

In the

Supreme Court of the United States

JOY SPORHASE AND DELMER MOSS,

ETC.,

Appellants,

v.

NEBRASKA EX REL. PAUL L. DOUGLAS,

ATTORNEY GENERAL

ORIGINAL

No. 81-613

Washington, D. C.

Tuesday, March 30, 1982

Pages 1 thru 57

ALDERSON

REPORTING

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Sporhase and Moss against Nebraska. Mr. Dudden, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD A. DUDDEN, ESQ.

ON BEHALF OF APPELLANTS

MR. DUDDEN: Thank you, Your Honor.

Mr. Chief Justice and may it please the Court:

We bring before you this morning a constitutional law question involving the commerce clause. Nebraska's law prohibits the transportation of water into another state unless that state has reciprocal legislation. Colorado has no reciprocal legislation.

In 1971 the Nebraska Department of Water Resources issued a well registration number for the well that is in question today. This registration filing noted on its face that the land in Colorado was to be irrigated. The well was then used by the Appellants' predecessors to irrigate the agricultural land in Nebraska.

But later on in 1971, the Appellants purchased this land from their predecessors and renewed their

1 intentions to irrigate the Colorado land. They obtained
2 approval to proceed from the manager of the local water
3 management district. This approval included the
4 conveyance of water by pipeline from the well located in
5 Nebraska to the Appellants' adjacent land in Colorado.

6 The well itself is located only a few feet from
7 the Colorado state line. If you were to look on page
8 112 of the joint appendix, there is a map that would
9 show you the location of the real estate involved and
10 the proximity of the well to the State of Colorado.

11 QUESTION: How deep is the well?

12 MR. DUDDEN: The well is approximately 300
13 feet deep, Your Honor.

14 QUESTION: How expensive to put it in?

15 MR. DUDDEN: Mr. Justice White, the --

16 QUESTION: Is that in the record?

17 MR. DUDDEN: It is in the record, but I can
18 answer that question. He expended approximately \$45,000
19 for the installation of the underground pipe and the
20 installation of the pivot sprinkler irrigation
21 equipment.

22 QUESTION: I suppose if he had put it six feet
23 on the other side of line, he'd have had the same
24 problem, I suppose?

25 MR. DUDDEN: Yes, he would, Your Honor,

1 because when you use a pivot sprinkler irrigation system
2 you pipe approximately 1300 feet to the center of the
3 field.

4 QUESTION: But he would have the same
5 exportation problem.

6 MR. DUDDEN: Into Nebraska?

7 QUESTION: Yes.

8 MR. DUDDEN: Yes, Your Honor. Colorado has an
9 absolute prohibition from transporting water into
10 Nebraska.

11 QUESTION: Do you think Colorado's absolute
12 prohibition is less vulnerable to commerce clause attack
13 than Nebraska's?

14 MR. DUDDEN: No, I do not, Your Honor.

15 QUESTION: So you don't rely on the exception
16 for reciprocity that Nebraska makes?

17 MR. DUDDEN: No, I do not.

18 The land upon which the water --

19 QUESTION: But don't you rely on the fact that
20 Nebraska -- with a permit he could do it?

21 MR. DUDDEN: If the Appellant had a permit in
22 Nebraska --

23 QUESTION: Yes, but the authorities could give
24 him a permit under Nebraska law.

25 MR. DUDDEN: No, they could not, because

1 Colorado does not have a reciprocity statute today --

2 QUESTION: I see.

3 MR. DUDDEN: -- to allow water to be
4 transported from Colorado into Nebraska. That's the
5 crux of the case, Your Honor.

6 QUESTION: Okay, yes.

7 QUESTION: Mr. Dudden, may I ask -- this, of
8 course, is a commerce clause case, isn't it?

9 MR. DUDDEN: Yes, it is.

10 QUESTION: I notice that the state argues at
11 pages 22 and 23 of its brief that Congress has enacted
12 any number of statutes -- I think they say 37 of them --
13 which expressly operate to exempt regulation, allocation
14 and distribution of water from the application of the
15 interstate clause, leaving it to the individual states.

16 And I don't see that you've addressed that
17 argument. Have you?

18 MR. DUDDEN: I think we have, Your Honor. I
19 haven't in my oral argument. However, we are relying on
20 the Mining Act, the Desert Land Act, and the Reclamation
21 Act of 1902. It is our position that none of those acts
22 direct attention to water.

23 QUESTION: Well, may I ask, have you any
24 section of your brief which addresses that particular
25 argument? I don't see a reply brief, for example.

1 MR. DUDDEN: No, we do not have that in our
2 brief in chief, Your Honor, and we did not prepare a
3 reply brief, in view of the number of briefs that had
4 been submitted covering the issue.

5 QUESTION: Well, of course, if Congress -- if
6 they were right and Congress has done that, that's the
7 end of this case, isn't it?

8 MR. DUDDEN: It would be. But Congress has
9 not done that, Your Honor.

10 QUESTION: But we're going to have to find out
11 for ourselves, are we?

12 MR. DUDDEN: That is correct.

13 QUESTION: Except that you're going to address
14 it in your oral argument.

15 MR. DUDDEN: Yes, I am.

16 The land upon which the water is to be used
17 from the Nebraska well is immediately adjacent to and
18 contiguous with the Nebraska land, as you will note on
19 the map. Only a small gravel road -- and it's not a
20 highway -- separates these tracts.

21 Based upon the approval by the district, the
22 Appellant invested a large sum of money, approximately
23 \$45,000, to install the underground pipelines and
24 irrigation equipment, and commenced irrigating the
25 140-acre tract located in Colorado.

1 In 1976, the Nebraska Department of Water
2 Resources issued a letter to the Appellants ordering
3 them to cease transporting water from Nebraska into
4 Colorado. Suit was brought by Nebraska against the
5 Appellants in the state court to enjoin them from
6 irrigating the Colorado land from the Nebraska well.

7 At that point in time the Appellants argued
8 that the law, the Nebraska law, was unconstitutional and
9 was in violation of the commerce clause. The Nebraska
10 Supreme Court, however, affirmed the state court's
11 injunction and held the law constitutional, including
12 the mandatory reciprocity requirements which were
13 included in the Nebraska statute.

14 However, in that opinion Nebraska's Chief
15 Justice Krivosha vigorously dissented on the reciprocity
16 issue. This appeal followed.

17 Nebraska held that water is not an article of
18 interstate commerce, and therefore the court concluded
19 that the commerce clause did not apply to the
20 reciprocity requirement. The question before this Court
21 today is whether water is a subject of commerce clause
22 standards.

23 We know if this were any other natural
24 resource the Nebraska statute requiring reciprocity
25 would be unconstitutional under the commerce clause.

1 This Court in the Great Atlantic & Pacific Tea Company
2 case said that a state cannot discriminate or unduly
3 burden interstate commerce and that a mandatory
4 reciprocity clause or requirement is unconstitutional.

5 The question, then, is whether water is
6 different from all other resources for commerce clause
7 purposes. Nebraska argues that water is unique and
8 should be exempted from commerce clause standards, and
9 they argued this for three reasons:

10 First, Nebraska has defined water under its
11 state law as being publicly owned. We acknowledge that
12 in Nebraska water is publicly owned and that Nebraska is
13 the public trustee of that water.

