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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: WYOMING, Petitioner V. UNITED STATES, ET AL.
CASE NO: 88-309
PLACE: WASHINGTON, D.C.
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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF WYOMING,		:	
	Petitioner,	:	
v.		:	No. 88-309
UNITED STATES, ET AL		:	
-----x		:	

Washington, D.C.

Tuesday, April 25, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

MICHAEL DOUGLAS WHITE, Special Assistant Attorney General, State of Wyoming, Cheyene, Wyoming; on behalf of Petitioner.

JEFFREY P. MINEAR, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

SUSAN M. WILLIAMS, Albuquerque, New Mexico; on behalf of Tribal Respondents.

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P R O C E E D I N G S

12:59 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 88-309, the State of Wyoming v. the United States.

Mr. White.

ORAL ARGUMENT OF MICHAEL DOUGLAS WHITE
ON BEHALF OF PETITIONER

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

This case is here on certiorari to the Wyoming Supreme Court which the state contends erroneously quantified the Federal Reserved water right for the Wind River Indian Reservation.

The specific question before the Court is whether the practically irrigable acreage standard, or PIA standard, for the quantification of the employed federal right was properly applied below where there were state water rights congressionally mandated and acquired for the reservation and where there was no need shown for an additional water right as a reserved right.

The general question --

QUESTION: Well, suppose -- suppose there hadn't been the state rights -- state water reservation rights, is your claim still that the standard was

1 misapplied?

2 MR. WHITE: Yes, sir.

3 QUESTION: Yes?

4 MR. WHITE: It is.

5 QUESTION: Okay.

6 MR. WHITE: And the more general question that
7 is before the Court, and the one that has drawn so much
8 attention from the amici is the applicability, the
9 universal applicability of the PIA quantification
10 standard to all reservations other than those in Arizona
11 I.

12 After briefly describing the facts of our case,
13 I would like to explain why the Wyoming court should be
14 reversed.

15 You have before you the cert petition itself,
16 and the last page of that petition is a fold-out map
17 showing the reservation. And following along with that,
18 let me make my explanation clear.

19 The reservation itself is located in
20 northwestern Wyoming. It's about 45 miles southeast of
21 Yellowstone National Park and Little Smoky River in
22 Yellowstone National Park. The boundaries that you see
23 on that map are about 60 miles from east to west and
24 about 50 miles from north to south.

25 The reservation itself was set aside by treaty

1 with the Shoshone in 1868. There were approximately
2 2,400 Indians that are part of a band of Shoshone that
3 were living to the west of the present reservation
4 site. Ten years later, in 1878, the Arapaho were
5 forcibly placed on the reservation, to which the
6 Shoshone strenuously objected and for which they
7 received compensation in the 1930s for the loss of
8 one-half of their reservation.

9 During the remainder of the 19th Century, there
10 was very little development on the Indian Reservation,
11 while around the Indian Reservation substantial
12 non-Indian development took place. So that by 1900,
13 when only roughly 1,700 Indians remained on the
14 reservation despite the fact that both tribes were now
15 permanently located there, the Indians were desperate to
16 get started in farming in earnest.

17 And Congress and the federal officials and the
18 Indians themselves were very anxious about the
19 availability of water to carry on that farming simply
20 because of all the non-Indian irrigation development
21 around the Reservation appeared to have called for more
22 water than would allow the Indians to continue. So --

23 QUESTION: Mr. White --

24 MR. WHITE: Yes, ma'am.

25 QUESTION: -- is it the fact that before 1915

1 that the Federal Government had obtained protective
2 state water permits sufficient to irrigate 145,000 acres?

3 MR. WHITE: That's correct, Your Honor. The
4 concern that I mentioned of the Indians, federal
5 officials, and Congress, led to the 1905 Act, which was
6 a ratification of the 1904 agreement with the Indians.
7 And it was pursuant to the Water Proviso of that Act
8 that these water rights were obtained.

9 The Water Proviso in Article III of the 1905
10 Act says that water rights shall be obtained under state
11 law.

12 QUESTION: The acreage found to be practicably
13 irrigable in this litigation by the Wyoming Supreme
14 Court was 108,000 acres? Is that right?

15 MR. WHITE: It is close to that -- it makes no
16 difference, Your Honor. I've used 100,000 for round
17 figures, but --

18 QUESTION: The state had apparently even agreed
19 that it was 102,000.

20 MR. WHITE: We agreed -- we have asserted, Your
21 Honor, when the litigation began that there were 102,000

22 --

23 QUESTION: Uh-huh.

24 MR. WHITE: -- but we used that with a
25 different quantification rate and a different priority

1 date.

2 QUESTION: But applying the practical -- the
3 practicably -- it's hard to say.

4 MR. WHITE: You're right.

5 QUESTION: -- irrigable standard, the state had
6 agreed it was at least 102,000?

7 MR. WHITE: With a different amount of water
8 and a different priority date, that's correct, Your
9 Honor.

10 The 1905 Act had two particular effects. First
11 was to open the reservation to non-Indian settlement in
12 the portion that's marked as ceded on your map.
13 Everything north of the Wind, east of the (inaudible).

14 The second thing was to allow that land to be
15 sold to non-Indians under the public land laws.

16 QUESTION: Marked ceded land?

17 MR. WHITE: Yes, sir, they are. The second
18 purpose was to take the proceeds that were enjoyed from
19 the sale or the eventual lease of those lands and use
20 them for the benefit of the -- of the Indians. And one
21 of those benefits was to acquire water rights under
22 state law, as I explained in response to Justice
23 O'Connor's questions.

24 In fact, the congressional intent in this
25 respect was so strong that when the Indian Rights

1 Association was concerned about state rights being
2 required for these Indian -- for the Indian water
3 rights, it was proposed in both committees of -- excuse
4 me -- the committees of each House of Congress that a
5 limited reserved right be established for the
6 reservation. And it was rejected. It was not included
7 in the 1905 Act.

8 And, again, in 1914, a permanent reserved right
9 was proposed for the reservation and it too was rejected
10 by Congress. It was stricken on the floor of both
11 Houses on a point of order as being a legislative matter
12 attached to an appropriations bill.

13 So, Congress knew what it was doing. It wasn't
14 merely a way to spend a little extra pocket money. It
15 was a way to effectuate congressional intent.

16 After -- after those water rights were obtained
17 Congress did in fact -- or, excuse me -- the Federal
18 Government did in fact construct substantial irrigation
19 projects on the reservation. There were --

20 QUESTION: But not enough to irrigate the
21 145,000 acres, I take it?

22 MR. WHITE: That's right. And by the beginning
23 of 1910 and continuing through 1963 the government began
24 to relinquish water rights which were obtained in excess
25 of those which had actually been used. And by 1963,

1 approximately 58,000 acres had been relinquished,
2 leaving 87,000 acres under state rights.

3 QUESTION: I suppose the Federal Government
4 says, though, that it relinquished those after the
5 Winters Doctrine had been established. So they didn't
6 think they were giving up anything that couldn't be
7 restored.

