ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2147 & 81-2188

TITLE ARIZONA, ET AL.,
v. Petitioners
SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.: AND
MONTANA, ET AL.,
v. Petitioners
NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

PLACE Washington, D. C.

DATE March 23, 1983

PAGES 1 thru 78

ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - x

3 ARIZONA, ET AL., :

4 Petitioners, :

5 v. : No. 81-2147

6 SAN CARLOS APACHE TRIBE OF :

7 ARIZONA, ET AL.; :

8 and :

9 MONTANA, ET AL., :

10 Petitioners, :

11 v. : No. 81-2188

12 NORTHERN CHEYENNE TRIBE OF THE :

13 NORTHERN CHEYENNE INDIAN :

14 RESERVATION, ET AL. :

15 - - - - - - - - - - - - - - - - - - x

16 Washington, D.C.

17 Wednesday, March 23, 1983

18 The above-entitled matter came on for oral

19 argument before the Supreme Court of the United States

20 at 1:04 o'clock p.m.

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 APPEARANCES:

2 JON L. KYL, ESQ., Phoenix, Arizona; on behalf of the

3 Petitioners in No. 81-2147.

4 MICHAEL T. GREELY, ESQ., Attorney General of Montana,

5 Missoula, Montana; on behalf of the Petitioners in

6 No. 81-2188.

7 ROBERT S. PELCYGER, ESQ., Boulder, Colorado; on behalf

8 of the Respondent Montana Indian Tribes.

9 SIMON K. RIFKIND, ESQ., New York, New York; on behalf

10 of Respondent Arizona Indian Tribes.

11 LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor

12 General, Department of Justice, Washington, D.C.;

13 on behalf of Respondent United States

14

15

16

17

18

19

20

21

22

23

24

25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JON L. KYL, ESQ., on behalf of the Petitioners in No. 81-2147	4
MICHAEL T. GREELY, ESQ., on behalf of the Petitioners in No. 81-2188	22
ROBERT S. PELCYGER, ESQ., on behalf of the Respondent Montana Indian Tribes	37
SIMON H. RIFKIND, ESQ., on behalf of the Respondent Arizona Indian Tribes	53
LOUIS F. CLAIBORNE, ESQ., on behalf of the Respondent United States	64
JON L. KYL, ESQ., on behalf of the Petitioners in No. 81-2147 - rebuttal	73

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Arizona against the San Carlos Apache Tribe of
4 Arizona, and Montana against Northern Cheyenne Tribe of
5 the Northern Cheyenne Indian Reservation.

6 Mr. Kyl, you may proceed whenever you are
7 ready.

8 ORAL ARGUMENT OF JON L. KYL, ESQ.,
9 ON BEHALF OF THE PETITIONERS IN
10 NO. 81-2147

11 MR. KYL: Thank you, Mr. Chief Justice, and
12 may it please the Court, during the floor debate on the
13 McCarren Amendment, Senator McCarren stated to Senator
14 Ernest McFarland, "Let me say to the Senator from
15 Arizona that there is no state in the Union more
16 interested in this bill than is the State of Arizona.
17 In fact, all of the western arid and semi-arid states
18 are interested in this bill."

19 Of course, the reason Senator McCarren
20 believed that the State of Arizona was interested in his
21 bill is because as its sponsor he understood that the
22 State of Arizona could utilize his bill for the
23 adjudication of water rights, and yet we are before this
24 Court 30 years later arguing about whether the McCarren
25 Amendment applies to the courts of Arizona as well as

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 the other western states.

2 These consolidated cases come to this Court on

3 writs of certiorari to the Ninth Circuit, five cases

4 from Arizona and seven cases from Montana. In Arizona,

5 state general water adjudications had been filed on the

6 five major river systems in the state. Within a month

7 after service of process on some 12,000 defendants on

8 the Salt River adjudication, five Arizona tribes filed

9 separate actions for removal petitions in federal court,

10 all on the same day, to enjoin any determination of

11 their rights.

12 These were not suits to adjudicate water

13 rights, but rather suits to prevent any adjudication of

14 their rights.

15 Six weeks later, two other tribes and one in

16 the first group filed separate federal suits to

17 determine their rights only. None of the federal tribal

18 actions in Arizona have sought a general adjudication of

19 water rights.

20 QUESTION: Could one seek that in a federal

21 court in Arizona?

22 MR. KYL: One could seek that in a federal

23 court in any state, Mr. Justice Rehnquist. None of the

24 tribes, and the United States has not, none of the

25 tribes have sought such an adjudication in the federal

1 courts in the State of Arizona, and no party disputes
2 that.
3 QUESTION: Well, what would be the basis of
4 federal jurisdiction?
5 MR. KYL: This Court held in the Colorado
6 River case that either under Section 1345 or -- well,
7 Section 1345 in that case, that a suit could be filed in
8 the federal court for adjudication of water rights.
9 QUESTION: For a statewide or streamwide
10 adjudication?
11 MR. KYL: For a streamwide adjudication, yes.
12 And of course the Court in Colorado River held that the
13 considerations of wise judicial administration that
14 would be applied by the Court would determine whether
15 the adjudication could go forward in the federal court
16 or in the state court if there were concurrent
17 proceedings and concurrent jurisdiction.
18 The key difference between that case and this
19 case is that there there were general adjudications
20 filed in federal court. Here, there are none.
21 In the state adjudication proceedings that
22 were in the meantime proceeding in Arizona on just the
23 river systems which are before this Court, over 100,000
24 potential defendants were identified. Over 70,000 have
25 been personally served. Claims have been filed, almost

1 7,000 separate claims, approximately one-third of them
2 by the United States itself, and over $2 million has
3 been appropriated to the Department of Water Resources
4 to assist the courts in Arizona to determine these
5 claims.

6 QUESTION: Do you suggest -- How does that
7 affect which court will decide the cases?

8 MR. KYL: Mr. Chief Justice, those are among
9 the factors, the considerations --

10 QUESTION: The numbers I am speaking of. The
11 numbers. Purely numbers.

12 MR. KYL: Simply to illustrate, Mr. Chief
13 Justice, the significant progress and involvement in the
14 Arizona state court proceedings. If there were federal
15 court general adjudications pending, the Court would
16 under the Colorado River balancing determine which court
17 to send the adjudication to. Here there are no federal
18 court adjudications, but I mention it to illustrate the
19 fact that the Arizona proceedings are viable and are
20 proceeding and involve a tremendous number of claims by
21 people on five different water systems.

22 The tribal actions were appealed to the Ninth
23 Circuit Court of Appeals and were argued in conjunction
24 with the seven cases from Montana. My co-counsel,
25 General Greely, will discuss the procedural history of

1 the Montana cases.

2 A divided three-judge Ninth Circuit Court

3 reversed the Montana and Arizona cases, holding that the

4 enabling Act and constitutional disclaimers of Arizona

5 and Montana constituted a bar from those states

6 adjudicating water rights held in trust for the tribes

7 by the United States unless the states had accepted

8 Public Law 280 jurisdiction.

9 Most, if not all, of the parties here agree

10 that Public Law 280 jurisdiction is irrelevant to these

11 cases.

12 The Ninth Circuit also reversed the Montana

13 case on the ground that the district judges there had

14 improperly considered or applied the considerations of

15 wise judicial administration. There was no such finding

16 in the Arizona cases because of the disposition on the

17 disclaimer issue.

18 The United States agrees that the application

19 of the McCarren Amendment is not barred by the

20 disclaimers of Arizona, Montana, and the other western

21 states. The respondent tribes, however, continued to

22 read the disclaimers as a bar. I will address that

23 issue first for both Montana and Arizona.

24 The second and, we believe, primary issue in

25 this case is whether considerations of wise judicial

1 administration counsel deference to the state court
2 proceedings in Arizona and Montana.
3 I will discuss the application of those
4 considerations in the Arizona litigation, which we
5 submit presents a much stronger case for state court
6 adjudication than did the facts of Colorado River. My
7 co-counsel, General Greely, will address those
8 considerations as to the Montana litigation.
9 The disclaimer provisions do not create
10 different law for those eleven states admitted after
11 1889 than for the states admitted before then. Rather,
12 the disclaimers were a response to U.S. versus
13 McBratney, merely intended to confirm the plenary power
14 of the United States government as to Indian tribes.
15 There was not in 1889 and there is not today any reason
16 to differentiate between the states. Any such
17 distinction would be purely artificial.
18 Congress has made no such distinction in
19 passing laws applicable to all of the states, nor has
20 this Court in interpreting the applicability of laws to
21 -- state laws to Indian reservations, and creation of
22 such a distinction today would not only put into
23 question those Acts of Congress, but also the decisions
24 of this Court. As the United States acknowledges, it is
25 too late in 1983 to create a distinction where none has

1 existed before.

2 This Court has -- That this Court has not read

3 the disclaimer as a bar is illustrated by your decision

4 in Organized Village of Kake versus Egan. There, Mr.

5 Justice Frankfurter, for a unanimous court, stated that

6 even though Indian lands in Arizona remained under the

7 absolute jurisdiction and control of the United States,

8 in other words, subject to the disclaimer, the Court had

9 declared in the Arizona case of Williams versus Lee that

10 the test whether a state law could be applied on an

11 Indian reservation was whether absent governing Acts of

12 Congress, the application of that law would interfere

13 with reservation self-government.

14 Congress has exercised its absolute

15 jurisdiction and control recognized by the disclaimers

16 by enacting the McCarren Amendment. That is the

17 governing Act of Congress here. It prevents all water

18 rights, including those held by the United States in

19 trust for the tribes, to be determined in comprehensive

20 state court general adjudications.

21 In other words, the disclaimer merely

22 acknowledges the right of the United States to pass a

23 law like the McCarren Amendment. Nor does it require,

24 as the tribes argue, that the states somehow have to

25 repeal the disclaimer, because, as this Court held in

1 Kake, the disclaimer is not inconsistent. The right, or
2 the disclaimer, rather, of all right and title was
3 merely a disclaimer of proprietary interest, not
4 governmental interest, and the acknowledgement in the
5 disclaimers of absolute federal jurisdiction and control
6 remains undiminished, not exclusive federal jurisdiction.
7 This Court's clear and meaningful decision in
8 Colorado River would be trivialized if the Court were
9 now to limit the application of the McCarren Amendment
10 to only four western states.
11 The real question in this case, we submit, is
12 the application of the consideration of wise judicial
13 administration to these cases. In Colorado River you
14 deferred to the state court proceedings after
15 considering those factors. A fortiori, you should do so
16 here.
17 In Colorado River, the most important factor
18 you found was the McCarren Amendment itself, and you
19 held that the McCarren Amendment evinced two clear
20 federal policies: Number One, the avoidance of
21 piecemeal adjudication of water rights, and Number Two,
22 the recognition of the availability of, and later in the
23 Moses Cohn case you said the peculiar appropriateness,
24 of comprehensive state systems for adjudication of water
25 rights.

