
14 position that Maryland could reject every effort by
15 Virginia to withdraw water from the river?

16 MR. BAIDA: No, Justice O'Connor. We -- we have
17 never taken that position.

18 QUESTION: What is your position then?

19 MR. BAIDA: That Virginia has riparian rights
20 with respect to the Potomac River.

21 QUESTION: Which includes the right to use some
22 of the water.

23 MR. BAIDA: Correct.

24 QUESTION: And take it out of the river.

25 MR. BAIDA: Correct.

1 QUESTION: With your permission.

2 MR. BAIDA: Correct.

3 QUESTION: But only with your permission.

4 QUESTION: It's only the last step that's the
5 problem

6 (Laughter.)

7 QUESTION: Is that right? Only with Maryland's
8 permission --

9 MR. BAIDA: Subject to a standard of
10 reasonableness, Justice O'Connor.

11 QUESTION: Is that reasonableness in part
12 assessed by the fact that Maryland is a sovereign?

13 MR. BAIDA: It's --

14 QUESTION: Pardon me. That Virginia is a
15 sovereign?

16 MR. BAIDA: No. It's assessed by the fact that
17 Maryland owns the river, but that Virginia, as -- as a
18 riparian owner, has rights with respect to the river that
19 Maryland must be reasonable with respect to which in its
20 regulations.

21 QUESTION: Virginia rights are -- Virginia
22 rights are no greater than any private landowner?

23 MR. BAIDA: That's precisely correct.

24 QUESTION: Even -- even assuming that's true, I
25 -- I thought a right is a right. I -- I thought we have a

1 right to something. It doesn't mean somebody can turn it
2 down.

3 MR. BAIDA: And -- and --

4 QUESTION: And riparian rights include the right
5 to take the water. That's clear.

6 MR. BAIDA: And --

7 QUESTION: And that's the right to take water,
8 not -- not the right to come and beg Maryland to take
9 water.

10 MR. BAIDA: The river, Justice Scalia, is
11 entirely within the State of Maryland, and that is
12 undisputed from the -- the language of the Maryland
13 charter back from 1632. The entire river is in Maryland.

14 QUESTION: But the compact reserves to the State
15 of Virginia and its citizens riparian rights. If riparian
16 rights include, as I think they do, the right to take
17 water, it seems to me that aspect of the case is -- is
18 quite easy to decide.

19 MR. BAIDA: Maryland's ownership of the Potomac
20 gives it to right -- gives it the right to regulate what
21 takes place on and over the bed. There are riparian
22 rights, but as this Court has recognized, those riparian
23 rights have always been subject to government regulation.

24 QUESTION: I'm mixed up. I'm sorry. Maybe -- I
25 didn't think the case was basically about taking water out

1 of the river. I thought it was about building something
2 for the purpose of taking water out.

3 MR. BAIDA: There --

4 QUESTION: Is -- is it actually that you're
5 saying -- I may have misread this and so is it actually --
6 you're saying if -- if somebody -- if the Governor of
7 Virginia goes to the river with a bucket and takes water,
8 a little bit of water, to wash some pans that he has, that
9 they have to get Maryland's permission? Is it about
10 taking the water out of the river? Is it about building
11 something, or both?

12 MR. BAIDA: It's about both.

13 QUESTION: All right. So now you're just
14 addressing the problem of taking water out of the river.
15 So can a person who lives next to a river under the common
16 law from 1302 or whatever -- now, can he go to the river
17 and just take some water when he's thirsty?

18 MR. BAIDA: Yes.

19 QUESTION: Yes. All right. So Virginia is just
20 taking water when they happen to have a lot of people who
21 are thirsty.

22 (Laughter.)

23 QUESTION: So what's the -- what's the special
24 thing about the water? I thought it was building a water
25 intake system

1 MR. BAIDA: It's -- it's about both. The right
2 to build into the Potomac which the compact --

3 QUESTION: All right. Let's imagine there were
4 no building. Then would you have an objection?

5 MR. BAIDA: Yes, because --

6 QUESTION: Because you can't take water out when
7 you're thirsty.

8 QUESTION: There are too many thirsty people is
9 what your objection is. Right?

10 MR. BAIDA: The -- the objection is simply that
11 Maryland has the right to regulate what takes place in its
12 territory, and what takes place --

13 QUESTION: It doesn't. What they do is they --
14 they build a -- a hole which fills up with the water from
15 the Potomac and that hole, which happens to be in
16 Virginia, is filled up with water and they drink it. Now,
17 is there any objection? They haven't built a thing.

18 MR. BAIDA: I think that's a different question.
19 That's --

20 QUESTION: No. I'm asking you, are you
21 objecting to the building or are you objecting separately
22 -- because I hadn't focused on that -- to just taking
23 water without building anything?

24 MR. BAIDA: If they're taking -- if they are --
25 the low-water mark on the Virginia side --

1 QUESTION: No. They have nothing built over
2 there. What happens is water comes up out of the Potomac
3 into Virginia and they drink it.

4 MR. BAIDA: But I'm trying to understand the
5 nature of your question, Justice Breyer. When they build
6 a hole, are they building the hole in Virginia?

7 QUESTION: In Virginia.

8 MR. BAIDA: So they're building a trench in
9 Virginia.

10 QUESTION: Yes, that's right.

11 MR. BAIDA: Maryland may have some objections to
12 that at some future point in time, but that's activity
13 that's taking place in Virginia.

14 QUESTION: Yes. That's what I thought the case
15 was about.

16 QUESTION: Unless the trench creates a new low-
17 water mark for the Potomac. I mean, I think that's what
18 Maryland's argument would be, that when you make an inlet
19 into Virginia, that's -- that's the low-water mark of the
20 Potomac.

21 MR. BAIDA: Well, that may -- that -- I don't
22 know whether that would actually change the --

23 QUESTION: I didn't want to get it mixed up.
24 All I wanted to do is I focused on this case as a matter
25 of building something. I didn't focus on it as a matter

1 of taking water out. And I'm -- and that's -- that was my
2 problem. Now, maybe just forget my problem. Maybe I'm
3 the only one who had it. So skip --

4 QUESTION: Let -- let me ask you this. There's
5 a Potomac River Flow Allocation Agreement of 1978. Does
6 it deal with the right of Virginia to use water or take it
7 out?

8 MR. BAIDA: That imposes restrictions on the
9 three major users of the Potomac River, the Washington
10 Aqueduct, the Army Corps of Engineers, the -- the Fairfax
11 County Water Authority and the Washington Sanitary --
12 Suburban Sanitary Commission, and imposes limitations on
13 the amount of water that they can take --

14 QUESTION: On the amount, but it acknowledges --

15 MR. BAIDA: -- in periods of low flow.

16 QUESTION: -- that water can and will be removed
17 by Fairfax County?

18 MR. BAIDA: Subject to a permitting system that
19 was in place at the time and still is in place. And the
20 only permitting system that's ever been in place with
21 respect to the Potomac River has been the permitting
22 system established by the State of Maryland.

23 And I think I'd like to just go back to the
24 initial point I tried to make at the beginning, which is
25 why Maryland has the right to do what it's doing here.

1 QUESTION: Before you do that, can I ask a
2 practical question? How is Maryland, if it is, adversely
3 affected by this pipe and the water intake? Is there any
4 adverse impact on Maryland or is Maryland just trying to
5 say, we are the sovereign? So even though our people are
6 not being adversely affected, you need to get a permit
7 from us. Is there any adverse impact on Maryland or its
8 residents?

9 MR. BAIDA: Well, the Maryland administrative
10 and judicial review proceedings answered that question
11 "no. "

12 But the reason why Maryland took the -- the
13 action that it did was because Fairfax County already had
14 an existing waterway intake pipe in the -- in the river.
15 They wanted to build another intake pipe 725 feet into the
16 river, and the edge of it would be 30 inches above water
17 with a 5-foot walkway. Maryland took the position let's
18 see if there are less intrusive alternatives that are
19 available.

