

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

ETSI PIPELINE PROJECT,)	
)	
Petitioner,)	
v.)	No. 86-939
)	
MISSOURI, ET AL.;)	
)	
and)	
)	
DONALD P. HODEL, SECRETARY OF)	
)	
THE INTERIOR, ET AL.,)	
)	
Petitioners,)	
v.)	No. 86-941
)	
MISSOURI, ET AL.)	

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 ETSI PIPELINE PROJECT, :

4 Petitioner, :

5 v. : No. 86-939

6 MISSOURI, ET AL,; :

7 and :

8 DONALD P. HODEL, SECRETARY OF :

9 THE INTERIOR, ET AL., :

10 Petitioners, :

11 v. : No. 86-941

12 MISSOURI, ET AL. :

13 -----x

14 Washington, D.C.

15 Tuesday, November 3, 1987

16 The above-entitled matter came on for oral argument
17 before the Supreme Court of the United States at 11:01 a.m.

18 APPEARANCES:

19 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General,

20 Department of Justice, Washington, D.C.; on behalf of the

21 Petitioners.

22 ELIZABETH M. OSENBAUGH, ESQ., Deputy Attorney General of Iowa,

23 Des Moines, Iowa; on behalf of the Respondents.

24

25

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	JEFFREY P. MINEAR, ESQ.	
4	on behalf of Petitioners	3
5	ELIZABETH M. OSENBAUGH, ESQ.	
6	on behalf of Respondents	27
7	JEFFREY P. MINEAR, ESQ.	
8	on behalf of Petitioners - Rebuttal	49
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Minear, you may proceed
4 whenever you are ready.

5 ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ.

6 ON BEHALF OF PETITIONERS

7 MR. MINEAR: Thank you, Mr. Chief Justice, and may it
8 please the Court:

9 Section 9 of the Flood Control Act of 1944 approved
10 the Pick-Sloan Plan, a comprehensive multiple purpose program,
11 jointly administered by the Army and the Interior Department,
12 for the development of the Missouri River Basin's water
13 resources.

14 The question here is whether the Secretary of the
15 Interior may enter into a contract pursuant to the federal
16 reclamation laws to supply a portion of the program's unneeded
17 irrigation waters for ETSI Pipeline Project's state-approved
18 industrial use.

19 I would like to begin by briefly describing the Pick-
20 Sloan Plan. Pick-Sloan represents a comprehensive yet flexible
21 response to the needs of a vast and varied river basin. It
22 combines the flood control features of the Army's proposed Pick
23 plan and the reclamation features of the Interior's proposed
24 Sloan plan into a unified inter-agency program designed to
25 provide maximum basin-wide benefits.

1 Under this plan, the arid upper basin states
2 dedicated a great expanse of productive lands for construction
3 of the massive main stem reservoirs that would protect the
4 lower basin states from disastrous seasonal floods. In return,
5 the upper basin states received assurances that water stored in
6 these reservoirs located within their borders would be
7 available for irrigation and other needs.

8 The main stem reservoirs have now been completed, and
9 the lower basin states are secured from the once devastating
10 flood waters, but the upper basin states anticipated irrigation
11 needs have not yet fully materialized and those states wish to
12 put this water which presently inundates their territory to
13 other beneficial applications.

14 The dispute here centers on Lake Oahe, a main stem
15 reservoir that was central to both the Pick and the Sloan
16 plans. The Army originally proposed two small flood control
17 reservoirs at this location. Interior, by contrast, recommended
18 one large reservoir with much greater capacity to meet the
19 upper basin states' reclamation needs.

20 The Army and Interior ultimately agreed that
21 Interior's proposal with its massive reclamation storage
22 capacity would best serve the needs of the basin. However, it
23 became clear in the early 1970s that the upper basin states'
24 irrigation needs were not developing as quickly as expected.
25 The Interior Department, with the cooperation of the Army,

1 therefore agreed to market the resulting unneeded irrigation
2 water at Lake Oahe and other reservoirs for state-approved
3 applications.

4 QUESTION: Mr. Minear, have the two agencies,
5 Interior and the Army, always agreed consistently on the proper
6 interpretation of the Flood Control Act?

7 MR. MINEAR: Yes, Your Honor, I think that they have.
8 This agreement has been --

9 QUESTION: There was some suggestion certainly by the
10 Respondents that they have not always agreed that the Army had
11 maintained at one time that the Secretary of the Interior could
12 not market water from Army reservoirs independently.

13 MR. MINEAR: The Army General Counsel, at the time
14 that this proposal was first made, indicated that the statute
15 appeared somewhat ambiguous but, nevertheless, agreed to
16 cooperate with the Interior Department's proposal, deferring to
17 the Interior Department's expertise in supplying industrial
18 water.

19 QUESTION: Well, has there been some uncertainty of
20 the position of the two agencies in the past? I have--
21 apparently they have come together for purposes of this
22 litigation, but I'm trying to get a candid assessment of what
23 their position was before.

24 MR. MINEAR: I think at the highest levels of the
25 Army, with the Secretary of the Army and the General Counsel of

1 the Army, who are in a position to make these determinations
2 under the Flood Control Act, there has been substantial
3 agreement between the two agencies throughout this program.

4 The Respondents cite several memoranda, internal
5 memoranda, obtained through discovery, that express some doubts
6 at lower levels. However, the Army General Counsel has been
7 quite consistent in his approach to this matter throughout--
8 since -- essentially since 1974.

9 QUESTION: Since I have you interrupted, let me ask
10 you one other thing. Under Section 6, now, the Corps can
11 market surplus water.

12 MR. MINEAR: That is correct.

13 QUESTION: Now, unused irrigation storage water can
14 be marketed by Interior.

15 MR. MINEAR: Yes, that is correct, also.

16 QUESTION: Now, can it be the same water? What is
17 surplus water as opposed to unused irrigation storage water? Is
18 it the same water we're talking about?

19 MR. MINEAR: Not necessarily.

20 QUESTION: Could it be? Could it be the same?

21 MR. MINEAR: Usually not. For instance, I would think
22 that the water that now -- the ETSI contract, this particular
23 20,000 acre feet of water, would not be treated as surplus
24 water by the Army.

25 QUESTION: Why not?

1 MR. MINEAR: Because it is being put to a use by the
2 Interior Department. It's being put to a use in accordance with
3 the federal reclamation laws.

4 QUESTION: Am I mistaken then in thinking that the
5 Corps has changed its position so it now believes that it could
6 have marketed the water in this case as surplus water?

7 MR. MINEAR: I believe the Army's present position,
8 which is presently being formulated at this point, it is still
9 under evolution, would be that it would not be able to market
10 the ETSI water, and the reason is this: let me go back, first,
11 to 1974.

12 The Army made a determination at that point that it
13 probably could not market unutilized irrigation water in these
14 circumstances because it would run through the hydro-powered
15 turbines and would, therefore, serve a beneficial use. The
16 Army has found that this interpretation, in fact, has resulted
17 in some very harsh applications. In particular, with small
18 towns, for instance, Parshall, North Dakota, was the example
19 used here.

20 The town requested a very small amount of water, 323
21 acre feet, for its municipal uses. The town almost adjoins the
22 reservoir and was in need of water. The Army's initial
23 determination was that perhaps it could not supply this water
24 because the water could be used to go through the turbine. The
25 Army has attempted to ameliorate that policy by, in fact,

1 making this water -- by concluding that when the water can be
2 made available to a municipal application without interfering
3 with other project purposes, that it then can supply the water.

4 This is really what the Army's policy is designed
5 for.

6 QUESTION: And supply it why? Because it becomes
7 surplus?

8 MR. MINEAR: They have decided to treat that type of
9 water as surplus.

10 QUESTION: Well, that's nice, but what does surplus
11 water mean? I thought it meant spill-over.

12 MR. MINEAR: Traditionally, that's how the Army
13 defined it. Water that would, in fact, pass over the spillway,
14 that would not be used for any other purpose.