14 QUESTION: When does its character change, if
15 it does change, from public to private?

16 MR. DUDDEN: Your Honor, in Nebraska the
17 constitution declares that water is publicly owned by
18 the state and that the state is the trustee of that
19 water for its -- for persons, cities, municipalities,
20 corporations, and any other entity.

21 QUESTION: That's up to a point. After you've
22 got it in a water glass, what about that?

23 MR. DUDDEN: My understanding or my feeling
24 is, Your Honor, that Nebraska believes that water is
25 publicly owned at all points in time, not when it is

1 converted to use and not when it is converted, for
2 example, to personal property, such as being drawn from
3 a well; that any water in the state, regardless of where
4 it is located, is publicly owned by the state.

5 QUESTION: Well, you think that nobody can
6 transfer a water right in Nebraska and get paid for it?

7 MR. DUDDEN: No, that is not -- we do not have
8 that position, Your Honor.

9 QUESTION: Well, that isn't the Nebraska law,
10 is it?

11 MR. DUDDEN: No.

12 The publicly owned philosophy, Justice White,
13 as I understand it, would be acting as a public trustee
14 for persons who desire to withdraw the water and put it
15 to a beneficial use.

16 QUESTION: Go ahead.

17 MR. DUDDEN: And we acknowledge that public
18 trustee ownership. And as long as a person, any person,
19 desires to withdraw water in Nebraska, they may do so
20 upon applying for permission.

21 The Court in the Hughes versus Oklahoma case,
22 this Court, held that a declaration of public ownership,
23 such as has been done in Nebraska, is a mere fiction and
24 makes no difference for commerce clause purposes. In
25 the Oklahoma case, Oklahoma claimed public ownership of

1 natural minerals much in the same way that Nebraska is
2 now attempting to claim public ownership of water.

3 Both in Nebraska and Oklahoma, that claimed
4 ownership is regulatory in nature and is not proprietary
5 or commercial. Since Nebraska is acting as a market
6 regulator and not as a market participant, it is our
7 position that Nebraska cannot discriminate against
8 interstate commerce.

9 Because Nebraska feels this way, they have
10 presented three arguments. The second argument is that
11 water is different because Congress by federal act has
12 authorized the western states to restrict interstate
13 transportation of water.

14 While Congress may enact such legislation, it
15 is our position that it must do so in clear and
16 unmistakable language. Congress has not acted in clear
17 and unmistakable language with regard to this subject.
18 Nebraska has relied for its basic references in
19 connection with the federal laws on the Mining Act of
20 1866, the Desert Land Act of 1877, and the Reclamation
21 Act of 1902, alleging that these acts constitute
22 authorizations for the states to prohibit or restrict
23 the interstate transportation of water.

24 However, none of these acts contain what this
25 Court has said, an affirmative grant of power to the

1 states to burden interstate commerce. They have -- none
2 of these acts contain that power.

3 In the Mining Act Congress opened up mineral
4 lands for use and development by citizens and confirmed
5 the vested water rights. In the Desert Land Act they
6 opened up desert lands for development by citizens and
7 confirmed vested water rights.

8 QUESTION: Well, didn't the case, the Portland
9 Cement case, in the thirties say that the Desert Land
10 Act severed the waters from the land and gave the
11 control of the waters to the states?

12 MR. DUDDEN: Your Honor, I believe that that
13 case and the case of California versus the United States
14 basically concluded that in operating under those acts
15 they must recognize the state water laws. But they did
16 not say that the states had the power to preclude under
17 interstate commerce. It was directed to a joining of
18 hands on those acts with the then current state laws.

19 And in the Reclamation Act of 1902, Congress
20 provided for the sale of public lands, the proceeds of
21 which were to be used to fund the creation of irrigation
22 projects.

23 Therefore, while we agree that Congress could
24 authorize the states to prohibit water exports, much as
25 they exempted the insurance industry under the McCarran

1 amendment, it is clear that none of the acts cited by
2 Nebraska exempt water from commerce.

3 Finally, Nebraska argues that water is
4 physically unique. However, a western water law
5 specialist, Professor Corker, would disagree with that
6 theory.

7 Professor Corker has written that water, from
8 whatever source, is not economically different from
9 other resources. He points out that a beneficial
10 exchange of goods is a motivating force in trade and
11 commerce and concludes that this free market motivation
12 should be equally potent when one of the commodities is
13 water and --

14 QUESTION: Well, isn't that up to the states,
15 though, to a certain extent, to say whether or not a
16 particular natural resource is subject to ordinary
17 commerce within or without the state? Certainly, if
18 they say it is subject to commerce within the state,
19 they can't say it's not subject to commerce without the
20 state.

21 But as I understand your description of the
22 Nebraska water law, it's that no one acquires a real fee
23 ownership in water. It's simply the right to use it
24 subject to the public trust.

25 MR. DUDDEN: That is correct.

1 QUESTION: So really, Nebraska has taken a
2 position contrary to the one you attribute to Mr.
3 Corker, hasn't it?

4 MR. DUDDEN: Well, I don't -- Nebraska has
5 taken the position that they can preclude the
6 transportation of water across state lines by requiring
7 other states to have reciprocal statutes. We don't
8 argue that Nebraska should not -- that Nebraska does not
9 have the power to control water. What we're arguing is
10 that they do not have the power to control water to the
11 extent that they can restrict commerce.

12 QUESTION: Well, what if your client decided
13 that they wanted to sell topsoil and wanted to take all
14 the topsoil off of the 140 acres, or whatever it is that
15 you're talking about, and simply ship it to someone else
16 in another state, and the State of Nebraska says, no,
17 topsoil simply isn't a marketable commodity, we're not
18 going to allow you to ship topsoil anywhere because it's
19 just too bad for the land?

20 MR. DUDDEN: I think it would depend, Justice
21 Rehnquist, on how Nebraska worded their law with regard
22 to the preclusion to transport it across state lines.
23 In this particular instance, they are requiring the
24 neighboring state to have a reciprocity clause in their
25 law in order to allow that water to be transported. In

1 other words --

2 QUESTION: I thought you didn't rely on that?

3 MR. DUDDEN: In other words, their tests are
4 reasonable use, waste and private welfare for the State
5 of Nebraska. And then they add, and in addition, you
6 may not transport water into another state unless that
7 state reciprocates with Nebraska.

8 We're contending that that is one step too
9 far, and that in-state water users should be afforded
10 the same equal treatment as out-state water users under
11 the commerce clause.

12 QUESTION: I thought you didn't rely on the
13 reciprocity provision.

14 MR. DUDDEN: Well, we are -- I'm not sure,
15 Your Honor, how to interpret the word "rely," what you
16 mean by the word "rely."

17 QUESTION: Well, that that was an important
18 part of your case or, you know, a significant part of
19 your case, that the Nebraska law provided for
20 reciprocity.

21 MR. DUDDEN: Nebraska law requires
22 reciprocity.

23 QUESTION: Yes.

24 MR. DUDDEN: And without relying on that,
25 without that statute being in or of record in Nebraska,

1 the Appellant in this instance would be eligible for a
2 permit to use water in Colorado.

3 QUESTION: Well, do you think your case is
4 stronger than if Nebraska had an absolute prohibition
5 against the interstate transportation of water?

6 MR. DUDDEN: I think that an absolute
7 prohibition of the interstate transportation of water
8 and the Nebraska statute are identical today.