20 Virginia wanted to do this. Fairfax County
21 wanted to do this because it was concerned about the
22 effect of the -- the water on the shoreline which is where
23 the existing intake pipe was and wanted to get cleaner
24 water from the -- from the middle of the river. And so
25 Maryland took the view, well, let's see if there are less

1 intrusive alternatives available, and --

2 QUESTION: Why?

3 QUESTION: Yes.

4 QUESTION: Because -- because there wasn't
5 enough water for the people in -- in Maryland? That's --
6 it -- one thing is, well, we're sovereign and you -- we
7 have to give our permission. Another is our people are
8 not going to have enough water if Virginia does this. I
9 think you're saying Maryland had no such objection.

10 MR. BAIDA: Maryland had no objection to the
11 Fairfax County Water Authority withdrawing water.
12 Maryland's objection was to minimize the impact on the
13 Potomac River.

14 QUESTION: What authority did you have to
15 minimize the impact? The compact between the States gives
16 the State and its citizens riparian rights, including the
17 right to build structures into the river so long as they
18 do not impede navigation. Was Maryland's objection that
19 -- that this new structure would impede navigation of the
20 river? It's a -- it's above the navigable portion anyway,
21 isn't it?

22 MR. BAIDA: Yes, it is.

23 QUESTION: So. So what was your objection?

24 MR. BAIDA: Because the riparian rights that --

25 QUESTION: It was ugly?

1 MR. BAIDA: Well, there was -- that was part of
2 it because it -- it was in the scenic portion of the
3 Potomac River.

4 QUESTION: Well, you should have reserved that
5 right in the -- in the compact. The compact could have
6 said, you know, provided it does not impede navigation or
7 be ugly.

8 (Laughter.)

9 MR. BAIDA: What the -- what the compact does,
10 Justice Scalia, is it provides that the Potomac River
11 could be used as a common highway by the citizens of both
12 States, and it also secures important private property
13 rights. Private property rights, again for the citizens
14 of both States.

15 QUESTION: All right. Let -- if I may, let me
16 interrupt you there. Do you concede that the State has
17 any rights under article VII of the compact?

18 MR. BAIDA: That the States?

19 QUESTION: The State, the State of Virginia, the
20 Commonwealth of Virginia. Article -- article VII talks
21 about citizens.

22 MR. BAIDA: That --

23 QUESTION: It doesn't talk about the
24 commonwealth.

25 MR. BAIDA: That's exactly what this Court has

1 said in --

2 QUESTION: Well, is that -- I mean, is that a
3 premise of your argument?

4 MR. BAIDA: Yes.

5 QUESTION: Do you -- do you also deny that the
6 State with respect to withdrawal of water for its citizens
7 that the -- do you deny that the State stands in the shoes
8 of its citizens?

9 MR. BAIDA: The -- the State -- the Commonwealth
10 of Virginia brought this action on behalf of its citizens
11 to seek --

12 QUESTION: No. I realize that, but are you
13 denying that it may properly do that?

14 MR. BAIDA: No. No, we are not.

15 QUESTION: So, in effect, are you saying the
16 State -- it -- it is just as though the State had express
17 rights under article VII because in making the claim that
18 it's making, it stands in the shoes of its citizens, and
19 its citizens do have rights. Is -- is that -- do you
20 concede that?

21 MR. BAIDA: Yes. The -- we've never denied that
22 the --

23 QUESTION: Then it's irrelevant that the -- that
24 article VII speaks only of citizens and not of the State.
25 Is that correct?

1 MR. BAIDA: No, it's not irrelevant, Justice --

2 QUESTION: Then what -- what difference does it
3 make?

4 MR. BAIDA: Because all that the compact does,
5 it secures -- it -- it makes a -- there is -- the compact
6 drafters recognized the difference between jurisdiction
7 and sovereignty and private property rights, and when they
8 wanted to, they knew exactly how to go about addressing
9 issues of sovereignty.

10 QUESTION: Now, one of my questions in this case
11 is this. You've answered Justice Souter and he posed his
12 questions this way based on article VII or paragraph --
13 clause VII of -- of the compact. But must we not
14 interpret that too according to the Black-Jenkins Award,
15 particularly paragraph 4 at page C-4 of -- of the -- of
16 the Special Master's appendices? That uses the -- that
17 says Virginia -- not citizens. That says Virginia has
18 riparian rights, and both of those two phrases are not
19 used in the compact. The phrase, riparian rights, I don't
20 think is used in the compact, and the compact talks about
21 citizens.

22 But the Black-Jenkins Award goes -- it seems to
23 me, interprets authoritatively -- and you correct me if
24 I'm wrong -- what the compact means. And I read the Black
25 -- at least I think it's a permissible reading -- to say

1 that Virginia -- and we'll argue about as a sovereign.
2 That -- that's -- that's a phrase I add -- has riparian
3 rights. So we really do have to focus not just on section
4 VII, but on part 4 of the Black-Jenkins Award, do we not?

5 MR. BAIDA: Yes. And we -- Maryland's view is
6 that that part of the award confirms Maryland's rights
7 over the river. And I'd like to explain this a little bit
8 more fully.

9 What the Black-Jenkins arbitrators did was they
10 rejected Virginia's claim to any right in the soil -- any
11 right in the soil -- beyond the water mark, any right to
12 any of the islands in the river, and any right to any part
13 of the bed of the river. Now --

14 QUESTION: Yes, but it said, as has been pointed
15 out, that Virginia was given a proprietary right and a
16 privilege to erect any structures necessary to the full
17 enjoyment of Virginia's riparian ownership, which
18 presumably encompasses taking out water.

19 MR. BAIDA: And the presumption, Justice
20 O'Connor, is overcome by looking at the rest of the award,
21 and what the -- the arbitrators did, they did give
22 Virginia title to the middle of other bodies of water,
23 namely the -- the Tangier Sound, the Pocomoke Sound, and
24 the Pocomoke River. But they specifically rejected --

25 QUESTION: Yes, but do you deny that Virginia

1 has riparian ownership up to the low-water mark of the
2 Potomac?

3 MR. BAIDA: The arbitrators said that Virginia
4 has full dominion over this right in the soil up to low-
5 water mark, but beyond that point, Virginia only has a
6 right to use the river. A right of use is not dominion,
7 it's not title, it's not sovereignty.

8 QUESTION: But it says --

9 QUESTION: Why? But it is a right of use, and
10 that's what you're -- and that's what you're contradicting
11 here. That's all they want. They're not trying to govern
12 the river. They just want to use it.

13 MR. BAIDA: A right of use, Justice Scalia, is
14 subject to governmental authority and regulation, and
15 that's exactly what this Court said --

16 QUESTION: Well, but it says here in the Black-
17 Jenkins Award and in the earlier compact, the privilege to
18 erect structures necessary to the full enjoyment of the
19 riparian ownership. That might mean a pipe to take water
20 out.

21 MR. BAIDA: This Court has said in, for example,
22 Massachusetts v. New York that Massachusetts' right to use
23 Lake Ontario was still subject to the regulatory authority
24 of New York because New York had title to the bed of Lake
25 Ontario.

1 QUESTION: Mr. Baida, can I ask you sort of a
2 basic question? In your view is there any difference
3 between the right that Virginia has, the riparian rights
4 of Virginia, on the one hand, and the riparian rights of
5 Maryland's citizens who -- who own the property on the
6 Maryland shore of the river? Do -- are they equivalent?
7 Or what is the difference between the riparian rights of
8 the people on the opposite sides of the river?

9 MR. BAIDA: The -- Maryland is to treat them
10 identically, and that's set forth clearly in article VII
11 of the compact.

12 QUESTION: So that either -- on either side of
13 the river, a property owner could stick a pipe in and
14 drain the river.

15 MR. BAIDA: Not -- not if it has any kind of
16 adverse impact from Maryland's perspective, whether it's
17 in Maryland -- if -- if the City of Rockville wanted to do
18 this, it would encounter presumably exactly the same kind
19 of reaction that Fairfax County initially did.

20 QUESTION: You say the riparian rights on either
21 side of the river are subject to the paramount authority
22 of the Maryland -- the State of Maryland to -- to govern
23 what happens to the water.