8 MR. WHITE: Well, I'm sure that's what you will
9 be told, Your Honor. But the facts are that when the
10 Water Proviso was adopted Congress knew what it was
11 doing. And it consciously elected to go the state law
12 route.

13 As you recall from the briefs, this reservation
14 has a sister reservation, the Baneck, or the Fort Hall
15 Reservation in Idaho. And their --

16 QUESTION: Mr. White why -- why did they
17 relinquish?

18 MR. WHITE: I'm sorry?

19 QUESTION: Why did they relinquish these state
20 rights?

21 MR. WHITE: Apparently they didn't need them,
22 Your Honor, and the suggestion is made that the state
23 cancelled these rights simply because the United States
24 didn't come in and renew them.

25 The fact of the matter is that in 1944 a major

1 portion of these water rights were voluntarily
2 relinquished by the Indian Service themselves. The only
3 evidence in the record is that there were water rights
4 for far more land than was actually irrigated and was
5 needed to be irrigated.

6 But in -- finishing that question, the Court
7 ought to contrast this Reservation with the Fort Hall
8 Reservation where the same players were involved, the
9 same negotiator and the same congressional committees.
10 And in 1900 -- excuse me -- in 1904 for the Fort Hall
11 Reservation, which is our sister reservation, Congress
12 --

13 QUESTION: Is that in Idaho?

14 MR. WHITE: Yes, sir, it is in Idaho. Congress
15 expressly created a reserved right. This was a year
16 before the Water Proviso on the 1905 Act.

17 So, the state would submit that there is no
18 question that Congress intended that -- and expressly
19 intended, that state water rights serve the needs of
20 this particular reservation.

21 The award below was, as Justice O'Connor points
22 out, for approximately -- for the irrigation of
23 approximately 100,000 acres, of which 70 percent were
24 previously covered by state water rights, of which, of
25 the 100,000, 55 percent were in the ceded portion. And,

1 as the Court will recall from the briefs, the ceded
2 portion was restored back to the reservation in the
3 1940s for the purposes of grazing.

4 Water rights were quantified on that ceded
5 portion, the restored ceded portion, not for grazing
6 purposes, but under the practicably irrigable acreage
7 standard.

8 QUESTION: Mr. White, there is some suggestion
9 in the briefs somewhere in this case that with some
10 additional storage of water that the full exercise by
11 the tribes of their rights to the 108,000 acres would
12 have no adverse effect on existing users. Is that
13 correct?

14 MR. WHITE: That was the -- the conclusion of
15 the master, and it was the decision of the first
16 district court judge that heard the case. Post-trial
17 motions were heard by a second Second District Court
18 judge. The first district court judge and the master
19 directed their attention to the future projects. There
20 were about 50 -- of the total awards, half the land had
21 been historically irrigated, the other half had been
22 part of future projects that would be irrigated in the
23 future according to the United States and Tribes
24 evidence.

25 And it was the future projects that the court

1 below, the master and the district court judge were most
2 concerned about. And they suggested that -- first, the
3 master -- that the future projects not be allowed to go
4 into operation right away. And the master observed that
5 would be no harm to the Indians because everyone knows
6 they wouldn't be built anyway -- they not be allowed to
7 go into operation right away but be required to go in 10
8 percent per decade. That was his thought.

9 The -- the district court judge approached it a
10 little bit differently. He said that instead of the 10
11 percent phasing approach to putting these futures into
12 effect, let's have storage, and if there is a future
13 project that requires "x" acre feet, let's have storage
14 in that amount.

15 The second district court judge that heard it,
16 rejected the storage approach. He rejected the concept
17 of storage because it was part and parcel of estoppel.
18 What the first district court judge had said was that
19 the United States under these circumstances is estopped
20 to claim a reserved right which would, in his words, put
21 -- or, render the state water rights virtually
22 worthless. Those were his words. So, he said if there
23 is estoppel, to remedy that estoppel we'll have the
24 storage.

25 Now, the second district court judge said,

1 sorry, no affirmative misconduct by the United States.
2 When they acquired these state water rights, there
3 wasn't anything wrong with that, so there wasn't any
4 affirmative misconduct. Estoppel doesn't apply.

5 So by the time we got out of the district court
6 through our post-trial motions, there were no -- no
7 conditions imposed on the water right, on the reserved
8 water right, which would serve to protect the owners of
9 state water rights.

10 Now, that was completely gone and when we
11 suggested that the sensitivity doctrine or the whole
12 decision of this Court in New Mexico would require some
13 inquiries as part of the quantification process into the
14 factors described in New Mexico, the thought was by the
15 Wyoming courts that those went to questions of purposes
16 and they didn't go to the question of quantification.

17 The -- what we suggested to the Wyoming court
18 was that the New Mexico decision and the decisions which
19 immediately preceded that and followed it established
20 four criteria for the -- for the quantification of
21 water, or of an implied reserved right.

22 First, that there be an inquiry into the
23 specific purpose of the reservation, and our complaint
24 with that was, of course, all of the restored lands were
25 for grazing purposes, restored for grazing purposes.

1 They were not restored for irrigation purposes. And
2 yet, the PIA doctrine was used to quantify water rights
3 for those restored lands.

4 In fact, the largest of the future projects --
5 it takes -- it's about about a hundred and -- excuse me
6 -- about 40,000 acres of future project is located on
7 restored land which was restored in 1944 for grazing
8 purposes. Yet, the water right that was quantified for
9 it was for irrigation. And that requires a remarkable
10 clairvoyance on the part of Congress if part of this
11 effort is to inquire into congressional intent that in
12 1944 water -- land would be restored for grazing
13 purposes and yet it receives an 1868 priority date for
14 irrigation purposes.

15 The second thing that the New Mexico court --
16 or, this Court in its decision in New Mexico, said was
17 that there should be an inquiry into need for the water
18 because this Court said that there had been a careful
19 examination every time this reserved right doctrine had
20 been applied to insure that the water was needed to keep
21 the primary purpose of the reservation -- or, the
22 specific purpose of the reservation from being defeated.

23 There was no evidence of need in the court
24 below, in the record below. The thought of the United
25 States -- at trial -- was all they needed to do was show

1 PIA. PIA, since Arizona I had become the standard --

2 QUESTION: There was some -- I take it if --
3 historically how many acres had been irrigated?

4 MR. WHITE: Historically about 54,000.

5 QUESTION: About 54,000? Well, that's evidence
6 of need. If they're using that land for agriculture and
7 had been using water to raise crops, I suppose that's
8 some evidence of need.

9 MR. WHITE: Well, of course, it's evidence of
10 need, Your Honor, but it's not a question of whether --
11 of need unsatisfied. That's land that's been irrigated
12 under the very state water rights that --

13 QUESTION: All right.

14 MR. WHITE: -- that Congress --

15 QUESTION: So you say there is no evidence of
16 any need that hasn't been satisfied?

17 MR. WHITE: That's correct.

18 QUESTION: All right.

19 MR. WHITE: I'm sorry. And, as a practical
20 matter, there wasn't any provided by the tribes in the
21 United States. The state, at the end of the case in
22 chief, filed its Rule 41 motion -- or, made its Rule 41
23 motion on the question of need. And that matter -- the
24 question of need was no longer addressed by the court
25 until we got to appeal.