9 QUESTION: So you would be making the same
10 arguments?

11 MR. DUDDEN: Yes, I would.

12 QUESTION: Do you contend that Colorado's
13 prohibition against shipping out of state, water out of
14 state, is also unconstitutional?

15 MR. DUDDEN: Yes, I do, Your Honor.

16 QUESTION: Then I suppose it really doesn't --
17 if you were right on that -- does Colorado follow the
18 same rule of law that Nebraska does on water rights?

19 MR. DUDDEN: No, their basic foundational law
20 is different in terms of ownership.

21 QUESTION: Do they treat it just like
22 Oklahoma?

23 MR. DUDDEN: They do not consider themselves
24 to be public trustees of the water.

25 QUESTION: Is their law substantially the same

1 as Oklahoma's in that earlier case?

2 MR. DUDDEN: Yes.

3 QUESTION: Or Texas, whichever it was.

4 MR. DUDDEN: Similar, similar -- not the Texas
5 law. No, not the Texas law. The Texas law is the old
6 English law, which is absolute ownership. And if you're
7 talking about the Aldus case, Your Honor --

8 QUESTION: Yes.

9 MR. DUDDEN: -- no, Colorado's law is a
10 modified law and is a modified American law. You have
11 --

12 QUESTION: In your complaint, you didn't, or
13 did you, expressly attack the constitutionality of the
14 Colorado statute?

15 MR. DUDDEN: No, we have not attacked the
16 Colorado statute.

17 QUESTION: If you persuaded the Court that
18 that statute is invalid, then I suppose you would have
19 -- then the reciprocity provision of the Colorado
20 statute would have no longer been a bar.

21 MR. DUDDEN: That's correct.

22 QUESTION: But you --

23 QUESTION: But you didn't raise that.

24 QUESTION: It wasn't the Colorado statute that
25 is interfering with your business.

1 MR. DUDDEN: Was it?

2 QUESTION: It isn't.

3 MR. DUDDEN: It is not, no. The Nebraska

4 statute is interfering with the Appellants' rights to

5 water.

6 QUESTION: Now, tell me again. Under Nebraska

7 law, can -- are water rights transferable between

8 private parties?

9 MR. DUDDEN: Yes, they are, Your Honor.

10 QUESTION: For money?

11 MR. DUDDEN: For money.

12 QUESTION: And are they -- are they -- can

13 they be separated from the land?

14 MR. DUDDEN: Yes, I believe they could be.

15 However, in most instances, Your Honor, the transfer of

16 water for money is involved in the price of the land.

17 QUESTION: Exactly, exactly.

18 MR. DUDDEN: The farmer is buying the right to

19 irrigate.

20 QUESTION: But I suppose -- but water rights

21 are adjudicated, aren't they?

22 MR. DUDDEN: Yes, they are. And Your Honor

23 --

24 QUESTION: And so, if you're going to buy a

25 piece of land, you get either a title opinion or title

1 insurance with respect to the water rights too, I
2 suppose.

3 MR. DUDDEN: Generally not. Generally, it's a
4 very simple regulatory procedure. A person owning a
5 piece of land with a water registration simply makes a
6 written request to the Nebraska Department of Water
7 Resources and instructs them to transfer it to the next
8 person.

9 QUESTION: And there's no problem in doing
10 that?

11 MR. DUDDEN: No, none at all, Your Honor.

12 QUESTION: What if I in Nebraska -- what if
13 your client wanted to -- wanted to sell his water right
14 to an adjoining landowner?

15 MR. DUDDEN: Today, my client today? If it
16 were in Colorado --

17 QUESTION: No, not in Colorado; in Nebraska.

18 MR. DUDDEN: In Nebraska?

19 QUESTION: In Nebraska. You want to separate
20 the land from the water and sell the water right. Can
21 you do that in Nebraska?

22 MR. DUDDEN: He could do that, Your Honor, but
23 the water registration specifically provides for the
24 water to be used on agricultural land. They call it
25 overlying agricultural land.

1 QUESTION: All right. But you can transfer it
2 to another piece of agricultural land?

3 MR. DUDDEN: Yes, he could.

4 QUESTION: And in that sense -- and he could
5 be paid for it?

6 MR. DUDDEN: Yes, in Nebraska.

7 QUESTION: In Nebraska. Now, in that sense
8 it's an article of commerce.

9 MR. DUDDEN: Absolutely, absolutely.

10 QUESTION: But he cannot -- he could not under
11 this law, I take it, sell that water right to somebody
12 in Colorado?

13 MR. DUDDEN: That is correct, Your Honor.

14 QUESTION: Suppose it's very good water that
15 your client has on his land. Could he bottle it and
16 sell it over in Omaha and Lincoln?

17 MR. DUDDEN: Nebraska has -- the Nebraska
18 Supreme Court has approved the commercial sale of water
19 for drinking purposes the Metropolitan Water District
20 case.

21 QUESTION: Well, that gives some hint that
22 it's an article of commerce, doesn't it?

23 MR. DUDDEN: I felt that it did, Your Honor,
24 yes. That's our position.

25 QUESTION: Is there a limitation on the areas

1 within Nebraska to which you can transfer agricultural
2 water? Is there a limitation to the particular aquifer
3 or valley?

4 MR. DUDDEN: The statute itself does not
5 provide for a limitation. There is a lot of activity
6 with regard to inter-transportation between basins at
7 the present time, Your Honor.

8 QUESTION: Well, have the courts or the
9 administrative agencies taken any position?

10 MR. DUDDEN: They are taking positions. They
11 are just starting to take positions.

12 QUESTION: I thought Nebraska law forbade on
13 its face -- where did I read that? -- the inter-basin
14 transfer of water except where a municipality is
15 involved?

16 MR. DUDDEN: That is correct, that is
17 correct.

18 QUESTION: So it's just a flat ban on
19 transferring water from one watershed to another?

20 MR. DUDDEN: From one watershed to another,
21 yes. But that --

22 QUESTION: So you can't take it out of the one
23 basin?

24 MR. DUDDEN: Yes, that's correct.

25 QUESTION: Even -- nobody can permit that, I

1 take it?

2 MR. DUDDEN: Not at the present time, no.

3 QUESTION: Counsel, the State of Nebraska has
4 also argued that we should look at the interstate
5 compacts that have been approved by Congress --

6 MR. DUDDEN: Yes.

7 QUESTION: -- as an indicator that Congress
8 believes that states are free to allocate and direct the
9 transfer of water within their boundaries.

10 MR. DUDDEN: Yes, they do, Justice O'Connor.
11 Interstate compacts, however, are for purposes of states
12 agreeing to use water from one state and move it into
13 another. We have just such an impact -- just such a
14 compact, called the Platte River Compact, in this area,
15 where the State of Nebraska and the State of Colorado
16 joined together and agreed to allow water to be
17 withdrawn from the Platte River in Colorado and
18 transported by canal into Nebraska. This was approved
19 by Congress.

20 It's our position that these compacts do not
21 in any case, in any specific instance, represent a
22 specific, clear language by the Congress to remove water
23 from interstate commerce. They simply are agreements or
24 contracts between the states to help the states
25 transport water back and forth among themselves,

1 actually contrary to our position, because here Nebraska
2 is attempting to keep water from being transported from
3 Colorado into Nebraska, when the compacts generally are
4 to allow water to go from one state to another by state
5 agreement.