24 MR. BAIDA: Yes.

25 QUESTION: And -- and in the exercise of that

1 authority, could Maryland give a higher priority to the
2 citizens of Rockville than to the citizens of Vienna,
3 Virginia?

4 MR. BAIDA: No, and this Court said in Yates v.
5 Milwaukee that -- that the riparian right cannot be
6 arbitrarily and capriciously denied. And that --

7 QUESTION: No. It's not arbitrary and
8 capricious. They make a lot of findings and they said
9 there's too much traffic in Virginia. Virginia would be
10 better off if it's rural.

11 (Laughter.)

12 MR. BAIDA: Well, Your Honor, I think --

13 QUESTION: And -- and what is -- what is the
14 source for your statement that Maryland has to be non-
15 arbitrary? Is this riparian water law or is this some
16 constitutional obligation that one State owes to another?

17 MR. BAIDA: I -- I think it's again set forth in
18 Yates v. Milwaukee where the Court said that a State
19 cannot -- or a government -- municipality cannot
20 arbitrarily and capriciously deny someone the exercise of
21 a riparian right.

22 QUESTION: So in your opinion --

23 QUESTION: But -- but that's based on -- on --
24 that's a statement of riparian law?

25 MR. BAIDA: Yes. I think -- I mean, it's a

1 property right. It is a property right, and it can't be
2 arbitrarily --

3 QUESTION: So we're talking about -- all we're
4 talking about is property rights here. We're just talking
5 about the definition of what a riparian right is.

6 MR. BAIDA: Yes.

7 And just so I'm clear, Justice Kennedy, the rule
8 of law, not administrative hyperbole, is what governed the
9 judicial and the administrative review proceedings that
10 led to Fairfax County getting this waterway intake pipe
11 permit. I mean, it -- there was -- it went through the
12 process. Maryland thought it had valid reasons for
13 restricting the -- the permit, and Maryland was -- was
14 overruled, and the permit has since issued. And so this
15 is not a case of Maryland just arbitrarily deciding, well,
16 we don't like what's happening over there, and -- and
17 then --

18 QUESTION: So your opinion is --

19 QUESTION: You -- you used the word arbitrary.
20 I didn't. I just want to know the source of law which
21 governs Maryland's obligation under your point of -- under
22 your submission to make these determinations. And you
23 said it has to just be fair among riparian owners because
24 this is what riparian law requires it to do.

25 MR. BAIDA: And I think it's also required by

1 the Constitution.

2 QUESTION: Your -- your point --

3 QUESTION: What provision of the Constitution?

4 MR. BAIDA: I think the Due Process Clause.

5 Maryland just can't arbitrarily and -- and capriciously
6 deprive someone of a property right.

7 QUESTION: Oh, but that's just an obligation it
8 has as to all of its citizens. Virginia doesn't have any
9 special standing as a State.

10 MR. BAIDA: No. And -- and again, it's because
11 of what Maryland gave up in this compact and -- and what
12 the Black-Jenkins Award provided.

13 And again, we have to go back -- and the -- the
14 problem with -- with the Special Master's recommendation
15 from Maryland's perspective is that he began at the wrong
16 place in history. He began with the compact. He should
17 have begun with the charter because the plain language of
18 the charter gives Maryland this river, and -- and so the
19 question at that point, since Maryland owns this river,
20 Maryland does have sovereign authority over it. So --

21 QUESTION: What was wrong with the Special
22 Master saying, yes, Maryland has this 1632 decree. It
23 looks -- this grant. It looks pretty good. But Virginia
24 has these other grants. And I think that they're both
25 arguable. So the States sensibly twice dealt with it.

1 But your argument seems to hang on that 1632
2 document indisputably was it, and that everything else
3 flows from there. The Special Master said, not
4 necessarily so. They couldn't even resolve it in 1785.
5 They finally resolved it in 1877, but it wasn't an
6 inevitable truth that it was 1632 rather than the Virginia
7 grants.

8 MR. BAIDA: Justice Ginsburg, the -- the flaw in
9 the reasoning is that it ignores the plain language of the
10 charter which this Court said includes the Potomac River
11 in unmistakable terms to the further bank. It doesn't
12 matter what kind of competing claims existed as of 1785
13 when the compact was written.

14 What matters is who had title, and under
15 Virginia's view, Maryland was a -- this -- Maryland was
16 basically a deed holder. This was a royal deed, and under
17 Virginia's view, this royal deed could not create rights
18 until it was interpreted by either the arbitrators or this
19 Court.

20 QUESTION: But there were other royal deeds too,
21 different kings, but there were royal decrees that -- that
22 Virginia had.

23 MR. BAIDA: Which this Court noted did not do
24 anything to divest Maryland of the authority it had under
25 the -- Maryland was first in time. First in line, first

1 in time. And so it had it in 1632. There was a
2 subsequent deed that was given by --

3 QUESTION: I thought there was -- the earliest
4 in time was in, wasn't it, 1609 or something? The --

5 MR. BAIDA: But in -- yes, in 1609 Virginia was
6 initially set up but then its charter was annulled in
7 1624. It converted to a royal colony which meant that
8 King Charles I in 1632 had the right to carve Maryland out
9 of Virginia, which is what he did. He created Maryland as
10 a proprietorial colony. At that point, the only way that
11 Maryland could lose any rights it had under its charter
12 was through a quo warranto proceeding. It was initiated
13 in 1685. It never resulted in anything, as the
14 arbitrators in 1877 noted. And so Maryland --

15 QUESTION: But -- but are you saying that the
16 compact in 1785 and the Black-Jenkins Award in 18 -- were
17 -- were simply wrong because they didn't follow that
18 interpretation that you're giving now?

19 MR. BAIDA: No, I'm not saying the compact was
20 wrong at all, Mr. Chief --

21 QUESTION: Are you saying the Black-Jenkins
22 Award was wrong?

23 MR. BAIDA: No. The -- I think -- all -- all
24 I'm saying is that Maryland had this authority as a result
25 of the plain language in the charter.

1 QUESTION: Well, are you saying that the
2 implicit assumption at least of both the 1877 Black-
3 Jenkins Award and the 1785 compact -- the implicit, if not
4 explicit, assumption was that Maryland owned the river?

5 MR. BAIDA: No. I think a fair reading of that
6 document -- of -- of the -- the 1785 compact and the 1877
7 award was that reasonable minds may have differed. And so
8 the States decided this is how we're going to address
9 issues of navigation.

10 QUESTION: Well, but I thought I was arguing --
11 making your argument for you. So -- so you -- but then,
12 it seems to me, that justifies the Special Master's
13 approach. You -- I thought you were saying, oh, now, he
14 proceeded on the wrong premise. This -- the -- the
15 boundary line was settled. All -- all we're talking about
16 is -- is the rights -- or -- or ownership and stuff. But
17 you're saying no. If it's everything is up for grabs,
18 then the 1785 compact and the Black-Jenkins Award, what do
19 we look to?

20 MR. BAIDA: If I said that, let me retrieve it
21 immediately because that was not what I meant to say.

22 (Laughter.)

23 MR. BAIDA: What I -- what I meant to say was
24 that Maryland's title has not changed one iota in almost
25 400 years.

1 QUESTION: Mr. Baida, maybe I'm missing
2 something here, but I did not understand that the State of
3 Virginia is contesting the ownership of Maryland of the
4 bed of the river. Is -- is that -- is that contested by
5 Virginia? I thought that they concede that the river
6 right up to the low-water mark on the southern shore of
7 the Virginia shore belongs to Maryland. But that -- but
8 that does not answer the question of whether the riparian
9 rights given to the citizens of Virginia and to the State
10 of Virginia requires that -- that they obtain permission
11 from Maryland before withdrawing water or creating a
12 structure to withdraw water.

13 MR. BAIDA: I agree, Justice Scalia, but it goes
14 a long way in resolving that question because by
15 acknowledging that -- that the boundary is not in dispute,
16 by acknowledging that Maryland does, indeed, have title to
17 this river, Virginia has acknowledged Maryland's
18 regulatory authority --

19 QUESTION: No, it hasn't because it --

20 QUESTION: No, it hasn't.

21 QUESTION: But it's all -- it's all subject to
22 the fact that the owners on both sides of the river have
23 riparian rights. Right?