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 You discussed those two first, the avoidance
2 of piecemeal adjudication is a critical factor here.
3 Unlike the facts of the Colorado River case, there are
4 no general adjudications pending in the Arizona federal
5 district court. The Ninth Circuit judge who dissented,
6 Judge Merrill, pointed out that in these cases there
7 would not only be no piecemeal adjudication, there would
8 be no adjudication of water rights at all in the federal
9 district courts.
10 The only adjudication of water rights that can
11 occur in Arizona, the only comprehensive adjudication,
12 is in the state comprehensive adjudication process.
13 The second of those two clear federal policies
14 was the recognition of the availability of state courts,
15 comprehensive state proceedings, and the significant
16 administrative assistance given to the state courts
17 through those comprehensive state statutes.
18 Just one month ago today, in the Moses H. Cohn
19 case, Mr. Justice Brennan for the Court said, "There is
20 an affirmative policy in federal law expressly approving
21 litigation of federal water rights in the state court,
22 the McCarren Amendment," and of course that is precisely
23 what the Colorado River case --
24 QUESTION: Mr. Kyl, I take it that the Ninth
25 Circuit didn't reach this question with respect to

1 Arizona as to whether wise judicial administration would
2 suggest that the federal court go on or abstain, did it?
3 MR. KYL: That is correct, Mr. Justice White.
4 QUESTION: And isn't that -- isn't that sort
5 of a -- well, isn't that a question of state law?
6 MR. KYL: Mr. Justice White --
7 QUESTION: As to whether it is really
8 comprehensive or whether it isn't?
9 MR. KYL: No, Mr. Justice White. This Court
10 in the Colorado --
11 QUESTION: It does go to interpreting state
12 law.
13 MR. KYL: Yes, it does, but there has been, I
14 believe, in this case no question about the
15 comprehensiveness of the Arizona state proceedings, the
16 ability of those statutes to comprehensively and
17 properly --
18 QUESTION: Well, but suppose we agree with you
19 on the enabling Act and on the Constitution. Suppose we
20 agreed with you that the Court of Appeals was quite
21 wrong in disposing of the case on that ground, the
22 Arizona case. Shouldn't we then remand to -- have them
23 consider whether the Colorado River factors point one
24 way or another?
25 MR. KYL: Mr. Justice White, the Arizona

1 federal district judge, Judge Cordoga, did precisely
2 that.
3 QUESTION: Well, I know, but the Court of
4 Appeals didn't reach it.
5 MR. KYL: Well, that's correct, and we would
6 certainly submit that the judge in the very best
7 position to weigh these factors would be the federal
8 district judge who is on the spot, who made the
9 decision.
10 QUESTION: Well, I know, but you wouldn't
11 suggest that we would reverse the Court of Appeals
12 necessarily if the Court of Appeals overturned the
13 district judge on what may be very much a question of
14 state law.
15 MR. KYL: Well, Mr. Justice White, let me
16 answer that question two ways. First of all, let me
17 reiterate, I do not believe that there is a serious
18 contention in this case --
19 QUESTION: All right.
20 MR. KYL: -- that the state law is deficient
21 in any respect.
22 QUESTION: I will ask the question of some
23 other source.
24 MR. KYL: Secondly, we believe that this case
25 is before the Court. All of the factors that need to be

1 weighed are before the Court. The factors go really
2 more to policy considerations in many respects than they
3 do testimonial facts, and this Court clearly can weigh
4 the same kind of factors that it did in the Colorado
5 River decision here, based upon the record before the
6 Court.

7 The Arizona proceedings, as I said, are
8 comprehensive, they are modern, fair, and efficient, and
9 as I indicated, there is nothing comparable for the
10 federal courts in Arizona.

11 Another important factor in Colorado River was
12 how much progress had occurred. There was some
13 discussion of the race to the courthouse. Of course,
14 the Arizona actions were filed first. But that is not
15 the important thing. What progress had occurred? In
16 the federal courts, no progress had occurred, because
17 before any answers were filed, the district judge either
18 dismissed or stayed or remanded all of the tribal
19 actions, so nothing had occurred.

20 In the state court proceedings, by contrast,
21 as I indicated in the beginning, there have been
22 significant proceedings, and a great deal of progress
23 toward the adjudication of water rights.

24 QUESTION: In that great deal of progress, how
25 much of that related to the Indians' claims in the state

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 proceeding?

2 MR. KYL: Mr. Justice Stevens, the Indians, or

3 the United States on behalf of the Indians, have

4 repeatedly sought extensions of time for the filing of

5 their claims in these proceedings.

6 QUESTION: Well, they want to proceed in the

7 federal court.

8 MR. KYL: Yes.

9 QUESTION: But to what extent have their

10 rights so far been adjudicated at all in the state

11 proceedings?

12 MR. KYL: No Indian rights have been

13 adjudicated in the state court proceedings.

14 QUESTION: And they rely on an entirely

15 different legal theory, as I understand it, than the one

16 normally applied in state proceedings.

17 MR. KYL: The Indians rely upon the reserved

18 right doctrine, and that doctrine is a doctrine of

19 federal law applicable in the state courts as well as

20 the federal courts.

21 QUESTION: So aren't both sets of cases right

22 at the starting point insofar as the Indian cases are

23 concerned, Indian claims are concerned?

24 MR. KYL: Mr. Justice Stevens, we would

25 suggest not. The determination that takes place in the

1 state court is a complex determination. It starts with
2 the investigation of the river system itself by the
3 Department of Water Resources, the physical on-site
4 investigation, to determine how much water is available.
5 It is important to recognize that in the
6 suggestion of the United States, for example, there is
7 the idea that somehow this is a very simple proposition
8 with respect to Indian reserved rights. It is not a
9 simple proposition at all, if done correctly, because
10 the reserved right doctrine depends upon the
11 availability of water. The reserved rights are not
12 implied to exist if they conflict with prior
13 appropriated rights or naturally if there is not enough
14 water available.
15 So the first thing that occurs in the state
16 proceedings is an investigation of the state court, or,
17 excuse me, the state river system. That has been going
18 forward. The filing of claims is the next point. The
19 United States has filed 2,315 claims in the cases before
20 the Court. There is another case not before the Court
21 in which one of the Indian tribes and the United States
22 have filed their claims.
23 QUESTION: Mr. Kyl, I think you said earlier
24 there had been 100,000 parties to this state
25 proceeding?

1 MR. KYL: No. Mr. Justice Brennan, in the
2 consolidated cases and the Little Colorado proceeding
3 that are before this Court -- there are some other cases
4 that are pending, but not before the Court.
5 QUESTION: Well, I was thinking of the state
6 -- of the pending state proceedings?
7 MR. KYL: Yes, there are --
8 QUESTION: How many parties are there?
9 MR. KYL: There have been over 70,000
10 defendants personally served.
11 QUESTION: Now, I gather the issues involved
12 in those cases are quite different than in the Indian
13 cases.
14 MR. KYL: Mr. Justice Brennan, no, there is
15 only one issue in any of these cases, and that is the
16 inter sese determination of rights: Who has how much
17 water right at what point in time, and how does it
18 relate to all of the other holders of water rights? And
19 that issue is best determined, as this Court held in
20 Colorado, in a unitary proceeding in which all of the
21 parties are before the Court, can present any testimony
22 and evidence that is required in order to fit it all
23 together, and then a final binding decree is issued
24 which is --
25 QUESTION: But it isn't correct, is it, that

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 you don't start from scratch with every new proceeding?
2 Haven't there been prior proceedings in which some
3 things have already been decided? Aren't some rights
4 already fixed?
5 MR. KYL: Mr. Justice Stevens, there are some
6 decrees existing in the State of Arizona, but one of the
7 key reasons for the implementation of the Arizona
8 statutory procedure in the 1970's was a recognition of
9 the fact that those decrees were simply insufficient.
10 They related primarily to parts of the --
11 QUESTION: Maybe they are insufficient, but
12 they are not nullities.
13 MR. KYL: No, they are certainly not
14 nullities, but they only went --
15 QUESTION: So you have some background that
16 you are building on.
17 MR. KYL: Yes, that is correct. That is
18 correct. It simply would be incorrect for me to suggest
19 that since 1900 there has been an ongoing procedure.
20 QUESTION: No, but if there had been, say, a
21 federal adjudication, which I understand there hasn't,
22 which determines some bundle of rights, that would be
23 part of the background --
24 MR. KYL: Yes.
25 QUESTION: -- that you would work with in your

1 proceeding.

2 MR. KYL: Certainly so.

3 QUESTION: Well, Mr. Kyl, if the Indians

4 prevailed and they were to go into federal court, would

5 they have to duplicate what is going on in the state

6 courts?

7 MR. KYL: Absolutely, Mr. Justice Brennan.

8 QUESTION: Completely so?

9 MR. KYL: Yes, almost completely so. The

10 reason I say almost is that we don't have just one

11 federal court action here. Each of the tribes have

12 proposed that they file their own individual suit, so

13 all of the defendants that are in the state court

14 proceedings that are in that particular river system

15 would have to be made a party, so it is almost a

16 complete duplication.

17 One other consideration that this Court noted

18 in the Moses Cohn case that was not specifically

19 addressed in Colorado River was the justification for

20 filing of duplicate suits, and I did want to make the

21 point that the filing of the federal actions in Arizona

22 was reactive and vexatious. It was reactive to the

23 service of process of the state adjudications. We

24 submit that that is not a valid reason to prefer the

25 federal court over the state courts.