1 Finally, there is -- or, another factor this
2 Court indicated in New Mexico should be considered is
3 deference to state law. It said that the Court had
4 always been careful with the reserved right doctrine
5 because of the implied nature of the reserved water
6 right and Congress' history of deference to state law.

7 And it also observed that when Congress had
8 expressly addressed the question of whether state law
9 should apply, that it had invariably deferred to state
10 law.

11 What could be a better example than the 1905
12 Act? There is an expressed deference to state law. And
13 yet that third factor, the deference factor, was
14 excluded from the Wyoming court's quantification of the
15 reserved right.

16 QUESTION: General White, can I ask about your
17 need point? When is that need to be measured? I mean,
18 whenever the litigation happens to come up? I mean, you
19 might say right now there's -- there's no more need than
20 -- than how many acres did you say, 50,000 or so?

21 MR. WHITE: Fifty -- about 54,000 --

22 QUESTION: Yes.

23 MR. WHITE: -- have been historically irrigated.

24 QUESTION: But, you know, 20 years from now if
25 it turns out that they can prove that they want to farm

1 more than that but can't do it because of lack of water,
2 then is the 1868 grant automatically increased? When do
3 you measure the need?

4 MR. WHITE: I think you measure the need based
5 on Congress' intent at the time of the initial
6 Reservation. We are trying to --

7 QUESTION: So, the 54,000 is irrelevant. You
8 -- you would have to look back to 1868 and figure the
9 need then, I guess.

10 MR. WHITE: Well, I agree that 54,000 is
11 irrelevant, Your Honor. But what's relevant is the
12 87,000 of state water rights that are still left that
13 have not been cancelled. Historically, after a hundred
14 years of existence, 54,000 acres have been irrigated on
15 the Reservation. And never more than that. In any one
16 year only about 35,000. And, yet, under the water
17 Proviso state water rights, 87,000 acres may be
18 irrigated. And there's no suggestion that at any time,
19 and no evidence that under any particular scenario, more
20 than the 87,000 -- or 90,000 in round numbers --

21 QUESTION: Uh-huh.

22 MR. WHITE: -- would ever be needed to be
23 irrigated. As a practical matter, if the needs of the
24 Indians should shift from an agricultural-based economy
25 to some other based economy, under Wyoming law those

1 state water rights can be changed to other purposes so
2 long as the consumptive use is not increased.

3 QUESTION: And I suppose the PIA standard just
4 assumes that you're allotting water for irrigation?

5 MR. WHITE: Well, it does --

6 QUESTION: For agriculture.

7 MR. WHITE: It does assume that you're only --

8 MR. WHITE: Well, it says it's for practicable
9 irrigable acreages. How much do you need for
10 agriculture?

11 MR. WHITE: Well, it certainly isn't measured
12 by the PIA doctrine, as we found out below.

13 QUESTION: Well, it certainly -- It certainly
14 doesn't measure the -- the water needs for any other
15 purpose.

16 MR. WHITE: That's correct. And it certainly
17 doesn't measure what Congress may have had in mind for
18 the -- for the agricultural needs of that reservation.
19 That --

20 QUESTION: But as I understand -- as I
21 understand Justice Scalia's question and your answer,
22 you would fix in this decree for all time the amount of
23 water to which the Indians are entitled based on your
24 present understanding of congressional intent?

25 MR. WHITE: We would fix it based on what

1 Congress said, Your Honor. Not our understanding, but
2 what they said in 1905, in the 1905 Act Water Proviso.

3 QUESTION: And that would, so far as you're
4 concerned, be a binding adjudication for all time?

5 MR. WHITE: If this Court defers to express
6 congressional intent, it would be. If this Court wishes
7 to go behind the expressed intent and find another
8 intent by implication, I don't see how it could be. If
9 it --

10 QUESTION: Well, let's just assume, though,
11 that it was just an ordinary case like in Arizona. We
12 decided what the -- how much water, based on this
13 formula, and that's in the decree now, isn't it?

14 MR. WHITE: That's correct. And that's res
15 judicata.

16 QUESTION: And it's not about to be changed, I
17 don't suppose.

18 MR. WHITE: It never will be.

19 QUESTION: If the Indians need more water, why,
20 the United States will have to condemn it.

21 MR. WHITE: Either that or make a new
22 appropriation or a new reservation.

23 I'm not sure I responded to your question,
24 Justice Kennedy. I'm --

25 QUESTION: Well, I -- the only further question

1 I have is, what, then, is the relevance of what happens
2 after 1905 if we're trying to determine the intent as of
3 1905?

4 MR. WHITE: Where you're really trying to
5 determine intent -- as of 1868, as of the date of the
6 treaty. But just as Congress can enter into these
7 various settlement acts to settle Indian water right
8 disputes, it can adopt the 1905 Act. And if any -- in
9 theory, anything that happened after 1905 is irrelevant.

10 But this case is here on the question of what
11 is the proper quantification standard, not whether the
12 water right continues to exist.

13 Now, had you accepted certiorari on the first
14 question, we would have been arguing that you can stop
15 in 1905 and not worry. But you accepted certiorari on
16 the second question, which is the measure of the reserve
17 right, and that's -- that's why we're here.

18 QUESTION: What does the 1905 Act have to do
19 with what Congress intended in 1868? That's a -- that's
20 a long time spread in between all of that. I mean --

21 MR. WHITE: Well, it has absolutely nothing to
22 do with what Congress intended in 1868.

23 QUESTION: So, if Congress intended more in
24 1868, if it intended enough water for all the
25 practicably irrigable acreage, Congress, by passing the

1 1905 Act was what? Just giving additional water? Or
2 whatever. It could do that, I suppose.

3 MR. WHITE: Once the 1905 Act came along, it
4 occurs to me, Your Honor, that it doesn't make any
5 difference what Congress' intent was in 19 -- or, excuse
6 me -- 1868, unless it was Congress' intent to reserve
7 more water than that for which state awarded water
8 rights were obtained in 1905.

9 QUESTION: Well, can they just take away the
10 water rights they had given in 1868? Could they --

11 MR. WHITE: They do it all the time under this
12 -- as early as 1896 in a case involving this particular
13 Reservation. It wasn't a water right case, but -- Ward
14 v. Racehorse. Express Indian treaty rights were taken
15 away under the plenary power of Congress.

16 QUESTION: They also relinquished most of the
17 -- an awful lot of the water rights -- state water
18 rights that were obtained for the reservation.

19 MR. WHITE: That's true. And voluntarily so,
20 Your Honor.

21 I would -- unless the Court has further
22 questions, I would like to reserve the remainder of my
23 time for rebuttal.