15 QUESTION: What else could it possibly mean?

16 MR. MINEAR: Well, in this case, take the example
17 here where the water, in fact, the water is being used to
18 produce hydro-power, and that is the only purpose that this
19 water can serve at all. If, in this case, a small town, in
20 this case, Parshall, is willing to pay enough for that water,
21 in fact, recoup the lost hydro-power purposes, then it fulfills
22 the ultimate objective of the reservoir.

23 QUESTION: Well, that's very desirable, but does that
24 transform it into surplus water? That's the issue.

25 MR. MINEAR: It depends. It appears that that was,

1 in fact, what Congress meant when, in fact, it adopted these
2 surplus water provisions here in the Flood Control Act, Section
3 6, that it was, at that time, addressing these types of
4 problems.

5 QUESTION: Well, it was addressing one aspect of
6 problems of water that is not being used and making that water
7 usable, but only one type of water that wasn't being used; that
8 is, surplus water, which means spill-over water, that is not
9 being reserved for irrigation, is not being reserved for any
10 other use.

11 MR. MINEAR: Well, Your Honor, I think, in any event,
12 --

13 QUESTION: You know, that's meeting one aspect of
14 that problem, but to say you meet one aspect of the problem is
15 not to say you intend to meet all aspects, including water
16 reserved for irrigation that is not being used. You would not
17 consider that surplus water, would you?

18 MR. MINEAR: No, Your Honor. But, Your Honor, I
19 think what's important to remember here is the Army's authority
20 is not what is in question here. Instead, it's the Interior
21 Department's authority. That is what has been challenged and is
22 the subject of this dispute.

23 QUESTION: But the meaning of surplus water is quite
24 relevant to the entire case, whether it -- because it pertains
25 not just to the Army's position but to what the two agencies

1 can do.

2 MR. MINEAR: And I think what the two agencies have
3 reached a reconciled position to, based on their two
4 definitions, that, in fact, --

5 QUESTION: You represent both agencies.

6 MR. MINEAR: That is correct.

7 QUESTION: Mr. Minear, --

8 QUESTION: Very ingenious position to be in.

9 MR. MINEAR: Yes, Your Honor.

10 QUESTION: I share Justice O'Connor's historical
11 concerns. It seemed to me that for awhile this was a turf
12 battle between the Army and the Interior until it got under the
13 jurisdiction of the Solicitor General and brought them
14 together.

15 Let me read one sentence from Judge Bright's dissent.
16 "It leaves the irrigation water stored in the main stem
17 reservoirs without a governing agency or law." Do you agree
18 with that, are you defending that, or is Judge Bright
19 completely wrong?

20 MR. MINEAR: I think that Judge Bright is partially
21 correct.

22 QUESTION: Partially correct.

23 MR. MINEAR: The Army simply cannot market all of the
24 water that's available in this reservoir as surplus water.
25 It's simply -- you must remember the Army's mission is

1 primarily flood control and navigation protection. Their supply
2 of surplus water is simply an ancillary power that has been
3 given to them by Congress to assure maximum utilization of
4 these reservoirs.

5 Congress' ultimate objective in these cases is to
6 assure that these reservoirs do the most good for the most
7 people. That point is repeated throughout the legislative
8 history. It's the guiding principle of the Pick Plan and the
9 Sloan Plan, and that is what the Army and Interior Department
10 are attempting to do here.

11 QUESTION: Of course, it's a strange thing that the
12 8th Circuit panel divided upper basin against lower basin
13 judges, too.

14 MR. MINEAR: Yes, Your Honor.

15 QUESTION: Well, wasn't this -- this reservoir was
16 designed to have -- and built to include irrigation water?

17 MR. MINEAR: That is correct, Your Honor.

18 QUESTION: Quite a lot of it.

19 MR. MINEAR: Yes, it was designed so.

20 QUESTION: And the Secretary of Interior has found
21 that that water -- none of that water or at least all of that
22 water is not needed for irrigation.

23 MR. MINEAR: Not at the present. That's correct.

24 QUESTION: And, so, there the water sits unused for
25 irrigation anyway, and your claim is, I take it, that the

1 Secretary of Interior has the power to use that water for some
2 other purpose.

3 MR. MINEAR: To make that water available to states.

4 QUESTION: So, it's unused irrigation water.

5 MR. MINEAR: Yes.

6 QUESTION: For a coal slurry in Wyoming.

7 MR. MINEAR: Yes, that is right.

8 QUESTION: Mr. Minear, getting back just for a moment
9 to this business of the relationship between the Secretary of
10 the Army and the Secretary of the Interior, certainly if the
11 Secretary of the Army had joined in signing this contract,
12 there wouldn't be any lawsuit at all, would there?

13 MR. MINEAR: Oh, I'm not so sure about that at all.
14 The Respondents, the states, have challenged the Army's
15 authority as well as Interior's authority.

16 In any event, this authority was executed under the
17 Interior's power, under the reclamation laws. So, whether the
18 Army signed the contract or not is probably not relevant given
19 the authority that was asserted.

20 QUESTION: Well, it certainly would have answered the
21 theory of the Court of Appeals decision, --

22 MR. MINEAR: Yes.

23 QUESTION: -- which was that it's a joint
24 responsibility rather than a single responsibility.

25 MR. MINEAR: But, in fact, they did cooperate here.

1 In fact, the contract states that.

2 QUESTION: But they didn't sign it, did they?

3 MR. MINEAR: No. The contract --

4 QUESTION: This lawsuit would be over if the
5 Secretary of the Army had signed this contract.

6 MR. MINEAR: I respectfully disagree with you, Your
7 Honor.

8 QUESTION: Certainly, the Court of Appeals decision
9 wouldn't have been written the way it was.

10 MR. MINEAR: Perhaps it would have been written
11 differently.

12 QUESTION: Perhaps. But what was the wise in the
13 agreement according to them that they didn't have the approval
14 of the Army? That's the only wise according to the Court of
15 Appeals.

16 MR. MINEAR: Your Honor, I don't think that that is
17 correct. I think because -- remember, the water service
18 contract was executed under the reclamation laws pursuant to a
19 state water right that ETSI now holds.

20 Now, the Army is generally not involved with the
21 application of the reclamation laws in these cases.

22 QUESTION: Do you think that the case would have been
23 the same if the Army had endorsed the contracts, we ratify and
24 approve everything that's being done here?

25 MR. MINEAR: Oh, I think there still would --

1 QUESTION: And then the states would make the same
2 claim?

3 MR. MINEAR: It's likely that there still would have
4 been a lawsuit in this case.

5 QUESTION: Well, some other ground, certainly. But
6 you're telling us that the Secretary of the Army agrees that
7 the Secretary of the Interior has this authority but isn't
8 willing to sign these papers. That's what the lawsuit is all
9 about.

10 MR. MINEAR: But, Your Honor, it was not necessary
11 for the Secretary of the Army to sign these papers.

12 QUESTION: Well, whether it was necessary or not,
13 they could have avoided a lawsuit and a lot of judicial time if
14 they had signed the contract.

15 MR. MINEAR: Yes, Your Honor. The contract even
16 specifies that the Army, in fact, was consulted on this and
17 approved this -- not approved, but, in fact, --

18 QUESTION: Is there any legal significance to their
19 having been consulted and approved?

20 MR. MINEAR: I think that there is legal significance
21 because the --

22 QUESTION: Then, the Secretary of the Interior does
23 not have the authority to act independently.

24 MR. MINEAR: Well, in terms of acting independently,
25 I think it's important to get this point straight, and that is,

1 that under the Pick-Sloan Plan, the Army and Interior
2 constantly consult on all of these matters because what one
3 does affects the other. So, I think that it is true that there
4 is an obligation for consultation and coordination. That took
5 place in this case.

