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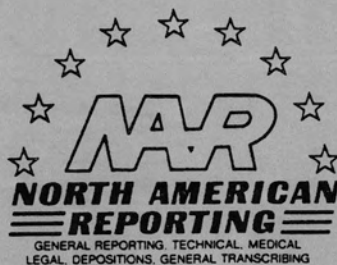
# Supreme Court of the United States

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STATE OF CALIFORNIA, ET AL., :  
Petitioners, :  
: No. 79-1252  
:  
v. :  
:  
SIERRA CLUB, ET AL., :  
Respondents :  
:  
and :  
:  
KERN COUNTY WATER AGENCY :  
:  
ET AL., :  
Petitioners, :  
: No. 79-1502  
v. :  
:  
SIERRA CLUB, ET AL., :  
Respondents :  
-----x

Washington, D.C.  
January 21, 1981

Pages 1 through 67

ORIGINAL



IN THE SUPREME COURT OF THE UNITED STATES

1 - - - - -X  
STATE OF CALIFORNIA, ET AL., :  
2 Petitioners, :  
3 v. : No. 79-1252  
4 SIERRA CLUB, ET AL., :  
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9 SIERRA CLUB, ET AL., :  
Respondents. :  
10 - - - - -X

11 Washington, D. C.

12 Wednesday, January 21, 1981

13 The above-entitled matter came on for oral argument before  
14 the Supreme Court of the United States at 1:36 o'clock p.m.

15 APPEARANCES:

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17 94102; on behalf of the Petitioners.

18 MRS. ELINOR H. STILLMAN, ESQ., Assistant to the Solicitor  
General of the United States, Department of Justice,  
19 Washington, D.C. 20530; on behalf of the Petitioners,  
(one issue) and the Federal Respondents (one issue).  
20

21 JOHN B. CLARK, ESQ., 600 Montgomery Street, San Francisco,  
California 94111; on behalf of the Repondents Sierra  
Club, et al.  
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C O N T E N T S

ORAL ARGUMENT OF

PAGE

RODERICK E. WALSTON, ESQ.,  
on behalf of the Petitioners 3

MRS. ELINOR H. STILLMAN, ESQ.,  
on behalf of the Petitioners and Federal  
Respondents, for separate issues 24

JOHN B. CLARK, ESQ.,  
on behalf of the Respondents Sierra Club et al. 43

RODERICK E. WALSTON, ESQ.,  
on behalf of the Petitioners -- Rebuttal 63

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in California v. Sierra Club and the consolidated case.

Mr. Walston.

ORAL ARGUMENT OF RODERICK E. WALSTON, ESQ.,  
ON BEHALF OF THE PETITIONERS

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

This case raises very important issues of federalism with respect to the control of water resources in the west. There are actually two major issues raised in this case with respect to the meaning of the Rivers and Harbors Act of 1899. The first question is whether under Section 10 of that Act the Army Corps of Engineers has authority to override state water rights laws, even where there are no impacts upon federal navigation interests. The second issue is whether the 1899 Act affords a private right of action that is available to the plaintiffs in this case.

QUESTION: Is that really, logically -- isn't the second issue that you mentioned really logically the first issue?

MR. WALSTON: It is indeed. I've arranged them chronologically, Justice Stewart, for the reason that I will argue only the first question, because we did not raise the second issue in our briefs. The United States will argue



1 the second issue in behalf of the Petitioners.

2 Briefly, the facts of the case are very complicated  
3 but I will try to just very briefly skip over them as I may.

4 The case involves water exports by the State Water  
5 Project, which is a massive reclamation project in Califor-  
6 nia, that essentially exports waters from the northern part  
7 of the State to the central and the southern parts of the  
8 State. The projects actually release waters that flow down-  
9 stream into the Sacramento-San Joaquin delta, and then pump-  
10 ing plants on the south end of the delta pump the waters to  
11 the users in central and southern California. This project  
12 is extremely vital to California's economic health. It pro-  
13 vides a water supply to about 14 million people, which is  
14 over half of California's population; provides irrigation  
15 water to about one million acres of prime agricultural land.  
16 And in fact the State project has been in operation since  
17 1967 so it's been exporting water since that period.

18 QUESTION: The Central Valley Project was authorized  
19 before the Federal Government made any contribution to it at  
20 all, wasn't it?

21 MR. WALSTON: That's correct. The Central Valley  
22 Project is a federal reclamation facility that essentially  
23 parallels the state facility and it's been operational since  
24 the 1930s.

25 The precise issue in this case is whether Section 10

1 of the Act authorizes the Corps of Engineers to control the  
2 allocation of water from this project, as I say, pursuant to  
3 Section 10 of the Act.

4 Section 10 essentially contains two clauses that  
5 are before the Court. The first clause is in our view the  
6 major clause. It establishes a general prohibition against  
7 obstructions to navigable capacity without the approval of  
8 Congress. The third clause makes it unlawful to alter the  
9 condition of navigable waters without approval of the Army  
10 Corps of Engineers.

11 And the State's argument may be briefly summarized  
12 as follows. Section 10 in our view applies only where there  
13 is an effect on navigable capacity as that term is used within  
14 the meaning of the first clause. And therefore Section 10  
15 applies only where there is an effect upon federal navigation  
16 interests.

17 Now, the question, does Section 10 apply to water  
18 allocations that are adopted by the states under the water  
19 rights laws? And on that question we raise essentially two  
20 alternative arguments. First, we argue that Section 10 does  
21 not apply to state water allocations at all. Second, we ar-  
22 gue that if Section 10 does apply in that context, the Court  
23 should develop a kind of common law or rule of reason test  
24 governing its meaning in that kind of situation. And under  
25 this rule of reason test, we argue that Section 10 should

1 apply to state water allocations only where there is a sub-  
2 stantial effect upon the capacity of waters to support actual  
3 navigation in the area where commerce actually takes place.

4 To state it very briefly, we argue that Section 10  
5 applies only where, to state water allocations only where  
6 there is a substantial effect upon federal navigation inter-  
7 ests and concerns. Now, the Court of Appeals rejected our  
8 analysis and held that Section 10 applies even whenever there  
9 is an effect on the condition of navigable waters, even  
10 though there may be no effect on navigation or navigable  
11 capacity. In other words, Section 10 applies without regard  
12 to the existence of federal navigation interest. And it fur-  
13 ther held that Section 10 fully applies to state water allo-  
14 cations and that the Court should not develop any kind of  
15 common law or rule of reason test with respect to the meaning  
16 of Section 10 in that situation.

17 QUESTION: When you talk about federal common law,  
18 do you mean something different than a construction of  
19 Section 10? Do you want us to overrule *Erie v. Tompkins*?

20 MR. WALSTON: No, we mean precisely a construction  
21 of Section 10, Justice Rehnquist. It is the same construction  
22 of Section 10 indeed that this Court rendered in 1899 in the  
23 Rio Grande case, and at that time the Court held that the  
24 Section 10 applies only where there is a substantial effect  
25 on navigable capacity in an area where navigation is a



1 recognized fact. That's precisely the language of the Court's  
2 decision. So the Court in that case appeared to adopt a rule  
3 of reason test which we regard as kind of a common law test.

4 If the Court of Appeals' interpretation of Section  
5 10 is correct, then we concede that Section 10 fully applies  
6 here, where the water exports in this case do affect the  
7 condition of navigable waters; and we concede that. But if  
8 our own interpretation of Section 10 is correct, then Section  
9 10 does not apply in this case because the State Water Project  
10 exports in this case do not substantially affect navigable  
11 capacity in that part of the delta where commerce actually  
12 takes place. The exports at most reduce water levels in the  
13 delta by only about one inch in that part of the delta where  
14 commerce actually takes place. And this reduction has no  
15 substantial effect on actual federal navigation interests in  
16 that part of the delta.

17 Now, a rule of reason test is in essence an attempt  
18 to accommodate conflicting, or at least, potentially con-  
19 flicting goals on the subjects of navigation and reclamation.  
20 Specifically, we are urging this Court to attempt an accommo-  
21 dation between federal navigation interests on the one hand  
22 and the congressional policy on the other hand of deferring  
23 to the water right laws and the water supply systems that  
24 have been developed by the western states.

25 Indeed, the very purpose of the Rivers and Harbors

1 Act of 1899 was to prevent obstructions of navigable capacity,  
2 and thus to protect federal navigation concerns. This Court  
3 has held that that Act was passed for the very purpose of  
4 overcoming this Court's decision in the Willamette Bridge  
5 case, a case in which this Court held that there is no federal  
6 common law with respect to obstructions to navigation. There-  
7 fore, in our view, the 1899 Act should be applied at least  
8 in this situation only where there is an effect, an actual  
9 effect on actual visible federal navigation interests.

10 This result, we believe, is reinforced by the con-  
11 cept that Congress has historically delegated broad authority  
12 and control to the western states to control their water  
13 rights system. This delegation of authority is based upon  
14 several laws that were passed by Congress in both this century  
15 and in the prior century relating to the subjects of reclama-  
16 tion, desert lands, mining, and a vast array of other types  
17 of subject matters.

18 And under this delegation of authority the western  
19 states have actually developed administrative water rights  
20 systems in which they have been trying, and successfully  
21 trying, to control and manage their water resources. And in-  
22 deed the water exports in this very case have been authorized  
23 under California's own water rights system. California's  
24 own water rights system is controlled by the State Water  
25 Resources Control Board, which has authorized the allocation

1 of the exports of water in this case, subject, however, to  
2 conditions that were intended to protect the environmental  
3 quality of the delta itself.

4           These state water allocation systems that have  
5 been developed by the western states are absolutely vital to  
6 their economic growth and prosperity. The west is unique in  
7 many ways, and Congress has dealt with the west in a unique  
8 way. The west has much land but very little water, so the  
9 western states have, in effect, developed reclamation systems  
10 for the purpose of transporting water from where it originates  
11 to where it may be used and where it is needed by human  
12 beings.

13           QUESTION: When you say, the delta, does that go up  
14 as far as Stockton?

15           MR. WALSTON: Yes, it does, Mr. Justice.

16           Under the Court of Appeals decision, the Corps of  
17 Engineers, however, could override potentially any state water  
18 allocation that is authorized under state water rights laws  
19 as long as there is an effect on the condition of navigable  
20 waters, even though there may be no effect whatsoever upon  
21 navigation or navigable capacity.