24 QUESTION: Very well, Mr. White.

25 Mr. Minear.

1 ORAL ARGUMENT OF JEFFREY P. MINEAR
2 ON BEHALF OF RESPONDENTS

3 MR. MINEAR: Mr. Chief Justice, and may it
4 please the Court:

5 The sole question presented in this case is
6 whether the Wyoming Supreme Court erred in following
7 this Court's decision in Arizona I in measuring the
8 tribe's reserved water right based on the PIA standard.

9 We submit that the Wyoming Supreme Court's
10 decision was correct for three reasons. First, this
11 case is indistinguishable from Arizona I. Second, this
12 Court's decision in Arizona I is sensible and correct
13 and should not be discarded or replaced. And, third,
14 the retention of Arizona I's PIA standard is essential
15 to insure an orderly, efficient, and certain resolution
16 of this and other ongoing Indian water rights disputes.

17 I would like to begin by emphasizing the
18 question here is not a matter of first impression. This
19 Court addressed how to measure Indian water rights 25
20 years ago in Arizona I. It applied the PIA standard,
21 relying on Special Master Rifkin's careful analysis of
22 the matter.

23 Arizona I's logic is both straightforward and
24 compelling. Since the United States set the reservation
25 lands aside to enable the Indians to become productive

1 farmers, the natural measure of their reserved water
2 right is the amount of water necessary to make their
3 agricultural land productive.

4 The Court's reliance on irrigable acreage was
5 not novel.

6 QUESTION: Well, why -- why is that such a
7 natural conclusion? I mean, why would you say that --
8 If you give somebody a certain amount of agricultural
9 land, I assume you would think that he'd have as much
10 water as everybody else around him.

11 MR. MINEAR: Not here --

12 QUESTION: But not all the water and then
13 whatever is left over can be used for everybody else.

14 MR. MINEAR: Well, Justice Scalia, I think your
15 -- your concern really was answered in Winters in 1908.
16 This is the question that was presented in Winters. Was
17 there a reserved water right that was created by the
18 creation of an agricultural Indian reservation?

19 QUESTION: Oh, yeah. I'm not questioning the
20 reservation of the right. I'm questioning the volume of
21 it, why you -- you asserted as simply self-evident that
22 if you reserve any water right, you reserve enough water
23 not just to enable this tract of land to be irrigated as
24 well as anything in the area is irrigated, but rather to
25 have this tract of land irrigated a 100 percent even if

1 everything around it has to go dry.

2 QUESTION: -- people are selling water?

3 MR. MINEAR: Pardon?

4 QUESTION: These people are not selling water,
5 are they?

6 MR. MINEAR: I don't -- no, they're not selling
7 water to my -- it's not my understanding.

8 QUESTION: Haven't they sold water in the past?

9 MR. MINEAR: I don't believe that's -- that's
10 true. I think that perhaps the tribes' counsel has a
11 better answer to that, but it's my understanding that
12 they are not. They are leasing some of their Indian
13 lands for farming purposes, but I don't believe that
14 they're selling any of their water rights here.

15 In any event --

16 QUESTION: Are they using all the water that's
17 been allocated in this proceeding?

18 MR. MINEAR: At present, no they're not using
19 all the water.

20 QUESTION: Well, what's happening to it?

21 MR. MINEAR: It's flowing downstream and being
22 used by non-Indians.

23 QUESTION: Well, have they -- have they
24 attempted to obstruct the flow on down the stream?

25 MR. MINEAR: I don't -- I believe that last

1 year -- and, again, I think the tribes' representative
2 is probably more knowledgeable on this point than I am.
3 But last year I believe that they did attempt to assert
4 the rights that were decreed by the Wyoming courts.

5 QUESTION: What were they going to use it for?

6 MR. MINEAR: I believe it was for irrigation
7 purposes. These were for irrigation purposes on Indian
8 lands.

9 QUESTION: Didn't they receive a payment from
10 the state not to assert those rights?

11 MR. MINEAR: Again, this -- this is all outside
12 the record, first of all. This was brought up by
13 Wyoming in addition of their factual statement described
14 as subsequent events outside the record. So, I don't
15 know how much you'll find in terms of accuracy, in terms
16 of what actually happened here.

17 But I believe it's the tribes' view that this
18 was a comprehensive settlement of certain other matters,
19 as well as certain water rights disputes.

20 But I'd like to return to what -- the question
21 you originally raised, Justice Scalia, which is the
22 measure of the water and the water right when the
23 reservation land was set aside.

24 I think it's quite logical that when these
25 parties determined a set amount of acreage to be set

1 aside for a reservation and also determined that a
2 certain amount of that land would be available for
3 farming -- in this case, it's less than five percent of
4 the total reservation acreage -- that the reserved water
5 right would be sufficient to meet those farming needs.

6 QUESTION: Mr. Minear, In calculating what's
7 practicably irrigable, is it necessary to take into the
8 calculus whether additional irrigation projects are
9 reasonably likely to be constructed to make it possible?

10 MR. MINEAR: In terms of -- are you talking
11 about irrigation projects constructed by the Indians to
12 put their water to use or --

13 QUESTION: Or the Federal Government --

14 MR. MINEAR: In --

15 QUESTION: -- on their behalf?

16 MR. MINEAR: In planning future projects what
17 the government does, it goes through, as the first step
18 --

19 QUESTION: No. I'm talking about measuring the
20 practicably irrigable acreage.

21 MR. MINEAR: Yes.

22 QUESTION: Does one have to take into the
23 calculus whether any of these projects to make it
24 irrigable will be constructed?

25 MR. MINEAR: Yes. I think that that is what we

1 have come up with. Our economic analysis represents
2 projects that can in fact be profitably run.

3 QUESTION: That could be run. Would those
4 projects have met Bureau of Reclamations standards or
5 are they projects that in fact are likely to be
6 constructed?

7 MR. MINEAR: They would exceed Bureau of
8 Reclamation standards. The -- the economic analysis
9 that we impose on Indian projects is in fact stricter
10 than the Bureau of Reclamation's analysis. And, in
11 fact, that has been one of the concerns of the tribe,
12 that we in fact impose more rigorous economic
13 requirements on the tribes than the Bureau of
14 Reclamation imposes on non-Indian farmers.

15 As far as these projects being constructed,
16 these projects can be constructed. I think there's a
17 good likelihood that they would be constructed because
18 they in fact would bring in income to the tribe. These
19 are not simply fantasy projects. These are real
20 projects that have been analyzed based on sound
21 engineering, scientific and economic factors.

22 And we -- one need only examine the Special
23 Master's report to see how carefully these matters were
24 in fact considered.

25 QUESTION: What would these projects do? Make

1 more irrigable land available to the Indians?

2 MR. MINEAR: Essentially what they would do is
3 they would increase the water supply to land that is
4 practicably irrigable. That is irrigable in that
5 sense. That this is -- there is good farm land out
6 there that could be in fact put to use and could grow
7 profitable crops that could be sold on the market.

8 QUESTION: Now, does this mean that Indians
9 would be farming it or that the Indians would lease it
10 to other people?

