

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: STATE OF NEBRASKA, Plaintiff v.

STATES OF WYOMING AND COLORADO

CASE NO: 108 Original

PLACE: Washington, D.C.

DATE: Wednesday, January 13, 1993

PAGES: 1 - 47

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STATE OF NEBRASKA, :

4 Plaintiff :

5 v. : No. 108 Original

6 STATES OF WYOMING AND COLORADO :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, January 13, 1993

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:14 p.m.

13 APPEARANCES:

14 DENNIS C. COOK, ESQ., Senior Assistant Attorney General of
15 Wyoming, Cheyenne, Wyoming; on behalf of the
16 State of Wyoming.

17 GALE A. NORTON, ESQ., Attorney General of Colorado,
18 Denver, Colorado, on behalf of the State of Colorado.

19 RICHARD A. SIMMS, ESQ., Special Assistant Attorney General
20 of Nebraska, Santa Fe, New Mexico; on behalf of the
21 State of Nebraska.

22 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.; on
24 behalf of the United States.

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DENNIS C. COOK, ESQ.	
4	On behalf of the State of Wyoming	3
5	ORAL ARGUMENT OF	
6	GALE A. NORTON, ESQ.	
7	On behalf of the State of Colorado	15
8	ORAL ARGUMENT OF	
9	RICHARD A. SIMMS, ESQ.	
10	On behalf of the State of Nebraska	21
11	ORAL ARGUMENT OF	
12	JEFFREY P. MINEAR, ESQ.	
13	On behalf of the United States	31
14	REBUTTAL ARGUMENT OF	
15	DENNIS C. COOK, ESQ.	
16	On behalf of the State of Wyoming	44
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (1:14 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 108 Original, the State of Nebraska v. the
5 States of Wyoming and Colorado.

6 Mr. Cook, you may proceed.

7 ORAL ARGUMENT OF DENNIS C. COOK

8 ON BEHALF OF THE STATE OF WYOMING

9 MR. COOK: Thank you, Mr. Chief Justice, and may
10 it please the Court:

11 We're here today on exceptions to the Special
12 Master's recommendations on cross motions for partial
13 summary judgment in an original action this Court accepted
14 in 1987. It was filed in 1986.

15 What makes this case important to more than the
16 parties before you here today is that these cross motions
17 for summary judgment provide the opportunity for the Court
18 to demonstrate the proper application of summary judgment
19 as a procedural tool to secure a just, speedy, and
20 inexpensive determination of this original case.

21 To follow the Special Master's recommendations
22 here will be to accept a view of summary judgment that is
23 incompatible with the Court's decision in Anderson v.
24 Liberty Lobby, Celotex v. Catrett, and National Wildlife
25 Federation v. Lujan.

1 The Special Master in this case indicates at the
2 outset of his Second Interim Report that he has followed
3 the Court's dictates with regard to the summary judgment
4 decisions, but I would submit that he hasn't, and the
5 clear example that makes the case is in his resolution of
6 the below Tri-State issue, where the Special Master says:

7 The specific issue to be addressed at this point
8 is the appropriateness of ruling on whether Nebraska's as-
9 yet-unseen evidence of injury or threatened injury to her
10 interest downstream of Tri-State will be material to
11 whether Wyoming or Colorado has violated Nebraska's
12 apportionment. At this stage, however, it is premature to
13 enter an order advising Nebraska how she may develop her
14 case and the provisions for which her evidence will be
15 deemed material.

16 Reading the Court's summary judgment decisions,
17 I do not believe that there's a fair reading of those
18 decisions that would allow this recommendation not to
19 decide, but to allow Nebraska more time yet to determine
20 if it has a case, to grope along for another 6 years,
21 possibly, to determine if it has a case.

22 That's the heart of our issue. Nebraska has
23 brought a petition that alleges four specific violations
24 of the North Platte decree. Wyoming has admitted in our
25 answer -- we have admitted the four specific actions, but

1 denied that they violate the decree. Then by way of
2 summary judgment motions, Wyoming asks the logical and
3 unavoidable legal question of whether those four specific
4 acts do in fact violate the decree.

5 Despite what -- as complicated as this case may
6 appear from time to time, that legal question is not
7 complicated. It involves simply reading the North Platte
8 decree and determining with respect to each of the four
9 issues whether there's a violation of the decree. The
10 decree was final in 1945, it is a clear and unambiguous
11 statement of what injunctions were imposed against
12 Colorado and Wyoming and Nebraska, and it does not require
13 a trial or further evidence to at least interpret that
14 decree.

15 The analysis of all of the four specific acts
16 follows the same basic course of reasoning. First, the
17 Court must look at the act and determine within the
18 language of the decree whether in fact that specific act
19 constitutes a violation of the decree. Then, if it isn't
20 a violation of one of the existing injunctions against
21 Wyoming, then Wyoming is entitled to a summary judgment on
22 that pure question of law.