22           Well, in practical reality, most state water allo-  
23 cations affect the condition of navigable waters. Thus, as a  
24 practical matter, the Court of Appeals' decision would allow  
25 the Corps of Engineers essentially to control most water



1 allocations that are authorized under the water rights laws  
2 of the western states. If this is so, then the Corps of  
3 Engineers would function as kind of a super water agency  
4 in the west. It would be responsible for ultimately con-  
5 trolling the diversion of water and the division of water  
6 among competing economic and environmental interests in the  
7 western states.

8 For example, it could determine the allocation of  
9 water between competing agricultural groups, or between com-  
10 peting urban groups, or between competing agricultural and  
11 urban users.

12 QUESTION: May I interrupt you there for a moment?  
13 It could not properly do so, could it? Because its only in-  
14 terest in the allocation would be in protecting the navigable,  
15 the interest in free navigation.

16 MR. WALSTON: That would our position, Justice  
17 Stevens, but the Court of Appeals held that the Corps of  
18 Engineers could go beyond that situation and could control  
19 water allocations even where there is no effect on --

20 QUESTION: Control it only to the extent that you  
21 have to get a permit before you go forward?

22 MR. WALSTON: Yes, that's correct.

23 QUESTION: And if they reviewed the facts and said,  
24 well, the only thing that's at stake here is an inch change  
25 in the water table or something like that, wouldn't we expect

1 them to grant the permit? They wouldn't deny it because they  
2 think they'd rather have Stockton have the business than  
3 San Joaquin, or something like that?

4 MR. WALSTON: Well, it's difficult to say exactly  
5 what the Corps of Engineers would do with that kind of situa-  
6 tion, but under the Corps of Engineers regulations, it could  
7 look to any public interest factor in determining whether  
8 the water should be used for one purpose or the other. In  
9 other words, the State would determine if the water should be  
10 used by one particular group of farmers in one particular  
11 region. And under the Court of Appeals' decision, the Corps  
12 of Engineers could effectively --

13 QUESTION: Do you think the Corps of Engineers --  
14 say you're going to build a bridge across a river and some-  
15 body says, we've got to have a permit. Do you think they  
16 could deny the permit if they found that there would be no  
17 interference with navigation, but they just didn't think it  
18 was in the public interest to build a bridge?

19 MR. WALSTON: That's what the Court of Appeals said,  
20 Justice Stevens.

21 QUESTION: Well, do you think the Corps of Engi-  
22 neers could override the provisions of the Reclamation Act  
23 of 1902?

24 MR. WALSTON: No, we don't believe that --

25 QUESTION: Do you think the Court of Appeals thought

1 it could?

2 MR. WALSTON: Yes, I think the Court of Appeals  
3 assumed that the Corps of Engineers is not governed by  
4 Section 8 of the Reclamation Act of 1902. This Court held  
5 recently in California v. United States that Section 8 of  
6 that 1902 Act gives the states very broad control of reclama-  
7 tion, but the Court of Appeals addressed that question and  
8 said that the State's power simply does not apply in any  
9 situation where the Corps of Engineers is exercising its  
10 powers under the Rivers and Harbors Act of 1899.

11 In effect, the Court of Appeals read Section 8  
12 out of the Act insofar as it applies to water diversions that  
13 might fall within the parameters of the Corps of Engineers'  
14 authority under the Rivers and Harbors Act of 1899.

15 To pursue the point, the power that is thus given  
16 to the Corps of Engineers under the Court of Appeals decision  
17 is immensely broad. The Corps could determine, for example,  
18 that it's better for Los Angeles to achieve more urban growth  
19 than for California's Central Valley to produce more fruit,  
20 or it could determine just the opposite. And under the Court  
21 of Appeals' decision the Corps of Engineers could make that  
22 determination irrespective of the effect upon federal naviga-  
23 tion interests and concerns.

24 There is nothing in the language or the legislative  
25 history of the Rivers and Harbors Act of 1899 that provides



1 any indication that Congress ever intended for such a massive  
2 federal intrusion into an area that has been traditionally  
3 regulated by the states themselves.

4 QUESTION: Did this lawsuit originate as a suit by  
5 the Corps of Engineers against the State of California, or  
6 was it a privately instituted lawsuit?

7 MR. WALSTON: It was a privately instituted law-  
8 suit. The plaintiffs in the case are the Sierra Club and  
9 other groups in and around the Sacramento-San Joaquin delta.  
10 The Corps of Engineers -- or I should say, to be more precise,  
11 certain federal officials were sued as codefendants along  
12 with the State of California.

13 QUESTION: So the federal Corps of Engineers acting  
14 under the Rivers and Harbors Act of 1899 was not complaining  
15 about what California was doing by way of diversion through  
16 the Tracy plant and so forth?

17 MR. WALSTON: No. The Corps of Engineers was not  
18 complaining at all. That's correct, Justice Rehnquist.  
19 It was a private lawsuit brought by the Sierra Club and other  
20 private groups against the State and the Federal Government.

21 The Corps of Engineers' own regulations, by the  
22 way, provide an indication of the potential breadth of the  
23 Corps' authority over the state water right systems that  
24 have been adopted by the western states. Under the Corps'  
25 own regulations, the Corps is authorized to consider any

1 factor relating to the "public interest" in the process of  
2 approving or denying a permit applications. The regulations  
3 even define the factors that relate to the public interest.  
4 And these factors are, among other things, water supply, food  
5 production, land use, aesthetics --

6 QUESTION: Well, how much of this is speculation  
7 as long as the Corps with this broad body of regulations was  
8 simply leaving you alone until a private cause of action was  
9 asserted?

10 MR. WALSTON: Well, it's difficult to say what posi-  
11 tion the United States and the Corps of Engineers would now  
12 take with respect to the State water diversions in this case,  
13 to comply with the Court of Appeals decision --

14 QUESTION: But you know the position they take on  
15 the merits from the brief filed in this case, don't you?

16 MR. WALSTON: Beg pardon?

17 QUESTION: You know their position from their  
18 brief filed in this case.

19 MR. WALSTON: Precisely; that's the point. Prior  
20 to this lawsuit, the Corps of Engineers had never complained  
21 about the State water diversions and had not sought to  
22 exercise any kind of jurisdictional --

23 QUESTION: Now you know that the Corps of Engineers  
24 believes that the Court of Appeals for the 9th Circuit was correct.

25 MR. WALSTON: That's exactly correct, Justice

1 Stewart. And for that reason we would strongly urge that  
2 this Court reach the merits of the case, regardless of what  
3 disposition it might make with respect to the procedural  
4 question of whether the courts have a --

5 QUESTION: How could we? How could we if there's  
6 no private right of action, how possibly could we reach the  
7 merits?

8 MR. WALSTON: Well, perhaps you could not, Justice  
9 Stewart, but we would hope that the Court might point --

10 QUESTION: Naturally you hope so.

11 MR. WALSTON: -- something in the way of --

12 QUESTION: You hope we'll decide the private cause  
13 of action the other way.

14 MR. WALSTON: Yes, that's correct.

15 QUESTION: And if we don't, how can we possibly  
16 reach the merits?

17 MR. WALSTON: Well, the Court has on occasion made  
18 alternative holdings, and that's the kind of thing we would  
19 look to in this case if the Court upholds our private right  
20 of action.

21 QUESTION: But we have to get over the threshold  
22 first before we can get to alternative holdings, don't we?

23 MR. WALSTON: That is, perhaps, correct.

24 QUESTION: Well, if we said it wasn't a private  
25 cause of action, I suppose you'd set aside all the opinions



1 and judgments in the case, and wouldn't you win, then, or not?

2 MR. WALSTON: Well, we wouldn't really win, Justice  
3 White, because --

4 QUESTION: Why? Why is that?

5 MR. WALSTON: -- we have to go back to California  
6 and then we wouldn't know whether we are subject to Corps of  
7 Engineers jurisdiction or not. We wouldn't know that for  
8 several years until the case got back to this Court, and in  
9 the meantime we --

10 QUESTION: You mean the Corps of Engineers might  
11 then say, might say to you, might bring an action to enjoin  
12 you?

13 MR. WALSTON: Yes. I would assume that the Corps  
14 of Engineers in the future would take the same position that  
15 it is taking -- as now.

16 QUESTION: As now; and then that the delta plant  
17 needs a permit?

18 MR. WALSTON: Right. And that we would obviously  
19 take the same position that we take now, to the effect that  
20 the pumping plants do not need a permit.

21 QUESTION: Well, why do you think the Corps of  
22 Engineers did not take the position that the delta plant  
23 required a permit before this lawsuit was brought?

24 MR. WALSTON: I simply have no idea, Justice  
25 Rehnquist. You may want to ask the United States that.

1 QUESTION: You didn't ask for it either, did you?

2 MR. WALSTON: No, that's correct. We have applied  
3 for a permit in this case, but only under protest and in  
4 response to the decisions of the lower courts in this case.  
5 We do -- our application has been under protest.

6 QUESTION: Well, how did Cecil Andrus get to be a  
7 party in this case?

8 MR. WALSTON: The federal defendants were sued be-  
9 cause the Sierra Club claimed that the federal Central Valley  
10 Project also needed permits approved by the Corps of Engineers  
11 under the Rivers and Harbors Act of 1899. In other words,  
12 there are really two reclamation projects before this Court.  
13 One is a federal project that was developed and built by the  
14 federal --

15 QUESTION: I suppose that technically, in the dis-  
16 trict court, the United States might have counterclaimed or  
17 cross-claimed against one of the defendants, against you,  
18 to enjoin the -- the delta plant?

19 MR. WALSTON: It might have done that, in light of  
20 its --

21 QUESTION: And it hasn't done that until now?

22 MR. WALSTON: No. In light of its present position  
23 I would except that it should have done that, and I think it  
24 did not do that for the reason that its position on the  
25 issues in this case was apparently not clear at the time of

1 the district court action.