6 QUESTION: What if, after the consultation, the Army
7 says I've heard everything you've consulted me about, but I
8 just think you're all wrong, I'd like to use this water for
9 down stream purposes?

10 MR. MINEAR: Then, that can be resolved within the
11 Executive Branch.

12 QUESTION: Then, the Secretary of Interior could not
13 act independently?

14 MR. MINEAR: That is right. If the Secretary of the
15 --

16 QUESTION: The Secretary of the Interior can act
17 independently unless the Army objects?

18 MR. MINEAR: That is right.

19 QUESTION: Strange law.

20 QUESTION: Mr. Minear, the Secretary of the Army
21 couldn't have signed this contract, could he, purporting to act
22 under the Reclamation Act?

23 MR. MINEAR: Yes, Your Honor. That is the point.

24 QUESTION: He has no authority under the provision
25 under which the contract purported to be executed.

1 MR. MINEAR: That is absolutely correct, Your Honor.

2 QUESTION: Nor is it clear that he had any authority
3 nor is it clear that he even asserts to have any such authority
4 under the surplus water provision of the Act which he is in
5 control of.

6 MR. MINEAR: Every one of those points is correct,
7 Your Honor.

8 QUESTION: So, there's no possible basis on which he
9 could conscientiously have signed the contract.

10 MR. MINEAR: I agree completely, Your Honor.

11 QUESTION: The most he could do --

12 QUESTION: The Army --

13 QUESTION: -- would be to agree with Interior that it
14 was a good idea to do it, which he did.

15 MR. MINEAR: Yes, that is correct.

16 QUESTION: Even if the Army decided that it had
17 authority to execute a contract like this on its own, it would
18 be pursuant to a completely different set of rules.

19 MR. MINEAR: That is correct, also.

20 QUESTION: Which is of fundamental importance, I
21 would think.

22 MR. MINEAR: Yes, that is right.

23 QUESTION: The Army doesn't assert anything here
24 because the Army is not here.

25 MR. MINEAR: Your Honor, the Army did sign our brief,

1 but this is primarily --

2 QUESTION: Is the Army here?

3 MR. MINEAR: Pardon?

4 QUESTION: Is the Army here?

5 MR. MINEAR: In what respect, Your Honor? The Army
6 was sued in this case, yes.

7 QUESTION: Do you represent the Army?

8 MR. MINEAR: Yes, Your Honor.

9 QUESTION: And the Interior?

10 MR. MINEAR: That is right, Your Honor.

11 QUESTION: Well, which side should I take?

12 MR. MINEAR: You should take the side of the United
13 States. We speak with one voice in this case, Your Honor.

14 As I was saying, the water marketing program advanced
15 three important objectives in this case. First, it permitted
16 the upper basin states to apply some of their presently
17 unneeded irrigation water to other beneficial uses. Second, it
18 allowed the Interior Department to recoup some of the costs
19 incurred in providing irrigation storage, and, third, it
20 secured water for alternative energy sources at the height of
21 the Arab oil embargo.

22 Now, we submit that Section 9 of the Flood Control
23 Act authorizes the Secretary of the Interior to enter into the
24 FC contract. Our legal position is quite straightforward.
25 Section (a) of the Flood Control Act approves the Pick-Sloan

1 Plan, which, in turn, designates the Secretary of the Interior
2 as the appropriate authority to manage the reclamation aspects
3 of the main stem reservoirs.

4 Section 9(c) then identifies the body of law, namely
5 federal reclamation law, that governs how the Secretary shall
6 exercise that authority. The Secretary may, therefore, enter
7 into contracts to supply unutilized irrigation water from a
8 main stem reservoir, in this case, Lake Oahe, in accordance
9 with the provisions of the Reclamation Project Act, a federal
10 reclamation law that permits the Secretary of the Interior to
11 provide unneeded irrigation water for miscellaneous purposes.

12 There are two points here that bear special emphasis.
13 First, the Pick-Sloan Plan sets forth the basic policy for the
14 systematic development of the river basin, and it expressly
15 recognizes that the Secretary of the Interior shall have
16 authority over irrigation storage at the main stem reservoirs.

17 It naturally follows under this functional division
18 of authority that the Secretary is authorized to administer the
19 application of irrigation waters not presently needed for
20 irrigation use.

21 Second, when Section 9(c) instructs that the
22 reclamation developments to be undertaken by the Secretary
23 shall be governed by the reclamation laws, it is referring to
24 the Secretary's reclamation activities and not merely the
25 physical work constructed by the Bureau of Reclamation.

1 Thus, Section 9(c) makes clear that the reclamation
2 laws shall govern the Secretary's entire reclamation program
3 beginning with his initial assessment of irrigation storage
4 requirements, continuing through to final repayment of costs,
5 and including in his determination what should be done with
6 unneeded irrigation water.

7 Respondents have only modest quarrels with our
8 construction of Section 9. They principally contend that two
9 other provisions of the Flood Control Act, Section 6 and 8,
10 override Section 9 in the functional division of authority set
11 forth in the Pick-Sloan Plan.

12 The reply briefs filed in this case explain in
13 considerable detail why Respondents are wrong. I will simply
14 summarize our answer here.

15 First, Respondents observe that Section 6 gives the
16 Army general authority to market surplus water from Army flood
17 control projects. They then surmise that the Army must have
18 exclusive authority to market water from the Pick-Sloan Program
19 to main stem reservoirs.

20 Claiming Respondents' logic does not follow, Section
21 6 does not purport to give the Army exclusive water marketing
22 authority, nor does it indicate how that authority should be
23 exercised in hybrid facilities, which combine both flood
24 control and reclamation features.

25 There is no basis for interpreting Section 6 to

1 override the functional division of authority expressly set
2 forth in the Pick-Sloan Plan.

3 Second, Respondents suggest that Section 8, which
4 specifies the general procedure for adding reclamation features
5 to Army flood control projects, provides the only avenue by
6 which Interior can exercise reclamation responsibilities at
7 Army projects.

8 Respondents' Section 8 argument is also untenable.
9 Section 8 deals with how to add reclamation features to flood
10 control projects. The section has no application here where
11 Interior is attempting to assure that Lake Oahe's pre-eminent
12 and existing reclamation feature, namely its massive irrigation
13 storage capacity, is optimally applied to a permissible
14 reclamation use.

15 Respondents also contend that the Secretary's
16 interpretation is not entitled to deference. However, this is
17 precisely the type of case where deference is appropriate.

18 First and foremost, the Secretary's construction of
19 Section 9 is certainly reasonable. The most that Respondents
20 can argue is the statute may be ambiguous, in which event the
21 Secretary's reasonable interpretation --

22 QUESTION: Wasn't even ambiguous. I thought it was
23 so clear that there was no room for doubt.

24 MR. MINEAR: But the Court of Appeals relied on
25 Section 6 and Section 8, which, as I've indicated, really have

1 no relevance here. They simply read the wrong sections of the
2 statute. They saw perfect plainness in the wrong provisions.

3 Second, the Flood Control Act is written in unusually
4 broad language that indicates Congress' intention that the
5 responsible agencies would fill in the gaps in this
6 legislation.

7 Furthermore, the Interior Department was intimately
8 involved in the formulation of this legislative program and its
9 interpretations are, therefore, particularly persuasive.

10 QUESTION: Can I ask one other question before you
11 get any farther into your deference argument?

12 MR. MINEAR: Yes, Your Honor.

13 QUESTION: What is the status of the contract right
14 now? As I understand it, the project is not going to be used
15 for the originally-intended purpose.

16 MR. MINEAR: The contract, in essence, has been
17 simply held up. There are still obligations that are owed by
18 ETSI under the contract, and we continue to have an obligation
19 to provide that water.

20 The contract has been enjoined. Performance has been
21 enjoined and, therefore, neither of these activities are taking
22 place.