24 MR. BAIDA: Correct.

25 QUESTION: Now, my question -- Justice Kennedy

1 asked it earlier, and I'm not sure you got an answer. Who
2 defines the riparian rights? I guess on Maryland's side
3 of the river Maryland can define the riparian rights. Who
4 defines the riparian rights on the Virginia side of the
5 river? Do you think Maryland has the authority to do
6 that, or is there a common law that's binding on us or
7 some kind of overriding Federal constitutional principle
8 at stake?

9 MR. BAIDA: I think a fair reading of the
10 compact is that both States agreed that they couldn't
11 agree on where the boundary was, and so they decided --

12 QUESTION: I think the fair reading is that
13 everybody thought there would be plenty of water, so we
14 didn't have to decide this. All we're worried about is
15 transportation down the river, and it's not -- and now
16 we've got a -- a possible problem on what is enough water
17 to go around.

18 MR. BAIDA: And -- and --

19 QUESTION: And I don't know that the compact
20 addresses the question of who defines the riparian rights
21 on the Virginia side of the river.

22 MR. BAIDA: And I think that both States agreed
23 that wherever the boundary was, the citizens of both
24 States would have the same rights of access to the river.
25 And -- and for that reason, they -- they --

1 QUESTION: Does that mean that because Maryland
2 can define the rights on the Maryland side of the river,
3 it may also define them on the Virginia side?

4 MR. BAIDA: I think that the -- the view -- a
5 fair reading would be that wherever the boundary was --

6 QUESTION: But is it your contention that that's
7 what it is?

8 MR. BAIDA: If -- if at the end of the day the
9 boundary is on Virginia's side, yes, Maryland gets to
10 decide because it's activity occurring in Maryland. This
11 is Maryland --

12 QUESTION: What if -- what if the Virginia
13 legislature passed a statute governing riparian rights on
14 -- all over the State in other bodies of water, not
15 limited to the Potomac? Could that statute govern the
16 riparian rights of Virginia property owners on the
17 Potomac?

18 MR. BAIDA: Not if Virginia does not own the
19 Potomac. And I'd like to --

20 QUESTION: May I ask just one quick question
21 before you sit down?

22 QUESTION: I just think it's not --

23 QUESTION: Does -- does Maryland require
24 Virginia's citizens to have a Maryland fishing license to
25 fish in the Potomac?

1 MR. BAIDA: No, because that's settled by
2 article -- I think article VIII of the compact.

3 QUESTION: It just says that they have rights to
4 fish, but just as you argue that riparian rights and
5 rights to take water can, nonetheless, require prior
6 permission, you could also take the -- you ought to also
7 take the position that the right to fish requires prior
8 permission. So you ought to get a Maryland fish -- I'm
9 darned if I'm going to get a Maryland fishing right --
10 fishing license --

11 QUESTION: Do you want to reserve the rest of
12 your time, Mr. Baida?

13 MR. BAIDA: I would. Thank you, Mr. Chief
14 Justice.

15 QUESTION: Very well.

16 Mr. Raphael, we'll hear from you.

17 ORAL ARGUMENT OF STUART A. RAPHAEL
18 ON BEHALF OF THE DEFENDANT

19 MR. RAPHAEL: Mr. Chief Justice, and may it
20 please the Court:

21 The Special Master correctly decided the
22 regulation issue for two reasons. First, the language of
23 the compacts in question is plain and unambiguous, and
24 second, for more than 180 years, Maryland never disputed
25 that it was entirely --

1 QUESTION: Does that plain language tell us what
2 riparian rights are?

3 MR. RAPHAEL: The plain language of article IV
4 of the Black-Jenkins Award uses the term riparian
5 ownership.

6 QUESTION: But you said plain language of the
7 compact, and now you're all of a sudden talking about
8 Black-Jenkins.

9 MR. RAPHAEL: It's both.

10 QUESTION: The compact does not use the word
11 riparian.

12 MR. RAPHAEL: That -- That's correct. But we
13 think that the plain language --

14 QUESTION: So you say it's the plain language of
15 the compact with the gloss of the Black-Jenkins Award.

16 MR. RAPHAEL: We think it's both.

17 QUESTION: What do you make -- and I don't have
18 this in front of me, so maybe I -- I'm missing something.
19 But I thought the Black-Jenkins Award also put a --
20 included a disclaimer that it wasn't, in fact, modifying
21 anything in the 1785 compact. Am I right?

22 MR. RAPHAEL: That's -- that's correct because
23 the enabling legislation for the Black-Jenkins Award
24 provided that neither of the States would be deprived of
25 any of the rights or privileges, nor would the citizens be

1 deprived of rights or privileges that they had under the
2 Compact of 1785.

3 QUESTION: How -- I'm sorry.

4 Assuming that then, how do we get from the
5 language of article VII in the compact that refers to
6 citizens to the language in Black-Jenkins that talks about
7 the States?

8 MR. RAPHAEL: Your Honor, the citizens in
9 Virginia only had those rights under the compact because
10 Virginia as a sovereign entered into an interstate compact
11 with Maryland.

12 Secondly, Maryland recognized in the enabling
13 legislation that provided for the Black-Jenkins Award that
14 the rights were the rights not only of citizens, but of
15 the States. That language is used in the enabling act.

16 QUESTION: So you -- you say that in
17 interpreting the Black-Jenkins Award, Virginia's riparian
18 ownership is -- is defined by its -- in part by its
19 sovereign status?

20 MR. RAPHAEL: Yes, that's correct.

21 QUESTION: So that sovereignty is inherent in
22 ownership?

23 MR. RAPHAEL: I think that's correct. If -- if
24 you look at the opinion that accompanied the Black-Jenkins
25 Award, the arbitrators said that Virginia had proven her

1 use of the Potomac River since her earliest days and that
2 her rights were, therefore, indisputable and that Maryland
3 assented to Virginia's use when she signed the Compact of
4 1785.

5 Now, that compact, Your Honor, was entered into
6 at a time when the boundary was disputed, and regardless
7 of where the boundary was set -- I think Mr. Baida admits
8 this -- it was recognized that that compact did not set
9 the boundary, but each State agreed that wherever the
10 boundary ultimately would be set, the citizens of each
11 State and the States themselves would have certain rights,
12 and those rights included the right to property in the
13 shores, and all advantages and emoluments thereunto
14 belonging, and the privilege of making and carrying out
15 wharfs and other improvements.

16 QUESTION: Except for the sense of the document,
17 at least of the compact, as I read it, is that the State
18 is treated just like any other owner.

19 MR. RAPHAEL: I don't think that that's correct,
20 Your Honor, because article --

21 QUESTION: Well, can you point me to
22 something --

23 MR. RAPHAEL: Yes.

24 QUESTION: -- in the compacts or the -- or the
25 Black-Jenkins Award to the contrary?

1 MR. RAPHAEL: Well, the Black-Jenkins Award
2 clearly deals with Virginia as a State. The compact deals
3 with Virginia as a State in article VIII, for example,
4 where it requires that neither State could regulate
5 fishing or navigation without the concurrence of the other
6 State. Articles X and XI and XII also deal with the
7 rights of the citizens. Wherever the compact involved a
8 matter in which a State would touch the activities of the
9 citizens of the other State, it said so expressly.

10 And it's inconceivable to think that the -- the
11 drafters of the compact would have agreed that concurrent
12 legislation would be required for fishing and navigation,
13 but Maryland could somehow regulate Virginia's right to
14 build improvements from the shore. It's inconceivable
15 that they would have ratified the compact if that had been
16 required.

17 QUESTION: Why -- why is it concurrent for
18 fishing? Article seventh says that the -- that the
19 citizens of both States -- the right of fishing in the
20 river shall be common to and equally enjoyed by the
21 citizens of both States.

22 MR. RAPHAEL: That's correct, Your Honor.
23 Article VIII requires concurrent legislation for fishing
24 and navigation rules in the Potomac River.