2 QUESTION: Well, what if it filed -- had said in  
3 its brief here, we would like the case remanded so we can  
4 file a cross-claim, or please accept this as a cross-claim?

5 MR. WALSTON: We would have no objection to that.  
6 We want to reach the merits in any way that's possible, and  
7 if the merits can be reached that way, then we would welcome  
8 that alternative.

9 QUESTION: Because your feared opponent is here.

10 MR. WALSTON: That's right. And they will meet us  
11 in the other court shortly. But if the Court doesn't reach  
12 the merits of the case, we will, as I say, be operating the  
13 State Water Project for the next few years without really  
14 knowing whether we're required to obtain a permit or not.  
15 And the same will apply with respect to the Peripheral Canal  
16 which is one of the current, hottest political issues in  
17 California. We simply don't know at this point, and we won't  
18 know until this Court resolves the question, whether we are  
19 required to obtain a permit for the Peripheral Canal or not.  
20 And apparently, if the Court disposes of this case on proce-  
21 dural grounds, the matter won't be resolved until doomsday.

22 QUESTION: Of course, we may never -- if it's a hot  
23 political issue, we may never have to reach it.

24 QUESTION: Well, to say, disposing of it on proce-  
25 dural grounds, I mean if the person who initiated the lawsuit



1 was not authorized by Congress to initiate the lawsuit, that's  
2 scarcely procedural grounds.

3 MR. WALSTON: Well, perhaps your point is correct,  
4 but whatever the grounds, the approach you're suggesting would  
5 be one way for the Court not to reach the merits of the law-  
6 suit, which we define as the meaning of Section 10 of the  
7 Rivers and Harbors Act.

8 Our concern in the case is that the Court ultimately  
9 resolve the meaning of Section 10 as it applies in this  
10 situation. We just simply don't know how to operate the  
11 State Water Project without some determination by this Court.  
12 We've got a decision by the 9th Circuit which is adverse, and  
13 presumably any district court would follow the 9th Circuit's  
14 decision in any future litigation. Certainly we would expect  
15 the United States to bring a lawsuit against the State of  
16 California if the State does not apply for the permit which  
17 the United States feels is necessary.

18 QUESTION: You can always wait for the 10th Circuit  
19 to speak.

20 QUESTION: May I ask about the status of the permit  
21 applications. First, did you -- I know you've done it under  
22 protest, but do they cover the Peripheral Canal as well as  
23 the operation of the delta pumping plant?

24 MR. WALSTON: No. There has been no application  
25 for a permit for the Peripheral Canal.

1 QUESTION: I'm just wondering why. But what's  
2 happening to the delta pumping plant right now? Is it oper-  
3 ating?

4 MR. WALSTON: Yes, it is operating. The Court of  
5 Appeals held that the pumping plant was required, that the  
6 State was required to obtain a permit for the pumping plant  
7 but it stayed its injunction with respect to that part of the  
8 case.

9 QUESTION: I see.

10 MR. WALSTON: So the injunction --

11 QUESTION: But no application was made for the  
12 Peripheral Canal?

13 MR. WALSTON: No, that's correct, Justice Stevens.  
14 Part of that is that we believe that no application is  
15 necessary for the reason outlined above.

16 QUESTION: Well, I know, but you also believe that no  
17 application was necessary for the delta pumping plant.

18 MR. WALSTON: That's correct. The difference, I  
19 believe, though is that the pumping plants are currently in  
20 operation, and we want to do everything we can to keep them  
21 going. The Peripheral Canal has not yet been built. And in-  
22 deed there is a local California referendum that will decide  
23 the fate of the Canal. It will be acted upon by the Califor-  
24 nia electorate within the next 18 months. So it is not as  
25 immediate.

1           QUESTION: It seems to me that's all the more rea-  
2 son to go ahead with the permit application when you've got  
3 plenty of time to see what the Army Corps of Engineers thinks  
4 about the project.

5           MR. WALSTON: That's one way to proceed, but if  
6 we're not required to obtain a permit --

7           QUESTION: I know, but you're not required, and in  
8 the other case you are.

9           MR. WALSTON: There we are again.

10          QUESTION: Is it conceded in the case that there  
11 is Article III jurisdiction in the sense of a case or con-  
12 troversy between these plaintiffs and the defendants?

13          MR. WALSTON: We have made no allegation that there  
14 is no case or controversy, and I don't --

15          QUESTION: I know you want it decided.

16          MR. WALSTON: Right. But I also believe that there  
17 is a case or controversy. I don't -- perhaps I'm not follow-  
18 ing you, Justice White.

19          QUESTION: Well, what's -- the plaintiffs are the  
20 Sierra Club; Friends of the Earth; Hank Schramm, a fisherman;  
21 and Dixon, a landowner.

22          MR. WALSTON: That's correct.

23          QUESTION: What stakes in this controversy do any  
24 of those people have?

25          MR. WALSTON: Well, you'll have to really ask the



1 Sierra Club, the respondents --

2 QUESTION: All right, I will.

3 MR. WALSTON: I think they're --

4 QUESTION: I don't want to waste your time, then.  
5 Go ahead.

6 MR. WALSTON: Okay. The approach which we're sug-  
7 gesting to this Court, again, I emphasize focuses on the  
8 existence of federal navigation interests and concerns.  
9 This approach is intended to preserve the traditional insti-  
10 tutional roles that have been carried out by the Corps of  
11 Engineers in the western states with respect to the control  
12 and management of water resources in the west.

13 The Corps of Engineers has traditionally focused on  
14 navigation, and has traditionally been concerned with naviga-  
15 tion, but not with water allocation. By the same token, the  
16 states have traditionally focused on water allocation and  
17 under the congressional delegation of authority that I men-  
18 tioned earlier have traditionally been responsible for allo-  
19 cating water among competing needs in the west.

20 Therefore, the Corps has no particular expertise  
21 over this subject matter, and the states on the other hand  
22 have a lot of expertise on this subject. But the Court of  
23 Appeals decision would effectively allow the Corps to essen-  
24 tially usurp this historic role occupied by the states and  
25 begin to take over this role for the Corps of Engineers itself.

1 It would allow the Corps essentially to occupy a role that  
2 has been historically occupied by the western states. So our  
3 approach is designed to achieve some kind of accommodation or  
4 balance between federal and state interests, federal naviga-  
5 tion interests and state reclamation interests.

6 On the one hand, our approach would prevent the  
7 states from incurring federal navigation interests and there-  
8 fore would protect the federal concerns that underlie the  
9 Rivers and Harbors Act of 1899. But on the other hand our  
10 approach would authorize the states to reclaim their arid  
11 lands in situations where there are no impacts upon federal  
12 navigation interests. So, in that sense, we are urging  
13 that this Court seek some kind of accommodation or balance  
14 between federal and state interests.

15 And I emphasize, once again very strongly, that  
16 this Court has in effect followed and adopted the very ap-  
17 proach which we are urging. In 1899 in the Rio Grande case  
18 this Court appeared to adopt a rule of reason test in de-  
19 fining the meaning of Section 10, and its definition of that  
20 test is essentially the same that we are offering to this  
21 Court today.

22 In the Sanitary District in Wisconsin cases, the  
23 Court held that Section 2 was applicable to water diversion  
24 from Lake Michigan that reduced the shipping capacity in the  
25 Great Lakes region by about three million tons each year,

1 and thus had a substantial effect on the rights of the many  
2 states that border Lake Michigan.

3 QUESTION: But that was because a state was a party,  
4 and when states are parties this Court has original juris-  
5 diction and we have to fashion a body of common law.

6 MR. WALSTON: Yes; well, that's correct. So the  
7 Court obviously had to reach the question in that case and  
8 you're suggesting the possibility that the Court may not have  
9 to do so here. But nonetheless, the Sanitary District case  
10 stands for the proposition that where there's an effect on  
11 federal navigation interest, as there were in that case in  
12 Lake Michigan, then Section 10 surely applies. But we don't  
13 have that kind of an effect in this case.

14 So, essentially, we are arguing that the Court  
15 should accommodate federal and state interests in this case  
16 by seeking an accommodation or balance of these interests in  
17 the fields of reclamation and navigation. This is the same  
18 test the Court followed in the Rio Grande case. We urge that  
19 it be followed here.

20 And I would like, if I may, Mr. Chief Justice, to  
21 reserve a few moments for rebuttal.

22 MR. CHIEF JUSTICE BURGER: Very well.  
23 Mrs. Stillman.

24 ORAL ARGUMENT OF MRS. ELINOR H. STILLMAN, ESQ.,  
25 ON BEHALF OF THE FEDERAL RESPONDENTS CECIL D. ANDRUS, ET AL.



1 MS. STILLMAN: Mr. Chief Justice, and may it please  
2 the Court:

3 The federal respondents were brought into this case  
4 as defendants, as counsel for California has indicated, with  
5 respect to a federal pumping plant that also pumped water to  
6 the south part of the State, because that pumping plant was  
7 determined by the Court of Appeals to be authorized by  
8 Congress. It's out of the case up here and the Court has not  
9 granted the petition that challenges that holding.

10 The Corps of Engineers were also named as defen-  
11 dants in this case, although no relief was sought directly  
12 against them. The federal pumping plant officials and the  
13 State pumping plant officials were ordered to apply for  
14 permits, to the Corps, and the Corps has been processing the  
15 State's permits, both, I understand, for the current delta  
16 pumping plant and for a planned expansion of that pumping  
17 plant.

18 QUESTION: And your position here as a respondent  
19 is supporting the judgment below?

20 MS. STILLMAN: We are here supporting petitioners  
21 on one issue and private respondents on one issue, Your Honor.

22 QUESTION: But your primary argument is that the  
23 Court of Appeals was mistaken in believing that there was a  
24 private cause of action, and you ask us to remand the case  
25 with directions to dismiss it.

1 MS. STILLMAN: That's correct. We believe that  
2 there is --

3 QUESTION: But you say that, if we disagree with  
4 you on that?

5 MS. STILLMAN: That's correct. Then you should  
6 affirm it on the merits.

7 QUESTION: Right. But you --

8 QUESTION: Did the Government take this position  
9 with respect to the delta plant in the lower courts?

10 MS. STILLMAN: The Government took not much of any  
11 position with respect to the delta plant in the lower courts.

12 QUESTION: So, your answer is, no, it didn't?

13 MS. STILLMAN: No, but it didn't take -- well, it --

14 QUESTION: Well, it did not press this argument about  
15 the delta plant in either the district court or the Court of  
16 Appeals?