6 It is our position that the purpose of the
7 commerce clause is to encourage a national market for
8 all resources and to encourage maximum economic
9 efficiency in the use of these resources. The mandatory
10 reciprocity clause in the Nebraska law is hostile to
11 this area and idea.

12 Reciprocity is not necessary to remove other
13 states' embargoes, because the commerce clause by itself
14 creates the necessary reciprocity. Furthermore, our
15 Chief Justice has said, in the opinion of the Sporhase
16 case that reciprocity is unnecessary to carry out
17 Nebraska's conservation goals.

18 The reciprocity of the Nebraska statute has no
19 connection to the need or availability of water, and it
20 is clear that the remaining part of Nebraska's law would
21 be adequate without the reciprocity provisions, as it
22 already provides for reasonable uses, conservation and
23 concern for public welfare.

24 QUESTION: Now, your clients' well is in a
25 critical ground water basin?

1 MR. DUDDEN: Yes, it is.

2 QUESTION: But nevertheless, you were given
3 permission to dig the well and withdraw water?

4 MR. DUDDEN: That is correct, Your Honor. I
5 would like to point out that the well was not in a
6 critical township or critical area at the time that it
7 was approved and drilled.

8 QUESTION: I see.

9 MR. DUDDEN: And that the withdrawal from that
10 well has always been used in all calculations by the
11 district and by the state in connection with withdrawals
12 of water in that area. To allow our client to continue
13 to use this well for the purpose which he is doing today
14 would make no difference on the use or public welfare of
15 the State of Nebraska.

16 It's our position that we don't need to have
17 discrimination against interstate commerce or interstate
18 uses of water and there is no justification for it.
19 What our Appellant asks of this Court is that the
20 commerce clause is exactly what the commerce clause
21 provides, and that would be that in-state water users
22 and out of state water users be afforded equal
23 treatment.

24 QUESTION: Do you think -- do you think that
25 if, say, someone decided that it'd be a good idea to buy

1 all the water they could in Colorado from private owners
2 and use it to transport coal in a slurry pipeline from
3 there down to New Orleans, and that everybody agreed
4 that if the project were carried out it would dry up all
5 of the eastern slope, do you think Colorado would have
6 any -- I take it you would say that it could not keep
7 that water from being sold out of state?

8 MR. DUDDEN: Your Honor, there are -- I don't
9 think that's a problem, and the reason I don't is --

10 QUESTION: Well, I didn't -- it may not be a
11 problem. But what if it was?

12 MR. DUDDEN: That would be a serious problem
13 if people were able to --

14 QUESTION: Well, what about the state power?

15 MR. DUDDEN: I don't believe the state has the
16 power to do that.

17 QUESTION: So it would have to leave it to
18 Congress?

19 MR. DUDDEN: Yes.

20 QUESTION: Even in an emergency, the state
21 would not have the power?

22 MR. DUDDEN: I find it difficult to conceive
23 of an emergency, Chief Justice Burger, that would
24 warrant that use of --

25 QUESTION: Well, Mr. Dudden, what about as a

1 conservation measure, the state -- notwithstanding the
2 water may be subject to interstate commerce?

3 MR. DUDDEN: As a conservation matter?

4 QUESTION: Yes. Does the state have that
5 authority even as to --

6 MR. DUDDEN: Yes. The states today have the
7 --

8 QUESTION: Well, in the instance that my
9 brother White put to you, would that not be an
10 appropriate and constitutional conservation measure?

11 MR. DUDDEN: I think each situation, of
12 course, would have to be very carefully reviewed on its
13 own independent facts.

14 QUESTION: Well, you mean you could conserve,
15 conservation in the sense you conserve it for use inside
16 the state, is that it?

17 MR. DUDDEN: Well, I think that each state has
18 --

19 QUESTION: I thought you were saying that you
20 couldn't possibly keep water at home like that?

21 MR. DUDDEN: Well, I think that each state has
22 current law that allows them to review each individual
23 application and determine whether or not those uses
24 proposed meet the current statutes. We don't need a
25 prohibition of transporting water from one state to

1 another to protect the states today and to protect their
2 water and the citizens' water.

3 QUESTION: Do you think Congress could by a
4 statute preempt Nebraska's law?

5 MR. DUDDEN: I think Congress by statute could
6 specifically say in clear language that each state has
7 the right to --

8 QUESTION: No, I want to run it -- I'm asking
9 you to run it the other way, that Congress could remove
10 any barriers that state law might erect to the
11 transportation of water in interstate commerce.

12 MR. DUDDEN: No, I do not.

13 QUESTION: You do not what? You don't
14 Congress has that power?

15 MR. DUDDEN: I do not think Congress has that
16 power. But I believe Congress has the power to allow
17 the states to control water themselves and take water
18 out of interstate commerce.

19 QUESTION: If you think water is an article of
20 interstate commerce, which it is in a lot of places, you
21 mean Congress couldn't insist -- remove state barriers
22 to interstate trade in water?

23 MR. DUDDEN: As long as their statutes do not
24 interfere with the interstate clause of the United
25 States Constitution, they might be able to do that.

1 QUESTION: You mean an act of Congress would
2 interfere with the commerce clause?

3 MR. DUDDEN: It could not. But they could
4 give the power to the states to remove water from
5 interstate commerce.

6 QUESTION: The commerce clause is basically
7 just a grant of power to Congress.

8 MR. DUDDEN: That's correct.

9 QUESTION: I'm at a loss to see how an act of
10 Congress pursuant to the commerce clause could interfere
11 with the commerce clause.

12 QUESTION: Well, go ahead.

13 MR. DUDDEN: Your Honors, that concludes my
14 argument. Thank you very much.

15 CHIEF JUSTICE BURGER: Very well.

16 Mr. Anderson?

17 ORAL ARGUMENT OF GEORGE RODERIC ANDERSON, ESQ.

18 ON BEHALF OF APPELLEE

19 MR. ANDERSON: Thank you, Your Honor.

20 Mr. Chief Justice, may it please the Court:

21 Before we go too far in the argument, I think
22 counsel both agree on what issue we're discussing today,
23 whether the commerce clause applies to natural -- to
24 water as a natural resource. I think before we get too
25 far into that, that I would like to, in light of

1 Appellants' remarks, address specifically some areas of
2 Nebraska law that have been discussed in your
3 questioning of Appellant here today.

4 I would like to clear some things up. In
5 answer to some questions directed by Justice White,
6 Appellant was saying that -- Appellants' counsel was
7 saying that water rights may be transferred and severed
8 from the land in the state of Nebraska. Now, as we read
9 the Sporhase decision in the Nebraska Supreme Court,
10 which is -- which is printed in the appendix, and I'm
11 reading from page 119 of that appendix -- our court
12 spoke upon its feelings on that, and it said:

13 "Neither the courts nor the legislature of
14 Nebraska have considered Nebraska ground water as an
15 article of commerce. Free transfer and exchange of
16 ground water in a market setting have never been
17 permitted in this state, since the water itself is
18 publicly owned.

19 "The public, through legislative action, may
20 grant to private persons the right to the use of
21 public-owned waters for private purposes" -- irrigation
22 or drinking; that's my parents -- "but as the Olson
23 opinion demonstrates with its emphasis on sharing in
24 times of shortage, the public may limit or deny the
25 right of private parties to freely use the water when it

1 determines that the welfare of the state and its
2 citizens is at stake.