11 MR. MINEAR: I think the tribes' plans are that
12 the Indians would farm it. And, in fact, the economic
13 analysis was done on that basis.

14 QUESTION: Does the calculus of the practicably
15 irrigable land depend in anyway on whether the tribes
16 intend to farm it themselves or intend to sell off the
17 rights they obtain?

18 MR. MINEAR: I think it does depend on the fact
19 that the tribes will sell it themselves. I think that
20 that was the basis --

21 QUESTION: That what?

22 MR. MINEAR: It does -- it does take into
23 account that the tribes would develop these lands. That
24 was the basis of the --

25 QUESTION: And use --

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MR. MINEAR: -- economic analysis.

QUESTION: -- it themselves --

MR. MINEAR: And use it --

QUESTION: -- rather than sell it off?

MR. MINEAR: And use it themselves.

QUESTION: And is that, in your view, part of the necessary calculus?

MR. MINEAR: Well, it was a part of the calculus here in terms of --

QUESTION: Well, is it part of the standard that the Court determines in this PIA question?

MR. MINEAR: If that is one of the premises of the standard, then, of course, that is going to be a factor in the economic analysis here.

QUESTION: Is that a premise --

MR. MINEAR: If that was a premise.

QUESTION: -- of the standard?

MR. MINEAR: Yes, I believe that it was a premise of the standard here. That the tribes themselves would operate these farms.

QUESTION: And you agree that it should be part of the standard?

MR. MINEAR: Yes, I think that that seems appropriate.

QUESTION: And as of what date is the standard

1 or the projection made? What was reasonably anticipated
2 in 1905 or today?

3 MR. MINEAR: The standard is based on 1980
4 projections, in large part by agreement by all the
5 parties. Wyoming, in fact, agreed to this, to the use
6 of current technology and in fact advocated it. And
7 although this issue has been raised rather late, I would
8 refer to you in the record, the Volume 5 of Wyoming's
9 Proposed Findings of Fact and Conclusions of Law, 15-12
10 at page 623.

11 QUESTION: Well, I don't suppose that agreement
12 binds us.

13 MR. MINEAR: No, it doesn't. But I think there
14 are good reasons for using the -- the current --

15 QUESTION: If you go back to -- if you talk
16 about what the intent was back in the 19th Century, it
17 would be hard to -- hard to think that these projects
18 would ever have been contemplated.

19 MR. MINEAR: Well, the projects might have been
20 smaller, but there would have been much greater water
21 usage. And I think there are three good reasons for
22 using the current technology, in any event.

23 Our first is a matter of precedent. This is
24 what was done in Arizona 1. And, in fact, this Special
25 Master notes -- I think that's at page 535(a) of the

1 Special Master Report.

2 Second, simply as a matter of the feasibility
3 of proof. We can in fact get experts who can testify on
4 the economics and the engineering aspects of present
5 irrigation systems. And those matters can be proven.
6 This is a matter that is, to use Wyoming's terminology,
7 capable of proof. Trying to prove 1868 irrigation
8 technology would be fairly speculative and I think would
9 probably make the -- would decrease the accuracy of the
10 actual water determination here.

11 QUESTION: By the way, what -- what crops are
12 being -- what crops are grown on the reservation?

13 MR. MINEAR: We are growing --

14 QUESTION: For sale?

15 MR. MINEAR: -- or, the tribes, in fact, are
16 growing alfalfa and small grains. The economic analysis
17 was based on those particular crops. Those are the same
18 crops that are grown by non-Indians.

19 On that subject, since we're talking -- since
20 Wyoming did raise the question of the restoration of
21 lands for grazing purposes, I think that's incorrect,
22 and I would simply refer you again to the Special
23 Master's Report in the petition appendix. The petition
24 appendix indicates in the restoration orders -- there is
25 no mention that these lands were restored for grazing

1 purposes. They are simply restored to the tribe to be
2 used for whatever purposes might be appropriate.

3 And so it's perfectly acceptable to quantify
4 the water right on that based on the fact that they can
5 be irrigable land.

6 QUESTION: Mr. Minear, why did the government
7 give up state water rights --

8 MR. MINEAR: What --

9 QUESTION: -- in the early part of the century?

10 MR. MINEAR: There's two critical periods where
11 this occurred. First of all, as I think our brief
12 points out, we sought protective water rights shortly
13 before Winters. After Winters was decided, to a large
14 extent we ceased seeking out those permits. We believed
15 that Winters --

16 QUESTION: Well, you allowed some to -- to
17 lapse.

18 MR. MINEAR: In 1963 after Arizona I. That, in
19 fact, reflects our view of -- of what this Court held in
20 Arizona I. It established the PIA standard. We felt,
21 therefore, there was no further need to continue to
22 create this paper cloud on state water rights system.

23 And what we actually did here is we simply did
24 not renew them. These permits have not been cancelled.
25 And, in fact, there is a phase three proceeding in this

1 -- in this case that will in fact go through the permits
2 one by one and determine which permits should be
3 retained and which should be formally cancelled by the
4 state.

5 QUESTION: Can you, under Wyoming law, retain a
6 right that long? It's a matter of state law, at any
7 rate?

8 MR. MINEAR: It's -- It's my understanding that
9 one simply needs to file an extension and they can
10 extend it every five years or so. So, this is a common
11 practice and a big problem in Wyoming, as a matter of
12 fact.

13 QUESTION: Now, you had three reasons to use
14 current technology. It was done in Arizona I. There is
15 feasibility of proof. And then is there a third reason?

16 MR. MINEAR: The third reason is I think that
17 this is consistent with what Congress probably intended
18 back in 1868.

19 When Congress looked at this -- or, I should
20 say, the treaty partners since this is a treaty in this
21 case, and it should be interpreted with respect to the
22 Indians in that regard. But I think the treaty parties
23 recognized that the Indians would have ample water to
24 irrigate their lands. In fact, it's reasonable for the
25 tribes to believe they would have had all the water in

1 this water shed since the land was being set aside for
2 them.

3 But, in any event, they probably were not
4 thinking about a specific number of acre feet of water
5 that would be applicable. And I think the best
6 inference of what they would have intended is that when
7 -- if there came a time and need for quantifying that
8 standard, or quantifying the amount of water that is
9 necessary, it would be done on the best available
10 information. And that's what we've done here in 1980.

11 I think that Wyoming all but concedes that this
12 case is indistinguishable from Arizona I and, therefore,
13 at least in its brief, it's forced to argue that Arizona
14 I itself must be discarded or replaced.

15 Now, we disagree with this. This Court does
16 not lightly discard its precedence.

17 QUESTION: Arizona I contains virtually no
18 reasoning.

19 MR. MINEAR: I think that it does contain the
20 core kernel of reasoning that's important to the -- the
21 determination of a water right. Namely, there is the
22 feasible and fair method for determining the amount of
23 water that's needed for land that's set aside --

24 QUESTION: Well, but --

25 MR. MINEAR: -- for agricultural purposes.

1 QUESTION: -- ordinarily in a court opinion
2 that is a conclusion you reach after a discussion of
3 possibilities. All that is is a statement of a
4 conclusion.