17 MS. STILLMAN: Correct. That's correct, Your Honor.  
18 But it certainly never at any time took the position that the  
19 State is exempt from the Act or that State water allocation  
20 systems are exempt from the Act, or the types of arguments  
21 the State has pressed today.

22 QUESTION: But at least you certainly didn't cross-  
23 claim against the -- ?

24 MS. STILLMAN: No, no, we did not, Your Honor. And --

25 QUESTION: Which you could have done, I suppose.

1 MS. STILLMAN: Could have brought our own action?

2 QUESTION: Why didn't the Corps bring its own  
3 action if it wants this case determined on the merits, if  
4 it's determined that there is a private cause of action?

5 MS. STILLMAN: Your Honor, what we -- the factual  
6 situation in the delta is that there is some change in water  
7 levels. We think that the characterization of that -- and  
8 net flow reversals. We think the characterization of that  
9 physical situation by the State as being something very de-  
10 minimis and beneath notice is incorrect, but characteriza-  
11 tions by the private respondent that there are egregious  
12 violations which were obvious to everybody, we think is also  
13 incorrect. We think that there is a situation there which  
14 was finally and fully brought to the attention of the Corps  
15 and with due reflection they recognized as meeting the thresh-  
16 old requirements of Clause 3 and requiring a permit, and  
17 that's what they're processing at the present time.

18 In this Court, therefore, as they did below, the  
19 federal respondents are challenging the right of the Sierra  
20 Club to bring the suit, and they're saying that the State is  
21 wrong in suggesting that there is some sort of special  
22 exemption for states or for states with state water alloca-  
23 tion systems, or for state water allocation systems that  
24 don't substantially impair navigation.

25 I will devote the first part of my presentation to



1 the private right of action issue, since we agree that that's  
2 the threshold issue and we don't reach the question on the  
3 merits, if you agree with us on that issue.

4 In recent decisions of this Court concerning the  
5 question of whether a private right of action under a federal  
6 statute may be implied from the terms of that statute, this  
7 Court has made it clear that the critical question is con-  
8 gressional intent. I refer to cases such as Transamerica  
9 Mortgage Investors' Association, Touche Ross, Cannon v.  
10 University of Chicago, and the Amtrak case.

11 This Court has indicated in those same decisions  
12 that there are various critical categories of evidence  
13 respecting congressional intent, critical in showing an ab-  
14 sence of any intent to create a specific implied remedy under  
15 the Act. One of those two -- one critical factor is whether  
16 the statute contains within itself a specific remedy, and  
17 moreover, a remedy that is specifically entrusted to federal  
18 officers to enforce.

19 Another critical factor is whether it appears that  
20 Congress enacted the statute for the benefit of the public  
21 at large or whether it enacted the statute for the benefit  
22 of a special class.

23 We submit that with respect to Section 10 of the  
24 Rivers and Harbors Act, that both of those factors are  
25 present and that they indicate that there was no intent on

1 the part of Congress to include an implied private remedy to  
2 enforce the statute. In Section 10 of the Rivers and Harbors  
3 Act Congress has devised a scheme, entrusting to an expert  
4 federal administrative body the task of determining whether  
5 certain types of obstructions to navigable capacity are  
6 unreasonable types of obstructions and therefore should not  
7 be permitted. That body of experts is the Secretary of War,  
8 later the Secretary of Army; and the Chief of Engineers and  
9 the Corps of Engineers.

10 If it appears that someone is in violation of the  
11 Act and efforts by the Corps to secure compliance are un-  
12 availing, the Corps can go to the U.S. Attorney, to the  
13 Justice Department, and suggest to them that action in court  
14 is advisable.

15 QUESTION: But you say that this very expert body  
16 let this mischief, if it be a mischief under the Court of  
17 Appeals' decision, go on unchecked for a long period of time  
18 until its attention was called to it by private litigants.

19 MS. STILLMAN: I'm not sure how long it went on,  
20 I'm not sure that it appeared -- it didn't appear overnight,  
21 but a decade ago I think it might have been gradual. And we  
22 don't assert -- we think that the Corps is expert. We don't  
23 assert that it's infallible.

24 QUESTION: Even when speaking on matters of faith  
25 and morals?

1 MS. STILLMAN: Only when speaking of matters of  
2 navigability. If it appears that someone is in violation,  
3 then, if the Corps thinks that court action is necessary, it  
4 may ask the U.S. Attorney to seek appropriate relief, and  
5 this may be criminal penalties; it also may be injunctive  
6 relief. And Section 406 of the Act, which is the enforcement  
7 provision for Section 10, specifically provides for both.

8 I might call the Court's attention to the fact  
9 that, of course, Section 406, where it says that the courts  
10 will have jurisdiction to enjoin the removal of structures in  
11 the waters, found illegal under Section 9 and 10, this Court  
12 in Republic Steel has construed that as much broader, that is  
13 that the U.S. Attorney when he is seeking remedies against  
14 violations of the Act, is not in fact limited to the literal  
15 language of that sentence.

16 And in making that judgment the Court emphasized  
17 that the reason he is not limited to that is because Congress  
18 in this statute was securing the interests of the United  
19 States, and in Section 17 of the Act they said that the  
20 Department of Justice shall conduct these proceedings to  
21 enforce, all necessary proceedings to enforce the provisions.  
22 And it was a very strong strain in the Republic Steel case,  
23 emphasizing that we have to have a broad remedy here, because  
24 this is the interests of the United States that are being  
25 enforced here, and that powers of the Attorney General are



1 brought to bear in these proceedings. And I don't think you  
2 can read from that case a sense that the broad types of  
3 equitable relief which might be sought by private parties  
4 are contained in the Act because Congress wanted private par-  
5 ties to have those powers.

6 Second, now, some of the courts, and the Sierra  
7 Club, say, well, Section 17 only concerns criminal proceed-  
8 ings. That's only saying that the Department of Justice  
9 is the one to bring these criminal proceedings. But this  
10 means that the phrase, "all proceedings necessary to enforce  
11 the Act," doesn't include injunctive relief, and that just  
12 can't be true, because injunctive relief is obviously quite  
13 critical to the enforcement of the statute. And Section 17  
14 says the Department of Justice shall control those proceed-  
15 ings. Language expressly assigning enforcement of the  
16 statute to federal officers, of course, is not absolutely  
17 preclusive of a private right of action, although it is ex-  
18 tremely strong evidence.

19 But here, as we have noted, it is strengthened by  
20 the second consideration, that this statute was enacted to  
21 protect the right of the public, the public at large. And it  
22 was not enacted for a special class, as this Court has found  
23 in other statutes such as the Voting Rights Act in the Allen  
24 case. And in fact, in the Cannon decision, in Footnote 13 of  
25 the Cannon decision, the Court specifically describes the

1 Rivers and Harbors Act as a statute enacted to protect the  
2 rights of the public at large.

3 The Sierra Club has argued that Congress must have  
4 intended to authorize suits under Section 10 of the Act by  
5 private parties suffering special damages, because Congress  
6 would have been aware of the principle that persons suffering  
7 a private nuisance may sometimes enjoin a public nuisance  
8 where they have special damages. They have also suggested  
9 that Congress must have contemplated such private enforcement  
10 of the Act because it was concerned with this Court's decision  
11 in the Willamette Bridge case, a case that was brought by  
12 private parties and dismissed because there was no federal  
13 law for them to bring the case under.

14 QUESTION: Did you suggest that injunctive proceed-  
15 ings under 17 may be brought only by the Department of  
16 Justice? How about the Corps of Engineers?

17 MS. STILLMAN: The Corps of Engineers requests the  
18 Department of Justice to bring proceedings.

19 QUESTION: Oh, is that the way it happens?

20 MS. STILLMAN: Their lawyers may sit there.

21 QUESTION: Well, request. But can Justice turn  
22 them down?

23 MS. STILLMAN: Yes, I believe Justice could.

24 QUESTION: And similarly, with Interior?

25 MS. STILLMAN: Yes.

1 QUESTION: Well, that's always been a hotly con-  
2 tested matter within the Executive Branch, has it not, whe-  
3 ther or not the Department of Justice shall control the liti-  
4 gation of federal claims or whether other agencies within the  
5 Executive Branch shall have the right to their own repre-  
6 sentations?

7 MS. STILLMAN: That's correct, Your Honor, but in  
8 this case it says in Section 17, the Department of Justice  
9 shall control all proceedings to enforce the provisions of  
10 this Act. So I think it's -- I think it's less of a question  
11 here.

12 QUESTION: So, if somebody goes forward with a  
13 diversion without a permit, the only thing the Corps can do  
14 about it is to ask Justice to bring suit?

15 MS. STILLMAN: Yes.

16 QUESTION: And if the Justice Department says,  
17 sorry, no permit is required, that's the end of it?

18 QUESTION: However hotly contested, the Department  
19 of Justice, the Attorney General has invariably prevailed,  
20 has he not?

21 MS. STILLMAN: Yes, I would think so. They're not as  
22 sensitiveto second-guess policy decisions of agencies, cer-  
23 tainly, in the Justice Department.

24 The Sierra Club also relies, as I say, on the  
25 Willamette case. These arguments might have some force if



1 Congress had written a statute different from the one that  
2 they wrote. But they didn't write a statute simply saying,  
3 thus-and-such a structure shall be a nuisance, or an uncon-  
4 sented structure shall be unlawful. They wrote this statute  
5 that creates a system of review. And I think to emphasize  
6 the problems, to illustrate the problems with the Sierra  
7 Club's argument, we might profitably look at the Willamette  
8 Bridge case itself.

9           That case involved plans to construct a bridge  
10 over the Willamette River which the decision says was a  
11 river the navigable portion -- indicates the navigable  
12 portions of that river were entirely within the State of  
13 Oregon. That would mean that the construction of that  
14 bridge would come within Section 9 of the Rivers and Harbors  
15 Act, and it would not need the consent of Congress, because  
16 the navigable portions of the river are entirely in the  
17 State. All it would need would be that the plan should be  
18 approved by the Chief of Engineers.