23 QUESTION: But I thought ETSI had cancelled.

24 MR. MINEAR: No. ETSI has not cancelled the
25 contract. They have essentially shelved their project, but the

1 contract remains a tangible asset of theirs, which they are
2 free to assign under certain conditions.

3 QUESTION: Is it a matter of indifference to the
4 Secretary of Interior what use the water is put to? Do you
5 care what they do with the water?

6 MR. MINEAR: Yes, we do care what they do with the
7 water.

8 QUESTION: But you don't know what they're going to
9 do with the water?

10 MR. MINEAR: Well, the water, they can only apply the
11 water in accordance with a state permit. Now, they obtained a
12 state permit. I believe the permit has since lapsed because
13 they are obligated to make a very large payment.

14 QUESTION: They were going to use it in some kind of
15 coal slurry, weren't they?

16 MR. MINEAR: Yes.

17 QUESTION: And that purpose was approved, but you
18 don't know what they really will do with it now?

19 MR. MINEAR: No, we don't, Your Honor, but if it went
20 outside of the terms of the contract, the understanding of the
21 contract, I'm sure that the Secretary would object. We did
22 supply this water for a particular purpose in this case.

23 QUESTION: What are the terms? So, it would have to
24 be used for coal slurry.

25 MR. MINEAR: It is for industrial purposes, I

1 believe. I think this would be a matter of really contract
2 interpretation. I'm not sure I'm well enough versed on the
3 contract to make that determination.

4 QUESTION: That's a matter entirely within the
5 authority of the Secretary of Interior to approve of the
6 purpose or disapprove?

7 MR. MINEAR: Yes, and, of course, there would be
8 consultation with the Army once again about this.

9 QUESTION: Is there an obligation to consult with the
10 Army now?

11 MR. MINEAR: We believe that there is an obligation
12 for the two agencies to consult in the activities that take
13 place at the Pick-Sloan reservoirs, given the nature of their
14 hybrid facilities.

15 As I was saying before, I think that the Secretary's
16 interpretation is certainly entitled to deference here,
17 particularly because the question here is complex and requires
18 specialized knowledge of a vast water resources program that
19 has been committed to the care of expert agencies.

20 Furthermore, the Interior Department has consistently
21 adhered to its present interpretation throughout the life of
22 this contract and to the same --

23 QUESTION: If I may ask one other question. I hate
24 to keep interrupting. But supposing there was a dispute as to
25 a given quantity of water, whether it was surplus water the

1 Army had jurisdiction over, or unutilized irrigation water, to
2 whom would we defer on that -- on resolving such a dispute?

3 MR. MINEAR: That dispute would be resolved within
4 the Executive Branch, mostly likely would not be answered by
5 the courts. Instead, the determination would be made between
6 the Secretary of the Interior and the Secretary of the Army.

7 QUESTION: That could be resolved in the Executive
8 Branch if this one can't be?

9 MR. MINEAR: Pardon?

10 QUESTION: I'm not sure why that dispute is
11 resolvable within the Executive Branch any more than this one
12 is.

13 MR. MINEAR: Well, it is because both of those
14 agencies ultimately are answerable to the President, and, in
15 fact, when this project was originally formulated, it's clear
16 that President Roosevelt was very active in determining the
17 hybrid nature of these facilities.

18 So, there is an answer in the Executive Branch for
19 any inter-agency dispute that might exist here.

20 QUESTION: And you're telling me that in this case,
21 you wouldn't have solved the dispute by resolving that dispute
22 and having the President of the United States tell them both, I
23 think this water should be used for that purpose, I'd like you
24 both to sign this contract? We'd still have this lawsuit?

25 MR. MINEAR: Well, again, I think as Justice Scalia

1 mentioned earlier, the contract was executed under the
2 reclamation laws, after consultation with the Army. The Army
3 had no --

4 QUESTION: Well, another whereas clause, by virtue of
5 authority given by that statute and by the authority given by
6 Section 6 to the Army, we sell you this water.

7 MR. MINEAR: Yes, but Section 6 wasn't mentioned. I
8 think it's useful to know exactly --

9 QUESTION: I know it wasn't mentioned.

10 MR. MINEAR: -- what statutes these waters are being
11 applied because they might have different repercussions.

12 QUESTION: I was puzzled as to what disputes are
13 resolvable within the Executive Branch and why you have to come
14 to us about them.

15 MR. MINEAR: I think that the disputes between
16 agencies are resolvable within the Executive Branch, but this
17 is not a dispute really between agencies; this is a dispute
18 between the upper and lower basin states over the use of this
19 water.

20 QUESTION: Yes, but Justice Stevens obviously would
21 be correct if it were clear and if you acknowledged that the
22 Army had authority, if it had jurisdiction over this water, to
23 dispose of it, but that isn't clear.

24 MR. MINEAR: Yes, that's right, it is not clear.

25 QUESTION: And that not being clear, the only way to

1 do it with assurance of lawfulness was through Interior.

2 MR. MINEAR: That is correct, Your Honor.

3 QUESTION: Yes, but it's perfectly clear that one or
4 the other or both had the authority to dispose of this water,
5 is it not?

6 MR. MINEAR: I'm sorry?

7 QUESTION: Either the Army or the Secretary or both
8 clearly had the authority by virtue of a combination of Section
9 6 of one Act and Section 9.

10 MR. MINEAR: Our position is that Interior clearly
11 has a --

12 QUESTION: I understand that's your position, but
13 nobody could contest the power to sell this water if they both
14 agreed and invoked both statutes, that we won't try to define
15 the water as either surplus or irrigation, because whatever it
16 is, we want to dispose of it for this purpose.

17 MR. MINEAR: In terms of contesting, I'm quite
18 confident that we would still have a lawsuit here today, Your
19 Honor, even if Army had signed that contract.

20 I would like to reserve the remainder of my time for
21 rebuttal.

22 CHIEF JUSTICE REHNQUIST: Very well, Mr. Minear.

23 I will hear now from you, Ms. Osenbaugh.

24

25

1 ORAL ARGUMENT OF ELIZABETH M. OSENBAUGH, ESQ.

2 ON BEHALF OF RESPONDENTS

3 MS. OSENBAUGH: Mr. Chief Justice, and may it please
4 the Court:

5 The question here is what law governs industrial use
6 of water stored in Army reservoirs on the Missouri River.

7 Respondents submit that the courts below very
8 properly held that the Secretary of the Interior may not claim
9 unilateral marketing authority over waters in Army reservoirs
10 for industrial use. Instead, Section 6 of the Act expressly
11 provides the terms which govern industrial use of this Army
12 reservoir.

13 Section 6 provides that the Secretary of the Army
14 makes the decision whether water is available for industrial
15 use and Section 6 also very specifically protects other uses of
16 the water. It establishes the terms and conditions for
17 industrial use of water at Army reservoirs.

18 QUESTION: Would you help me with the problem I've
19 had with your adversary? Would you agree that if the Secretary
20 of the Army had said, well, we're not sure whether it's surplus
21 water or irrigation water, but we join in the contract, would
22 you still have an objection to this transaction?

23 MS. OSENBAUGH: There would be two issues if the
24 Secretary of the Army had joined in the contract. There would
25 not be the issue, I'm sorry, of which agency can market the

1 water. Then, the question would simply be whether the
2 Secretary of the Army complied with the terms of Section 6.

3 QUESTION: In other words, would you take the
4 position that if you win this lawsuit, the Secretary of the
5 Interior can't dispose of this water, then they said, well, we
6 will now classify it as surplus water rather than that, you'd
7 say they can't, and would you also say they couldn't sell it
8 then either?

9 MS. OSENBAUGH: Then, the issue would be the
10 reasonableness of Army's interpretation of Section 6. As is
11 shown by Army --

12 QUESTION: So, the answer is you would be opposed to
13 that sale, too?

14 MS. OSENBAUGH: No, I'm not saying that, Your Honor,
15 but I am saying that Section 6 does impose substantive
16 protections of other uses.