25 QUESTION: For the preservation of fish or for

1 the performance -- for preserving and keeping open the
2 channel?

3 MR. RAPHAEL: That's correct.

4 QUESTION: Has -- has Virginia issued -- is a
5 Virginia fishing license valid in the -- in the Potomac?

6 MR. RAPHAEL: Your Honor, until 1957, the States
7 had concurrent legislation governing fishing in the
8 Potomac River. In 1957 -- and that was based on article
9 VIII of the compact. In 1957, Maryland attempted to
10 abrogate that requirement and to assume unilateral
11 authority over the Potomac River. Virginia filed suit
12 here. This Court appointed a special master to hear the
13 case. The States resolved their dispute as to the tidal
14 Potomac with the creation of the Potomac River Fisheries
15 Commission, which is a bi-State agency that now regulates
16 fishing in the -- in the tidal Potomac.

17 As to the non-tidal Potomac, since 1957 each
18 State has had laws on the books that recognize permits
19 issued or licenses issued to citizens of the other State
20 as valid licenses for fishing in the non-tidal Potomac.

21 QUESTION: What's left of the dispute now? Is
22 -- does Virginia now have a permit to withdraw the water?

23 MR. RAPHAEL: The -- the permit, Justice
24 O'Connor, was issued to the Fairfax County Water
25 Authority.

1 QUESTION: Yes. Is that all you're arguing
2 about?

3 MR. RAPHAEL: No, Your Honor, because we contend
4 that no permit was required in the first instance, and we
5 also challenged that specific permit because the Maryland
6 legislature required that it contain a condition requiring
7 the water authority to put a flow restrictor into the
8 pipeline for the sole purpose, the Maryland legislature
9 said, of allowing Maryland to control growth and
10 development in northern Virginia. We object to that. The
11 authority objected to that subject to the outcome in this
12 case. We object to any --

13 QUESTION: So we're -- we're talking now about a
14 flow restrictor in the pipe?

15 MR. RAPHAEL: That's correct.

16 QUESTION: I mean, that's what it comes down to.

17 MR. RAPHAEL: That's correct. And --

18 QUESTION: Well, but Virginia objects on general
19 principle, I take it, to the idea that Maryland can
20 restrict the amount of water it takes out of -- of the
21 Potomac.

22 MR. RAPHAEL: That's exactly right, and I don't
23 mean to say my answer is limited to just the Fairfax
24 County Water Authority. We object to the continuation by
25 Maryland of a permit system that requires Virginia to get

1 Maryland's permission anytime we want to withdraw water
2 from the Potomac River or build improvements appurtenant
3 to the shore.

4 QUESTION: But do you -- what about the general
5 right of a riparian owner on a river to withdraw water?
6 Would you say that right includes the right to withdraw an
7 unlimited quantity of water?

8 MR. RAPHAEL: I don't believe that that would be
9 a riparian right, Your Honor.

10 QUESTION: Well, then who decides what limit can
11 be -- can be imposed on the riparian owner's right to
12 withdraw water?

13 MR. RAPHAEL: With respect to the Potomac River,
14 there's a low flow allocation agreement in place that
15 Congress required which allocates the flows during periods
16 of low flow. There is a water coordination agreement of
17 1982 in place by which the three main utilities in the
18 District of Columbia have agreed to provide for a future
19 water supply.

20 This Court said in Colorado --

21 QUESTION: But assume there are no agreements.

22 QUESTION: -- riparian question that's not
23 controlled by those documents.

24 QUESTION: Assume there are no agreements at
25 all. Would Maryland have the right to say no more than X

1 amount of water may be withdrawn by any riparian owner in
2 Maryland or Virginia?

3 MR. RAPHAEL: No. We don't believe they do have
4 that right.

5 QUESTION: Could you drain the river?

6 MR. RAPHAEL: Not under the low flow agreement
7 and not under the water supply coordination agreement,
8 absolutely not.

9 QUESTION: No. But let's assume there were
10 none.

11 QUESTION: We've -- in some original
12 jurisdiction cases, we have decided on amounts of water.
13 In fact, in the Texas against New Mexico case, there's a
14 -- there's a river master on the Pecos River, operating
15 under one of our decrees.

16 MR. RAPHAEL: Yes, Mr. Chief Justice. This
17 Court said in Colorado v. New Mexico that before this
18 Court will enjoin any State from diverting water from the
19 Potomac River, the State --

20 QUESTION: Well, they weren't talking about the
21 Potomac River.

22 MR. RAPHAEL: I'm sorry. That was the Vermejo
23 River. This Court requires a showing that the diversion
24 would cause clear -- by clear and convincing evidence that
25 the diversion would cause injury to the State seeking to

1 prevent the diversion.

2 In this case, Maryland has circumvented that
3 requirement by controlling the tap. Maryland doesn't
4 contend that anything Virginia has done to date injures
5 the river.

6 QUESTION: No, but I mean, your -- your --

7 QUESTION: If they did so contend, could they
8 enforce that contention?

9 MR. RAPHAEL: There -- there would be many
10 places where they can raise that issue if Virginia
11 prevails in this case. They can raise it in the context
12 of the Federal and Virginia permitting requirements, the
13 404 and section 10 permitting requirements.

14 QUESTION: I'm just trying to -- trying to -- we
15 have an original jurisdiction case involving a fight
16 between two States. And assume nobody had made any
17 agreements other than those determining the ownership of
18 this river. Would then Maryland have no right to -- to
19 limit the amount that Virginia could withdraw?

20 MR. RAPHAEL: If -- if Maryland has a claim that
21 Virginia's withdrawals injure it, it has a place where it
22 can raise that claim

23 QUESTION: And that's here.

24 QUESTION: That's --

25 MR. RAPHAEL: It could be here.

1 QUESTION: -- just what it's doing here.

2 MR. RAPHAEL: It could be in the Army Corps of
3 Engineers permitting process.

4 QUESTION: Now, well, let's -- let's forget
5 the --

6 QUESTION: -- findings. I'm trying to put to --

7 QUESTION: Assuming that the one --

8 QUESTION: -- one side all the agreements and
9 just have a brand new problem Maryland or Virginia are
10 fighting about who can control withdrawals of water from
11 this river. And is there any principle that -- that says
12 that someone other than the owner of the river can make
13 that decision?

14 MR. RAPHAEL: Federal common law would govern
15 that, as this Court said in Colorado v. New Mexico. The
16 fact that that the river was in Colorado didn't give
17 Colorado a right to withdraw water from that river.

18 QUESTION: Well, Virginia would have the same
19 claim against Maryland if Maryland took out too much
20 water.

21 MR. RAPHAEL: Yes, Your Honor.

22 QUESTION: And that's Federal common law because
23 two States are involved?

24 MR. RAPHAEL: That's correct. They're co-equal
25 sovereigns contending about an interstate river that

1 supplies water to the citizens of -- of both States.

2 QUESTION: All right. Let --

3 QUESTION: What about a citizen of Virginia who
4 owns property on the -- up to the low-water mark of the
5 river and wants to build a dock and a pier out, that
6 extends out into the river? Does that citizen have to get
7 permission from Maryland to do that?

8 MR. RAPHAEL: Under -- under our view of the
9 case, no, because the compact gave that citizen the right
10 to do it, subject to Federal regulations, subject to
11 Virginia regulation. And Maryland can contend either in
12 the permitting process or independently that any action by
13 a Virginia citizen that -- that it can show causes injury
14 to Maryland shouldn't be allowed. But --

15 QUESTION: Is that what the Special Master
16 specifically held in your view?

17 MR. RAPHAEL: The Master ruled that under the
18 compact and the award, Virginia and its citizens have the
19 right to withdraw water and to construct improvements
20 appurtenant to the shore without having to get permission
21 from Maryland. Yes.

22 QUESTION: What if Maryland takes the position
23 that it obstructs navigation? Who's going to decide that?
24 Virginia?