19           After the Rivers and Harbors Act was passed, if the  
20 statute is construed as we say it should be construed, what  
21 Senator Dolph's clients, Mr. Hatch and his coplaintiffs would  
22 have done, is go to the local Corps of Engineers and say,  
23 these people are planning to build this bridge over the  
24 Willamette River and they haven't gotten their plans approved  
25 by you. And the Corps could go to the bridge builders and

1 say, you can't build that bridge unless you show us your  
2 plans, and then we approve them. If there was refusal and  
3 noncompliance, the Corps of Engineers could go to the Depart-  
4 ment of Justice and say, enjoin the building of that bridge,  
5 because they're going to build it on improper plans.

6           However, if the Corps of Engineers looked at the  
7 plans and said, those plans look fine to us, go ahead and  
8 build your bridge; even if Senator Dolph's clients, Mr. Hatch  
9 and his coplaintiffs didn't like it and thought the bridge  
10 would still be inconvenient to them, they would have no rights  
11 under this Act to say, that bridge is a nuisance, don't  
12 build it, because this Act doesn't protect the individual's  
13 convenience, it protects the rights of the public.

14           QUESTION: Would it make that decision reviewable  
15 at all?

16           MS. STILLMAN: You mean the decision of the Corps?

17           QUESTION: Yes.

18           MS. STILLMAN: I think the situation now, with the  
19 Administrative Procedure Act, that it probably would be re-  
20 viewable. But I think at the time that the 1899 Act was  
21 passed it probably wasn't.

22           QUESTION: Well, it is today, though?

23           MS. STILLMAN: Probably now; yes. But if you're  
24 talking about the intent of Congress in 1899 -- ?

25           QUESTION: Well, I'm not; I'm talking about, would

1 a decision like that be reviewable today or not?

2 MS. STILLMAN: If agency action, I suspect it would.  
3 Although it's discretionary and there's a question of whether  
4 the standard --

5 QUESTION: Well, suppose a diversion from a naviga-  
6 ble river is made by a person who asks for a permit from the  
7 Corps of Engineers and they say, oh, well, you don't need a  
8 permit, I'm not going to give you a permit, you just don't  
9 need one. And the person, somebody downstream says, well,  
10 you did need a permit, and furthermore, the water level is  
11 lowered and I can't get water out of the river anymore in  
12 my distribution system. So, he wants to sue for damages,  
13 he doesn't want to sue for injunction. He wants damages, and  
14 he wants it adjudicated that a permit was required. Is your  
15 argument still as good in that -- ?

16 MS. STILLMAN: Well, if he really wants damages,  
17 he can sue in a state court. We're talking about federal  
18 court actions here. Why does he have to sue under this  
19 statute?

20 QUESTION: No, I'm talking about -- I want to ask  
21 you, does your same argument apply to a damages action  
22 brought by a private individual under the Act?

23 MS. STILLMAN: Yes, I think it does. We think --

24 QUESTION: But not because it's been in the control  
25 of the Department of Justice?



1 MS. STILLMAN: We think this Act creates no private  
2 right of action. I might say, on that, that it's evident to  
3 us that it's very complicated trying to fit these very dif-  
4 ferent types of private right of actions, the private actions  
5 that the Sierra Club is relying on, to dovetail them with  
6 the statute. And for this reason, Congress not having said  
7 anything on this subject as to how these were to fit, we can't  
8 see that they really had any intent of there being private  
9 actions here.

10 QUESTION: Well, is it your position -- just so I  
11 have it clear in the case that Justice White proposes --  
12 that the proper procedure that Congress intended was, sue in  
13 the state court; if you lose there, then you can appeal on  
14 petition for certiorari to this Court, which would then  
15 construe Section -- the Rivers and Harbors Act?

16 MS. STILLMAN: I don't think it would be a question  
17 of the Rivers and Harbors Act in the state court. They'd  
18 have a common law nuisance action in the state court, not  
19 action under this statute.

20 QUESTION: So you're not just saying there's no  
21 federal private cause, there is just no remedy under the --

22 MS. STILLMAN: Under the Rivers and Harbors Act,  
23 that's right, but they --

24 QUESTION: Even if there's a plain violation there?

25 MS. STILLMAN: That's right. But if they have any

1 remedies under state law or for traditional nuisance actions  
2 they could go to the state courts for that.

3 QUESTION: Would the federal statute prevent them,  
4 and could they -- why couldn't they go into state court?

5 MS. STILLMAN: It's not clear -- we're not saying  
6 it's preemptive of state nuisance actions.

7 QUESTION: But what would prevent a state court  
8 from saying, we think if you violate the federal statute we  
9 ought to give a remedy? Is there anything that would prevent  
10 that? In other words, they're in violation of federal law,  
11 but you say there's no federal remedy. Why can't the state  
12 provide a remedy?

13 QUESTION: All state judges swear to uphold  
14 the federal law.

15 MS. STILLMAN: Well, if the question of whether a  
16 private remedy is included in a federal statute as a question  
17 of congressional intent --

18 QUESTION: Even as respects an action in a state  
19 court?

20 MS. STILLMAN: Yes. We think that there was no  
21 intent to create a private remedy in this statute, that this  
22 was a statute to be enforced by the Department of Justice as  
23 the Congress said in Section 17.

24 QUESTION: This is not to say that the California  
25 court, the state court, couldn't say as a matter of state law,

1 find anything that violates the federal act is a nuisance?

2 MS. STILLMAN: Certainly, if they wanted to say  
3 that as a matter of state law, I don't think there'd be --  
4 it's not preemptive in that sense. I'd like to --

5 QUESTION: The historical argument -- let me just  
6 stop you for just a -- their historical argument is that  
7 there had been private action to try and prevent bridges  
8 and one thing and another, and then that this statute was  
9 enacted to make something unlawful that the court had not  
10 been willing to hold unlawful, but not to change the reme-  
11 dial setup at all.

12 MS. STILLMAN: But we think it did change the reme-  
13 dial setup because of the way the statute was constructed.

14 QUESTION: It took away a remedy that was pre-  
15 viously available?

16 MS. STILLMAN: Yes. And we think that if you look  
17 at Senator Vest's comments, he thought really what you needed  
18 was federal enforcement here, that that's what would take  
19 care of the situation.

20 QUESTION: Did he say, though, that sure, he wanted  
21 it, but that there could be nothing else too?

22 MS. STILLMAN: He did not specifically say there can  
23 be nothing else, but there's certainly no statement by anyone  
24 that we're hereby creating a private right of action.  
25 I'd like to --



1 QUESTION: Or even preserving one.

2 MS. STILLMAN: We don't think there was any federal  
3 cause of action before this, and this statute --

4 QUESTION: Well, there were federal injunction acts.

5 QUESTION: In the 1890 act or the 1899 act?

6 MS. STILLMAN: In neither one did it create one.  
7 I'd like to just touch briefly on our arguments against the  
8 State's claims that it's exempt from this Act. I won't ad-  
9 dress their claim that they make in their brief that states  
10 don't even come under the Act at all, because we can't believe  
11 that they're seriously pressing that claim. I would like to  
12 address its contention that state water allocation systems  
13 are somehow exempt from the Act, and simply to say that  
14 there's nothing in the language of the Act -- it very clearly  
15 covers any disturbance of navigability or any alteration in  
16 condition in Clause 3 has to be looked at by the court. It  
17 says nothing about, unless it's part of a state water alloca-  
18 tion system.

19 I might say also that that's an extremely amorphous  
20 category, state water allocation systems. I think --

21 QUESTION: What if one were to find a conflict  
22 between the Reclamation Act of 1902 and the Rivers and  
23 Harbors Act of 1899?

24 MS. STILLMAN: Your Honor, I can't see any conflict  
25 in here, because in Section 8 of the 1902 Act they said they

1 preserved existing state authority to control their water  
2 acts. Well, existing state authority was qualified by the  
3 requirements of the Rivers and Harbors Act of 1899.

4 QUESTION: Then how about Section 1, saying that  
5 the projects should be constructed in conformity with state  
6 law and -- I don't remember the language -- ?

7 MS. STILLMAN: But, Your Honor, as I read your  
8 opinion in California v. United States, you say that where a  
9 state law is inconsistent with congressional directives, that  
10 it doesn't prevail.

11 QUESTION: Well, but, don't you at least have  
12 to look at the two together?

13 MS. STILLMAN: Well, yes, but it seems to me that  
14 if you -- again, as I read California v. United States, it  
15 says if there's a congressional directive that's inconsistent  
16 with state law, it prevails. And here we have a congressional  
17 directive in the Rivers and Harbors Act that says, if you  
18 alter the conditions of navigable waters -- we agree there's  
19 a de minimis standard there, by the way -- and if it has the  
20 potential, we believe that's what Clause 3 really means,  
21 these are things that might have the potential for disturbing  
22 navigability, and there's something that the Corps should  
23 take a look at and decide whether they should be permitted  
24 or not.

25 What the State is saying, is read that clause out

1 and don't let the Government look at us until there's a fait  
2 accompli. Now, that's not the scheme of the statute. The  
3 statute is, let the Corps look at it and decide whether  
4 there's going to be a serious disturbance of navigability,  
5 and if there is, they won't permit it. If there is not,  
6 they will allow it. I will agree that in their permitting  
7 process now, as it's changed recently, they look at things  
8 beyond that. They now look at environmental factors because  
9 of the Fish and Wildlife Coordination Act and other words.

10 QUESTION: Well, the Court of Appeals told them  
11 that's what they should do.

12 MS. STILLMAN: Yes. I do not agree, though, we do  
13 not accept the suggestions by California that the Corps de-  
14 cides this person should have water and that person shouldn't  
15 have water. Stockton should have water and California should  
16 shouldn't. They look always to the effects on the water,  
17 the effects on water --

18 QUESTION: But if it's an environmental standard  
19 or some other standard, some standard other than navigational,  
20 the Court of Appeals told them that it's okay to apply the  
21 public interest generally, or any aspect of it.