17 QUESTION: Well, let me ask you another -- put it a
18 different way. Say the President of the United States thinks we
19 ought to sell this water and he calls in the Secretary of the
20 Army and the Secretary of the Interior and says, how can we do
21 it, and they do all the paper work in the world on it, would
22 you find any objection to their power to dispose of this water,
23 if they all agreed they wanted to do it?

24 MS. OSENBAUGH: No. We'd agree that they would have
25 power to make the decision whether to dispose of the water, and

1 the Army General Counsel's opinion indicates that Army does
2 have authority to determine whether this water is available for
3 industrial use and to determine that a certain portion of that
4 water is surplus, even though it may reduce the power generated
5 at the reservoir.

6 The difference, though, between Army's current
7 position and the position of the Secretary of the Interior is
8 still quite significant.

9 QUESTION: Well, I'm trying to get your position.

10 MS. OSENBAUGH: Yes.

11 QUESTION: What would you -- would you have any
12 objection to a contract that was signed by both the Secretary
13 of the Army and the Secretary of the Interior and sought its
14 authority in both statutes, said we don't want to worry about
15 which -- whether to classify it as surplus or extra irrigation
16 water, we just want to dispose of this water for this purpose,
17 would you say they had no power to do that?

18 MS. OSENBAUGH: No, I would not say they had no
19 power. I would say that provided that they did reasonably
20 accommodate other project purposes and meet the requirements--

21 QUESTION: They didn't do anything except what
22 they've done here. They've accommodated nothing else. They have
23 all this very large amount of water in this particular
24 reservoir. Would you say that given the facts we all know are
25 true as of now and just recited them all in the contract, both

1 the Army and the Interior signed the contract, would you have
2 any valid objection to the contract, to the sale of the water?

3 MS. OSENBAUGH: If they did not adequately protect
4 other uses.

5 QUESTION: Well, they gave precisely the same
6 protection that this contract gives.

7 QUESTION: Well, if I understood it, if Interior
8 markets it, all interior has to be concerned about is whether
9 other irrigation needs are met, and it's not necessary for
10 Interior to think about down stream users at all if they aren't
11 using it for irrigation.

12 Now, if the Army sells it as surplus, then it's my
13 understanding that consideration must be given to the flood
14 control and other possible power uses and other uses of down
15 stream users above and beyond irrigation use, is that correct?

16 MS. OSENBAUGH: That is correct, Your Honor.

17 QUESTION: And under this contract, the consideration
18 to down stream users was not given because Interior was
19 considering only irrigation and there wasn't any irrigation,
20 isn't that right?

21 MS. OSENBAUGH: That is correct.

22 QUESTION: Okay.

23 MS. OSENBAUGH: Interior takes the position that the
24 Reclamation Projects Act requires that it not only -- that it
25 need consider only the effect on irrigation and not even just

1 the effect on irrigation, but only its own irrigation units.

2 So, we have challenged the adequacy of their
3 consideration.

4 QUESTION: But they can only -- they only purport to
5 reach that part of a reservoir's capacity that has been set
6 aside for irrigation.

7 MS. OSENBAUGH: There is no specific block of water
8 set aside for irrigation. That is, the water is in multi-
9 purpose storage where it is used for all the purposes that
10 Congress envisioned.

11 QUESTION: I know, but if the lake hadn't been built
12 to irrigate also, it wouldn't have been built the way it was.

13 MS. OSENBAUGH: That is correct. It was built for a
14 variety of purposes.

15 QUESTION: It was built to have a specific amount of
16 irrigation water capacity.

17 MS. OSENBAUGH: There is no defined specific amount.
18 It was clear that Congress contemplated that there would be
19 significant irrigation development and that the reservoirs --

20 QUESTION: May I'm wrong. I thought I read that it
21 was agreed between the two agencies that what the capacity of
22 the lake would be, this reservoir would be, and that a specific
23 amount of it was for irrigation.

24 MS. OSENBAUGH: Well, I don't believe --

25 QUESTION: Is that right or wrong?

1 MS. OSENBAUGH: -- that they've ever shown a specific
2 amount for the irrigation. The agencies did agree and the
3 capacity of the reservoir was established in the documents that
4 coordinate the plans.

5 The district courts specifically noted that the only
6 thing, function, Interior has ever had at the reservoir was,
7 other than marketing hydro-power, which was the power taken
8 away, was to -- the language in the Senate documents indicating
9 that the two agencies would agree on the reservoir capacity.

10 QUESTION: Let me ask you. Do you think there's
11 water available for irrigation in this reservoir?

12 MS. OSENBAUGH: Yes, there is water.

13 QUESTION: And if there was a need for it, Interior
14 could go ahead and sell it for that purpose?

15 MS. OSENBAUGH: Yes. Section 8 --

16 QUESTION: Without anybody's consent? I mean,
17 without the Army's consent?

18 MS. OSENBAUGH: Under Section 8, for them to develop
19 any irrigation works to utilize the water, congressional
20 authorization would be required.

21 QUESTION: Well, yes, but not Army's?

22 MS. OSENBAUGH: For them to construct the work, there
23 is an advanced determination requirement by Army, but the
24 Section 8 has been construed to indicate that reclamation law
25 and Interior would have irrigation purposes.

1 QUESTION: They have control. There is irrigation
2 water in that reservoir, and Interior has a responsibility for
3 that water. It says it doesn't need it now.

4 MS. OSENBAUGH: No, Your Honor. The reservoir was
5 placed under Army control. The entire reservoir of the Pick-
6 Sloan Plan. There's water in that reservoir which could be used
7 for irrigation. Section 8 provides for Interior to carry out
8 that irrigation function, and Section 6 provides for Army to
9 carry out the industrial use provision.

10 QUESTION: Right, exactly.

11 MS. OSENBAUGH: So, Interior -- water could be
12 provided for irrigation, but nothing in the Act or in the Pick-
13 Sloan Plan gives Interior jurisdiction over the block of
14 storage or for the use of that water for industrial purposes.

15 QUESTION: Well, so, you're saying -- you're really
16 saying, which is not what the Court of Appeals said, that
17 Interior would never have any power to sell any water for
18 industrial purposes?

19 MS. OSENBAUGH: No, Your Honor. I'm saying that
20 Section --

21 QUESTION: You just said that.

22 MS. OSENBAUGH: I don't believe so. Interior has no
23 authority to dip directly into the reservoir and say this block
24 of water is under our control, we are going to divert that for
25 industrial use. Interior does have authority, if the

1 procedures in Section 8 are followed, to operate separate
2 irrigation works. If it operates separate irrigation works, it
3 has incidental powers under the reclamation law, including
4 power to provide water for municipal --

5 QUESTION: So, if they had irrigation works here,
6 they needed water for irrigation and they developed whatever
7 works were necessary and were using the water for irrigation
8 but they said, well, there's a lot of other water that could be
9 used for irrigation, could they sell that for industrial
10 purposes?

11 MS. OSENBAUGH: Only if it was incidental to the
12 irrigation function.

13 QUESTION: Well, that's a completely different
14 rationale than the Court of Appeals, which may be quite right.

15 MS. OSENBAUGH: Well, I -- perhaps I'm
16 misunderstanding the question or misstating it because I
17 believe the Court of Appeals specifically talked about --

18 QUESTION: What you're saying is, as I understand it,
19 that the Interior has got no power whatsoever to sell unused
20 irrigation water for industrial purposes.

21 MS. OSENBAUGH: Directly from an Army reservoir in
22 the absence of a work authorized by Congress.

23 QUESTION: Exactly, exactly. But it's got power to
24 take -- to develop and use that water for irrigation right out
25 of the Army reservoir, and I don't know that -- and you would

1 say that the only purpose that it can divert water from that
2 reservoir is for irrigation. That may be right.