1 And may it please the Court, let me simply
2 conclude with a brief point about the proposal of the
3 government and the tribes. The only justification that
4 has been presented for this new proposal surfacing at
5 this stage is the notion that the tribes need the
6 protection of the federal court. That question was
7 argued to this Court in Colorado River. It was decided
8 by this Court in Colorado River, where you specifically
9 held that Indian rights could be subjected to state
10 court determination, and that doing so would not imperil
11 those rights.
12 Far from creating more certainty, the
13 government's proposal would raise questions which we
14 believe would plague this Court for years. It is
15 legally flawed. It is piecemeal. It is duplicative,
16 wasteful, all of these things we have discussed in our
17 brief in some detail, and this is also true with respect
18 to the tribes' proposals for class action lawsuits,
19 which are an even more piecemeal way of approaching the
20 problem than the proposal of the United States.
21 This Court, we believe, is faced with a
22 choice, application of its clear and workable holding in
23 the Colorado River decision in forcing the Congressional
24 policy enunciated in the McCarren Amendment, or
25 attempting to fashion a new rule contrary to prior

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 decisions and contrary to the legislative intent of
2 McCarren.
3 We urge the Court to reinstate the ruling of
4 the district judge.
5 Mr. Chief Justice, I would like to reserve the
6 remainder of my time.
7 CHIEF JUSTICE BURGER: Very well.
8 Mr. Attorney General.
9 ORAL ARGUMENT OF MICHAEL T. GREELY, ESQ.,
10 ON BEHALF OF THE PETITIONER IN
11 NO. 81-2188
12 MR. GREELY: Mr. Chief Justice, and may it
13 please the Court, I think it would be helpful if I
14 briefly describe the procedural postures of these cases
15 in the State of Montana, first in the federal court and
16 then the state situation.
17 There were seven cases filed in Federal
18 District Court, six by the United States and one by the
19 Northern Cheyenne Tribe. In January, '75, the Northern
20 Cheyenne named 21 defendants and 100 John Does in their
21 action. The six United States suits were filed at the
22 request of the tribes, including the Northern Cheyenne
23 Tribe.
24 In March of '75, the United States, at the
25 request of the Northern Cheyenne Tribe, named 24

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 defendants and asked for adjudication of all federal and
2 Indian reserve water rights on the Tongue River.
3 In April of '75, the United States, at the
4 request of the Crow Tribe, named several hundred
5 defendants on the Big Horn River. The four remaining
6 suits were all filed in 1979, and they involved the
7 Flathead River and the northern tributaries to the
8 Missouri River but not the Missouri River itself, and
9 these suits were also filed at the behest of the tribes.
10 There has been virtually no progress in any of
11 these federal cases, and all seven of these cases were
12 dismissed by the Federal District Court in Montana in
13 1979 based on the Akin factors.
14 Now, this is in sharp contrast to the
15 situation in Montana's state courts. Montana's state
16 adjudication has been moving very rapidly. In 1979,
17 pursuant to state law, a statewide adjudication began
18 with regard to all water rights in the State of
19 Montana. Special water courts were established and
20 funded by the Montana legislature --
21 QUESTION: With separate judges in different
22 areas, I take it.
23 MR. GREELY: Well, it is considered to be one
24 court. There are four divisions.
25 QUESTION: I know, but there are separate

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 judges doing different rivers.

2 MR. GREELY: That is correct. The United
3 States was served as trustee in the state proceeding as
4 -- on its -- for -- on behalf of the Indian water rights
5 in its own capacity. By April 30th of 1982, over
6 200,000 claims to water rights in the states had been
7 filed in the state courts, and anyone who had not filed
8 by that date in the State of Montana are presumed to
9 have abandoned their claims.

10 Thirty-five thousand of those claims, of the
11 200,000, were filed by the United States on their own
12 behalf and on behalf of the various tribes, including
13 the tribes involved in this case. The water courts
14 are --

15 QUESTION: Claiming the very -- claiming the
16 very water that they are suing for here?

17 MR. GREELY: Yes, they duplicate the suits
18 that are involved in this case in the federal courts.
19 Obviously, the state proceeding is comprehensive
20 statewide; the federal cases involve certain river
21 drainages.

22 The water courts are in the process right now
23 of gathering evidence, and preliminary decrees in those
24 cases will be issued as soon as possible. Now, unlike
25 the situation in Arizona --

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 QUESTION: General Greely, is Montana drained
2 entirely into the Mississippi by the Missouri River, or
3 does anything go over to the Pacific?
4 MR. GREELY: There's a few -- we have the
5 Continental Divide that goes through the state, so some
6 of that is drained into the Columbia River system.
7 QUESTION: Goes into Columbia.
8 MR. GREELY: Unlike Montana, the state
9 adjudication has not been stayed pending this -- pending
10 this proceeding, and the Montana water courts of course
11 have relied on the McCarren Amendment and the Colorado
12 River decision to proceed with their adjudication.
13 QUESTION: Was there any effort made, Mr.
14 Attorney General, to have state proceedings stayed?
15 MR. GREELY: There was an effort, I believe,
16 on behalf of one of the tribes to stay the proceedings.
17 That motion was -- I believe it was in federal court in
18 Missoula, and I think it was agreed that the federal
19 district judge would not stay -- try to stay the state
20 proceedings pending the decision of this case.
21 Now, in preparation for my oral argument
22 today, I decided to listen to the tape of the oral
23 argument in the Colorado River decision, and I found it
24 to be quite interesting, because I had kind of thought
25 that there wasn't that much discussion of Indian

1 rights. I thought the discussion in that case before
2 the Court in oral argument concentrated on keeping the
3 federal reserved rights in federal court.
4 But much to my surprise, over 50 percent of
5 the argument that was presented by the Solicitor's
6 Office, Mr. Shapiro, involved Indian water rights, and
7 many of the questions that this Court raised involved
8 Indian rights. The question that appeared in oral
9 argument was whether Indian rights, reserved water
10 rights should be adjudicated in state court.
11 And the arguments in that case echo very much
12 the briefs of the Indian tribes and the United States in
13 this case. It is interesting, and I have the brief here
14 from the Colorado River case, and obviously I am not
15 going to read it to you or read great detail from it,
16 but it is -- just to give you an idea, with the
17 indulgence, let me just read a couple of the headings
18 here.
19 "Determination of Indian and federal water
20 claims in federal court will not interfere with state
21 proceedings. Important practical benefits result from
22 water rights suits by the United States in federal
23 courts. Federal decrees can easily be integrated into
24 Colorado's general adjudication. Federal courts alone
25 have jurisdiction over claims for determination of

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 Indian water rights."

2 Now, the only reason -- the only difference I

3 see between that language and the language in the

4 Solicitor's brief today is that they used the term

5 "integrated" in that brief, that the rights would be

6 integrated in the state proceedings, and the terminology

7 that has been used here is "plugging in."

8 Now, this Court rejected all those arguments

9 in the Colorado River decision, and we are dealing with

10 the same statute, the McCarren Amendment, and this Court

11 has interpreted that in Colorado River, and seven years

12 after the decision in 1976 in Colorado River, Congress

13 has not seen fit to amend that provision.

14 I think it might also be important, if I may,

15 to examine the proposal of the Solicitor in this case,

16 the proposal that the Indian rights somehow can be

17 adjudicated separately in a federal court proceeding

18 while all the other rights are adjudicated in a state

19 court proceeding. This, of course, was the same

20 argument that was made in Colorado River, and this Court

21 has held, as Mr. Kyl referred to in the Cohn case, that

22 clear federal policy of avoiding piecemeal adjudications

23 of water rights in the river system are concerned, and

24 there is a preference for a unitary and comprehensive

25 proceeding in the state court.

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 And there is good reason, and let me suggest
2 the nightmare that may occur in Montana should we have
3 any kind of a concurrent proceeding in that state
4 ongoing in the same river drainages as the comprehensive
5 proceeding for state water rights.
6 And the government says in its brief that the
7 -- the government says in its brief that it, if course,
8 if this Court would hold that Indian rights could be
9 done in federal court, it will go back and amend its
10 complaint, and of course it would have to amend its
11 complaint to put that plug-in plan into effect.
12 Under the federal rules, of course, they would
13 have to file a motion to amend, and in the federal cases
14 there are approximately 9,000 defendants, and they would
15 have to be served, and some of those defendants may
16 oppose the motion, some of them may consent to it, and
17 some of them might not even respond, and then there
18 would be hearings on those motions, and if the motion
19 were granted, then the new complaints would have to be
20 filed, and those would have to be served, and really the
21 question is, who would be the defendants in those
22 federal case proceedings when they are supposedly just
23 adjudicating Indian rights?
24 Well, the answer is, in a comprehensive water
25 adjudication everybody would have to be a defendant,

1 whether they had a state right, a federal right, a
2 federal reserved right, or an Indian water right, if --
3 that is, if that decree were to be binding on all the
4 parties.
5 And the purpose for all of this, the
6 government suggests, is that the federal courts are the
7 judicial forum or the preferred forum for determining
8 Indian water rights, and Colorado River clearly answered
9 this argument by saying that the Indian rights can be
10 adjudicated in state court just as easily and maybe more
11 easily than in federal court.
12 Now, there is one other issue that may
13 possibly trouble the Court, and this issue I don't
14 believe was discussed or brought up in the Colorado
15 River decision, and this is the issue that apparently
16 gave some trouble to the Ninth Circuit, and that was the
17 issue of whether or not there was a conflict of interest
18 between the tribes and the United States which
19 apparently occurred for the first time at the Ninth
20 Circuit level.
21 I don't know that the issue was addressed. It
22 wasn't addressed by the federal district judges of
23 Montana when they dismissed in favor of the state
24 proceedings on the grounds of Colorado River and
25 McCarren. And of course as I understand, the

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 government's position is that they don't recognize any
2 conflict of interest in this case or in any of these
3 cases, to my knowledge, that are consolidated here on
4 appeal.

5 Apparently, the argument, and this is the
6 argument that is made by the tribes, is that the U.S.
7 should not be representing the tribes with regard to
8 their reserved Indian water rights because the U.S. may
9 have some federal reserve water rights that may be in
10 conflict with the tribes' rights if they occur in the
11 same adjudication process.

12 Of course, that was the exact situation that
13 existed in the Colorado case. The United States in that
14 case was suing on its own behalf for water rights. I
15 forget the name of the forest on the San Juan River.
16 And the Indian tribes were also involved. Their water
17 rights were also invovled in that case.

18 The United States, while not recognizing any
19 conflict of interest, say that of course they are the
20 trustee for the tribe, and as trustee they have a
21 special obligation to protect those rights. In fact, in
22 the cases in Montana, the tribal rights come first in
23 the order of complaint. It doesn't appear that there is
24 any problem with that in the state of Montana, but --
25 QUESTION: In the state adjudications, have

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 the tribes appeared independently?

2 MR. GREELY: There have -- I think there's one

3 or two tribes, Your Honor, that have filed claims on

4 their own behalf as tribes.

5 QUESTION: Are they permitted to file on their

6 own behalf?

7 MR. GREELY: Yes, they are. Encouraged to.

8 QUESTION: Whether or not the United States

9 files for them?