22 MS. STILLMAN: Strictly speaking, I think that ques-  
23 tion is not here on review. That's really the Zabel v. Tabb  
24 issue. And what State is claiming is that they don't even  
25 come under Clause 3 as it was enacted in 1899. And that



1 clearly is wrong. Whether the 5th Circuit is right, as we  
2 think it was in Zabel v. Tabb, that the Court can look at  
3 these other environmental factors, I think is not here to be  
4 decided in this case.

5 JUSTICE BRENNAN: Thank you, Mrs. Stillman.  
6 Mr. Clark.

7 ORAL ARGUMENT OF JOHN B. CLARK, ESQ.,  
8 ON BEHALF OF THE RESPONDENTS SIERRA CLUB, SCHRAMM, AND DIXON

9 MR. CLARK: Mr. Chief Justice and may it please  
10 the Court:

11 If I may, I would like to address first the ques-  
12 tion of the private right of the plaintiff to bring this suit.  
13 And at the outset I would like to emphasize that unlike the  
14 situation of the plaintiff in the Amtrak, Touche Ross, the  
15 Cannon, and the Transamerica cases, we are not proposing  
16 that this Court try to discern from the legislative language  
17 an intent to create a new and different private cause of  
18 action that did not exist before.

19 We agree that the test here is legislative intent,  
20 and unlike the dilemma that we frequently find ourselves in,  
21 here we are able to gauge legislative intent quite accurately.  
22 And I think it's possible in this case to actually determine  
23 the state of mind of the Congressmen who enacted the Rivers  
24 and Harbors Act of 1890, which was the predecessor of the  
25 Rivers and Harbors Act of 1899 and which all counsel agree,

1 I believe, is the relevant statute for determining the legis-  
2 lative intent behind the Rivers and Harbors Act of 1899.

3 Counsel has agreed, and I think the federal defen-  
4 dants have acknowledged in their brief, that the purpose of  
5 the Congress when they enacted the Rivers and Harbors Act of  
6 1890 was, in effect, to overrule a decision of this Court in  
7 Willamette Iron Bridge Company v. Hatch. For that reason I  
8 think it instructive to go back to Willamette Iron Bridge v.  
9 Hatch and examine how that case would have been decided with  
10 the change that was wrought by Congress when it enacted the  
11 Rivers and Harbors Act of 1890.

12 Willamette Iron Bridge v. Hatch was a suit brought  
13 by a citizen of Oregon against another citizen of Oregon to  
14 abate a nuisance. He relied upon what he asserted was a  
15 statute of the United States that rendered unlawful the con-  
16 struction of a bridge that obstructed navigation. He said,  
17 "That bridge is a nuisance because it obstructs navigation  
18 and it is made unlawful by an Act of Congress."

19 QUESTION: He didn't need to add the latter, I take  
20 it, did he?

21 MR. CLARK: He did, I believe, Your Honor, in that  
22 case, because he was suing in a federal court, and he sought  
23 federal relief in --

24 QUESTION: Well, he only said it was a nuisance.

25 MR. CLARK: But, Your Honor, his only basis of

1 federal jurisdiction --

2 QUESTION: You can conclude it was a nuisance because  
3 it was obstructing navigation.

4 MR. CLARK: Yes, Your Honor, but it was between the  
5 citizens of the same state. He had no jurisdiction in federal  
6 court unless he could show that his case arose under a federal  
7 statute. So he relied upon that statute which admitted  
8 Oregon into the Union and contained some language that  
9 recited that the Willamette River would be forever free for  
10 navigation. He said, "The construction of that bridge ob-  
11 structed navigation and it provided the necessary element of  
12 a private cause of action for nuisance, that is, that the  
13 obstruction was unlawful."

14 And this Court said to him, just as it had said in  
15 a string of very similar cases decided in the 19th Century  
16 in language that sounds like it was directed at Congress  
17 rather than to the private litigants, that "you are right  
18 every step of the way with one exception, there is no federal  
19 statute which makes the obstruction of a navigable waterway  
20 unlawful."

21 Now, that was the culmination of a series of cases,  
22 many of which, or a number of which at least came to this  
23 Court and were decided the same way. And within two years  
24 Congress had enacted the Rivers and Harbors Act of 1890. And  
25 I believe that what Congress intended quite clearly from the



1 enactment of that particular statute was to put Mr. Hatch in  
2 the position where if that lawsuit had been brought after the  
3 enactment of that particular law, he would have prevailed. He  
4 would have prevailed on the theory of a private nuisance, and  
5 he would have to have shown that he was specially injured  
6 just as anyone would have to have done at that point in time  
7 and today in order to prevail on a claim of a private nuisance.  
8

9 QUESTION: He wouldn't have had to show that the  
10 navigability of a navigable stream was obstructed?

11 MR. CLARK: He would have, Your Honor. He would  
12 have had to show some sort of obstruction. I don't think that  
13 obstruction was the only ground of nuisance at that point in  
14 time. There were other things one could do to a river that  
15 constituted nuisance, but he would have to have shown something  
16 other than injury to himself.

17 QUESTION: But as I read the 1890 Act, it speaks in  
18 terms of the federal interest being obstructions to navigation.  
19

20 MR. CLARK: Yes, I think that's true. That was not  
21 the only purpose of that Act, I would submit, Mr. Justice  
22 Rehnquist. I believe this Court has held in the Standard Oil  
23 case, for example, that Congress intended to protect the  
24 interest of the nation in both navigable waterways and pure  
25 waterways, when it enacted the Rivers and Harbors Act of 1899

1 and that is the reason that in addition to Sections 10 and 12  
2 upon which plaintiffs rely here, it also enacted a number of  
3 other sections designed to prevent dumping and pollution --  
4 did not use the word pollution -- and it enacted a number of  
5 other sections designed to keep our waterways clean.

6 QUESTION: Well, do you think that kind of a suit --  
7 were you saying that that kind of a case would technically  
8 arise under a federal statute and give a federal district  
9 court jurisdiction?

10 MR. CLARK: Yes, Your Honor.

11 QUESTION: Well, all you're saying, it's a cause  
12 of action for nuisance. And you aren't saying -- I guess  
13 what you're arguing is that this isn't, that kind of a case  
14 wouldn't be a private cause of action under the Rivers and  
15 Harbors Act at all? If you are, then there --

16 MR. CLARK: Well, Your Honor, it's largely --

17 QUESTION: -- wouldn't be any federal jurisdiction?

18 MR. CLARK: That is largely true. What Congress  
19 intended to do and I think quite clearly intended to do was  
20 provide a federal statute so that this kind of action would  
21 in fact arise under federal law. And I think a consideration  
22 of the alternative to that conclusion indicates very strongly  
23 why Congress must have so intended.

24 QUESTION: What if they brought it in a state court?

25 MR. CLARK: That is the alternative, Your Honor.

1 QUESTION: Well, then, would it be controlled by  
2 federal law or state law as to what a nuisance is?

3 MR. CLARK: I think it would be controlled by  
4 federal law if the nuisance actions could be brought in state  
5 courts, but we would not have a uniform development of a law  
6 in that particular area. The interpretation of the Rivers  
7 and Harbors Act in that instance would be left to all the  
8 superior courts and state courts of this country.

9 QUESTION: Well, it sounds to me like you're reading  
10 the arising under jurisdiction much like the Savings to  
11 Suitors in Admiralty Clause in the Constitution, as if it  
12 were preserving a particular right rather than simply allow-  
13 ing Congress to create rights.

14 MR. CLARK: Your Honor, that may be. I think what  
15 I am attempting to do primarily is to determine what Congress  
16 actually intended, however we may characterize it today.  
17 I think it is true, and I think it is the most logical and  
18 probable interpretation of the intent of Congress back in  
19 the last century, that when it enacted this particular law  
20 it did contemplate the bringing of actions of this kind.

21 QUESTION: But the Court of Appeals didn't agree  
22 with you on that point, did it?

23 MR. CLARK: The Court of Appeals did agree, Mr.  
24 Justice.

25 QUESTION: I thought the Court of Appeals said it



1 was neither one.

2 MR. CLARK: No, they held that there is a private  
3 right of action.

4 QUESTION: Yes, but I mean, didn't they say that  
5 the congressional history didn't help them?

6 MR. CLARK: They said it was not clear; yes. As  
7 the opinion was written --

8 QUESTION: But you say it is clear?

9 MR. CLARK: I think it is. And I think it is made  
10 clear in part by the further research that has been done in  
11 preparation for this particular argument. I think our brief  
12 lays out in rather extensive detail the considerations not  
13 only of the legislative history of this Act but the contem-  
14 poraneous legal context in which this statute was enacted.

15 It was somewhat different back then from what it  
16 is today. And as we have attempted to argue in our brief,  
17 suits by private suitors were the norm, and enforcement by  
18 federal agencies was the exception. That has somewhat been  
19 reversed in the 80 years since the enactment of the Rivers  
20 and Harbors Act of 1899, but back then, to assume that private  
21 suitors would be able to enforce this particular act was not  
22 unusual at all. It certainly was not the kind of situation  
23 that this Court was confronted with in the recent decisions  
24 in Transamerica, Cannon, and so on, in which you do not have  
25 that kind of background and you are attempting to determine

1 whether Congress when it enacted a new regulatory scheme  
2 intended as a part of that to also give private suitors the  
3 right to enforce that particular new law. That was not this --

4 QUESTIONS: So, on private action you want to move  
5 us back to the 19th Century?

6 MR. CLARK: No, I think we have to go back there  
7 because of this Court's pronouncements that we look to con-  
8 gressional intent. The intent of Congress that is relevant  
9 starts back in the 19th Century and I think it continues to  
10 this very day. Because since the enactment of the Rivers and  
11 Harbors Act there has been engrafted upon that statute a  
12 number of additional further requirements that are of particu-  
13 lar importance to the plaintiffs who bring this suit: the  
14 Federal Water Pollution Control Act, the Fish and Wildlife  
15 Coordination Act, the National Environmental Policy Act of  
16 1969, the National Estuarine Areas Act, all of which to one  
17 extent or another must be taken into account by the Corps of  
18 Engineers when it passes upon applications for permits and  
19 exercises its jurisdiction over the navigable waters of the  
20 United States.