25 MR. RAPHAEL: No, Your Honor. The primary place

1 will these -- where these disputes will be decided is in
2 the -- as a practical matter is in the Federal permitting
3 process. It's very much like then-Associate Justice
4 Rehnquist wrote for the Court in Milwaukee v. Illinois,
5 that the Federal permitting process -- that was a -- a
6 Federal water pollution control act case -- that the
7 Federal permitting process provides an adequate forum for
8 the State to raise concerns that it has about --

9 QUESTION: Because this is a navigable river,
10 the Federal Government has such a scheme in place.

11 MR. RAPHAEL: That's exactly right.

12 QUESTION: But if -- if it did not, I -- I take
13 it the answer would be in -- in a Federal question suit
14 brought by Maryland against the Virginia citizen?

15 MR. RAPHAEL: That's correct.

16 QUESTION: Yes.

17 MR. RAPHAEL: I think the key evidence of -- let
18 me move beyond what we think is -- is the plain language
19 and -- and discuss also what the Master looked at with
20 respect to Maryland's practice historically.

21 The -- the key evidence here comes from 1873.
22 This is at a time when Maryland and Virginia were trying
23 to settle their boundary dispute. In the boundary
24 arbitration, Maryland contended that the boundary line
25 should be on the Virginia side at the low-water mark and

1 go around any improvements then existing or which, quote,
2 may hereafter be extended by authority of Virginia,
3 unquote. That's at page 130 of the Virginia lodging.

4 In the Maryland view in 1873 and in the view
5 they maintained in the arbitration, it was entirely up to
6 Virginia to decide when, whether, and where to build
7 improvements from the shore. And they actually thought
8 that would alter the boundary line.

9 QUESTION: Could you answer this question for
10 me? And in part, I'm going back on the ground that we've
11 been traversing already.

12 What is there in -- in the documents before us
13 -- by that, I mean the compact and the Black-Jenkins
14 agreement, number one, or in the law generally, number two
15 -- that gives Virginia special rights as a sovereign to
16 withdraw water for its people as opposed to the right it
17 would have simply as an owner of -- of property to
18 withdrawal rights for that property that it owns?

19 MR. RAPHAEL: I think, Your Honor, all of the
20 Court's equitable apportionment cases recognize that the
21 State has a sovereign interest in protecting the water
22 supply of its citizens where that water supply is served
23 by an interstate river.

24 QUESTION: But -- but those are cases -- correct
25 me if I'm wrong -- in which the State owns out to the --

1 to the centerline of the river.

2 MR. RAPHAEL: Most of the cases --

3 QUESTION: Correct me if I'm wrong.

4 MR. RAPHAEL: Justice Kennedy, most of the cases
5 involve a river which goes from one State into another
6 State, and we don't --

7 QUESTION: Yes, in which each State has an
8 interest in the river. But here --

9 MR. RAPHAEL: That's right.

10 QUESTION: -- Virginia owns only to the -- to
11 the low-water mark. And I want you to show -- tell me
12 something in these documents which says that Virginia has
13 a special right -- special rights as a sovereign --

14 MR. RAPHAEL: Article IV of the Black-Jenkins --

15 QUESTION: -- other than what I just -- other
16 than we know that Virginia is a party.

17 MR. RAPHAEL: Your Honor, article IV of the
18 Black-Jenkins Award says Virginia has a right to the use
19 of the river beyond the line of low-water mark as being --
20 as may be necessary to the full enjoyment of her riparian
21 ownership. And Maryland stipulated --

22 QUESTION: But her -- but does her riparian
23 ownership give it any rights that are different and
24 greater than a private owner of land?

25 MR. RAPHAEL: Absolutely. It absolutely does.

1 QUESTION: And what is the source?

2 QUESTION: And -- and what is your support for
3 that proposition?

4 MR. RAPHAEL: This Court's Federal common law
5 cases that distinguish between the rights of States with
6 respect to a water supply and the rights of individual
7 citizens.

8 QUESTION: But those are cases in which the
9 States have an ownership interest -- an equal ownership
10 interest in the river.

11 MR. RAPHAEL: I don't think that --

12 QUESTION: And is just riparian ownership.

13 MR. RAPHAEL: Colorado v. New Mexico is a good
14 example. The Pecos River -- 75 percent of it came from
15 Colorado, and it then flowed into New Mexico. But this
16 Court effectively denied Colorado any use of that river
17 regardless of the fact that she owned the river.
18 Ownership is not dispositive in -- in a dispute between
19 States over a -- a water supply that supplies the citizens
20 of both States.

21 Now, the Potomac River is an interstate river.
22 The Congress recognized that in 1976 when it required the
23 waters to be allocated. A drop of water that begins in
24 the Shenandoah is not a Virginia drop of water anymore
25 than it's a Maryland drop of water when it's in the main

1 stem of the Potomac.

2 QUESTION: I think at the -- I think at the
3 least, would you concede or would you -- that the Black-
4 Jenkins agreement goes a step beyond the -- the compact in
5 this regard?

6 MR. RAPHAEL: We think it's at least coextensive
7 with the compact, but I -- I don't -- I think that that
8 position would be defensible but it does go beyond --

9 QUESTION: Well, isn't it --

10 QUESTION: But you --

11 QUESTION: -- isn't it limiting in this extent?
12 There is something in this fourth article of the Black --
13 of the 1877 arbitration award that refers to without --
14 without impeding navigation -- that's been there
15 throughout -- or otherwise interfering with the proper use
16 of it by Maryland. What would those words suggest other
17 than Maryland can permit the use to assure that its proper
18 use is not interfered with?

19 MR. RAPHAEL: Your Honor, those words give
20 Maryland a right of action and a cause of action against
21 Virginia or the user if it -- if the use interferes with
22 Maryland's use of the river. That doesn't mean Maryland
23 gets to decide. No State can control another State's
24 access to the water supply and no State can be a party to
25 a dispute and -- and then fairly decide that dispute.

1 QUESTION: But you are depending then on what
2 you referred to as Federal common law and not the words of
3 the compact and not the words of -- of the -- the Black-
4 Jenkins.

5 MR. RAPHAEL: No. Your Honor, we rely on -- on
6 the -- the plain language of the compact and the Black-
7 Jenkins Award which clearly give Virginia the right to the
8 use of the --

9 QUESTION: But I -- I thought when Justice
10 Kennedy pressed you, your -- you ultimately rested on
11 Federal common law.

12 MR. RAPHAEL: My understanding of Justice
13 Kennedy's question was whether there's a distinction
14 between riparian -- the rights of -- of riparian users as
15 private users and the rights of States as riparians. And
16 I was answering that question that yes, there is a
17 difference, as this Court has repeatedly said. The civil
18 law as between riparian users does not bind States with
19 respect to their use of an interstate stream. That was
20 the question I -- I was answering.

21 QUESTION: Mr. Raphael, what -- it's your
22 position that if -- I believe, that if a private
23 landowner, riparian owner on the Virginia side, the
24 southern shore, wants to build a pier out into the river,
25 that pier would be permitted by Virginia?

1 MR. RAPHAEL: That's correct.

2 QUESTION: Why?

3 MR. RAPHAEL: It --

4 QUESTION: You see, I can understand the
5 authority for Maryland to permit it since Maryland owns
6 the river bed. What -- what is the authority for Virginia
7 to demand a permit from its riparian owners?

8 MR. RAPHAEL: Virginia has the right to regulate
9 its citizens' use of the river, and it -- it has been
10 doing that for many years through the local building
11 permit requirement that you can't build a -- a pier or a
12 wharf on the Virginia side, even though it goes beyond
13 low-water mark, without getting a -- a building permit
14 from the -- from the county. Virginia has enacted --

15 QUESTION: Because of its State riparian
16 sovereignty over -- because of its State sovereignty over
17 the bank.

18 MR. RAPHAEL: That's correct. And Virginia has
19 enacted, subject to the resolution of this case, a -- the
20 Virginia water permit protection requirement applicable to
21 Virginia users of the river. So if -- if Virginia
22 prevails in this case, Maryland will regulate its users of
23 the river and Virginia will regulate its users of the
24 river.