23 Before going further with any one of those
24 specific acts to determine if this Court should exercise
25 its extraordinary power to enjoin the State of Wyoming to

1 prohibit an act, the Court then has to ask the question,
2 has it been asked to amend the decree by Nebraska, has the
3 Court agreed to consider such an amendment of the decree
4 and then, if both of those tests have been met, now, on
5 summary judgment, when Wyoming moves to pierce their
6 pleadings, has Nebraska come forward with evidence that
7 would support a finding in their favor, and that evidence
8 would have to support a finding by clear and convincing
9 evidence that an injunction is necessary to protect some
10 vital interest of the State of Nebraska under the existing
11 decree.

12 QUESTION: Mr. Cook, do you plan to go through
13 the various points seriatim? Either -- as you say, the
14 case does perhaps appear somewhat complicated, and I at
15 any rate would be helped if -- the first one is the Inland
16 Lakes, is that right?

17 MR. COOK: That's one issue, and I can get to
18 that right away.

19 QUESTION: Yes, well, just whatever order you
20 want, but it would help me if you could devote a little
21 bit of attention to each one of the issues.

22 MR. COOK: Right. Your Honor, let me turn to
23 the Inland Lakes, at your suggestion, and suggest that
24 Wyoming is entitled to a ruling in its favor on summary
25 judgment, and our initial summary judgment motion was that

1 it is not a violation of the decree for Wyoming not to
2 recognize an interstate water right for the Inland Lakes.
3 The point that we would make is that there is no
4 interstate water right in the decree, Your Honor.

5 The Supreme Court in 1945 -- and I would turn to
6 paragraph IV of the decree. That's found at Appendix A-4
7 of our brief -- knew how to specify an interstate water
8 right. The entire North Platte case that spanned 11 years
9 from 1934 to 1945 was about a request to enforce
10 interstate water rights. That was to have the State of
11 Wyoming and the State of Wyoming -- or, State of Wyoming,
12 pardon me, and the State of Colorado forced by this Court
13 to exercise their police power against valid rights in
14 those States for the benefit of a right in Nebraska.

15 No one asked for an interstate water right for
16 the Inland Lakes, and when you look at paragraph IV, where
17 there's very careful specification of the interstate water
18 right for five specific canals, where Wyoming was required
19 to exercise its police power to prohibit the -- or to
20 interfere with the operation of valid Wyoming water rights
21 for the benefit of these Nebraska rights, the Court was
22 clear. They did not issue a water right then for the
23 Inland Lakes. They were not asked to issue one, and there
24 was no predicate State water right for which they could
25 base one.

1 QUESTION: The Master's alternate ground for
2 granting summary judgment for Nebraska on the Inland Lakes
3 I think was that there had been a longstanding
4 acquiescence by Wyoming.

5 MR. COOK: That is his basis, or one basis. We
6 disagree, Your Honor.

7 QUESTION: Yes, I would expect you would.

8 MR. COOK: What has occurred over time is that
9 the Inland Lakes have stored water from the North Platte
10 River, but since 1913, the record that we've supplied
11 through our affidavits on summary judgment is that Wyoming
12 has put the United States on notice since 1913 that they
13 had no valid water right, and to the extent that they took
14 water, they had no right to expect priority
15 administration. They were taking free river water at
16 their peril.

17 In other words, they can continue to do that,
18 and we will allow that practice to continue now, but the
19 problem is, is the Special Master would recommend that a
20 1904 priority be imposed that works a mischief on many
21 Wyoming water rights obtained according to Wyoming water
22 law, including the Cities of Casper and most of the major
23 users on the North Platte.

24 Further, I would just suggest that because it's
25 not in the decree, that resolves the issue completely, and

1 there is no interstate water right.

2 Should the Court consider whether they would
3 like to amend the decree, that becomes, then, a question
4 of fact, whether that amendment is necessary to protect
5 those interests in Nebraska that are protected by the
6 decree, and the decree clearly protects irrigation water
7 rights that divert between Whalen and Tri-State Diversion
8 Dam, nothing else -- nothing further downstream.

9 If I might, Your Honor, I'll turn to the Deer
10 Creek issue, to give some thought to that. On the Deer
11 Creek project, clearly even the Special Master agrees that
12 there is no current restriction that prohibits Wyoming
13 from constructing the Deer Creek project. The issue
14 becomes whether the Court has agreed to accept an
15 amendment of the decree, and hear a case to amend the
16 decree to prohibit Wyoming from constructing the Deer
17 Creek project.

18 Whether the courts accepted it, or whether the
19 State of Nebraska made the proper threshold showing
20 allowing them to get into court on that separate issue,
21 becomes irrelevant when you look at the fact that now it
22 apparently is here in front of the Special Master on
23 summary judgment Nebraska has come forward with no facts
24 that under your cases on summary judgment would support
25 them prevailing at trial if that was the only evidence

1 presented.