21 QUESTION: Mr. Clark, may I interrupt you? Putting  
22 the case back in the 1890 context, which you ask us to do,  
23 as I understand your argument, the private plaintiff would  
24 have had to allege something akin to a private nuisance --

25 MR. CLARK: Yes.

1 QUESTION: A very direct injury to himself, his own  
2 interest. Now do your clients qualify under that kind of an  
3 standard?

4 MR. CLARK: Yes, they do.

5 QUESTION: Which is the one that best qualifies in  
6 the sense -- certainly you don't have an obstruction of navi-  
7 gation in the same sense?

8 MR. CLARK: Well, I think we do, Mr. Justice  
9 Stevens. It is true, of course, that one of the concerns of  
10 our clients is the environment, but we represent clients who  
11 use the waters of the delta for navigation as well as for  
12 recreational interests. So we --

13 QUESTION: Do you allege that their use of the  
14 waters for navigation will be impaired?

15 MR. CLARK: Yes, we do.

16 QUESTION: That's the Sierra Club and Schramm, the  
17 fisherman?

18 MR. CLARK: And Schramm, Your Honor.

19 QUESTION: I thought he was in San Francisco Bay.

20 MR. CLARK: Yes, he fishes in San Francisco Bay.  
21 He is not affected by the lowering of water levels by having  
22 the navigation of his boat impeded. He however fishes for  
23 salmon, 80 percent of the salmon fishery that works out of  
24 San Francisco Bay is entirely dependent upon the delta en-  
25 vironment for the production of that particular anadromous



1 fish that goes up in the fresh water, lays its eggs, and  
2 swims out into the salt water of the ocean.

3 So he is affected and he has a very serious economic  
4 interest in this particular action.

5 QUESTION: Yes, but his navigability is not --

6 MR. CLARK: His navigability is not affected, but  
7 there are members of the plaintiff's class --

8 QUESTION: You're relying on the Rivers and Harbors  
9 Act of 1899 as granting a private cause of action?

10 MR. CLARK: Yes.

11 QUESTION: And that was concerned --

12 QUESTION: Exclusively with navigation.

13 MR. CLARK: Well, I think not, but let me assume  
14 arguendo that it is concerned exclusively with navigation.  
15 In that instance we would be required to show an effect on  
16 navigation, and we believe we have done that. I might advise  
17 the Court of one factor that I think has not been made clear  
18 in the past, and that is that the trial below was a bifur-  
19 cated trial, and the court entered an order that no evidence  
20 of the damage caused by these particular diversions should be  
21 admitted until the second phase of the bifurcated trial.

22 So the issue that has been resolved to date is an  
23 issue of standing. Now, I think there is no difference be-  
24 tween standing and that special injury. I may be mistaken in  
25 that regard, but at the very least standing to bring these

1 suits and the special injury that was traditionally required  
2 in a private nuisance suit --

3 QUESTION: It seems to me there is a difference.  
4 It seems to me the inability to get salmon would satisfy  
5 an Article III standing requirement, but wouldn't it consti-  
6 tute an impediment to your ability to navigate wherever you  
7 want to navigate?

8 MR. CLARK: That may well be.

9 QUESTION: And is there anything in the record that  
10 indicates that any of your clients by reason of what your  
11 adversaries are doing cannot navigate in the way they like  
12 to navigate?

13 MR. CLARK: Yes.

14 QUESTION: What is that?

15 MR. CLARK: We allege, Mr. Justice Stevens, that  
16 our clients, the members of the plaintiff classes, use the  
17 delta waters for boating and they have been --

18 QUESTION: Is there any place they can't go because  
19 of a --

20 MR. CLARK: I'm sorry?

21 QUESTION: Well, go ahead. I'm sorry, I shouldn't  
22 have interrupted. You finish your sentence.

23 MR. CLARK: We simply allege that navigability has  
24 been affected and there has been minimal proof on that issue  
25 through the first phase of the bifurcated trial.

1 QUESTION: It doesn't seem to me that lowering the  
2 water table a few inches would satisfy the requirement, if  
3 you can still navigate anyplace you could previously navigate?

4 QUESTION: Well, it might mean you couldn't tie up  
5 at the same docks, or it might make some marinas unusable or  
6 something.

7 MR. CLARK: Well, we heard this morning that a  
8 lowering of six inches affected trade on the Great Lakes by  
9 300 million tons or dollars -- I know that figure, I'm pro-  
10 bably not reciting it correctly. But I would submit to you  
11 that one of the things Congress had in mind when it enacted  
12 this statute is that neither this Court nor any other court  
13 should be determining such issues as whether or not one inch  
14 of lowered water level at one particular point had that  
15 effect on navigation that would trigger the effects of this  
16 particular Act. Congress said that is a role that the Corps  
17 of Engineers and the Secretary of War were to play, and that  
18 the initial step in compliance with the Rivers and Harbors  
19 Act was to go to them and seek a permit.

20 If it was true, as California contends, that there  
21 is nothing in their proposed and continuing diversions of  
22 water that is prohibited by the Rivers and Harbors Act, then  
23 in that event the result should be the issuance of a permit  
24 forthwith. That is the way the statute was intended to  
25 operate, but the State of California and, to date, the federal



1 defendants have chosen not to comply with that particular law  
2 insofar as it applies to any of the water projects that divert  
3 water from northern California.

4 QUESTION: If you want to take us back to the 1890s  
5 as you have for some purposes, wasn't it true in the 1890s  
6 and for many decades thereafter that no private claimant would  
7 have had any right to challenge the action of the Corps of  
8 Engineers in refusing or in granting a permit?

9 MR. CLARK: I don't know. I do not think that's  
10 correct. I think they would have had a right of mandamus that  
11 would have given them a limited right. There are cases in  
12 which private suitors have sought, and, I think, obtained  
13 mandamus against the Corps.

14 QUESTION: Certainly nothing like the Administrative  
15 Procedure Act?

16 MR. CLARK: No, the Administrative Procedure Act,  
17 of course, was not available. But what people in fact did,  
18 and I think a test of the theory that I advance here, is to  
19 go to the courts, the federal courts, and assert actions  
20 under the Rivers and Harbors Act. And a test of whether my  
21 analysis of congressional intent is correct, I would submit,  
22 is what the courts in fact did when private litigants came to  
23 them and made the same sort of claim that the Sierra Club and  
24 the other private individual plaintiffs have made here.  
25 They treated them as plaintiffs who had a private right of

1 action under the Rivers and Harbors Act, and they granted the  
2 injunctive kind of relief, the very kind of relief that  
3 Mr. Hatch sought against Willamette Iron Bridge back in 1886.  
4 And the cases, the Chatfield case, the Carver case, cited in  
5 our brief, arose under very similar factual situations.

6 QUESTION: None of those are from this Court?

7 MR. CLARK: That's true, I think, Your Honor. They  
8 are not from this Court. The decision of this Court that  
9 probably is most in point is the Wyandotte case cited in  
10 Cort v. Ash and in Cannon as one in which this Court implied  
11 a right of action under the Rivers and Harbors Act to be  
12 true in favor of the United States. In Cort v. Ash that was  
13 cited as a finding of a case that stood for the proposition  
14 that there is in fact a private right of action under the  
15 Rivers and Harbors Act of 1899.

16 In the Cannon case that characterization was  
17 moderated somewhat, and was simply one in which this Court  
18 noted that in the Wyandotte case it had implied a right of  
19 action that was not specifically provided for in the Rivers  
20 and Harbors Act, that is not significantly different from the  
21 kind of relief that these private plaintiffs seek here. And  
22 I think there is little reason for the United States to have  
23 that kind of relief in its proprietary capacity and yet deny  
24 that same kind of relief to --

25 QUESTION: Could I ask you what the elevation of

1 the delta plant is?

2 MR. CLARK: Above sea level, Your Honor? I believe  
3 that the elevation is substantially at sea level.

4 QUESTION: Well, then, suppose you diverted entire-  
5 ly the Sacramento River above the delta plant --

6 MR. CLARK: Yes?

7 QUESTION: If it's substantially at sea level,  
8 then there would be just as much water at the delta plant,  
9 the only thing is it would be seawater.

10 MR. CLARK: Right.

11 QUESTION: So that wouldn't affect navigation any.

12 MR. CLARK: Your Honor, it would in this sense --

13 QUESTION: Well, you'd be still-- if the water level  
14 would be substantially at the same level --

15 MR. CLARK: Well, I disagree with your premise,  
16 with all due respect.

17 QUESTION: What premise? I asked you how high it was  
18 and you said it was substantially at sea level.

19 MR. CLARK: Yes. The elevation of the delta pumping  
20 plant will not change, and if it is at sea level, that is  
21 where it is. But the level of the water will change, and  
22 whatever mean low or low, or mean low or high water may be at  
23 any particular point at any particular time, when the delta  
24 pumps start to pump water, the water levels in the adjacent  
25 waterways goes down.



1 QUESTION: Goes down until it's replaced by sea  
2 water?

3 MR. CLARK: Yes, it comes back in sometimes.

4 QUESTION: The Pacific Ocean is a pretty adequate  
5 supply.

6 MR. CLARK: The quantity is adequate, Your Honor.  
7 The supply, indeed, the quality, though, is something else.

8 QUESTION: Well, yes, but if we were talking  
9 navigation?

10 MR. CLARK: If we're talking navigation we can talk  
11 navigation, and when we --

12 QUESTION: I agree with you, it certainly changes  
13 the character of the river from fresh water to seawater,  
14 which is a substantial change, but is that of Rivers and  
15 Harbors Act concern?

16 MR. CLARK: Yes, Justice White, it is, and I believe  
17 that quality of water is a Rivers and Harbors Act concern.  
18 But I want to make very clear that we believe the plaintiffs  
19 satisfy a strictly navigational test. If this Court were to  
20 say you cannot assert a right under the Rivers and Harbors  
21 Act without showing that you were privately and personally  
22 affected in some effort to navigate these waters, we think  
23 we can show that. We do not believe that is a correct way  
24 to apply the Act.

25 QUESTION: But Mr. Clark, shouldn't you have shown

1 that the first day of trial?