25 QUESTION: But what if there's a -- a pier going

1 out into the river that's been there for 5 years and the
2 owner wants to modify it, wants to build something more at
3 the end of the pier? From whom would he get authority to
4 do that?

5 MR. RAPHAEL: He would get that authority from
6 Virginia.

7 QUESTION: But that's -- it's in the State of
8 Maryland.

9 MR. RAPHAEL: The -- the construction --

10 QUESTION: The end of the pier I'm talking
11 about.

12 MR. RAPHAEL: Your Honor --

13 QUESTION: The pier is not part of Virginia, is
14 it?

15 MR. RAPHAEL: The pier is appurtenant to
16 property on the Virginia shore, and --

17 QUESTION: Yes, but the pier is located in the
18 State of Maryland.

19 MR. RAPHAEL: That's correct.

20 QUESTION: Then why wouldn't he have to get the
21 authority to make the modification from the State of
22 Maryland? I guess the -- when they enforce the gaming
23 laws or whatever they are, the Maryland police are the
24 ones that have jurisdiction, aren't they?

25 MR. RAPHAEL: I think you have -- we distinguish

1 between uses that are riparian and uses that are not
2 riparian. 99 percent of everything that's ever been built
3 there --

4 QUESTION: Well, repairing the end of a pier, is
5 that a riparian use or a non-riparian?

6 MR. RAPHAEL: That would be a riparian use.
7 Operating a casino on the pier would not be a riparian
8 use, and that's why Virginia has not objected to a wide
9 variety of activities by Maryland on its side of the line
10 that don't go to whether Virginia has the right to build
11 the riparian structure in the first place.

12 QUESTION: And for that answer, I take it, you
13 -- you do rest on article VII of the 1785 compact.

14 MR. RAPHAEL: Article VII and article IV of the
15 Black-Jenkins Award.

16 QUESTION: Yes.

17 MR. RAPHAEL: That's correct.

18 QUESTION: What about operating a fishing pier,
19 charging for -- who -- who would have the authority to tax
20 the fishing pier? Is that a riparian use or not riparian?

21 MR. RAPHAEL: Well, there may be uses that are
22 in between in gray as to whether it's a riparian use --

23 QUESTION: Yes. I tried to pick one.

24 MR. RAPHAEL: Let me -- here's -- I'm not sure
25 how the question would be answered, but let me tell you

1 what the guiding principles would be. Most of the uses,
2 the States are going to agree, are riparian uses,
3 traditional things, bulkheads, piers, wharfs, docks, water
4 intakes, as the Master found. There are a number of uses
5 that, we'll agree, are non-riparian. Building a casino in
6 the middle of the river. If there's a gray area in
7 between and -- and we've got an argument that it's
8 riparian and Maryland has an argument it's not, that issue
9 may have to be litigated if we can't resolve it. But
10 that's the framework I think that answers these questions.

11 Now --

12 QUESTION: Is that why the Special Master said
13 gambling, safety rules, health, tax, licensing, all of
14 that is irrelevant to this case?

15 MR. RAPHAEL: That's -- that's exactly right,
16 Justice Ginsburg, because after Maryland -- after the
17 boundary was set on the -- on the Virginia side at low-
18 water mark in 1877, Virginia doesn't dispute that Maryland
19 acquired a wide range of police powers on its side of the
20 boundary, but that specifically did not apply to those
21 rights that Virginia and its citizens enjoyed under the
22 Compact of 1785 and which were preserved as a condition of
23 the Black-Jenkins Award and which Maryland historically,
24 at least until 1957, recognized was entirely up to
25 Virginia to decide what to do on Virginia's shore.

1 QUESTION: Does Maryland or Virginia tax the --
2 the value of a -- of a major pier that goes out into the
3 river? I mean, it's worth something, and I assume there's
4 a tax on it. Anything that's worth anything is taxed.

5 MR. RAPHAEL: Your Honor, there are something
6 like 340 piers extending from the Virginia side of the
7 Potomac River. All -- all of them are taxed by the -- by
8 Virginia. Only -- there are only three properties that
9 are taxed by Maryland and those are unique. They're
10 restaurant properties that are sited on property that's --
11 the fee simple title to which is recorded in Maryland.
12 Those are on the Maryland side of the line. So Virginia
13 taxes 99 percent of those improvements.

14 Maryland argued that -- that you should -- the
15 Court should look at its taxation of those three
16 restaurant properties. We think that that is the
17 exception the proves the rule. Maryland doesn't tax 99
18 percent of everything that Virginia has ever built.

19 The Maryland construction in 1873 that it was
20 entirely up to Virginia to decide when and whether and
21 where to build improvements remained their construction
22 until at the earliest 1957. And it was in 1957 when the
23 first permit was issued to a Virginia user that was
24 Fairfax County, but the record is undisputed that that
25 permit was not known to Virginia State officials.

1 QUESTION: In the -- in the compact beginning
2 with article or clause VIII, there's some very particular
3 assignments of sovereign powers, abrogation of sovereign
4 power, but that doesn't apply in VII. And it seems to me
5 that that helps Maryland in this case. When the compact
6 wanted to provide Virginia would have very specific police
7 powers, it provided it, but it didn't provide that with
8 respect to riparian rights. In fact, it doesn't even
9 mention riparian rights. It just talks about wharfs.

10 MR. RAPHAEL: It refers to the advantages and
11 emoluments.

12 QUESTION: Referring to the compact.

13 MR. RAPHAEL: Right. The article VII refers to
14 the advantages and emoluments of the ownership of land.

15 QUESTION: But that -- it doesn't use the word
16 riparian.

17 MR. RAPHAEL: That's -- that's exactly right.
18 But the answer to your question, Your Honor, is that there
19 was no need in article VII to address that specific
20 question because it was -- everybody would have assumed
21 that each State retained the authority to regulate its own
22 citizens.

23 QUESTION: Well, I'm -- I'm not so sure. If --
24 if three or four provisions of the contract -- of the
25 compact have very specific abrogations or assignment of

1 sovereignty and the other one doesn't, I -- I would assume
2 that there is -- that that provision has not been made.

3 MR. RAPHAEL: But, Your Honor, it's -- to our
4 thinking it would be inconceivable that George Mason who
5 -- who negotiated that compact on behalf of Virginia, who
6 opposed the Federal Constitution because it gave Congress
7 too much authority over -- over commerce, that he would
8 have signed an agreement with the understanding that
9 Maryland had the authority to decide when and where
10 Virginia could make use of the river.

11 QUESTION: Well, other than he's operating from
12 the baseline where Maryland owns the river.

13 MR. RAPHAEL: That's -- but history is the other
14 way. That's Maryland's argument, is that it always had
15 every stick in the bundle of sticks, but historically
16 that's not the case because there were prior and
17 subsequent grants to Virginia which included the Potomac
18 River. Five monarchs disputed Maryland's claim. And the
19 issue was in controversy, as this Court has twice said in
20 *Morris v. United States and Marine Railway*, and they
21 agreed in 1785 that the bundle of sticks was over here and
22 the two States agreed that regardless of where the
23 boundary would be set, each State would have equal sticks
24 from that bundle representing the right of equal access to
25 the river, and they further agreed that as a condition of

1 the award, those sticks in that bundle would never be
2 deprived of either State. And if Maryland didn't have the
3 authority to take away or regulate Virginia's rights prior
4 to 1877, they could not have gained that authority by the
5 Black-Jenkins Award.

6 QUESTION: Yes, but it seems to me that as a
7 matter of sort of looking at history and all, at the time
8 these documents were negotiated and prepared, I don't
9 think anyone contemplated the possibility that a diversion
10 of water from the river would be so great that it might
11 lower the low-water mark. And is it your view that --
12 that Virginia could syphon off enough water to reduce the
13 -- move the low-water mark about, say, a foot, but not
14 obstruct navigation? Clearly, they couldn't take that
15 much out. But could they change the State -- the boundary
16 of the State by doing that?

17 MR. RAPHAEL: Part of that question, Your Honor,
18 goes to the -- goes to whether the boundary is at the
19 historic low-water mark or at the mean low-water mark.