3 MS. OSENBAUGH: The question would arise if Interior
4 had a congressionally-authorized irrigation work, as to what
5 incidental functions it could carry out through that work, but
6 directly from the reservoir, --

7 QUESTION: But you certainly wouldn't say that this
8 kind of a project would be incidental to any kind of
9 irrigation, would you?

10 MS. OSENBAUGH: It's very unlikely.

11 QUESTION: So, you do have quite a different
12 approach, and it may be quite right.

13 MS. OSENBAUGH: The significant difference between
14 Section 6 and the reclamation law is that Section 6 does
15 protect other uses of the water. Congress placed the Missouri
16 River reservoirs under the control of the Secretary of the Army
17 because of their peculiarly-close relationship with flood
18 control and navigation. That is, their dominant purpose was
19 flood control and navigation and not irrigation, and the water
20 is contained in multi-purpose storage where it is used for a
21 variety of purposes, including navigation, flood control and
22 hydro-powered generation.

23 Because Army manages the reservoir and Army has
24 control over all the waters in that reservoir, it is the
25 logical entity to determine what water is surplus to the

1 functions and the purposes of the reservoir.

2 Interior carries out no function at Oahe Reservoir.
3 It has no interest in protecting other uses of the water.
4 Additionally, its Bureau of Reclamation, which is the entity of
5 the Department of the Interior involved in this case, has
6 limited geographic reach. It has no interest in the States of
7 Iowa, Missouri or Minnesota, three of the ten Missouri Basin
8 states. By contract, it is a national agency that represents
9 all interests in the inter-state river.

10 It is incongruous to take the position of the
11 Secretary of the Interior that two agencies can market the
12 same water for the same use, we're talking only about
13 industrial use, on different terms. It encourages form
14 shopping for entities, such as ETSI, that seek to exempt
15 themselves from the limitations Congress directly imposed in
16 Section 6.

17 Now, when ETSI approved this contract in 1982, it was
18 its first assertion of unilateral authority to market the water
19 and it asserted that it would market a million acre feet of
20 water annually for energy or industrial use without further
21 consideration of other uses. In so doing, it relied on the
22 reclamation law. It did not rely on Section 6 or Army authority
23 because Army had terminated the memorandum of understanding by
24 which they had jointly provided a temporary solution from 1975
25 to 1978.

1 During that time period, Army made a number of
2 statements, including one by the Secretary of the Army, that
3 the memorandum of understanding was only a temporary solution,
4 that there was concern about statutory authority, and that
5 modifications would be brought back to Congress if desired, and
6 at no time did the agencies obtain congressional approval, and
7 Army terminated the memorandum of understanding.

8 Army specifically did not approve the ETSI contract
9 under Section 6. The Court of Appeals asked for further
10 information on that point and the federal defendants stated
11 that Army did not approve the contract under Section 6. It was
12 entirely dependent upon the authority of the Secretary of the
13 Interior.

14 Now, they argue that, first, there is a block of
15 irrigation water and it's unutilized irrigation water, but
16 concede that there is no specific block of water there that is
17 not under Army control. It's clear from the Army General
18 Counsel's opinion --

19 QUESTION: Ms. Osenbaugh, when you say under Army
20 control, you don't mean day-to-day management; you mean under
21 Army jurisdiction under the statute?

22 MS. OSENBAUGH: I mean, Army has jurisdiction over
23 the entire reservoir that this water is contained in. It's
24 clear from the Pick-Sloan Plan, Army controls the main stem
25 reservoir. It manages it for all functions.

1 QUESTION: But what are the consequences of that
2 control that you're referring to, so far as Interior's right to
3 dispense water for -- to use surplus?

4 MS. OSENBAUGH: Well, Section 8 establishes the terms
5 under which Interior utilizes Army reservoirs for an irrigation
6 purpose. The Secretary of the Interior does not rely on
7 Section 8. They do not contend that Section 8 would justify
8 their action here. In fact, they argue that the general
9 sections of the Act, such as 8, which provides for the
10 irrigation function at Army reservoirs, and Section 6 don't
11 apply to the Secretary of the Interior on the Missouri River.

12 And, so, their entire claim of authority is certain
13 statements and legislative history that Interior would adopt
14 regulations for the use of storage available for irrigation at
15 Army reservoirs. However, Congress specifically rejected that
16 approach when it rejected the language like that in the House
17 bill and instead adopted present Section 8.

18 So, Section 8 is limited to irrigation purposes and
19 irrigation works.

20 Army, however, physically operates the reservoir and
21 it not -- so, it operates and has control over all the water.
22 It doesn't just have jurisdiction over surplus water. Surplus
23 water is the water that can be made available for industrial
24 use. But Army has jurisdiction to determine what is surplus
25 and, thus, the Army has taken the position, as is shown in the

1 1986 General Counsel's opinion, that it does have authority
2 over the water which is stored in multi-purpose storage in the
3 reservoir, even though that water would be available for
4 irrigation, if needed. It is not a separate block that
5 reclamation law controls this block of storage in the reservoir
6 and Army controls the rest. Instead, all the water is subject
7 to Army control with Section 6 defining when the water can be
8 made available.

9 And the Secretary of the Interior concedes that in
10 both industrial use at this Army reservoir and the reservoir
11 itself and that this water are within the scope of Section 6.
12 Section 6 clearly sets forth the terms on which the water can
13 be used. The Army General Counsel's opinion shows that it's a
14 reasoned construction, that they've abandoned the position of
15 the dissent below, that all water would be locked up and could
16 not be used for any purpose, or even that there would be no
17 water available for industrial use.

18 The current position of the Secretary of the Army is
19 clear that some water could be made available for industrial
20 use at Oahe under Section 6.

21 Now, there's nothing in the Act that says that
22 Interior controls industrial use of water at Army reservoirs.
23 To the contrary. They cannot cite anything in either the Act or
24 the Pick-Sloan Plan that says --

25 QUESTION: It says in the Pick Plan, the Pick Plan, I

1 believe, utilization, utilization of storage reserved for
2 irrigation in all multi-purpose reservoirs should be in
3 accordance with regulations prescribed by Interior.

4 Now, this is certainly utilization of storage
5 reserved for irrigation. Now, -- at least it's, you know,
6 close enough for government work. It's certainly a reasonable
7 meaning of that phrase and that's the meaning that Interior and
8 Army have both chosen to give it. Why shouldn't we accept that?

9 MS. OSENBAUGH: Because Congress did not. That
10 language, that identical language, was in Section 6 of the
11 House bill. Congress and the Conference Committee rejected
12 Section 6 of the House bill and instead adopted Section 8,
13 which speaks in separate irrigation works and irrigation
14 purposes.

15 QUESTION: But 6 and 8 don't just apply to this dam;
16 they apply to everything, right?

17 MS. OSENBAUGH: Right.

18 QUESTION: But this Pick Plan only applies to this
19 one facility and for this one facility, Congress did approve in
20 the statute the Pick Plan. The broad outlines of it and it
21 seems to me that's a broad outline, that utilization of storage
22 reserve for irrigation shall be in accordance with the
23 regulations prescribed by Interior.

24 MS. OSENBAUGH: Well, all right. First, it's in the
25 transmittal letters. It's not an integral part of the plan

1 itself that was adopted by Congress.

2 Second, even if that section did become law for the
3 Missouri River and only for the Secretary of the Interior's
4 actions on the Missouri River, because they agreed that
5 Sections 6 and 8 applied to Army's use of the Missouri River,
6 it would only mean that Interior would adopt regulations for
7 the use of that storage for irrigation purposes.

8 Army would still operate the reservoir. Army would
9 still enter into the contracts. Interior has never adopted
10 regulations governing the use of this storage. So that
11 Interior has not acted as if it believed that that language in
12 the transmittal letters became law.