10 MR. GREELY: That's correct.

11 QUESTION: Are the Blackfeet Indian tribes in

12 the state proceeding?

13 MR. GREELY: They are -- they are a part of

14 one of the -- one of the 1979 suits filed by the United

15 States on their behalf, but they are not a part of the

16 state proceedings, other than -- other than the rights

17 that they have under the United States trusteeship.

18 QUESTION: General, let me go back just -- I

19 meant to ask you, the Ninth Circuit did reach the

20 judicial administration issue in the Montana case?

21 MR. GREELY: Of the Akin factors.

22 QUESTION: Yes. Yes. And it seemed to me

23 that they zeroed in on the lack of comprehensiveness

24 under Montana law, and isn't that -- isn't that a -- do

25 you disagree with them in that respect?

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 MR. GREELY: Yes, I do, Your Honor.

2 QUESTION: Well, isn't that a matter of state

3 law?

4 MR. GREELY: Whether or not the proceeding is

5 comprehensive?

6 QUESTION: Let's assume they were right that

7 it wasn't, and that factor ought to weigh heavily in

8 favor of the federal proceeding. Do the other factors

9 outweigh it, or what?

10 MR. GREELY: I would think so. There are the

11 factors that I have even suggested on argument, the fact

12 that if you have concurrent lawsuits, concurrent suits,

13 one in the federal court, one in the state court, all

14 the defendants in both suits will have to participate in

15 both of those suits. So there will be a piecemeal

16 adjudication. You will have everybody in the federal

17 court doing one thing in adjudicating the Indian rights,

18 and then in the state court you will have them

19 adjudicating everything except Indian rights.

20 QUESTION: Well, were they right in what they

21 said about the comprehensiveness of the state proceeding

22 or not?

23 MR. GREELY: No, because the state proceeding

24 is much -- much more comprehensive.

25 QUESTION: Well, it may -- let's just talk

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 about one river system. Just assume that there was only
2 involved here one river system in the federal case,
3 although certainly the state proceedings cover the whole
4 state. For the particular river system, is the state
5 proceeding comprehensive?
6 MR. GREELY: The state proceeding is
7 comprehensive because it joins everybody on that stream,
8 all the rights on that stream.
9 QUESTION: I thought they said that the state
10 adjudication excluded some kind of water claims.
11 MR. GREELY: Well, they were suggesting that
12 Indian Lotie claims would be excluded, but --
13 QUESTION: What else?
14 MR. GREELY: -- the United States would
15 represent those.
16 QUESTION: What else? Anything else?
17 MR. GREELY: Well, they mentioned that our
18 state law talks about stock water, which we consider to
19 be a de minimis right. I mean, stock water, if a person
20 is living on a stream and his stock drinks out of that
21 stream, he doesn't have -- he is not required -- he may
22 file voluntarily.
23 QUESTION: Don't have a water right. He is
24 not -- that is just a riparian right.
25 MR. GREELY: Well, no, it is not riparian,

1 Your Honor, because in Montana he has the process of
2 adjudication.
3 QUESTION: Well, I know, but you don't have to
4 have it adjudicated --
5 MR. GREELY: Well, it is similar to a riparian
6 right.
7 QUESTION: But you don't have to have -- you
8 don't have to have an adjudication to let your cattle
9 drink out of the stream.
10 MR. GREELY: No. No, but if you were to -- if
11 you were to divert water for the purpose, or impound
12 water for stock purposes, then you would have to.
13 QUESTION: But you don't if you just -- if you
14 are a riparian owner who has cattle --
15 MR. GREELY: That's correct.
16 QUESTION: -- they can drink out of the
17 stream.
18 MR. GREELY: That's right. And domestic uses,
19 Your Honor, also are excluded.
20 QUESTION: But those are the only things
21 excluded in the state?
22 MR. GREELY: That's correct.
23 I will just finish up on the point I was
24 making on the conflicts. The United States represents
25 the Indian tribes as trustee for the water rights, and

1 the Indians are -- the Indian tribes --

2 QUESTION: General Greely?

3 MR. GREELY: Yes.

4 QUESTION: Let me go back just a moment to the

5 Ninth Circuit's discussion of comprehensiveness. I was

6 just reading over those two paragraphs in their opinion,

7 and as I read the -- it doesn't really decide the

8 question of comprehensiveness. Or am I wrong? It

9 specifies the factors, states the arguments of Montana,

10 states the arguments of the tribes, and then say, "The

11 tribes correctly stress that Akin only required

12 dismissal where the federal proceeding would be

13 piecemeal and the state proceeding is comprehensive.

14 Where that is not the case and jurisdictions concur, the

15 federal court may not abdicate its judicial

16 obligations," which is simply a statement of the rule in

17 Akin.

18 Then they go on to talk about the race to the

19 court, forum non-convenience. Do you think they decided

20 comprehensiveness as a separate inquiry?

21 MR. GREELY: Well, I think they have

22 considered -- see, the federal court in Montana said one

23 of the main reasons for dismissing in deference to state

24 court was that our -- the federal district court found

25 that our state proceedings were comprehensive. In fact,

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 they even cite in their opinion bits of our water law
2 and how our process takes place.
3 I believe that the -- First of all, I believe
4 the Ninth Circuit was wrong in this discussion of
5 comprehensiveness, but it is only one of the many
6 factors that would occur in the Colorado River.
7 QUESTION: Where do you think the Ninth
8 Circuit in those two paragraphs said that the Montana
9 proceeding was not comprehensive?
10 MR. GREELY: Where do I see that it says it
11 was not comprehensive?
12 QUESTION: Yes.
13 (Pause.)
14 QUESTION: Well, I don't mean to hold you up.
15 MR. GREELY: Well, I'm sorry. I recall
16 reading that paragraph where the Ninth Circuit discussed
17 the comprehensiveness of the federal proceeding and the
18 state proceeding. I frankly disagreed with some of the
19 statements. I think if you look at our brief, and I am
20 not sure if I have the page number -- I don't believe I
21 can cite you the page number of our brief, but it does
22 discuss some of the errors of the Ninth Circuit Court of
23 opinion -- the Ninth Circuit opinion, as to what the
24 status of those proceedings were.
25 Thank you.

1 CHIEF JUSTICE BURGER: Mr. Pelcyger.

2 ORAL ARGUMENT OF ROBERT S. PELCYGER, ESQ.,

3 ON BEHALF OF THE RESPONDENT MONTANA INDIAN TRIBES

4 MR. PELCYGER: Mr. Chief Justice, and may it
5 please the Court, may I start out by correcting a
6 misstatement of General Greely's? None of the tribes,
7 Justice White, have participated in the state court
8 proceedings on their own in Montana.

9 QUESTION: What do you mean, on their own?

10 MR. PELCYGER: They have not entered an
11 appearance on their own. Their sole participation is
12 vicarious through the United States.

13 QUESTION: So that any claims, water claims
14 that have been filed in those proceedings have been
15 filed on their behalf by the United States?

16 MR. PELCYGER: Correct. Yes.

17 Now, in this case there are --

18 QUESTION: Did anybody ever serve them as
19 adverse parties in the state proceedings?

20 MR. PELCYGER: No, sir.

21 QUESTION: What about the Blackfeet? Are they
22 represented in the state proceeding also by the United
23 States?

24 MR. PELCYGER: Yes, that is my understanding.
25 But the Blackfeet, unlike the other respondent Montana

1 tribes in this case, are not parties to the federal
2 court cases, so they are not here.
3 QUESTION: You are not representing the
4 Blackfeet?
5 MR. PELCYGER: That's correct.
6 QUESTION: If they are represented today, they
7 are represented by the United States?
8 MR. PELCYGER: That's correct.
9 Now, in this case, there are several statutory
10 and policy reasons why federal courts must or in any
11 event should retain jurisdiction to adjudicate the
12 Indian water rights. I want to discuss two of these
13 important reasons. The first is the Disclaimer Act bar,
14 which is an absolute jurisdictional bar in our opinion,
15 and the second is the conflict of interest point, which
16 is certainly a significant factor and, we would claim,
17 decisive factor in the circumstances of this case.
18 Before discussing the particulars of the
19 disclaimer, however, I think it is important to keep the
20 big picture in sharp focus. This is a jurisdictional
21 dispute that directly involves Indian tribes and their
22 most important and precious property right. At issue
23 are the water rights of the biggest reservations and the
24 largest Indian tribes in the country.
25 States are asserting jurisdiction and control

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 over the tribes and their property, matters which are at
2 the very core of the protective relationship between the
3 United States and the Indian tribes, and from which the
4 tribes and their elected officials historically have
5 been excluded.

6 The states are claiming this power by virtue
7 of a statute, the McCarren Amendment, that does no more
8 on its face than simply waive the sovereign immunity of
9 the United States in water adjudication suits. It does
10 not mention Indians, Indian tribes, Indian water rights,
11 or Indian reservations, nor is there any evidence in the
12 legislative history of this statute of Congressional
13 concern about such critical matters as tribal sovereign
14 immunity, the federal government's conflict of interest,
15 the state court's traditional hostility to Indians, or
16 the disclaimers of jurisdiction in the enabling Acts and
17 constitutions of the eleven western states.

18 The petitioners, we submit, are asking this
19 Court to do the work of the Congress by filling in all
20 of these legislative gaps, but the McCarren Amendment is
21 far too slim a reed to carry this immense weight. It
22 cannot sweep everything else aside, especially when
23 effect can be given to its principal purpose as well as
24 other relevant laws, treaties, and national policies, by
25 limiting McCarren's waiver of sovereign immunity to the

1 federal courts in the disclaimer states.

2 This Court's job is to reconcile and give
3 effect to all of the relevant laws, not to pick one and
4 allow it to ride roughshod over all of the others. So,
5 the states and the petitioners' submission is
6 fundamentally flawed, because the tribes' position gives
7 effect to the McCarren Amendment in the disclaimer
8 states, and the McCarren Amendment does constitute a
9 waiver of the sovereign immunity of the United States
10 with respect to suits in federal court to adjudicate
11 Indian water rights. It would not eviscerate or
12 eliminate the effect of the McCarren Amendment.

13 Now, the Colorado River case stretches the
14 McCarren Amendment as far as it reasonably can be
15 extended, but the Colorado River case expressly rejected
16 the argument that the McCarren Amendment divests federal
17 courts of their jurisdiction to adjudicate Indian water
18 rights.