3 "Even where it appears that water itself is
4 being marketed, as in municipal water supply
5 arrangements, it is the value of the cost of
6 distributing the water that is the basis of rate
7 structure and not the value of the water itself."

8 Appellant recognizes in its brief at page 13
9 that water used for irrigation, agricultural irrigation,
10 must be applied to the overlying land. That's the
11 overlying land of the ground water from which it is
12 pumped. That means under Nebraska law, as it is
13 understood by the Attorney General of that state and by
14 those who apply those statutes in Nebraska, that water
15 may not be transferred. It may not be severed from the
16 land. It is not and cannot be sold.

17 QUESTION: Now, I was under the impression
18 that your friend, in response to a question, said that a
19 farmer out in rural areas of Nebraska who had especially
20 good water could bottle it and send it into Omaha and
21 sell it. Do you agree with that? I thought he said
22 that the Supreme Court had --

23 MR. ANDERSON: There is no doubt -- that
24 specific question has never arisen, Your Honor, and
25 there is no doubt that water is -- can be used for

1 drinking, and that there is no doubt that water can be
2 used for consumption in agriculture, in any sort of
3 function.

4 However, water itself cannot be severed from
5 the land. It is not -- a water right is not a separate
6 title.

7 QUESTION: Well, after you've got it in quart
8 or gallon bottles in a supermarket in Omaha, is it an
9 article of commerce, or is just the bottle an article in
10 commerce?

11 MR. ANDERSON: Your Honor, if someone is
12 selling water in Nebraska, which I do not know about,
13 they -- it would be an article of commerce at that
14 point, just, Your Honor, as water can be an article of
15 commerce in Texas, I suppose, once it's possessed. But
16 water, agricultural water, irrigation water, is not
17 subject to private ownership.

18 QUESTION: Now, it's your position, counsel,
19 that the owner of farmland could not sell water rights
20 to be used on an adjacent parcel of farmland?

21 MR. ANDERSON: That's correct, Your Honor,
22 under Nebraska law.

23 QUESTION: Even in the same basin?

24 MR. ANDERSON: Yes, Your Honor. Yes, Your
25 Honor.

1 QUESTION: Are you speaking not only of ground
2 water, but of irrigation water generally?
3 MR. ANDERSON: Irrigation water generally --
4 now, irrigation water, there is -- storage water is --
5 you're paying for the transfer of the water, that's
6 right.
7 QUESTION: Well, I'm asking --
8 MR. ANDERSON: I'm speaking of --
9 QUESTION: You do irrigate some farmland in
10 the North Platte Valley, don't you?
11 MR. ANDERSON: That's correct.
12 QUESTION: And the source of the water is the
13 river.
14 MR. ANDERSON: That's correct.
15 QUESTION: And it's stored in a reservoir.
16 MR. ANDERSON: That's correct.
17 QUESTION: And taken out?
18 MR. ANDERSON: That's correct.
19 QUESTION: And you have water rights and
20 farmers have individual water rights.
21 MR. ANDERSON: Farmers have individual water
22 rights for the natural flow of that water, yes, Your
23 Honor.
24 QUESTION: Well, they're entitled to use it on
25 their land.

1 MR. ANDERSON: That's correct, and then cast
2 it off.

3 QUESTION: Can that water be sold off the
4 land? Can it be transferred?

5 MR. ANDERSON: No, Your Honor.

6 QUESTION: Those waters, what do they call
7 them? Rights, shares, or what?

8 MR. ANDERSON: A right of appropriation, Your
9 Honor. And that right of appropriation cannot be
10 transferred from that land. If you do not use that
11 appropriation on that land for three consecutive years,
12 that appropriation is subject to cancellation. It
13 ceases. It cannot be used to transfer to some other
14 land. It cannot be used to transfer to your
15 brother-in-law or to sell to someone else for a profit,
16 for any money.

17 QUESTION: Well, you certainly get some money
18 for it when you sell your land.

19 MR. ANDERSON: Your Honor, it is part of the
20 land. It carries no value separate from the land. The
21 land will -- the value of the land will vary depending
22 upon such things as the --

23 QUESTION: The value of the land will vary on
24 whether it's got some water rights attached to it.

25 MR. ANDERSON: Just as it will vary, Your

1 Honor -- that's correct. Well --

2 QUESTION: Not all land does.

3 MR. ANDERSON: No. But Your Honor, it'll vary
4 depending on whether you have an aquifer below it and
5 whether you have your -- whether it can grow the crop
6 that you want, whether it's adjacent to a city or
7 metropolitan area, what the type of soil is, whether
8 it's rolling or non-rolling.

9 None of those can be severed from the land,
10 just as water cannot.

11 QUESTION: When you say that ground water has
12 to be used on the overlying land, well, you're certainly
13 talking about a bigger piece of land than the land that
14 surrounds the pipe within six feet. I suppose you're
15 talking about the owner can use the water on all the
16 land he owns.

17 MR. ANDERSON: Well, that's not necessarily
18 so, Your Honor.

19 QUESTION: Well, adjacent to the --

20 MR. ANDERSON: Well, that's true. I don't
21 know of any particular case which has defined --

22 QUESTION: Well, let's take this case. Let's
23 take this case. There's no suggestion that this
24 particular gentleman who wants to export this water
25 could use the water, his ground water, on all the land

1 he owns in Nebraska, in this particular piece?

2 MR. ANDERSON: He owns --

3 QUESTION: How many acres does he own in
4 Nebraska?

5 MR. ANDERSON: I can't tell you exactly. He
6 owns some contiguous land, Your Honor, and I don't
7 believe that there is any contest, there has been no
8 contest, of his --

9 QUESTION: But some of the land that he owns
10 in Colorado -- the land he owns in Colorado is just as
11 close to the well as the land he owns in Nebraska.

12 MR. ANDERSON: Oh, closer than some, some land
13 is closer, that's correct. But Your Honor, we must
14 recognize that water is --

15 QUESTION: So all you're saying -- but
16 certainly some of the land in Colorado, anyway, would be
17 called overlying.

18 MR. ANDERSON: I don't agree with that, Your
19 Honor.

20 QUESTION: Well, I wouldn't think you would.

21 MR. ANDERSON: You can't say it's overlying
22 when you have a state boundary between them. You can't
23 -- this is a recognized boundary between tracts of
24 land. It is a legally recognized boundary, and water,
25 Your Honor --

1 QUESTION: You say, here's a piece of land
2 that's within 100 feet of the well. The only thing is
3 it's in Colorado. And you say that isn't overlying,
4 although there's a part of that land in Nebraska that is
5 2,000 feet from the well and you would call it
6 overlying?

7 MR. ANDERSON: Well, I didn't say that 2,000
8 feet from the well would necessarily be overlying, Your
9 Honor. I would say that water is treated as being
10 allocated to states, and states are the unit by which
11 water is apportioned.

12 This Court has apportioned water to states in
13 their equitable apportionment decrees and judgments.
14 The various states and Congress have negotiated and
15 approved interstate compacts which have apportioned and
16 allocated water between the states. Both of these
17 approaches have conceived of water as being treated, as
18 being subject to the complete control and management and
19 regulation by the states of this water.

20 QUESTION: Counsel, what if Nebraska just
21 repealed its reciprocity provision and issued a permit
22 to this gentleman to transfer the water to Colorado.
23 Would that violate any interstate compact?