13 QUESTION: I agree. I can see arguments pro and con,
14 both, but, you know, I don't think that either of them is so
15 over-powering that I'm willing to ride over what both Interior
16 and Army agree should be the accepted meaning of it.

17 MS. OSENBAUGH: Well, Army's litigation position in
18 this Court is only -- is a very guarded statement that
19 Interior's position is acceptable so long as it does not
20 interfere with Army's duties.

21 QUESTION: The Solicitor General submits.

22 MS. OSENBAUGH: Well, I'm referring to the statements
23 in the Solicitor General's brief.

24 QUESTION: Well, isn't the Solicitor General
25 representing the Army here?

1 MS. OSENBAUGH: Yes, Your Honor.

2 QUESTION: So, do you question his statement of what
3 the Army's position is?

4 MS. OSENBAUGH: No. I was merely stating that their
5 description of what Army's position is does not --

6 QUESTION: Well, I still don't understand --

7 MS. OSENBAUGH: -- give us Army's interpretation.

8 QUESTION: -- why if this water is so much under the
9 control of the Army, how would Interior ever go about, without
10 getting Army's consent, to utilizing this water for irrigation?

11 MS. OSENBAUGH: They would follow the procedure in
12 Section 8. Section 8, the Act, does specifically provide for
13 use of Army reservoirs for irrigation purposes. In practice,
14 irrigation from the Missouri River reservoirs is not pursuant
15 to Interior contracts, but, instead, --

16 QUESTION: That isn't what I asked you. I asked you
17 how would Interior ever use the water for irrigation without
18 Army's consent under your position?

19 MS. OSENBAUGH: Well, I think that Section 8 does
20 provide the procedure. I think irrigation is clearly an
21 authorized purpose of the reservoir and that under Section 8--

22 QUESTION: That may be. So, that wouldn't require any
23 thing from the Army.

24 MS. OSENBAUGH: It requires coordination with Army
25 because Section 8 begins with the requirement of the --

1 QUESTION: So, you're telling me that Interior cannot
2 without Army's coordination use the water for irrigation
3 purposes.

4 MS. OSENBAUGH: I think that Section 8 establishes
5 the procedure. Now, --

6 QUESTION: Well, the SG says we look to Section 9(a),
7 not 8, that 8 is something else, and that Interior can proceed
8 under Section 9(a) by administering reclamation aspects of the
9 program, isn't that right?

10 MS. OSENBAUGH: Yes, and it is clear that the Pick-
11 Sloan Plans did contemplate an irrigation purpose. It is clear
12 that nothing in the Pick-Sloan plan gives the Secretary of the
13 Interior authority over industrial use at Army reservoirs.

14 Irrigation clearly can be provided and is not
15 affected by the issue in this case, which involves industrial
16 use, and Section 8 had been construed so that the Secretary of
17 the Interior can -- that reclamation law would apply to
18 irrigation use of Army reservoirs even in the absence of works.

19 Now, Congress has rejected the applicability of the
20 requirements of reclamation law even to irrigation, which
21 undercuts the theory that reclamation law can be the source of
22 authority for industrial use. I think it's clear that Oahe can
23 be made available for irrigation use under Section 8 and that
24 industrial use is under Section 6.

25 QUESTION: May I just ask another stupid question,

1 probably? But is it your position that the water that would be
2 supplied pursuant to this contract is surplus water within the
3 meaning of Section 6?

4 MS. OSENBAUGH: It is our position that the Secretary
5 of the Army makes the determination as to whether it is surplus
6 water and the Secretary of the Army has, and the Army General
7 Counsel's opinion indicates, that they have determined that
8 they can define the term "surplus water" to make water
9 available for industrial use from the reservoirs.

10 QUESTION: So, the answer is yes?

11 MS. OSENBAUGH: Yes. It is also our position that
12 the term "surplus water" defines what water is available for
13 industrial use. It does not limit the Army's jurisdiction over
14 the water for multiple purposes.

15 QUESTION: Where does it go if the Interior lets the
16 contract as opposed to the Army? The money the Army gets from
17 it goes into the Treasury. Isn't there some other disposition
18 if the Interior Department sells the water?

19 MS. OSENBAUGH: On appeal, the contention has been
20 made by the Secretary of the Interior that it should be paid
21 into the reclamation fund and that Section 6 provides for
22 deposit in the Treasury as miscellaneous --

23 QUESTION: Right. Do you contest that, that there's
24 a different disposition depending on which agency has it?

25 MS. OSENBAUGH: It's -- no. I would only point out

1 that Interior in discussing power revenues, which was a matter
2 that they clearly had authority over the marketing of power at
3 Army reservoirs until '77, that they could not find a basis in
4 the reclamation law to place power revenues from the Missouri
5 River for developments in the reclamation fund and that was
6 resolved by subsequent congressional action that's not involved
7 here.

8 So, where the money went could not have been a basis
9 for the Congress in 1944 to have decided whether Interior could
10 market any of this water for industrial use.

11 There's amendments in the Pick-Sloan Plan regarding
12 the utilization of reservoirs for irrigation storage was
13 specifically rejected by Congress, and Congress also rejected
14 amendments to Section 6 that would have specifically given the
15 Secretary of the Interior authority over industrial use of Army
16 reservoirs, and at that time, the Secretary of the Interior in
17 1944 specifically stated in asking for that authority that he
18 recognized that industrial use in Section 6 in no way involves
19 reclamation but sought it for purposes of administrative
20 efficiency. Congress did not adopt those amendments to Section
21 6 and Congress adopted the version of Section 8 which gives
22 Interior authority over separate irrigation works and gives
23 Interior authority over irrigation purposes but not over
24 industrial use.

25 I believe that the Secretary of the Interior's

1 decision is not entitled to deference because the very question
2 here is what law applies to industrial use at Oahe. Deference
3 assumes that Congress has delegated authority to the agency to
4 decide a question, and in this case, that is the issue.
5 Congress did not delegate to the Secretary of the Interior the
6 decision whether it would be Interior or Army or whether
7 Section 6 would apply.

8 QUESTION: Well, maybe not to Interior. If the SG
9 were here just representing Interior, I might agree with you,
10 but certainly Congress delegated to Interior and Army the
11 decision of what their respective jurisdictions are as an
12 initial matter. I mean, it's always ours in the last analysis,
13 but as an initial matter, surely the division of jurisdiction
14 between Army and Interior is a matter for Army and Interior to
15 decide.

16 MS. OSENBAUGH: No, Your Honor. I believe Congress
17 did address it in Section 6. Rather than saying Army and
18 Interior shall decide how to run these reservoirs, Congress
19 specifically provided for specific uses, such as industrial
20 use.

21 QUESTION: Well, the theory always is that there is
22 some real jurisdiction, but the initial decision as to what
23 that real jurisdiction is is for Interior and Army, not
24 Interior alone. If you said that, I'd agree with you. Interior
25 might be impinging on Army's ground, but, here, you have both

1 Army and Interior saying this is how we think the jurisdiction
2 comes out.

3 Now, it may be absolutely wrong, but at least you've
4 got to say that that's the initial cut at it and that cut
5 should be given some deference, shouldn't it?

6 MS. OSENBAUGH: No. They make the decision
7 initially, but Congress didn't give them any discretion as to
8 the factors used in making that decision. Congress specified
9 the terms in Section 6, and it's a pure question of law as to
10 whether the Secretary of the Interior can do it.

11 QUESTION: We give no deference on pure questions of
12 law.

13 MS. OSENBAUGH: If Congress has spoken and it's
14 ascertainable by principles of statutory construction and
15 Congress did not in the statute delegation discretion to the
16 agency on that, then, no, I don't believe this Court should
17 give deference.