19 While the anti-piecemealing policy that the
20 Court perceived in the McCarren Amendment was held
21 sufficient to justify deference to an ongoing state
22 adjudication in certain very specific and limited
23 circumstances, we submit that much more than that is
24 required to overcome the force of other equally valid
25 federal laws, treaties, and policies that are involved

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 in this case.

2 First, let me speak specifically about the

3 disclaimers. Under the Constitution, of course, Indian

4 tribes and their property are subject to the exclusive

5 jurisdiction of the United States. This promise was

6 repeated in numerous treaties between the United States

7 and the tribes, including the Apache and Navajo treaties

8 that are involved in this case.

9 And after this Court's decision in 1882 in the

10 McBratney case cast some doubt on that proposition, it

11 was repeated in the disclaimer provisions in the 1889

12 Act admitting Montana and three other states. It was

13 repeated again in the 1910 Act admitting Arizona and New

14 Mexico, and on six or seven other occasions, as recently

15 as 1958.

16 The position of the tribes is that these

17 enabling Acts have not been changed or repealed, that

18 they remain in effect, and that they absolutely bar

19 state court jurisdiction over Indian rights.

20 Now, there is little doubt about what the

21 McCarren -- about what the disclaimers mean, excuse me.

22 They mean what they say. They say that Indian lands,

23 not forest lands, not public domain, not military

24 reservations, only Indian lands shall remain under the

25 absolute jurisdiction and control of the Congress of the

1 United States until the disclaimers are revoked with the
2 consent of both the United States and the respective
3 state.
4 At one point in this case there was a
5 contention that the disclaimers were limited to
6 proprietary matters. As I understand the reply brief of
7 the Arizona petitioners, that claim is no longer before
8 the Court, and I won't any longer go into the meaning of
9 the disclaimers.
10 The critical questions relate to the
11 relationship between the disclaimers and the McCarren
12 Amendment. McCarren, as I said, is simply a waiver of
13 the government's immunity, no more, no less. There is
14 no indication anywhere on the face of the Act or in its
15 history of any intent to repeal the disclaimers. There
16 is no mention of them. There is not even a hint of
17 them. And no one in this case has even argued that the
18 disclaimers and McCarren are in irreconilable conflict,
19 the test for an implied repeal.
20 Effect, as I said, can be given to both
21 McCarren and the disclaimers by holding that the
22 McCarren Amendment's waiver of sovereign immunity
23 applies to adjudication of Indian water rights in the
24 federal courts of the disclaimer states. This result
25 achieves the primary purpose of the McCarren Amendment,

1 ensuring that all water rights on a stream, including
2 the government's and the Indians', will be subject to
3 adjudication.
4 There is no basis anywhere in the McCarren
5 Amendment or in the governing rules for construing two
6 statutes that bear on a common subject but totally
7 subordinating and ignoring the disclaimers in favor of
8 the McCarren Amendment. Both laws can and therefore
9 should and must be given effect.
10 Now, the petitioners' primary argument,
11 however, is that the disclaimers are nothing more than a
12 reservation of federal authority over Indians and their
13 lands, and that Congress exercised this authority when
14 it enacted McCarren, but this is contrary to what the
15 disclaimers say. They do not say that Congress reserves
16 authority. They say that Indian lands shall remain
17 subject to the absolute jurisdiction and control of the
18 United States until they are revoked.
19 They are solemn compacts pledging that Indians
20 and their lands would not involuntarily be made subject
21 to coercive state jurisdiction unless Congress and the
22 people of the states consent. This is an exercise of
23 authority, not a reservation, and the disclaimers have
24 been so applied by this Court on numerous occasions.
25 The state's argument also, I point out, flies

1 in the face of Public Law 280, in which Congress
2 partially repealed the disclaimers because they were
3 viewed as legal impediments to the assumption of state
4 court jurisdiction over Indians.

5 Now, the federal government takes a somewhat
6 different tack in arguing against the disclaimer. It
7 objects to distinguishing between disclaimer and
8 non-disclaimer states on policy grounds. Since Colorado
9 River upheld non-disclaimer state court jurisdiction
10 over Indian water rights, the United States argues that
11 the same rule now should be applied to disclaimer
12 states.

13 In effect, the government reads the Colorado
14 River decision as an implied sub silentio repeal of the
15 disclaimers. The obvious response is that the
16 disclaimers are duly enacted laws of the United States.
17 They must be given effect unless they are found to be
18 unconstitutional or impliedly repealed, and the
19 government does not even attempt to show that the
20 standards for finding an implied repeal have been met.

21 Congress obviously was aware that states
22 admitted after 1889 were made subject to different laws
23 than previously admitted states, and Congress has
24 frequently applied different rules to Indians in
25 different states. There is neither a compelling need

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 for uniformity nor consistent historical practice of --

2 QUESTION: How about the equal footing clause?

3 MR. PELCYGER: The equal footing doctrine only

4 prohibits the United States from asserting unique

5 conditions on statehood that Congress would not

6 otherwise have authority to impose, and since Congress

7 has plenary and full authority to impose virtually any

8 condition and any exercise, any authority over Indians,

9 the equal footing doctrine is not a concern in this

10 case.

11 QUESTION: Well, in Pollard against Hagen, the

12 objection was not that Congress didn't have authority in

13 the abstract to reserve water out of its own territory

14 that was making a state, but that it hadn't done it with

15 the other states.

16 MR. PELCYGER: I'm sorry. I missed the

17 beginning of your question.

18 QUESTION: In Pollard against Hagen, which I

19 think is the leaving equal footing case.

20 MR. PELCYGER: Well, there is no question, and

21 Arizona against California specifically held that

22 Congress has full authority to reserve water for Indian

23 reservations pre-statehood and post-statehood, and there

24 is a full range of court decisions which hold -- Winters

25 against the United States is probably the leading case

1 holding that the equal footing doctine does not prohibit
2 any federal legislation dealing with Indian affairs or
3 any reservation of rights for Indians.
4 QUESTION: No, but that was not addressed to
5 this kind of a disclaimer.
6 MR. PELCYGER: Well, the disclaimers have been
7 given effect by this Court, the Indian disclaimers have
8 been given effect by this Court time and time again, in
9 Williams against Lee, in Fisher against the District
10 Court, in McClannahan in 1973, and the equal footing
11 doctrine under the cases cited in our brief at Pages 46
12 to 47 is just not a factor in dealing with Indian
13 affairs, for the reasons that are explained in those
14 cases.
15 Now, if the government believes that
16 disclaimer and non-disclaimer states should be treated
17 exactly alike, it is addressing its argument to the
18 wrong institution. Congress created that distinction,
19 and it is for Congress, not this Court, to do away with
20 it, and indeed, only a year after McCarren was enacted,
21 when the disclaimers were specifically brought to the
22 attention of the Congress, Congress did exactly that.
23 It repealed the disclaimers in Public Law 280 in order
24 to permit disclaimer state courts to assume limited
25 civil and criminal jurisdiction over Indian disputes but

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 of course specifically excluded the adjudication of
2 Indian water rights.
3 So, what both the petitioners and the
4 government's position have in common that they are
5 asking this Court to do what Congress has never done,
6 repeal the disclaimers in order to permit state court
7 adjudications of Indian water rights.
8 Since effect, though, can and therefore must
9 be given to both statutes, we submit that the federal
10 courts should retain jurisdiction to adjudicate Indian
11 water rights.
12 Now, turning to the conflict of interest --
13 QUESTION: Are you going to discuss Organized
14 Village of Kake in your oral argument?
15 MR. PELCYGER: I wasn't planning to, but I'll
16 be glad to. Organized Village of Kake against Egan, I
17 think, was fully distinguished from our situation by
18 this Court's opinion in McClannahan which pointed out
19 that Kake against Egan does not provide any rules or
20 guidelines for determining the relative contours of
21 state jurisdiction when Indian reservations are
22 involved. That was an off-reservation case that was --
23 there were no Indian reservations involved there, and
24 that's what the Court said in McClannahan in dealing
25 with Kake against Egan.

1 Now, in Colorado River, the Court -- I am
2 dealing now with the conflict of interest issue -- the
3 Court expressly did not decide "whether dismissal of the
4 federal suit would be warranted if the state proceeding
5 were in some respect inadequate to resolve the Indian
6 claims."
7 Recently, in Moses H. Cohn Memorial Hospital
8 case, this Court elaborated on the overriding importance
9 of this inadequacy criterion in cases of this kind. The
10 Court stated, "When a district court decides to dismiss
11 or stay under Colorado River, it presumably concludes
12 that the parallel state court litigation will be an
13 adequate vehicle for the complete and prompt resolution
14 of the issue between the parties. If there is any
15 substantial doubt as to this, it would be a serious
16 abuse of discretion to grant the stay or to dismiss at
17 all."
18 In this case, the state court proceedings are
19 unsatisfactory and inadequate because the government is
20 called upon to represent numerous conflicting interests,
21 and therefore cannot adequately represent the tribes'
22 interests. As a result, the judgment may not be binding
23 on the tribes.
24 The government's evident conflicts were
25 recognized by the Ninth Circuit. They literally litter

1 the landscape. To take one example, on the Milk River
2 in Montana, the United States claims rights to water for
3 the Glacier National Park, for a Bureau of Reclamation
4 project, for five national wildlife refuges, for three
5 wildlife production areas, for two military
6 reservations, four reservoirs, and in addition to all of
7 these federal proprietary interests, four separate
8 Indian reservations.
9 Now, the only way to correct this obvious
10 problem, to remove this taint from the state court
11 proceedings, to avoid this inadequacy, is for the tribes
12 to be parties to the adjudications in their own right,
13 represented by their own attorneys. In that way, their
14 interests will be fully and fairly represented, and the
15 resulting judgment will not be subject to direct or
16 collateral attack on --
17 QUESTION: Well, the Attorney General of
18 Montana suggests that the tribes should file their
19 claims in the state proceedings.
20 MR. PELCYGER: Well, that remains to be seen,
21 but assuming that --
22 QUESTION: Well, do you assume that they
23 cannot?
24 MR. PELCYGER: No --
25 QUESTION: Do you assert they cannot?