20 QUESTION: I see.

21 MR. RAPHAEL: And I don't think the Court has
22 answered that question, and that may require resolution in
23 the future. But --

24 QUESTION: I don't know how you'd know what the
25 historic low-water mark was if you --

1 MR. RAPHAEL: This Court determined in Ohio v.
2 Kentucky what the low-water mark was as of 1792.

3 QUESTION: We can do that kind of stuff.

4 (Laughter.)

5 QUESTION: You -- you would say -- but assuming
6 -- assume there is a -- a -- now an understanding of what
7 the border is and it's a fixed border. Could Virginia
8 change that by drawing -- withdrawing water in your view?

9 MR. RAPHAEL: Again, I think it's going to
10 depend on whether it's the historic low or the mean low,
11 and if -- you have to answer that question before I think
12 you can answer the question.

13 QUESTION: But you do say that even if it might
14 not change the boundary of the State, they could withdraw
15 as much water as they want as long as it doesn't interfere
16 with the transportation on the river.

17 MR. RAPHAEL: And as long as it doesn't
18 interfere with Maryland's use, and once it does, Maryland
19 has a remedy. It can object in the permitting process.
20 It can file an original action. It could sue the Virginia
21 user making use of that water.

22 The issue, though, is whether Maryland gets to
23 decide in the first instance what Virginia's rights are,
24 and this Court has never given one State the authority to
25 control another State's water supply.

1 QUESTION: Well, generally riparian owners are
2 own -- have the -- the right to withdraw water subject to
3 the overriding control of the governmental body that
4 controls the -- the lake or the river, whatever it is.

5 MR. RAPHAEL: That's right.

6 QUESTION: But you're saying that's not true
7 here.

8 MR. RAPHAEL: It is true here. Virginians can
9 withdraw water subject to paramount Federal control and
10 subject to Virginia's control.

11 QUESTION: But not subject to the control of the
12 owner of the river.

13 MR. RAPHAEL: They can withdraw water subject to
14 Virginia's control.

15 QUESTION: But riparian ownership usually
16 contemplates beneficial use of the waters on the riparian
17 land, not just general withdrawal for inland uses.

18 MR. RAPHAEL: That's correct, Your Honor. But
19 this Court has said in a number of cases, including New
20 York -- New Jersey v. New York, Connecticut v.
21 Massachusetts, that a common law limitation that may limit
22 it to the shoreline use of the riparian use would not
23 apply as between States. And article VII of the --
24 article IV of the Black-Jenkins Award refers to Virginia's
25 rights as a sovereign to the use of the Potomac.

1 QUESTION: Strictly speaking --

2 QUESTION: No, it doesn't say as a sovereign.

3 It -- it says Virginia. It does not say as a sovereign.

4 This is very important.

5 MR. RAPHAEL: Well --

6 QUESTION: I'm right.

7 MR. RAPHAEL: It doesn't use the word sovereign,

8 but I don't -- I fail to see the distinction --

9 QUESTION: Of course, it does not use the word.

10 MR. RAPHAEL: -- because both in the award and

11 in the -- in the opinion, the arbitrators were talking

12 about Virginia as a commonwealth, as a State, not -- not

13 Virginia as -- as a mere property owner.

14 QUESTION: Well, they were talking about

15 Virginia as a sovereign when it has a right to regulate,

16 but the question is whether they were talking about

17 Virginia as a sovereign when it withdraws water.

18 MR. RAPHAEL: Well, the issue of withdrawing

19 water, whether that's a riparian use, has been -- has been

20 stipulated. The Master said at page 12 of his report that

21 Maryland never disputed that this was a riparian use or a

22 use covered by the compact. So that's not an issue.

23 QUESTION: I think it's fair to say that article

24 fourth acknowledges that Virginia is what you might call a

25 riparian sovereign. It has sovereign rights over -- over

1 the bank of the river. It says is entitled not only to
2 full dominion over the soil to low-water mark, blah, blah,
3 blah, blah, but such use of the river beyond the line of
4 low -- as may be necessary to the full enjoyment of her
5 riparian ownership.

6 MR. RAPHAEL: That's correct.

7 QUESTION: And I think that's referring to
8 sovereign ownership.

9 MR. RAPHAEL: I -- I agree with that, Justice
10 Scalia.

11 I'd like to correct one misstatement I think my
12 friend, Mr. Baida, made with respect to the Low Flow
13 Allocation Agreement. That agreement and the -- the
14 enabling legislation that provided for it was amended to
15 make clear that Maryland did not have the authority to
16 control Virginia's withdrawals. That issue was put aside
17 to another day, and the Low Flow Allocation Agreement, for
18 example, says that no party can withdraw water from the
19 Potomac River without being subject to a permit which
20 imposes the low flow conditions or becoming a member party
21 to the agreement. And we point out in our papers the
22 numerous instances in the 1970's where Virginia went on
23 record saying Maryland did not have the authority to
24 regulate Virginia's water withdrawals.

25 Whether you look at this case under the -- under

1 the compacts in question or under the -- under Federal
2 common law, you cannot give one State the authority to
3 control another State's water supply. This case is
4 important not only because of Virginia's rights to build
5 wharfs and improvements. It's important because if
6 Maryland prevails, they can control growth and development
7 in -- in Virginia. Under Mr. Baida's theory, as long as
8 they treat everybody equally, they can do anything they
9 want, and that would include things like in 2001 when
10 there was legislation before the Maryland General Assembly
11 that would have made users of the -- of the waters pay for
12 water withdrawal. Maryland could decide that it doesn't
13 like growth and development on either side of the river,
14 and therefore it's treating each State equally by not
15 allowing any use. It's impossible to square that type of
16 position with the plain language of article IV of the
17 award or article VII of the compact.

18 And if there are no further questions, thank you
19 very much.

20 QUESTION: Thank you, Mr. Raphael.

21 Mr. Baida, you have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF ANDREW H. BAIDA

23 ON BEHALF OF THE PLAINTIFF

24 MR. BAIDA: Prior to this case, Virginia has
25 never taken the position that it has any authority to take

1 any kind of regulatory action at all with respect to piers
2 and wharfs beyond the water mark. And in fact, what
3 Virginia has done is it has sent hundreds of its citizens
4 to Maryland and it has told its citizens that their
5 construction projects from the Virginia side of the
6 Potomac River fall outside of Virginia's jurisdiction but
7 fall within Maryland's because Maryland owns the bed of
8 the river. That ownership gives Maryland the right,
9 putting aside just for the moment any agreements -- it
10 gives Maryland the right to regulate withdrawals of water
11 from Maryland.

12 And so what we're left with at this moment is
13 article VI, the fourth paragraph, of the Black-Jenkins
14 Award, and it says it does give Virginia full dominion
15 over the right in the soil, but Justice Scalia, I would
16 disagree it gives Virginia any sovereign rights to use the
17 river beyond that point because if it gave Virginia the
18 unrestricted right to use the Potomac River beyond that
19 point, that's called quiet title. That means Virginia
20 gets to do what it wants. Maryland can't regulate it, and
21 this Court said in Idaho v. Coeur d'Alene Tribe that that
22 kind of regulatory action, if unrestricted, is the
23 equivalent of a quiet title action.

24 The Black-Jenkins arbitrators rejected
25 Virginia's claim to any title to the middle of the river.

1 They set Virginia's boundary at low-water mark on the
2 Virginia side. They could have done the boundary line.
3 They could have drawn it around the piers and wharfs.
4 They showed an unbelievable dexterity in drawing the
5 boundary through Smith Island. They went from the bottom
6 of the Chesapeake Bay up through the bottom third of Smith
7 Island and back down again. They didn't do that on the
8 Virginia side of the Potomac. They set low-water mark on
9 Virginia's side.

10 Title to -- Virginia has title to low-water
11 mark, but only a right of use beyond that point. It has
12 not an unrestricted right of use. The right of us is
13 subject to governmental authority. The government that
14 gets to regulate it is the government that owns it.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bai da.

17 The case is submitted.

18 (Whereupon, at 12:01 p.m., the case in the
19 above-entitled matter was submitted.)

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