18 I think this differs from cases in which Congress
19 clearly indicated that an agency shall develop rules for its
20 jurisdiction over counter claims or the agency shall determine
21 whether this is a flood claim so that permits are required. In
22 each of those, the Court makes the initial determination, we've
23 delegated -- that Congress has delegated the law-making
24 function, the discretion to the agency, to consider matters of
25 policy and to resolve it.

1 In this statute, under Section 6, under their
2 argument, it is a question of did Congress delegate a decision.
3 It's a question of construction. Section 6 versus their
4 suggestion that Congress silently created an exception for the
5 Missouri River to the positions of the Act.

6 The Missouri River Basin was clearly a major focus of
7 the debate on the Flood Control Act of 1944, but questions of
8 jurisdiction were resolved in the debate over Section 8 and the
9 debate over Section 6, and in both of those debates, what
10 happened was that Congress rejected the approach that the
11 Secretary of the Interior is asserting here today and every
12 official position of the Secretary of the Army indicate that
13 they cannot rely on the authority of Army under Section 6.

14 We believe that Interior's position ignores the
15 legislative history and the protections that Congress imposed
16 in the Act for other uses. Our protection by contrast protects
17 all uses as provided in Section 6. Interior has no authority
18 to correct flaws that it perceives --

19 QUESTION: Would you like us to affirm or would you
20 like us to embrace all the reasoning of the Court of Appeals?

21 MS. OSENBAUGH: I believe that the decision of the
22 Court of Appeals is correct, Your Honor.

23 QUESTION: And the reason for it, that this is just
24 not a reclamation project?

25 MS. OSENBAUGH: I think clearly they have not

1 established the threshold requirement for their contention that
2 reclamation law applies, which is that it must be a reclamation
3 development to be undertaken by the Secretary of the Interior
4 under the Pick-Sloan Plans.

5 It is not. Oahe is currently undertaken by Army and
6 not Interior.

7 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Osenbaugh.

8 Mr. Minear, you have five minutes remaining.

9 ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ.

10 ON BEHALF OF PETITIONERS - REBUTTAL

11 MR. MINEAR: Thank you, Your Honor.

12 First, to answer Justice O'Connor's question about
13 whether or not existing uses were taken into account, under
14 Joint Appendix Page 226, the contract is set out, and I'd like
15 to read what was said in the contract.

16 "The Secretary of the Interior, after consultation
17 with the Secretary of the Army, has determined that providing
18 water service for industrial use to ETSI for 20,000 acre feet
19 of water annually will not impair the efficiency of the product
20 period, project for irrigation, interfere with the operation of
21 the project for flood control nor adversely affect existing
22 uses of water, and is a beneficial consumptive use of water."

23 QUESTION: What page?

24 MR. MINEAR: This is on page 226 of the Joint
25 Appendix, paragraph D.

1 QUESTION: Thank you.

2 MR. MINEAR: Next, I would like to just note some of
3 the incongruities in Respondents' position.

4 If, in fact, Section 9(c) requires that physical
5 irrigation work must be completed before the Secretary of the
6 Army --

7 QUESTION: I'm sorry. I've got to go back to that
8 finding. That finding was not necessary, though, under your
9 theory of the case.

10 MR. MINEAR: Indirectly, it was, Your Honor. We
11 believe the consultation between Interior and Army is necessary
12 as part of the Pick-Sloan Plan, and it's important to focus.
13 The question here is what Pick-Sloan Plan requires, which is
14 set forth in Section 9.

15 So, insofar as it's required, yes, that consultation,
16 we believe, is required, and that is the fruit of that
17 consultation.

18 QUESTION: And it's not only consultation, but a
19 finding similar to that requirement, no adverse effect down
20 stream?

21 MR. MINEAR: I'm not certain about that, but I think
22 it might well be.

23 As I was saying, there are certain incongruities that
24 come from Respondents' position. If Section 9(c) requires a
25 physical irrigation work must be completed before the Secretary

1 of the Interior can invoke the reclamation laws, then the
2 Secretary could not follow his standard practice of entering
3 into reclamation contracts with irrigators prior to completing
4 irrigation works. Notably, he entered into such a contract
5 here with South Dakota's Oahe Conservancy District at the time
6 he initiated the construction of the now-suspended Oahe
7 irrigation works.

8 These works were in progress at the time that the
9 contract, the ETSI contract, was entered into. Furthermore,
10 the Secretary is wrong in construing Section 9 to establish a
11 functional division of authority of these reservoirs. In his
12 determination of hydro-powered cost allocations for the entire
13 Midwest, --

14 QUESTION: Mr. Minear, what is your short answer or
15 is it a long answer to why Section 8 is not applicable? Where
16 it just says that if the Secretary of Interior decides that
17 there's irrigation water available and if the Secretary
18 determines.

19 MR. MINEAR: Yes, Your Honor, because those works--
20 there has already been authorization for those works. This is
21 for adding irrigation works to flood control projects that only
22 have flood control features.

23 The Sloan Plan was, in fact, fulfilled.

24 QUESTION: And this particular reservoir was the
25 result of that kind of a consultation?

1 MR. MINEAR: Exactly. Those steps were followed in
2 this case at the time the project was authorized.

3 Finally, there's some question whether Interior's
4 reclamation activities in Pick-Sloan, in fact, Interior's quite
5 active or has been quite active in participating in the
6 determination of reclamation storage requirements here. It
7 conducted extensive surveys of irrigation needs. It entered
8 into a reclamation contract. It secured water rights for
9 reclamation purposes. It obtained -- it continues to coordinate
10 its main stem and tributary activities with the Army.

11 So, it's simply not accurate to say that Interior is
12 not active in the Oahe reservoir.

13 Finally, I would like to address the practical
14 considerations that lie at the very heart of this dispute.
15 Congress approved the Pick-Sloan Plan to serve the needs of the
16 entire Missouri River Basin. The congressionally-approved plan
17 was carefully formulated and coordinated by the Corps and
18 Bureau Engineers to provide a fair and efficient distribution
19 of the Missouri River resources to all states within the Basin.

20 The upper basin states now seek a reasonable and,
21 indeed, a reasonably anticipated benefit from their support of
22 the program. The opportunity to put a portion of the waters
23 stored within these reservoirs to a beneficial use. The lower
24 basin states, which already have far greater water resources
25 than their northern neighbors, show no persuasive reason for

1 their unwillingness to share --

2 QUESTION: Well, is the only basis for your saying
3 the Interior has the power to sell water for industrial use
4 that provision in the reclamation law that says it may sell for
5 irrigation and miscellaneous purposes?

6 MR. MINEAR: In conjunction with Section 9 of the
7 Flood Control Act. The Flood Control Act gave Interior
8 responsibility for these reservoirs, to exercise its authority
9 under the reclamation laws, and this particular reclamation
10 law, 9(c) of the Reclamation Project Act, gives the Secretary
11 express authority in this case.

12 QUESTION: To do what?

13 MR. MINEAR: To provide irrigation -- unneeded
14 irrigation water for miscellaneous purposes as discerned
15 throughout the --

16 QUESTION: And this industrial use is a miscellaneous
17 purpose?

18 MR. MINEAR: That is correct.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.

20 The case is submitted.

21 (Whereupon, at 12:01 o'clock p.m., the above-entitled
22 matter was submitted.)

23

24

25

REPORTER'S CERTIFICATE

1
2
3 DOCKET NUMBER: 86-9397 and 86-941

4 CASE TITLE: ETSI Pipeline Project v. Missouri and
Donald P. Hodell v. Missouri

5 HEARING DATE: November 3, 1987

6 LOCATION: Washington, D.C.

7
8 I hereby certify that the proceedings and evidence
9 are contained fully and accurately on the tapes and notes
10 reported by me at the hearing in the above case before the
11 Supreme Court of the United States,
12 and that this is a true and accurate transcript of the case.

13 Date: November 3, 1987

14
15
16 *Margaret Daly*
17 Official Reporter

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