2 MR. CLARK: I think not, Your Honor.

3 QUESTION: You never accepted the premise.

4 MR. CLARK: We don't accept the premise, but we  
5 also are under an order that defers until the second phase of  
6 a bifurcated trial all proof of the damage caused to these  
7 plaintiffs by these particular diversions.

8 QUESTION: If you're looking at remedy, that's cer-  
9 tainly a normal way to bifurcate a trial. If you're looking  
10 at authority to proceed with the litigation, it's a rather  
11 strange bifurcation.

12 MR. CLARK: Well, Your Honor, that is simply the  
13 way this case has gotten up to this particular Court.  
14 I don't think the --

15 QUESTION: Well, if it's a jurisdictional question,  
16 why just bifurcating the trial doesn't give a court some  
17 jurisdiction it doesn't have.

18 MR. CLARK: No, but I --

19 QUESTION: The first issue addressed by both  
20 Judge Renfrew and the Court of Appeals was private cause of  
21 action.

22 MR. CLARK: That's right, and he found and the  
23 Court of Appeals found that we had satisfied those tests on  
24 the record, on the record before those courts, and I think  
25 the record is sufficient. I think we --

1 QUESTION: It isn't sufficient if you're saying to  
2 us, we can prove it, if you let us go back and do it in the  
3 second stage of the trial. Don't we have to take the record  
4 as it's made up to now?

5 MR. CLARK: I don't think you could dismiss these  
6 plaintiffs on the ground that in the middle of the trial, a  
7 trial that was specifically deferred until a second phase,  
8 certain elements of proof, I don't think you could dismiss  
9 now on the ground that those deferred elements of proof had  
10 not yet been proven.

11 QUESTION: Well, we can just disagree with Renfrew  
12 and the Court of Appeals that we thought there was standing.

13 MR. CLARK: Clearly, yes. Of course.

14 QUESTION: And we can just disagree with him.

15 MR. CLARK: Yes.

16 QUESTION: On the grounds that there was no private  
17 -- or I suppose we could say that, disagree with him that  
18 the threshold showing of any injury to these people was  
19 shown by these facts.

20 MR. CLARK: Well, I think an examination of the  
21 record will show that there is ample proof in the record of  
22 an actual injury to navigation. That issue has not been  
23 argued on appeal. The issue that has been raised is whether  
24 there is a private right.

25 QUESTION: Is it your contention that the



1 substitution of salt water, Pacific Ocean water, for fresh  
2 water is itself an obstruction to navigation?

3 MR. CLARK: No, Mr. Justice Stewart, that is not  
4 our position.

5 QUESTION: It's the opposite, isn't it? I mean,  
6 salt water is more buoyant.

7 MR. CLARK: It may be. And I would emphasize that  
8 the lower court found as a matter of fact that there was an  
9 obstruction to navigation, that was a factual finding they --

10 QUESTION: On lowering the level one inch?

11 MR. CLARK: Yes. Now, the evidence on which that  
12 was based is not confined to a lowering of one inch. That  
13 was counsel's statement. The record shows that the lowering  
14 of water levels is 18 inches at some points under the present  
15 amount of pumping. And one must bear in mind that the  
16 present pumping is far less than the volume of pumping con-  
17 templated by these particular defendants.

18 QUESTION: Down to the lower part of the State?

19 MR. CLARK: Yes. They propose substantial addi-  
20 tional pumping.

21 QUESTION: Correct me if I'm wrong. Was not the  
22 obstruction to navigation something that was yet to be  
23 built in the Peripheral Canal, and that there is no showing  
24 that that particular obstruction interfered with your  
25 clients' ability to navigate?

1 MR. CLARK: No, I --

2 QUESTION: Am I wrong about that?

3 MR. CLARK: I think you are wrong, Mr. Justice.

4 ~~What~~ QUESTION: What is it in the record, just so I can  
5 pinpoint something, on which, if you had to rely on the  
6 present record, what could you point to to say that there is  
7 anything showing any interference with any of your clients'  
8 present ability to navigate?

9 MR. CLARK: Just the proof, Your Honor, that water  
10 levels have been reduced and that the plaintiffs use the  
11 waters of the delta for boating and other purposes. Their,  
12 I believe --

13 QUESTION: Is there someplace they can't go or  
14 couldn't go when this thing was built, that they can go now?

15 MR. CLARK: I think that is the fact, Mr. Justice,  
16 but I don't believe that's the state of proof at this stage  
17 of the trial down below. We are under an order of the Court  
18 that was issued at the time the intervenors were granted the  
19 right to intervene, that said that proof of the effect of  
20 these diversions would be deferred until the second phase of  
21 the trial, so although the record happens to have a substan-  
22 tial quantity of evidence on the effect of these diversions  
23 it is there largely because it is in evidence introduced for  
24 other purposes. And the proof of the extent of the effect  
25 of these diversions has been deferred until the second phase.

1 I might mention that, while I'm on this point, that  
2 we take the position that in terms of substantive proof,  
3 substantive application of the Act itself, we must only show  
4 that the defendants are engaged in the kind of conduct  
5 referred to in the second or third clauses of Section 10 of  
6 the Rivers and Harbors Act, and a showing of that fact is  
7 sufficient to require a ruling that they seek a proper per-  
8 mit and approval from the Corps of Engineers.

9 QUESTION: Assuming you have a private cause of  
10 action.

11 MR. CLARK: Assuming we have a private cause of  
12 action. Thank you.

13 JUSTICE BRENNAN: Thank you, Mr. Clark.  
14 Mr. Walston, do you have some more?

15 ORAL ARGUMENT OF RODERICK E. WALSTON, ESQ.,

16 ON BEHALF OF THE PETITIONERS -- REBUTTAL

17 MR. WALSTON: Just very briefly, Mr. Justice  
18 Brennan. The Sierra Club has stated that assuming that the  
19 Corps of Engineers has jurisdiction, the Corps should be  
20 allowed to deny the permit on any non-navigational grounds  
21 such as on any solely environmental grounds.

22 I might point out to the Court that that position,  
23 although very consistent with the decision of the Court of  
24 Appeals in this case, is inconsistent with the position  
25 expressed by United States in its own briefs. For at page 31



1 of the United States brief, last full sentence, the United  
2 States makes the following statement: "We assume, moreover,  
3 that an alteration or modification must be of a type with  
4 the potential for affecting navigation; i.e., that water  
5 quality alterations would not be covered unless there are of  
6 a type with a potential for reducing stream capacity, for  
7 example, by increasing siltation."

8 Thus the position of the Sierra Club and the United  
9 States on the merits of this case is apparently at odds,  
10 according to their oral arguments.

11 I would further point out that according to the  
12 facts of the case, yes, indeed, there are some effects in  
13 this case caused by the water exports upon delta environmental  
14 quality. Those effects largely relate to the salinity in-  
15 trusion, just as has been pointed out. And the State Water  
16 Resources Control Board in the process of issuing appropria-  
17 ted water rights permits to the State Water Project has  
18 essentially dealt with those kinds of concerns and has worked  
19 out a finely tuned program to ameliorate or perhaps avoid  
20 those salinity intrusion problems altogether. So the State  
21 has performed a very active function and role in the process  
22 of trying to determine the allocation of water between  
23 northern and central and southern California needs.

24 It is our view that the State's role should be main-  
25 tained, that the program developed by the State Water

1 Resources Control Board should be upheld and that the Corps  
2 of Engineers should not have the power to override it or veto  
3 it in the absence of some kind of discernible substantial  
4 effect upon federal navigation interests. And that kind of  
5 an effect simply doesn't exist here.

6 QUESTION: Are you saying that, would you have the  
7 same -- that just changing fresh water to salt water would  
8 not, for example -- ?

9 MR. WALSTON: Has no navigational effect that  
10 we're aware of, and the lower courts did not so hold.

11 QUESTION: Well, but barnacles accumulate a lot  
12 faster on sailing vessels.

13 MR. WALSTON: It's possible. I suppose it's hypo-  
14 thetically possible that such an effect could take place,  
15 but if so, the lower court would have to consider that  
16 question and make factual findings on it. The lower court  
17 didn't do that in this case because it held that the Act was  
18 triggered merely by the fact that the water exports in this  
19 case had solely environmental effects.

20 QUESTION: You don't -- is it true that the delta  
21 pumping plant will reduce the level of the water in the river  
22 at that point and down river to a certain extent?

23 MR. WALSTON: According to the district court's  
24 findings, the pumping plant would reduce water levels in the  
25 delta in the interior delta channels where commerce actually

1 takes place by about one inch, and that is the combined  
2 export of water both by the State pumping plant and by the  
3 federal pumping plant.

4 QUESTION: At the present levels, isn't that  
5 right?

6 MR. WALSTON: That's correct, yes. But the district  
7 court also held that in the area near the pumping plants  
8 where there is no commerce the water exports, the combined  
9 exports from both the federal and state projects would there  
10 reduce delta water levels by about this much, a foot and a  
11 half.

12 But our position is that there is no actual commerce  
13 or navigation that takes place in those exterior delta  
14 channels that are near the pumping plants.

15 QUESTION: Well, that may be, but that's just maybe  
16 by happenstance. I mean, it could, couldn't it?

17 MR. WALSTON: Well, in the real world I don't think  
18 it's plausible to expect that ships would be plying --

19 QUESTION: We don't need to talk about ships. We  
20 can talk about logs or anything else. Or canoes full of fur.

21 MR. WALSTON: But the area we're talking about,  
22 Justice White, are channels that lead away from the main  
23 stream of the delta down to the pumping plants, and there is  
24 no logs, and no ships, and nothing else that plies those  
25 particular waters. Thank you.



1 JUSTICE BRENNAN: Thank you, gentlemen. The case  
2 is submitted.

3 (Whereupon, at 2:54 o'clock p.m., the case in the  
4 above-entitled matter was submitted.)

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MILLERS FALLS  
EZERASE  
COTTON CONTENT

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1252

No. 79-1502

STATE OF CALIFORNIA, ET AL.

V.

SIERRA CLUB, ET AL., AND CECIL D. ANDRUS, ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will T. Wilson

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