24 MR. ANDERSON: That would not, Your Honor.
25 The question really arises because the question --

1 QUESTION: Well then, of what relevance is the
2 interstate compact that you're talking about?

3 MR. ANDERSON: The interstate compact is of
4 two relevances, Your Honor. One is that it shows that
5 the state is treated as the unit which manages the
6 water, number one, and that a state boundary has a
7 meaning in water law, as in law over water as a natural
8 resource.

9 Number two, it shows Congress' deference, or
10 exemption, if you will, to the states to the management
11 of water resources. Water is different than other
12 natural resources.

13 QUESTION: Mr. Anderson, may I go back to the
14 law of Nebraska with respect to the problem? Confining
15 ourselves to the law within the state of Nebraska to
16 adjacent farms, and there's a well on one and not a well
17 on the other, can the one on the -- how does the second
18 farm get water? What kind of legal arrangement may it
19 make to get water to its land from the neighboring farm
20 which has a well?

21 MR. ANDERSON: In Nebraska, you mean?

22 QUESTION: Yes. Just Nebraska, just
23 Nebraska. I just want to get the adjacent parcel
24 problem sort of outlined.

25 MR. ANDERSON: We have -- if I understand your

1 question, we have two farms. One --

2 QUESTION: One has a well and one does not.

3 The one without a well wants to get water from his
4 neighbor. Can he do it legally and get a legally
5 binding agreement that will entitle him to get such
6 water?

7 MR. ANDERSON: No, Your Honor, he cannot. He
8 must drill his own well or he must appropriate water
9 from a water source, a stream, if he has access to
10 that. Or if he is on an irrigation canal --

11 QUESTION: He cannot get any legal protection
12 for his rights to obtain water from a neighbor who
13 happens to have a well?

14 MR. ANDERSON: Your Honor, he doesn't --

15 QUESTION: There's no provision in Nebraska
16 law for that problem?

17 MR. ANDERSON: Your Honor, we have such a
18 thing as irrigation districts, and people who don't have
19 water underlying their land -- we have two types of
20 water, Your Honor, underground water, what we call
21 ground water --

22 QUESTION: That's what I'm talking about. I
23 want to get away from the Platte River problem.

24 MR. ANDERSON: Surface water.

25 He would then, if he has no source of

1 underground water, if there's no sufficient aquifer
2 there -- and there is land like that -- we have a
3 predominant situation --

4 QUESTION: His neighbor does have, is my
5 hypothesis. Is there any way in which he can get a
6 legally binding commitment from his neighbor to get the
7 water he needs?

8 MR. ANDERSON: No.

9 QUESTION: The answer is no.

10 MR. ANDERSON: No, Your Honor, not ground
11 water. His remedy is surface water. And that's -- this
12 is Nebraska water law, that a person -- that the
13 overlying land owner --

14 QUESTION: Well, if I could just add one,
15 there is no surface water in that area.

16 MR. ANDERSON: Pardon me?

17 QUESTION: If I add to Mr. Justice Stevens'
18 question --

19 MR. ANDERSON: Okay.

20 QUESTION: -- there is no surface water in the
21 area.

22 MR. ANDERSON: Then, Your Honor, there's such
23 a thing in Nebraska --

24 QUESTION: It's dry land. It's dry land,
25 then?

1 MR. ANDERSON: It's dry land farming, just as
2 the Appellant is doing with the land in this case.

3 QUESTION: Does he get the same answer if the
4 land on which the well was located purchased the
5 adjacent property from his neighbor?

6 QUESTION: Or leased it?

7 MR. ANDERSON: If he owned -- if one man owned
8 two tracts of land, then there would be some leeway to
9 pumping the water. I suppose it would depend how close
10 it is, Your Honor.

11 QUESTION: Suppose they're adjacent.

12 MR. ANDERSON: Well, they're adjacent, but I
13 don't know what sort of distances we're talking about.
14 If we're talking about two miles, if we've got one farm
15 in one section and one farm in another, probably not,
16 Your Honor, to bridge sections. You know, you're
17 familiar with section lines, or with townships --

18 QUESTION: So you would give the same status
19 to section lines that you do to state boundaries?

20 MR. ANDERSON: Not necessarily, Your Honor.
21 State boundaries have a much more important legal
22 importance, because states are the units by which water
23 is managed.

24 QUESTION: Well, I thought maybe you were
25 going to say that the rule would be that if the

1 adjoining land was outside the reaches of the aquifer
2 you couldn't use it on that land.

3 MR. ANDERSON: Aquifers, Your Honor, are not
4 of fixed boundaries.

5 QUESTION: Well, I know. But usually if the
6 land has got potential value somebody has tried to drill
7 a well on it, and they've found out that it's too deep
8 or they just don't find water. And so they would like
9 to transfer water from somewhere else.

10 MR. ANDERSON: Transfer of water is not
11 permitted, of ground water, Your Honor, in Nebraska.
12 And we have a lot of dry land farming in Nebraska. I
13 guess that's what --

14 QUESTION: Here's a piece of dry land and he
15 leases it to the fellow who has drilled a well and found
16 water. Can the fellow who has the well use the water on
17 the adjoining piece of land?

18 MR. ANDERSON: Your Honor, water is attached
19 to the land. If the land is merged some way, then -- if
20 someone wants to acquire water, they can acquire the
21 land and they acquire the water. But the water cannot
22 then be transferred to some far-away land. It cannot be
23 used for non-agricultural purposes. In this case --

24 QUESTION: It isn't far away. It's right next
25 door. It's right across --

1 MR. ANDERSON: Well, it's entirely possible
2 that under a set of circumstances, Your Honor, that
3 would be the case.

4 QUESTION: Let me ask another irrelevant
5 question, probably. The Sporhases are residents of
6 Colorado, are they not?

7 MR. ANDERSON: That's correct, Your Honor.
8 And to be fair, contained in the Colorado amicus brief
9 it was mentioned that the Nebraska reciprocity statute
10 is not the only problem to the Appellants. Appellants
11 had applied to the Colorado authorities for a permit to
12 have a well on the Colorado tract and were denied that,
13 because the water is over-appropriated in Colorado under
14 the Colorado system.

15 QUESTION: My question now, however, is, if
16 they lived on the Nebraska side you'd still be taking
17 the same position? Their Colorado residence is
18 immaterial so far as you're concerned?

19 MR. ANDERSON: Oh, yes, very definitely, Your
20 Honor. They own -- yes, it doesn't matter who. The
21 statute applies equally to all, Your Honor, as appears
22 from the face of it.

23 Appellants never applied for a permit, Your
24 Honor. They were never denied and there was never any
25 decision upon whether the permit should be granted.

1 They were pumping water without attempting to comply
2 with the Nebraska statute.

3 QUESTION: Well, but I thought the law was,
4 and the Supreme Court said, they couldn't get a permit
5 anyway, because there was no reciprocity.

6 MR. ANDERSON: The law is now, after they were
7 enjoined, that they can't get a permit. But they never
8 applied for a permit, Your Honor. They never took the
9 first step.

10 QUESTION: Let me go back --

11 QUESTION: Go ahead.

12 QUESTION: Let me go back to my earlier
13 question. Now I am frankly confused. Your friend said
14 that ground water could be taken out of the ground, put
15 in bottles, shipped over, carried over by truck or
16 otherwise to Omaha, and sold in the supermarkets.