5 MR. MINEAR: But the discussion took place in
6 the Special Master's Report, which, in fact, that's
7 appended to our brief.

8 QUESTION: Yeah, but ordinarily we don't
9 consider the report of a Special Master as someone
10 incorporated by reference into the Court's opinion.

11 MR. MINEAR: On the other hand, the statement
12 in the opinion in Arizona I was that we agreed with the
13 Special Masters report. That's in fact what the Court
14 has said.

15 QUESTION: Well, about those --

16 MR. MINEAR: Pardon?

17 QUESTION: About those reservations.

18 MR. MINEAR: About those particular
19 reservations. But these Reservations are
20 indistinguishable. In fact, there is a stronger
21 argument, I think, in this case than in those cases.

22 QUESTION: Well, there's no history about those
23 reservations in Arizona I, like there is here in Wyoming.

24 MR. MINEAR: That's right. The history here
25 supports Wyoming's --

1 QUESTION: Well, you could say --

2 MR. MINEAR: With respect to the agricultural --

3 QUESTION: -- they are different reservations.

4 MR. MINEAR: But the --

5 QUESTION: They're not the same reservations.

6 They are different Reservations.

7 MR. MINEAR: They -- they might be different
8 reservations, but the agricultural purpose of these
9 reservations is even more clear than those Executive
10 Order ones.

11 QUESTION: But it was also -- this -- this
12 reservation was intended for particular tribes, Shoshone
13 and later another tribe was added. But --

14 MR. MINEAR: The treaty itself indicates,
15 though, that it was for other tribes that might be
16 settled amongst them. So I don't think that it's -- it
17 was clear that only the Shoshones would -- that only the
18 Shoshones would reside on that tribe.

19 QUESTION: Well, in Arizona I it was clear that
20 it was -- it was not for any particular tribe or others
21 that might settle amongst them. But for all Indians.
22 Isn't that right?

23 I mean, I find it difficult to believe that in
24 1868 Congress, no matter what the size of the Indian
25 population that was contemplated to be on the -- on the

1 reservation in question, should be deemed to have said
2 we're giving enough water to irrigate every -- every
3 inch of arable land. No matter how large the tribe they
4 thought they were settling. Did they expect to make
5 some tribes very rich so they could have an enormous
6 export business --

7 MR. MINEAR: Well, I think --

8 QUESTION: -- in agricultural products or --

9 MR. MINEAR: -- the idea that these tribes
10 would become very rich off of this grant of water is
11 simply a fantasy.

12 QUESTION: Well, I thought -- I thought that
13 the purpose of the -- of the agricultural grant was to
14 enable them to grow food by which they would live.

15 MR. MINEAR: Yes. And I think it's very
16 reasonable to assume that the size of the Reservation
17 and the amount of arable land that was set aside for
18 them represented the best judgment of the treaty
19 partners of what their future needs might be.

20 I don't know how else you would measure the
21 future needs except by the amount of land that the
22 parties determined was necessary to meet those future
23 needs.

24 This was set aside as a permanent homeland for
25 the tribes.

1 QUESTION: Would you agree then that necessity
2 enters into this calculation?

3 MR. MINEAR: I think it does in the sense that
4 they do need -- that the measure of necessity is the
5 amount of water that's needed to irrigate the
6 practicably irrigable land.

7 And, in fact, that's what Wyoming had argued.
8 If you look at their objections to the Special Masters
9 Report, pages 24 through 27, their objection to the PIA
10 standard was -- in fact, they did not object. They said
11 that that was the -- in essence argued that that was a
12 part of the minimal needs test. The PIA standard should
13 be applied in this case.

14 QUESTION: There is no argument in this case
15 about how much water is necessary to irrigate an acre?

16 MR. MINEAR: I don't believe so, except for the
17 fact of the matter -- not in this case -- that we're
18 being held -- the tribes are being held to a stricter
19 efficiency standard than anyone else in both their
20 historic lands and their future lands. And, again, this
21 simply verifies that the amount of water that was
22 quantified here is really quite reasonable.

23 QUESTION: Do we usually get --

24 QUESTION: You don't want --

25 QUESTION: Excuse me.

1 QUESTION: -- you don't want the reserved right
2 to ever be subject to diminution for non-use?

3 MR. MINEAR: That's -- well, that is in the
4 very nature of a reserved water right.

5 QUESTION: Well, it doesn't have to be.

6 MR. MINEAR: I think --

7 QUESTION: It certainly doesn't.

8 MR. MINEAR: I think that that has been the
9 clear implication.

10 QUESTION: Well, it doesn't have to be. If
11 water is scarce and nobody is using it --

12 MR. MINEAR: Well, if there is a problem --

13 QUESTION: I mean, under most -- under most
14 state laws you either use it or lose it.

15 MR. MINEAR: But the federal reserve water
16 rights are an exception to the --

17 QUESTION: It's not a total exception as if it
18 stood there on a plateau all by itself while all the
19 appropriative rights went down to nothing. There --
20 there is no doctrine of water law that elevates one
21 water right over the other to that extent.

22 MR. MINEAR: But if the water was initially
23 reserved for the reservation, it was set aside by
24 Congress, then it seems as if Congress is the party that
25 needs to worry if there are later shortcomings --

1 QUESTION: But, of course, the whole -- the
2 whole Winters Doctrine is just an implication to
3 Congress. Congress never said in so many words, we're
4 reserving a water right. That's just what this Court
5 said Congress must have intended. So, Congress has
6 never even spoken.

7 MR. MINEAR: But I think Congress --

8 QUESTION: And they certainly haven't spoken
9 with --

10 MR. MINEAR: -- has relied on every decision
11 since the -- has been relying on every decision since
12 the 1908 Winters decision, including the Powers
13 decision, including Arizona I. In fact, the present
14 congressional activity indicates that sort of reliance.

15 QUESTION: Mr. Minear, do you have any idea how
16 many more areas there are in the United States where
17 there are reserved water rights for tribes that haven't
18 yet been determined?

19 MR. MINEAR: Well, I think that there are a
20 good number of those. And those are presently being
21 quantified -- and settlements are being made, and
22 they're being done on the PIA standards. And that's one
23 of the important reasons why the PIA standard should be
24 retained.

25 QUESTION: Well, there are a lot more yet to be

1 determined, in other words.

2 MR. MINEAR: There are a fair number that need
3 to be determined. Yes, but --

4 QUESTION: Like how many?

5 MR. MINEAR: -- of them -- there could be as
6 many as 20, I suppose.

7 QUESTION: Uh-huh.

8 MR. MINEAR: Perhaps more.

9 QUESTION: But the PIA standard as set in the
10 Master's Report in Arizona I, isn't that a legal
11 principle? Do we usually defer to Special Masters on
12 legal principles?