1 MR. PELCYGER: I do not assume they cannot.
2 It would be a question of whether the state courts
3 allowed them to intervene, which nobody can predict, but
4 I submit the Ninth Circuit considered that question and
5 said that it would be unfair to put the tribes to that
6 Hobson's choice.
7 I point out that Congress had this question
8 before it on two occasions. When the McCarren Amendment
9 was enacted, Congress did not waive the tribes'
10 immunity. Congress could have waived the tribes'
11 immunity and made them subject to suit in state court,
12 but did not, waived only the government's immunity.
13 QUESTION: So far as worrying about collateral
14 attack, doesn't the Heckman case pretty well take care
15 of that? The tribes are bound by the United States
16 representation.
17 MR. PELCYGER: Not if there is a denial of due
18 process.
19 QUESTION: Well, nothing you have told me so
20 far suggests a denial of due process.
21 MR. PELCYGER: Well, if the government is --
22 if the government's conflict prevents them from
23 adequately representing the Indians' interests, and the
24 Indians have not had a full and fair opportunity to be
25 heard owing to the government's conflict, then that

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 would be a denial of due process that would cloud the
2 resulting judgment.
3 Now, the second -- the second point is that --
4 QUESTION: What is the -- what is the -- Is
5 there a statute giving tribes sovereign immunity, or a
6 case?
7 MR. PELCYGER: No, that is an inherent
8 attribute of sovereignty that was reaffirmed in Santa
9 Clara Pueblo against Martinez --
10 QUESTION: So they may not be sued without
11 their consent?
12 MR. PELCYGER: That's correct, and Congress in
13 1966, when it enacted 28 USC Section 1362, which my
14 colleagues will be talking more about, specifically
15 recognized the existence of this conflict problem,
16 recognized that there were instances when the Attorney
17 General would not be able to represent the tribes'
18 interest owing to the conflict, and provided a federal
19 forum, consciously did not provide a state forum for
20 tribes to sue under those circumstances and to represent
21 its own interests.
22 So, I think under those circumstances the
23 Ninth Circuit was quite right not to require the tribes
24 to intervene in the state courts.
25 QUESTION: May I ask you a question about

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 that? I don't quite understand why the conflict of
2 interest is any different in the state court than in the
3 federal court.
4 MR. PELCYGER: No, I agree with that in
5 principle. The fact is that the tribes --
6 QUESTION: Then it is not a reason for picking
7 one forum over the other.
8 MR. PELCYGER: Yes, it is where the tribes
9 have participated and are participating in the federal
10 court, because the problems posed by the conflict do not
11 exist if the tribes are independently represented. They
12 are in the federal courts. They are not in the state
13 courts.
14 QUESTION: Well, some of them elected to
15 proceed to the federal courts represented by the United
16 States, as I remember.
17 MR. PELCYGER: That's correct, and with regard
18 to those cases, the conflict factor would not point
19 either way, but it would be decisive where the tribes
20 are participating in the federal court but are not
21 participating in the state court --
22 QUESTION: Well, unless they elected to
23 participate in the state court. I can't imagine the
24 states would want to keep them out.
25 MR. PELCYGER: What I am suggesting is that

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 they are immune from suit, and that in these
2 circumstances --
3 QUESTION: Well, that is a sovereign immunity
4 argument.
5 MR. PELCYGER: Yes.
6 QUESTION: I understand that.
7 MR. PELCYGER: Well, and that it would be
8 unfair to put them to the -- to force them to compel
9 their immunity by intervening in federal court,
10 particularly when Congress has provided a federal forum
11 for them.
12 QUESTION: But that is all true without the
13 conflict of interest.
14 MR. PELCYGER: Yes, but there is a --
15 QUESTION: It just seems to me the conflict of
16 interest doesn't really add much to the argument.
17 MR. PELCYGER: Well, conflict of interest
18 shows the inadequacy of the state court proceeding.
19 Thank you.
20 CHIEF JUSTICE BURGER: Mr. Rifkind.
21 ORAL ARGUMENT OF SIMON H. RIFKIND, ESQ.,
22 ON BEHALF OF THE RESPONDENT ARIZONA INDIAN TRIBES
23 MR. RIFKIND: Mr. Chief Justice, and may it
24 please the Court, my argument will be addressed to the
25 considerations which necessarily must underlie the

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 argument of this case as I see it, and that is a
2 discussion of the factors addressed to our attention in
3 the Akin case, the case that we have all decided to call
4 Akin, Colorado River against -- but I should like to
5 open with this one sentence.
6 One of the problems of a consolidated
7 proceeding of this kind is that it homogenizes 12
8 different district cases, and the facts do not always
9 fit a single pattern. I should therefore like to deal
10 in the course of my argument with the facts as they are
11 set forth in the Navajo case, and only in the Navajo
12 case, because I think that gives you a simple structure
13 and a simple situation.
14 Now, if the Akin case leaves room for any
15 Indian water claim, I say if, then this is the case, and
16 that I shall try to demonstrate in the course of my
17 argument. As I listened to the arguments of my
18 distinguished friends from Arizona and Montana, I got
19 the impression that they never will find a case under
20 Akin which will enable an Indian claim to remain in the
21 federal court, but if that is so, then the statements in
22 Akin which proclaim again and again that it is the
23 exception and not the rule that seems to be turned
24 upside-down, then we have the rule of abstention set
25 forth in Akin become the universal rule, and then there

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 are no cases which are outside of that. That I cannot
2 accept.
3 Now, in considering Akin, I want to deal with
4 the factors involved, and one of them is history, and
5 therefore, to the extent that occasionally I overlap the
6 argument made by my friend who just preceded me, it
7 isn't because I want to assert the disclaimer argument.
8 I simply want to narrate that as part of the history of
9 this controversy.
10 The Navajo nation, whom I represent, and by
11 reason of the consolidation to some extent I speak for
12 the other Indian tribes, are united in their perception
13 that the choice of forum, which is the problem before
14 us, in these cases is critical to their prosperity in
15 future. From the vigor of the opposition by Arizona and
16 Montana, I infer that they regard the Indians'
17 perception as correct.
18 This common perception springs from a long
19 history, and of course within the few minutes of my
20 disposal I can only mention a few points, a few aspects
21 of it. After years of warfare, the United States from
22 time to time entered into treaties with the Indian
23 tribes. I can't quote them all, but I refer you to the
24 Apache Treaty of July 1, 1852, the Navajo Treaty of
25 1849, and the source of my claim to water, the

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 particular source to which I shall advert, the Navajo
2 Treaty of 1868.
3 And the common aspect of these treaties is
4 that the Indians are promised by this great nation, and
5 I quote the words, "federal jurisdiction and federal
6 protection." One sentence out of the 1868 treaty uses
7 that language a little bit more quaintly. It says, "if
8 bad men among the whites shall commit any wrong upon the
9 person or property of the Indians, the United States
10 will proceed at once to cause the offender to be
11 arrested and punished according to the laws of the
12 United States."
13 Out of these treaties and others of similar
14 import, there has been distilled historically a national
15 policy, first enunciated in these words in Rice against
16 Olson back in 1945, and more recently in the McClannahan
17 case in 1973, in these words: "The policy of leaving
18 Indians free from state jurisdiction and control is
19 deeply rooted in the nation's history." And I say that
20 that is a factor that should be taken into consideration
21 in engaging in the weighing process that Akin instructs
22 us to undertake.
23 The Navajos, for whom I speak, never agreed to
24 subject themselves or their property to the jurisdiction
25 or laws of any state, and so the United States

1 understood. They understood that that was their treaty
2 arrangements with the Navajos, and in order to keep its
3 promise to the Indians, and to put the matter beyond
4 dispute, the United States Congress in 1910, before
5 admitting the State of Arizona to the Union, exacted a
6 promise from the people of that state that they would
7 forever disclaim, and so forth, as you have heard from
8 my friend, Mr. Pelcyger.
9 The most recent step taken by the Congress
10 consistent with this United States promise to the
11 Indians, was the enactment in 1966 of Section 1362 of
12 Article 28 to the Code conferring direct access upon the
13 Indian tribes to the federal forum.
14 In the light of this history, it was perfectly
15 natural that the Navajos turned to the federal court
16 when they filed their complaint for a declaration of
17 their federal rights only to the waters of the Little
18 Colorado and for a quantification of those rights under
19 the doctrines of the Winters case and the more recent
20 case of California against Arizona.
21 Now, the Navajos filed this complaint in the
22 District Court of Airzona on the 17th of April, 1979.
23 At that time, there was no statute for stream
24 adjudication in the state of Arizona. That was enacted
25 a little later, April 24th, 1979, but I lay no stress

1 upon that time factor. I regard it as without
2 significance.
3 But I do stress that the Navajos' complaint is
4 very narrowly focused. I quite agree with the gentleman
5 from Montana. It is very narrowly focused. It asks for
6 a declaration of the rights to the waters of the Little
7 Colorado as determined by its treaty with the United
8 States and as interpreted in Winters and Arizona.
9 Such a declaration is sought against everyone,
10 but it asks no determination of the rights of all the
11 users of the Colorado River inter sese. Once its rights
12 have been determined and declared, then there is a
13 provision in the Arizona water statute which says that
14 you can take this decree and enfold it into the Arizona
15 decree in its proper hierarchy of rights of all the
16 other users.
17 So that as a practical matter -- as my time is
18 running out very fast -- it is -- avoids any possibility
19 of competition between the two proceedings. There is no
20 duplication, and even if the matter were all in the
21 state courts, you would find that the Indian water
22 rights, since it is derived from an entirely different
23 set of principles, utterly unrelated to appropriation,
24 utterly unrelated to beneficial use, utterly unrelated
25 to any of those factors which determine rights in

1 Arizona for private users --

2 QUESTION: Would it be related to the quantity

3 of water in the stream?

4 MR. RIFKIND: It would of course be related to

5 the water -- quantity of waters in the stream, but in

6 the most generalized sense of that term only, not

7 because some other user is applying it beneficially to

8 his property.

9 The point that I am trying to make is this,

10 that if this case, Indian and non-Indian rights, were

11 tried in one court, you would find that the Indian claim

12 would have to be encapsulated in a separate proceeding

13 and treated separately as in fact has been done in quite

14 a number of proceedings which have already taken place,

15 because the two don't mingle, and that's what I mean

16 when I say that there is no duplication, there is no

17 possibility of conflicting decision, there is no

18 piecemealing in the sense in which the term is used in

19 the Akin case.

20 It is more like a bifurcation of a case, say,

21 under the antitrust laws, where you have --

22 QUESTION: Well, Mr. Rifkind, the same is true

23 of claims by the United States on its own behalf. Those

24 rights would be determined by federal law, and yet the

25 United States has to go litigate them in the state

1 proceedings.