17 I wasn't sure what your answer was, but I wish
18 you would clear it up. Can they do that with ground
19 water now?

20 MR. ANDERSON: No. No, Your Honor.

21 QUESTION: So there's a sharp disagreement
22 between the two of you on that particular hypothetical.

23 QUESTION: I think in light of the Nebraska
24 Supreme Court's decision in this case, in which they say
25 that the Nebraskam constitutional provision which says

1 that the use of water of every natural stream within the
2 state of Nebraska is dedicated to the people of the
3 state for beneficial purposes, subject to the provisions
4 of this section, and that that section applies to ground
5 water, people could not exercise ownership of it and
6 deprive others.

7 They have to use it and let it flow on, and
8 they can't --

9 QUESTION: They're not depriving others.

10 MR. ANDERSON: -- sell that water.

11 QUESTION: They aren't depriving others.

12 They're trying to share it with them, when they send it
13 over to Omaha in a bottle. But you say they can't do
14 that?

15 MR. ANDERSON: I don't believe that under the
16 decision in the Sporhase case, which is the definitive
17 discussion of ground water, the rights to ground water,
18 that they could do that, Your Honor, no.

19 QUESTION: Mr. Attorney General, what is
20 spring water?

21 MR. ANDERSON: Spring water?

22 QUESTION: Is that ground water?

23 MR. ANDERSON: It's -- spring water, I
24 believe, Your Honor, would be ground water --

25 QUESTION: I was thinking about it, because

1 that's the water that's usually bottled.

2 MR. ANDERSON: -- that has naturally reached
3 surface and become surface water.

4 QUESTION: Yes, that's usually the water
5 that's bottled, is spring water, isn't it?

6 If it was spring water --

7 MR. ANDERSON: I suppose so, yes.

8 QUESTION: -- from a spring, it couldn't be
9 transferred?

10 MR. ANDERSON: Not -- well, it's my
11 understanding that under this case, Your Honor, under
12 the Sporhase decision, that ground water would not be
13 able to be sold.

14 Now, we have a different -- I think we have to
15 realize that there is a different treatment for
16 municipal or drinking water than there is for
17 agricultural and irrigation water. The MUD case, which
18 was referred to by the Appellant, is a case which does
19 deal with transportation of water, and that is an
20 exception to the general rule. The general rule applies
21 to agricultural irrigation water. However, the rule on
22 municipal drinking water is that it may be taken from
23 the sources of water to the municipalities, as --

24 QUESTION: That goes for ground water, too,
25 doesn't it?

1 MR. ANDERSON: That's correct, Your Honor.

2 QUESTION: So that my landowner may transfer
3 water to the municipality?

4 MR. ANDERSON: Well, Your Honor, the
5 municipality is the landowner in that case, and they
6 said that that -- the municipality is not charging for
7 the ground water, it is charging for the cost of
8 distributing that water, not the value of the water
9 itself.

10 QUESTION: Mr. Anderson, if Colorado had a
11 reciprocity statute that would satisfy the Colorado
12 requirement for reciprocity, I take it that the Nebraska
13 statutes would permit the issuance of a permit to take
14 the water out of the state?

15 MR. ANDERSON: Not necessarily so, Your
16 Honor.

17 QUESTION: Now, here's what the Supreme Court
18 says: "The statute allows such transfers" -- namely,
19 transfers across state lines -- "conditioned on the
20 receipt of a permit from the director of the Department
21 of Water Resources, who may grant the permit if the
22 transfer is reasonable, is not contrary to conservation,
23 and the use of ground water." That's what the Supreme
24 Court says. Now, I'm reading from A-7 in the
25 jurisdictional statement.

1 QUESTION: Page 119.

2 MR. ANDERSON: Thank you.

3 One of the conditions that has to be met is,
4 not contrary to the use of ground water, and the use of
5 ground water in the state is use with --

6 QUESTION: Well, I agree they might forbid
7 it. But it would not -- they could also permit it --

8 MR. ANDERSON: Oh, yes, Your Honor.

9 QUESTION: -- in which event it seems to me
10 that there is a provision -- there is a situation in
11 which water may be transferred outside the state.

12 MR. ANDERSON: I think that this case -- that
13 this situation would only apply to municipal water
14 purposes, Your Honor. This, in reading the legislative
15 history, this enactment was enacted for municipal water
16 purposes, so that the City of Superior, Nebraska, could
17 acquire a municipal water supply from Kansas.

18 The distinction --

19 QUESTION: Mr. Anderson, may I ask a question,
20 please. Even absent this reciprocity provision, could
21 not Nebraska prevent the taking of the water in any area
22 where it was determined that it was a critical water
23 area and it should not be used? Couldn't Nebraska
24 achieve the same result absent a reciprocity provision
25 like this?

1 MR. ANDERSON: Well, it could. It could, Your
2 Honor, if it applied the same standard to both the
3 in-state and out of state uses. And we do in this case
4 -- we wouldn't -- if the commerce clause applies, then
5 we would have to be uniform for both in-state and out of
6 state uses. And the real question is --

7 QUESTION: And it might reach the same end
8 result in an area where the water supply is low or
9 critical, right?

10 MR. ANDERSON: Well, it might, Your Honor.
11 The problem is --

12 QUESTION: Then how do you explain the
13 statement in your brief where you talk about what might
14 happen if we were to invalidate the reciprocity
15 provision, and where you say the other alternative is
16 the application of a silent de facto reciprocity
17 consideration? What did you mean by that?

18 MR. ANDERSON: Well, by that I meant, Your
19 Honor, that the state is looking at trying to balance
20 their exports and their imports, and in order to ensure
21 that there is water on the land that is in the state,
22 and that one of the considerations --

23 QUESTION: Well, were you saying that even if
24 we were to invalidate it you'd consider -- you would do
25 the same thing you're now doing?

1 MR. ANDERSON: No, no, Your Honor.

2 QUESTION: I didn't understand the statement.

3 MR. ANDERSON: No, that is not the case. But
4 the state is attempting to maintain a static water table
5 in this particular area, or in all areas of the state,
6 particularly this control area and this critical
7 township where the well is located and where there is a
8 great deal of control.

9 The problem -- the reason that it is so
10 important to look at the -- whether the commerce clause
11 applies in this case is because if we reach the question
12 of whether the reciprocity statute is -- the reciprocity
13 clause should be considered, evaluated, we then are
14 concluding that the commerce clause applies to water.
15 And we don't think that the commerce clause does apply
16 to water, for the three reasons, for one of the three
17 reasons that either Congress has deferred to the states
18 by its specific enactment of statutes again and again
19 --

20 QUESTION: Any particular one? You've got 37
21 of them cited here. You mean all of them?

22 MR. ANDERSON: All of those statutes contain
23 some language which defers to the states, Your Honor.

24 QUESTION: Well, has Congress said in so many
25 words in any of these statutes that the commerce clause

1 shall not apply to ground water?

2 MR. ANDERSON: It has not --

3 QUESTION: And that states are free to
4 regulate it? Has it said that in so many words?

5 MR. ANDERSON: Well, it certainly has in so
6 many words, yes, Your Honor. It says in --

7 QUESTION: Which statute?

8 MR. ANDERSON: Section 8 of the 1902
9 Reclamation Act, Your Honor: "Nothing in this Act shall
10 be" --

11 QUESTION: Where are you reading from, now?

12 MR. ANDERSON: I don't have the --

13 QUESTION: Well, I guess it's at page 23 of
14 your brief, isn't it?

15 MR. ANDERSON: That's --

16 QUESTION: Where you cite Section 8?

17 MR. ANDERSON: Yes, Your Honor, 23 of my brief
18 says: "Nothing in this Act shall be construed as
19 affecting or intending to affect or in any way interfere
20 with the laws of any state or territory relating to the
21 control, appropriation, use or distribution of water
22 used in irrigation or any vested right acquired
23 thereunder," and that the United States shall comply
24 with those laws.