13 MR. MINEAR: I think that when a Special
14 Master's Report has been incorporated into existing law
15 to the extent that the Special Master's Report has here,
16 I think it's very important to recognize the element of
17 certainty that it has created.

18 I would like to also point out that since the
19 question of shortages has come up --

20 QUESTION: If there is anything that is created
21 under certainty around -- in the water business in the
22 western states, it's this whole process of quantifying
23 the reserved right.

24 MR. MINEAR: But I think once the right is
25 quantified, there is no uncertainty.

1 QUESTION: Well, it hasn't been quantified yet
2 with Wyoming.

3 MR. MINEAR: And with respect to the notion of
4 shortages the Chief Justice raised, I'd simply point out
5 that the Wyoming Supreme Court noted here that there
6 would be -- there was no indication of any
7 gallon-for-gallon reduction in this case. And for that
8 reason, it eliminated the storage requirement that was
9 -- that had been imposed by the lower courts in any
10 event.

11 So, the extent that we're talking about
12 interference with other water rights, that is not
13 present in this case, and I would suggest that we should
14 wait until one of those cases actually arises before we
15 raise that as a -- as a concern for setting aside the
16 PIA standard.

17 QUESTION: But you would never -- you would --
18 once -- your suggestion is that if we set -- once the
19 reserved right is established with a priority date of
20 1868, there is never any other water right going to take
21 precedence over that.

22 MR. MINEAR: Well, that's right in this basin.
23 But, also, there's a limited amount of irrigable land in
24 this basin. And the general view is that the -- for the
25 land that is now in service, there would not be any

1 gallon-for-gallon reduction for that land.

2 I see that my time has expired.

3 QUESTION: Thank you, Mr. Minear.

4 Ms. Williams.

5 ORAL ARGUMENT OF SUSAN M. WILLIAMS

6 ON BEHALF OF TRIBAL RESPONDENTS

7 MS. WILLIAMS: Mr. Chief Justice, and may it
8 please the Court:

9 If the time permits me today, I would like to
10 emphasize just two points. First, the natural
11 understanding of the treaty at issue in this case is
12 that the United States and the Shoshones reserve
13 sufficient water to irrigate all of the reservations.
14 That is, their permanent homes, farmable land for both
15 the present and for the future generations. This vested
16 property right cannot now be easily discarded or
17 replaced without clear and unambiguous congressional
18 abrogation.

19 Second, water quantification standards other
20 than the PIA standard either legally or infirm because
21 they take the future out of the Winters Doctrine, as is
22 the case with the proposed historically irrigated
23 acreage standard, or they do not achieve the fixed
24 present determination of Indian water rights long
25 mandated by this Court.

1 Moreover, any standard other than PIA simply is
2 not fair or just in light of the historic and the
3 present conditions on the Wind River Reservation.

4 Before the treaty and the Reservation's
5 creation, the Shoshones hunted and fished in what are
6 now three western states. After the treaty, the
7 Shoshone agreed to live in a very much diminished land
8 area although this still is the third largest
9 reservation in the country. They would subsist
10 primarily on agriculture.

11 No evidence exists anywhere in this case that
12 the great Chief Washike in 1868 failed
13 uncharacteristically to consider the needs of all of his
14 people, both the future generations as well as the
15 present generations when he reserved lands in the best
16 water area of Wyoming. The only way to have considered
17 both the present and the future generation's needs for
18 water was to reserve at least the water necessary to
19 farm the reservation's farmable land.

20 In 1908 this Court in *Winters* recognized that
21 when reservations were set aside, water was set aside
22 for all time. In 1963 this Court in *Arizona against*
23 *California I* --

24 QUESTION: Ms. Williams, the *Winters* Doctrine
25 was just an intent that this Court attributed to

1 Congress, wasn't it? Congress didn't say in so many
2 words, in the reservations we're setting aside the water.

3 MS. WILLIAMS: That's correct. It is this
4 Court's reading of the implied intent of Congress, and
5 indeed the implied intent of the Indians, as the tribes
6 submit, is that they would set aside land and sufficient
7 water to farm all of that much diminished reservation
8 after having prior to that time having economic
9 opportunities to hunt and fish in a vast public -- vast
10 domain out west.

11 In 1963 this Court in Arizona against
12 California concluded that the only feasible and fair way
13 to achieve that fixed present determination of Indian
14 agricultural water for present and for future Indian
15 needs since population increases are difficult to
16 predict, is the PIA.

17 QUESTION: What is the Indian population on the
18 reservation?

19 MS. WILLIAMS: The current Indian population on
20 the Wind River Indian Reservation is about 5,400 Indians.

21 QUESTION: What was it in 1868? Do you know?

22 MS. WILLIAMS: We are not clear, but it was
23 something much smaller than that size there. But,
24 again, in 1868 the chief of the Shoshones had in mind to
25 protect and to reserve water not only for the then

1 existing population but for any future population that
2 might --

3 QUESTION: How many families are there? Do you
4 know?

5 MS. WILLIAMS: I'm not clear on that point, Mr.
6 Chief Justice.

7 QUESTION: Well, would you suppose there would
8 be half this many or three-quarters of this many? Or
9 just -- you don't know?

10 MS. WILLIAMS: I'm sorry. I just don't know
11 that fact.

12 QUESTION: Do I understand from the briefs that
13 the population has been increasing in the last ten years?

14 MS. WILLIAMS: The population has been
15 increasing dramatically. Indeed, the Special Master in
16 this case so found that by the year 2020 the population
17 of the Indians on the Reservation would be upwards of
18 9,000 tribal members.

19 This tribal-vested property right which was set
20 aside by the Shoshones and agreed to by the United
21 States in a solemn contractual bargain cannot now be
22 divested, easily discarded, or replaced without clear
23 and unambiguous congressional intent.

24 The State of Wyoming suggests that such
25 congressional intent can be found in the 1905 Act in the

1 Water Proviso that authorized the expenditure from the
2 remainder of \$85,000 after a per capita payment was to
3 be made to the Indians is such clear and unambiguous
4 congressional intent to divest the property right, the
5 water right, that was set aside in 1868.

6 This just makes no sense at all for several
7 reasons. First of all, the \$85,000 was the tribe's
8 money. That was money set aside from the receipts of
9 the land sales in the open area of the reservation. The
10 vast portion of that was to be spent on a per capita
11 distribution to the tribal members at that time. Only
12 the remainder, said the United States, could be used to
13 purchase state water permits for the reservation at a
14 time prior to this Court's decision in 1908 when there
15 was uncertainty as precisely the scope of the federal
16 reserve water right, and, indeed, the quantification of
17 it.

18 Any standard against this backdrop of an 1868
19 right, a 1905 Act statute by Congress that does not
20 clearly divest that right, as required by this Court,
21 that would serve as a substitute for the PIA standard,
22 as Wyoming submits, must be premised on the need for
23 future water. That is legally unsound. It is blind to
24 present facts, and it grossly distorts history.