2 MR. RIFKIND: Yes, Your Honor, but the United

3 States --

4 QUESTION: And they would be -- stand on a

5 completely separate basis --

6 MR. RIFKIND: That is correct.

7 QUESTION: -- just like the Indian claim.

8 MR. RIFKIND: Yes, Mr. Justice, but the United

9 States, through the Act of its Congress, acquiesced in

10 such an arrangement.

11 QUESTION: I understand. I understand.

12 MR. RIFKIND: The Indians never acquiesced in

13 such an arrangement. They hold a promise from this

14 great nation, and they want that promise performed.

15 QUESTION: Well, then, I take it -- I take

16 it --

17 QUESTION: Well, you want to overturn Winter.

18 You want to overturn Akin.

19 MR. RIFKIND: Oh, no, Your Honor.

20 QUESTION: I take it you would say there is no

21 claim involving an Indian water right that would ever be

22 appropriate to be tried in a state court.

23 MR. RIFKIND: If the state brings a

24 proceeding?

25 QUESTION: You suggest that the other side

1 says there is never one that would be proper for the
2 federal court.
3 MR. RIFKIND: I do not say the contrary.
4 QUESTION: When would an inquiry be proper?
5 MR. RIFKIND: If Arizona brings an action for
6 stream adjudication and the Indians don't do anything,
7 and they bring in the Indian claims by serving the
8 United States, then Akin would say that can go on in the
9 state court. I have no question --
10 QUESTION: And the Indians can be bound by
11 it?
12 MR. RIFKIND: Oh, I have no doubt of it.
13 QUESTION: Even though, even though
14 determining the Indian water right in that proceeding
15 would be a separate matter resting on a separate
16 foundation?
17 MR. RIFKIND: Yes. I am simply saying that it
18 does not generate the kind of conflict that was pointed
19 out in the Akin case when we were weighing two parallel
20 proceedings. In that case, the United States started a
21 general stream adjudication, the states started a --
22 there were two wasteful proceedings both moving towards
23 the same target. Obviously, there was going to be a
24 collision at the end of that terminal. Somewheres those
25 two trains would come together, and there would be a

1 crash. No such thing can happen here.

2 QUESTION: Well, what if in Montana the --

3 what if in Montana -- the United States has filed some

4 claims on behalf of Indians in the state proceeding.

5 MR. RIFKIND: Well, all I --

6 QUESTION: So let us assume that proceeding

7 goes forward, the federal court proceeding goes forward,

8 one court ends up saying, well, the Indian claim is

9 worth so many acre feet of water, and in the other

10 proceeding it says it is a different --

11 MR. RIFKIND: I apprehended that you might ask

12 me that question, and therefore I found out the answer

13 from among my colleagues. We are still in the pleading

14 stage.

15 QUESTION: Ah ha.

16 MR. RIFKIND: Nothing has happened beyond the

17 pleading stage.

18 (General laughter.)

19 MR. RIFKIND: And I can say to this Court that

20 all these gentlemen representing the Indians are quite

21 happy to adjust their pleadings to such form as this

22 Court will find agreeable in order to ensure their safe

23 residence within a federal forum.

24 QUESTION: Well, you know, then, that

25 something is going to have to be done to avoid a

1 conflict.

2 MR. RIFKIND: There is no conflict in the

3 system that I have described.

4 QUESTION: Well, I know, but something is --

5 unless this Court or somebody does something, those two

6 proceedings are going to go on side by side, and there

7 could easily be a conflict.

8 MR. RIFKIND: Justice White, if you say that

9 the Navajo plan, the complaint that I worked out in

10 Navajo, which I did with both my eyes focused on the

11 Akin case, and I made sure that I never trespassed one

12 foot inside that territory, and I did it with eyes open,

13 and I have accomplished it, I believe, and having done

14 that, then the others can accommodate themselves to the

15 same kind of a complaint that will be safe in the

16 federal court.

17 QUESTION: If we held to the contrary, the

18 people in the federal courts will just have to

19 accommodate themselves.

20 MR. RIFKIND: I would be -- I am just --

21 QUESTION: You wouldn't mind if Akin were

22 overruled, would you?

23 MR. RIFKIND: I am not here to ask you to

24 revisit Akin. I wouldn't mind if Akin was overruled. I

25 can live with it.

1 (General laughter.)

2 CHIEF JUSTICE BURGER: Mr. Claiborne.

3 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

4 ON BEHALF OF RESPONDENT UNITED STATES

5 MR. CLAIBORNE: Mr. Chief Justice, may it
6 please the Court, the question we have asked ourselves
7 in respect of these cases is whether it is unavoidable
8 to have an all or nothing solution to have water rights
9 adjudication, Indian, non-Indian, federal, all in the
10 state court or all in the federal court, as indeed Akin
11 suggests must be the result.

12 It has seemed to us, after some years of
13 experience under Akin, we ask the Court to revisit only
14 that aspect of the Akin holding. It is that it is
15 indeed possible, practical, and desirable to divide the
16 task between the federal and state courts. It is
17 cooperative federalism to attempt that if it can be done
18 consistently with the statutes and consistently with
19 practical realities.

20 It is the way of attempting to reconcile and
21 accommodate apparently conflicting indications from the
22 Congress. And it seems to us not to present the
23 problems that what apparently were in the forefront of
24 the Court's mind when it decided Akin. It seems to us
25 there is no duplication, there is no prospect of

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 conflict, there is no wasted judicial resource. On the
2 contrary, there can be, and once the lines are clearly
3 drawn, hopefully will be a cooperation between the two
4 court systems.

5 QUESTION: Mr. Claiborne, since in the last
6 analysis it all depends in these dry western states on
7 how much water there is, how do you handle the
8 determination by both the federal court and the state
9 court of different quantities of available water?

10 MR. CLAIBORNE: Justice O'Connor, I don't know
11 whether your question suggests that either decree will
12 adjudicate more water than is available. I don't think
13 that specter has been put forward. If not --

14 QUESTION: No, a different determination of
15 how much water is available. Those figures can vary
16 depending on who is deciding the case.

17 MR. CLAIBORNE: Justice O'Connor, all we
18 suggest the task of the federal court will be is simply
19 to determine adversely to all those who want to contest
20 it in the federal court forum the number of acre feet of
21 water to which Indian reservations are entitled and the
22 priority date appropriate.

23 QUESTION: But doesn't that depend in part on
24 how much water there is?

25 MR. CLAIBORNE: Only to the extent that the

1 number of acre feet which a river bed bore might be
2 greater, computing so many acre feet per acre for each
3 acre than is available. Otherwise, the federal court
4 simply says, and there may be earlier priorities -- of
5 course, that would have to give way -- the federal court
6 merely makes the determination that assuming enough
7 water is available, the reservation is entitled to so
8 many acre feet per year.

9 That is all and as far as the federal court
10 goes. The state court in its comprehensive adjudication
11 takes that decree and places it in the proper sequence.
12 If there is an earlier priority date, it must be
13 satisfied before the reservation claim. More usually,
14 the reservation claim will be an earlier one, and the
15 adjudicated claims for others will come afterwards.

16 The state decree at the end of the day will be
17 comprehensive and will include this determination, this
18 quantification accomplished by the federal court. It
19 seems to us that that is indeed the way in which state
20 proceedings have proceeded when it is all in the state
21 court. We cite the Wyoming example. There, the water
22 master quite reasonably, it seems to us, and almost
23 inevitably, determined first the federal Indian reserve
24 claims with a view to incorporating that in his ultimate
25 decree.

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 He did that by inviting all those who wished
2 to contest it to appear. Very few did.
3 QUESTION: Do you think not only the
4 quantification of the reserved right but also its date
5 would be determined in the federal court?
6 MR. CLAIBORNE: Yes, the date, Justice White,
7 and of course that may be --
8 QUESTION: But the state law would determine
9 its priority?
10 MR. CLAIBORNE: I take it that in the western
11 states there is no dispute, the trust in right -- first
12 in time is first in right, and I don't think this is --
13 QUESTION: Well, that might be an assumption
14 that isn't universally applicable, but anyway, you would
15 -- your answer is yes, I take it.
16 MR. CLAIBORNE: I think my answer is yes. The
17 date is normally not a matter of great dispute. At
18 least it has been the indication from this Court that
19 the priority date -- Arizona versus California, most
20 notably -- is the date on which Congress or the
21 executive --
22 QUESTION: Well, do you think at least for the
23 purpose of finally firming up the state -- the Indian
24 water right in its priority, somebody is going to have
25 to go and have it included in the state decree?

1 MR. CLAIBORNE: The United States itself will
2 be a party to the state decree.
3 QUESTION: Well, what if the Indians don't
4 want you to be? What if they -- If they want a decree,
5 want a water right decree, isn't somebody going to have
6 to take their claim to the state court?
7 MR. CLAIBORNE: The --
8 QUESTION: For example, Mr. Claiborne, are you
9 going to comment on that motion of the Blackfeet Indian
10 tribe? They don't want you to represent them.
11 MR. CLAIBORNE: We have in effect answered the
12 motion in the letter we sent to the --
13 QUESTION: Your letter of March 15th?
14 MR. CLAIBORNE: That is so, Mr. Justice --
15 QUESTION: I see.
16 MR. CLAIBORNE: That is to say that in the
17 absence of any intervention by the tribe, it is the
18 power and duty of the United States to represent Indian
19 claims, whether the tribe wishes it or not, and so to
20 that degree we are here. We cannot default and say the
21 Blackfeet tribe are unrepresented.
22 The reasons why it is appropriate for the
23 federal court to adjudicate the federal Indian rights
24 which are for federal water determined in accordance
25 with federal law principles are too obvious to need

1 elaboration if the McCarren Amendment did not make that
2 solution impossible.
3 The Akin decision was at pains to point out
4 that federal jurisdiction over water claims was not in
5 any way diminished by the passage of that legislation,
6 and accordingly, as my brother, Judge Rifkind, pointed
7 out, if the reservation of that federal jurisdiction was
8 to be meaningful, it must apply in at least some cases.
9 If these cases, particularly the Montana
10 cases, in which the claims were filed in federal court
11 almost five years before the state in its leisurely way
12 prepared itself to begin an adjudication, and the
13 federal court effectively sat on those complaints for
14 that length of time, do not satisfy the Akin factors, it
15 is hard to imagine one that does.
16 Now, we have urged the Court to draw a clearer
17 line only because the jurisdictional skirmishing that
18 has ensued from the decision seems to us extremely
19 wasteful and acrimonious.
20 There is an ingredient in this case that was
21 not present in Akin, and it is one of some importance,
22 it seems to us. It is the Congressionally granted
23 prerogative to Indian tribes to invoke the federal forum
24 and very pointedly the federal forum under Section 1362
25 of the judicial code, and to do so in their own name.