25 And this is repeated over and over again, in

1 the Flood Control Act of 1944 --

2 QUESTION: In pretty much those words?

3 MR. ANDERSON: Pretty much, and they go -- I
4 think, Your Honor, that by these 37 Acts, by the
5 repeated ratification and approval of interstate
6 compacts negotiated by the states, Congress has
7 specifically recognized that the states have the power
8 to manage the water.

9 This Court has recognized that in their
10 decrees of --

11 QUESTION: If you're right about this, what's
12 left of the commerce clause argument?

13 MR. ANDERSON: There's nothing left with
14 respect to the natural resource water, and water is a
15 unique natural resource.

16 QUESTION: Well, I know, but for purposes of
17 this case.

18 MR. ANDERSON: That is determinative of this
19 case, Your Honor.

20 QUESTION: Well, of course, the argument on
21 the other side is that up to a point they left it with
22 the states. But there's nothing specific in these Acts
23 that speak about interstate commerce or against -- or
24 authorizing the restrictions of the movement of water to
25 another state.

1 MR. ANDERSON: There is specifically, Your
2 Honor, in the interstate compacts and in these statutes
3 a restriction upon water. The state manages the water
4 and by their management decisions they restrict the
5 water.

6 In, for instance, this case, Colorado does not
7 permit by its decisions water now to be exported out of
8 the state in this region. The Appellants applied for a
9 permit to use water on their overlying land and it was
10 denied. Anyone applying in the state of Colorado to
11 export water could not export it. Their management of
12 the water of Colorado prevents exportation, and that
13 then gets us into a commerce clause review.

14 And Congress has said that the state statutes
15 are controlling in this area and that therefore a
16 commerce clause review is not necessary.

17 QUESTION: Is it not correct that if your
18 argument based on these, the Reclamation Act and the
19 other statutes, is valid, that the City of Aldus case
20 should be overruled?

21 MR. ANDERSON: I don't think so, Your Honor,
22 because the Aldus case deals with a completely different
23 state management --

24 QUESTION: In other words, you think all these
25 statutes just say that the water is not an article of

1 commerce if the state law is such as Nebraska's? That's
2 what these statutes all add up to?

3 MR. ANDERSON: I think we -- I think we have
4 to recognize, Your Honor, that where -- I think Aldus
5 and the Hudson case and our approach in this case are
6 all consistent. Water is a unique natural resource in a
7 state where it is dedicated to the people and not
8 treated as a commodity. At no point in time is
9 agricultural irrigation water, or water at all, in
10 Nebraska treated as a commodity, as an article of
11 commerce. It is not sold.

12 And under that legal framework, as is true
13 with the eleven states that filed, generally, the eleven
14 states that filed briefs in our support, water is not
15 reachable by the commerce clause, and the reason for
16 that is Congressional deference.

17 And also, I think we can look to the legal
18 theory of the Usery case, where water in the state of
19 Nebraska and elsewhere within the arid western states
20 has become an area of traditional functioning by the
21 states. It's part of the state sovereignty. It is just
22 as important to the people of that state as is fire
23 protection, as is police protection, as is health,
24 sanitation, parks and recreation, which are those areas
25 mentioned in the Usery case, and which were discussed in

1 your case last week of the Long Island Railroad case.

2 The Usery case does apply, and in Nebraska
3 there are day to day decisions being made relating to
4 the economic, the life, of drinking water, all of the
5 social interests of the people of Nebraska, as in
6 Arizona, as in Colorado and Utah and the other western
7 states, that relate directly to those people's everyday
8 lives.

9 QUESTION: Now let me take you back to that
10 quote from California against the United States that has
11 been referred to in the colloquy. I read that, the
12 language of this Court, as being limited to water used
13 in irrigation. Now, is in your view all the water that
14 we're talking about used in irrigation?

15 This isn't -- this would not affect bottling
16 the water, ground water, and selling it in supermarkets
17 in Omaha, as you suggested.

18 MR. ANDERSON: We're not --

19 QUESTION: This is irrigation.

20 MR. ANDERSON: I didn't suggest that, Your
21 Honor. We are dealing with irrigation in the case at
22 bar, and the Supreme Court was ruling, our Nebraska
23 Supreme Court, was ruling on that in the case. I think
24 that as far as irrigation water goes in agriculture, it
25 is not subject to ownership, to sale to market-setting,

1 and it is not subject to the commerce clause.

2 We would urge, Your Honor, that you affirm the
3 Nebraska Supreme Court finding that water is a unique
4 resource, different from the other natural resources of
5 natural gas, et cetera, and would affirm the Nebraska
6 Supreme Court.

7 Thank you.

8 CHIEF JUSTICE BURGER: Thank you.

9 You have two minutes remaining, counsel. Do
10 you have anything further?

11 REBUTTAL ARGUMENT OF RICHARD A. DUDDEN, ESQ.

12 ON BEHALF OF APPELLANTS

13 MR. DUDDEN: Thank you, Your Honor.

14 Mr. Chief Justice and may it please the
15 Court:

16 I think it is important to point out that if
17 this mandatory reciprocity requirement were eliminated
18 that there still would remain on the books and records
19 of the Nebraska statutes adequate law to allow the state
20 of Nebraska to evenhandedly control and regulate water.
21 They would do this by determining reasonable uses and
22 setting forth those reasonable uses, so that people
23 could calculate whether or not they were making
24 reasonable use of the water, by conducting
25 administrative hearings and by issuing well permits

1 specifically restricting the use of water as to the
2 particular purpose requested.

3 They do not need to have a mandatory
4 reciprocal requirement in order to control water in
5 Nebraska.

6 I would like to point out to the Court that
7 there is no case in the state of Nebraska that
8 specifically defines overlying land, and that has been
9 discussed quite a bit this morning.

10 I would also like to mention that it is our
11 opinion that Congress does have the power to regulate
12 concerning water, as has been asked by this Court. But
13 the question that's really before the Court today is:
14 What is the law under the commerce clause when Congress
15 has not clearly and unmistakeably legislated on the
16 question?

17 It is our position that, in view of all of the
18 Acts that have been mentioned in counsel's opposing
19 brief by the State of Nebraska, none of those Acts use
20 clear and unmistakeable language --

21 QUESTION: What you're saying is, if we're to
22 say that Congress has said the states are free and
23 there's no commerce clause, whatever it may be, Congress
24 gives it up, they have to say so in explicit words?

25 MR. DUDDEN: That is correct. And I'm saying

1 further, they have not done so.

2 Thank you very much, Your Honor.

3 CHIEF JUSTICE BURGER: Thank you, gentlemen.

4 The case is submitted.

5 (Whereupon, at 11:04 p.m., the case in the
6 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Joy Spohrase and Delmer Moss, Etc., Appellants, V. Nebraska Ex Rel.
Paul L. Douglas, Attorney General -- No. 81-613

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

BY Reene Hammond

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