25 The need, the equities, as this Court pointed

1 out in Cappaert unanimously in 1976, are not to be
2 balanced in determining the scope of federal Indian
3 Reserve water. Though not legally relevant, Wyoming
4 suggests that the tribes have had ample opportunity to
5 demonstrate the amount of water needed for this
6 reservation, ignoring utterly that over the last 80
7 years the Federal Government has funded irrigation
8 projects at Wind River and throughout the west primarily
9 for the benefit of non-Indians. A bias described in
10 1973 by the National Water Commission as one of the
11 sorrier chapters in the history of the United States
12 government's treatment of Indian Tribes.

13 This federal bias is starkly in evidence at
14 Wind River. Over \$70 million has been spent on
15 irrigation projects that benefit primarily the
16 non-Indians. Only \$4.4 million, in contrast, has been
17 expended by the United States government for the Indian
18 irrigation projects.

19 In these circumstances, the state simply cannot
20 in good faith argue that the tribes have had ample
21 opportunity to demonstrate their need for water.

22 The Indians' need for water in this case now
23 should come as no surprise to the state. In 1905 the
24 United States, as a pre-Winters precaution, obtained
25 permits for about 125,000 acres of land for Indian

1 Irrigation. Indeed, before trial, the state argued
2 102,000 acres on this Reservation were PIA.

3 The simple fact is these tribes, under any
4 standard, need the water awarded to them by the Wyoming
5 Supreme Court, which, as we have shown in our briefs, is
6 a modest award considering the amount of acres per
7 tribal member now and over time that can be irrigated
8 with this award.

9 Agribusiness represents the only certain hope
10 for this tribe's sustained economic future on this
11 reservation. This reservation is large, but it is
12 remote, and it has considerable available land. Its
13 only other natural resource is oil and gas. It is
14 depleting very rapidly. With 70 percent of the tribal
15 members unemployed, expanded agriculture and related
16 businesses, even if only as subsistence, can make a real
17 difference.

18 The tribe -- the Shoshone Tribe recently
19 executed a contract to sell all of the barley it can
20 produce.

21 In addition, many tribal members are cattle
22 producers, but due to the lack of grasses to feed their
23 cattle through the winter, they currently sell those
24 calves at less than half the weight the cattle
25 industry's experience shows is where the major profit

1 lies. Only through expanded agriculture now on the
2 presently idle and the future lands to produce a winter
3 feedstock -- the natural grasses on the reservation are
4 not on the winter pastures -- will the cattle industry
5 on the reservation be able to thrive.

6 In short, by any definition, the tribes in this
7 case need their future water. For the first time in
8 their history, the Shoshone and the Arapaho Tribes are
9 poised to build a sustained and productive reservation
10 agricultural economy. This is what their ancestors
11 envisioned in 1868 and what the tribes must do in 1989
12 to alleviate staggering unemployment and poverty-related
13 social ills on this reservation.

14 Not only will the tribal people benefit from
15 this, but so will the regional economy as dollars flow
16 off the reservation for machinery, retail, and for other
17 purposes.

18 QUESTION: Do you think the -- do you think the
19 reserved right should incorporate or should be used to
20 maintain instream flows?

21 MS. WILLIAMS: The reserved right that was set
22 aside in 1868 was to be primarily for agricultural
23 purposes. But what the Indians intended impliedly in
24 1868 was to have water sufficient to live on that
25 reservation for all time.

1 you'd like to ask me about the record, I'd be glad to
2 respond.

3 QUESTION: I'd rather stick to the record on
4 both sides myself.

5 MR. WHITE: Well, if I've -- If I have failed
6 to do so, Your Honor, I wish you'd call it to my --

7 QUESTION: Well, you did fail to do so. You
8 have a long section in your brief on what happened after
9 the trial.

10 MR. WHITE: I'm sorry, Your Honor. I tried to
11 make it clear that that was outside the record.

12 There have been -- there has been some
13 suggestion that the -- there is no acre-for-acre -- or,
14 excuse me, gallon-for-gallon reduction in Wyoming for
15 state water rights as a result of the reserved right.
16 And that is what the Wyoming Supreme Court did say. But
17 the triers of fact, the Master in the district court,
18 did not say the same thing.

19 At page 232(a) of the Petitioner's Appendix you
20 will find the district court's observation that "holders
21 of state awarded water rights will find their formerly
22 valuable water rights worthless."

23 QUESTION: Well, ordinarily we take the word of
24 the Supreme Court of the state over the district court
25 unless it's some obvious mistake. Did the Supreme Court

1 of Wyoming look at it differently than the district
2 court did?

3 MR. WHITE: They didn't look at it, Your
4 Honor. They made the -- just made the conclusion that
5 there is no finding below and you're as free as the
6 Wyoming Supreme Court to look at the findings below.

7 QUESTION: They said that there was no finding
8 below and they were -- that was what they based their
9 statement on?

10 MR. WHITE: Yes, sir. It's also been suggested
11 that the 55 percent of the PIA that was restored to the
12 reservation had no relation to grazing purpose. No
13 purpose at all was described. I would refer the Court
14 to page 741(a) of the Petitioner's Appendix in which is
15 located the restoration order for the largest of the
16 future project. And it says, whereas the tribes --
17 quote -- "require additional grazing land to support
18 their expanded livestock industry"-- close quote --
19 there will be a restoration.

20 QUESTION: Mr. White, suppose these were all
21 state water rights that had been involved here and they
22 weren't being used completely and the water that wasn't
23 being used flows on down the stream. Suppose they
24 wanted to use the water for something else, would the
25 junior appropriators down below have a valid objection?

1 MR. WHITE: Absolutely. And that points out
2 the stark distinction between the state and federal
3 rights involved here. We're --

4 QUESTION: Well, we don't know whether that's
5 different or not.

6 MR. WHITE: I'm sorry, Your Honor. As have
7 been argued. The state water right user, if he wished
8 to change his water right to a different use or a
9 different place of use or a different time of use, would
10 have to demonstrate that that change would not injure
11 anyone else. Not only that it wouldn't injure anyone
12 else, but that there had been continued use over a long
13 period of time, over a long what's called historic use,
14 before that change could be made.

15 Each of the western states has a mechanism
16 established for changing existing state water rights.
17 None of them allow a change without an inquiry into
18 historic use and injury.

19 QUESTION: But does every -- does every state
20 have a mechanism for saying if you don't use your water
21 right, you lose it?

22 MR. WHITE: In one way or the other every state
23 has either an abandonment or a forfeiture statute, Your
24 Honor.

25 QUESTION: But it takes some time, though,

1 doesn't it?

2 MR. WHITE: That's right. It -- every -- I
3 know of none where the period is less than five years,
4 and several where the period is as much as ten,

5 If there are no further questions, that's all I
6 have, Your Honor.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. White.
8 The case is submitted.

9 (Whereupon, at 1:56 p.m., the case in the
10 above-entitled matter was submitted.)
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
No. 88-309 - WYOMING, Petitioner V. UNITED STATES, ET AL.

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BY JUDY Freilicher
(REPORTER)

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