1 Regardless of any conflict of interest, it is
2 desirable to attempt to accommodate that Congressional
3 directive, the availability of a federal court to the
4 Indian claims, with the policy of the McCarren
5 Amendment, if that can be done.
6 It seems to us that it can indeed be done, and
7 at least when the tribes invoke that jurisdictional base
8 as they have in all of the Arizona cases, and as they
9 have in most of the Montana cases, by intervening, that
10 choice should be respected, and it is a choice which
11 respects the Congressional judgment that Indian claims
12 are more appropriately adjudicated in the federal
13 court.
14 And that can live together with the concerns
15 of the McCarren Amendment, which are to avoid a
16 situation in which a tribe or the United States stands
17 aloof, refusing to participate in the adjudication of
18 its water rights in any forum. But we say that so long
19 as by a joint effort of state and federal courts all of
20 the rights in the stream can be adjudicated
21 contemporaneously --
22 QUESTION: Would you say, Mr. Claiborne, that
23 the claims of the United States in the Montana case were
24 properly referred to the state court, or were there any?
25 MR. CLAIBORNE: There were claims of the

1 United States, not on behalf of --

2 QUESTION: No, no, I mean, the United States'

3 own claims. Were they properly referred to the state?

4 MR. CLAIBORNE: We say they were.

5 QUESTION: Under -- under Colorado River?

6 MR. CLAIBORNE: Under Colorado River --

7 QUESTION: So those factors in Colorado River

8 would not only authorize but require the reference of

9 the United States claims to the state court, but not the

10 Indian claims?

11 MR. CLAIBORNE: Yes. Well, we are content

12 whether we would be entitled to resist that referral to

13 the state court to say that the special reasons for

14 preserving the federal jurisdiction of Indian claims

15 most obviously indicated in the reservation of water

16 rights in Public Law 280 and Section 1362 --

17 QUESTION: But it wouldn't -- I don't see how

18 you can say that the reference of the United States

19 claims was quite proper under Colorado River, and yet

20 the reference of the Indian claims were not under those

21 same factors.

22 QUESTION: Akin didn't distinguish between

23 Indian claims and United States claims.

24 MR. CLAIBORNE: The Akin court was not, at

25 least at the instance of the United States, invited to

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 focus on the special situation under the Acts of
2 Congress for Indian claims, most specifically, Section
3 1362. Here we have, as was not true in Akin, tribes
4 invoking what Congress gave them, a right of entry to
5 the federal court, and it would be a meaningless gift it
6 can be taken away from them by the expedience of suing
7 the United States in state court.

8 QUESTION: I think you really are, then,
9 asking that we really redo Colorado River with respect
10 to Indian claims, that those factors just -- however
11 much they might be satisfied with respect to the claims
12 of the United States itself, are nevertheless either not
13 satisfied or there are additional factors that come into
14 being that must be brought to bear on Indian claims.

15 MR. CLAIBORNE: I must candidly concede that
16 we are asking the Court to reconsider one aspect of Akin
17 in light of Section 1362, not involved there, and that
18 the experience under Akin has led us to invite the Court
19 to draw a firmer line.

20 We do point out that the federal courts would
21 -- the state courts would nevertheless, as they did in
22 the Wyoming case, have jurisdiction to adjudicate Indian
23 claims if neither the United States nor the tribe invoke
24 in a timely way its prerogative to remain in --

25 QUESTION: But you would say what our rule

ALDERSON REPORTING COMPANY, INC.

440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 ought to be is a bright line rule. Any time in a timely
2 way the United States or the Indian tribe invoked the
3 jurisdiction of the federal court, the quantification
4 and the date of priority of the Indian claim should be
5 adjudicated by the federal court.
6 MR. CLAIBORNE: We invite the Court to that
7 result, though we likewise endorse the in communi
8 position put forward by Judge Rifkind.
9 MR. CLAIBORNE: All right.
10 CHIEF JUSTICE BURGER: Do you have anything
11 further, Mr. Kyl?
12 ORAL ARGUMENT OF JON L. KYL, ESQ.,
13 ON BEHALF OF THE PETITIONERS IN
14 NO. 81-2147 - REBUTTAL
15 MR. KYL: Mr. Chief Justice, and may it please
16 the Court, yes, I do have some remarks.
17 The tribes and the government speak of history
18 and policy. We believe that the history is the McCarren
19 Amendment, that Congress's legislative intent was clear,
20 and that that is where policy issues should be
21 resolved. This Court interpreted the McCarren Amendment
22 in its Colorado River decision, and I suggest that most
23 of the suggestions of the tribes and the government are
24 indeed to revisit that case.
25 For example, the suggestion that the McCarren

1 Amendment did not waive Indian tribal sovereignty.
2 Indian tribal sovereignty is deemed waived because the
3 assertion of the claims is by the United States, and the
4 United States's tribal -- sovereign immunity is waived
5 under the McCarren Amendment.
6 The reading of the Congressional intent with
7 respect to Section 1362 that Mr. Claiborne just offered
8 to you would suggest to you that the Indian tribes have
9 a greater right to access to the federal courts under
10 Section 1362, which only eliminated the $10,000
11 jurisdictional barrier, than the United States has under
12 Section 1345, which this Court was dealing with in
13 Colorado River, a truly anomalous result.
14 That is not what either Congress has intended
15 or what this Court would intend in the Colorado River
16 decision.
17 Mr. Pelcyger suggests that the McCarren
18 Amendment -- excuse me, that the disclaimer really
19 suggests that there is an absolute bar. The disclaimer
20 is not an absolute bar, as this Court has suggested in
21 its prior decisions. For example, in the Mescalero
22 Apache tribe case, this Court specifically said that
23 even on reservations state laws may be applied to
24 Indians unless such application would interfere with
25 reservation self-government or impair a right granted or

1 reserved by federal law.

2 That was a New Mexico case. Similar language

3 is found in Arizona cases, in Montana cases, in

4 Washington cases, in many of the disclaimer states.

5 This Court has said on many prior occasions that the

6 absolute jurisdiction of the federal government does not

7 oust the state of all jurisdiction.

8 QUESTION: When confronted with a claim under

9 a disclaimer statute?

10 MR. KYL: Mr. Justice Rehnquist, I am not

11 aware of what a disclaimer statute would be.

12 QUESTION: No, with a disclaimer -- I mean,

13 say the Washington cases, the New Mexico cases,

14 Mescalero, that you are referring to. Was that

15 statement by the Court that you quote made in the

16 context of the disclaimer provision in the state's

17 constitution being argued?

18 MR. KYL: Mr. Justice Rehnquist, no, the

19 disclaimers are occasionally mentioned in these cases,

20 but they have never been seen as a bar.

21 With respect to the theory of the government,

22 I want to allude particularly to the Navajo tribe,

23 because Justice O'Connor was making a point that has a

24 great deal of validity in these semi-arid states. Both

25 in terms of identifying legally what water has been

1 appropriated, which is done in the state court
2 proceedings, and identifying physically how much water
3 is available, it is very important to be able to
4 integrate everything.
5 The Navajo tribe was put together in 17
6 different sections at 17 different times. There are
7 claims of non-Indians interspersed among those various
8 parts of the Navajo Indian reservation. That same
9 situation exists with respect to other reservations.
10 Whatever court is going to determine all of these rights
11 is going to have to have all of the parties before it to
12 hear all of the claims at the same time, identify the
13 various dates and the priorities, how much water is
14 physically available, what prior rights were
15 established, and then put it all together.
16 This is what Congress had in mind when it
17 adopted the McCarren Amendment. The legislative history
18 is clear that it was pointing to many of the various
19 state statutes that permitted precisely that. This
20 Court in Footnote 2 of the Colorado decision referred to
21 the Arizona statutes as among those statutes that could
22 determine all of these rights, and the Court has
23 declared on several prior occasions that the
24 adjudication of water rights are a unique kind of
25 litigation that require the -- all of the parties before

ALDERSON REPORTING COMPANY, INC.
440 FIRST ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 the Court in a unitary proceeding.

2 Unless that is true, you have intolerable
3 conflicts between courts, for example, the
4 administration of the same water by a federal court on
5 the one hand and a state court on the other hand. To
6 which court do the parties go if a conflict develops
7 with respect to the administration of the decree at a
8 later date? The conflicts are intolerable.

9 And if that kind of a proposal is necessary to
10 satisfy the government's concern, it can easily be
11 addressed to Congress, which could then change the law
12 to try to address some of these policy considerations,
13 but it has not done so.

14 We submit, if it please the Court, that the
15 only way that the state of Arizona and the other arid
16 and semi-arid states of the west are going to finally
17 get a complete and binding determination of water rights
18 so that everyone, Indians and non-Indians alike, can
19 move forward, can develop their economies, is if all of
20 the parties are before the same court at the same time.

21 This Court in Colorado River said that the
22 rights of the Indians would not be imperiled by sending
23 them to state court. There has been no suggestion by
24 any of the Indian tribes in the cases before you now
25 that the state courts of Arizona or Montana are hostile

1 to the Indian tribes, and in Colorado River you
2 specifically rejected the argument of the government.
3 You said that is an erroneous assumption, to assume that
4 if the Indian tribes have to go to state court, that
5 somehow state court judges are going to deprive them of
6 their rights.
7 In any event, this Court sits in final review
8 of any question which has been preserved that comes from
9 a state court. We submit that these cases should be
10 returned to the district court, and that the state court
11 adjudications should be allowed to proceed.
12 Thank you.
13 CHIEF JUSTICE BURGER: Thank you, gentlemen.
14 The case is submitted.
15 (Whereupon, at 2:34 o'clock p.m., the cases in
16 the above-entitled matter were submitted.)
17
18
19
20
21
22
23
24
25

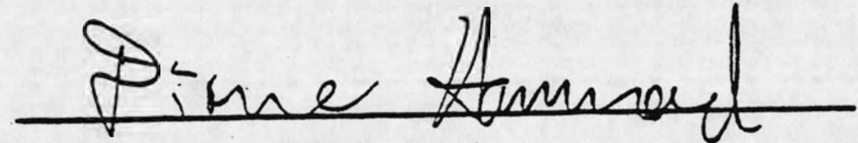
CERTIFICATION

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:

#81-2147 - ARIZONA, ET AL., Petitioners v. SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL; and

#81-2188 - MONTANA, ET AL., Petitioners v. NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

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

BY 

(REPORTER)

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

983 MAR 30 AM 9 07