2 Special Master Olpin in this case narrowed the
3 issue down to the record of two specific affidavits of
4 Mr. Lee Becker, an expert employed by the State of
5 Nebraska, former Nebraska State hydrologist, and those
6 two -- I'd point the Court's attention to that in their
7 consideration of this case to review those two affidavits
8 and determine if they could enter judgment on behalf of
9 Nebraska based on that.

10 Mr. Becker specifically told -- in his March 1
11 affidavit indicated that, after analyzing the Deer Creek
12 project, its effect on the North Platte River, he even
13 analyzed the impact of a junior water right on the Inland
14 Lakes, and he analyzed the impact of no flows from the
15 Laramie reaching the North Platte, he concluded that
16 historic diversions from Whalen to Tri-State Diversion Dam
17 can be met in all scenarios described.

18 QUESTION: I can't understand the Master's
19 finding. He refused to enter summary judgment for
20 Wyoming, but he said that this -- the Deer Creek thing had
21 to be tried, so it wasn't as if he entered summary
22 judgment against you.

23 MR. COOK: Oh -- no, he hasn't judged against
24 us, but the problem, Your Honor, is -- and the purpose of
25 summary judgment is, if there's no proof at this point,

1 6 years into this case, no affidavits when two separate
2 motions for summary judgment have challenged Nebraska to
3 come forward with a reason for trial, then why should we
4 go through the considerable expense of trying an issue
5 that -- there's nothing there?

6 The issue --

7 QUESTION: Well, the Master --

8 MR. COOK: Pardon me.

9 QUESTION: I know you don't agree with the
10 Special Master, but the Master -- it was his opinion that
11 the Deer Creek project if carried out would lessen the
12 mainstream flow of the North Platte.

13 MR. COOK: Your Honor, there's no debate about
14 that. To build a project, if it doesn't deplete the
15 stream, there's no point in building it.

16 QUESTION: Well, yes, and what if he -- and if
17 he's right about that -- of course, you claimed that it
18 wouldn't, didn't you?

19 MR. COOK: No, no, no. We freely admit that it
20 will deplete the system 10,000 acre-feet per year on
21 average.

22 QUESTION: And why did the Master think that
23 there should be a trial, then?

24 MR. COOK: Well, he submits that there's
25 indication to him based on those affidavits of a question

1 of fact that those canals in that Whalen to Tri-State
2 reach will be affected.

3 Mr. Becker's affidavits indicate that he does
4 not conclude that. He had a second affidavit that said, I
5 still agree with my first conclusion. When we pointed
6 this out and said it looks to me like you've lost your
7 case, they came up with a second affidavit and he said, I
8 agree with my conclusion, but I also recognize that there
9 are other analysis of this Deer Creek project that would
10 indicate that the effect of Deer Creek would be on
11 Government storage projects in Wyoming, and then, in a
12 series of dry years, that could affect.

13 The point is that could affect doesn't tell us
14 anything. He doesn't agree with that. He doesn't like
15 that analysis, and he has submitted to the -- he's
16 committed to the other.

17 We also have a record that shows that Nebraska
18 takes more than 40,000 acre-feet per year in excess of the
19 requirements determined by this Court in 1945 as what it
20 was protecting, so we have Nebraska taking in excess of
21 40,000 acre-feet per year more than their requirements at
22 the same time they're attacking the construction of a
23 10,000 acre foot per year project for municipal use in
24 Wyoming.

25 I think that summary judgment resolves this

1 issue in paragraph XIII, and the Court need go no further.
2 If it does go further, then there's the paragraph X
3 question of municipal use and the exemption under
4 paragraph X, Your Honor.

5 QUESTION: Well, didn't he say that issue had to
6 be tried in any event -- whether it came within the
7 exception in paragraph X?

8 MR. COOK: He has, Your Honor. We don't think
9 so. We don't think there's even been a question of fact
10 presented about whether the municipal use that would be
11 made of water stored in Deer Creek is not the same
12 municipal use that would be used in Nebraska or Colorado,
13 and we don't see the affidavits that show contrary to
14 that, but we think that paragraph X need not be reached,
15 but we also think paragraph X is an absolute exemption.

16 QUESTION: But who has the burden of proving
17 whether or not the water would be within the usual
18 domestic municipal and so forth purposes?

19 MR. COOK: In the case that it would be
20 questioned, it would be the State of Wyoming, Your Honor.

21 QUESTION: Isn't he saying that you have to put
22 in proof on that issue, so therefore he can't decide on
23 summary judgment? Maybe I misunderstood something.

24 MR. COOK: Well, he -- there has to be a
25 controversy. We've said there's no problem with Deer

1 Creek, so then it becomes incumbent upon our opponent to
2 come forward with proof why -- where we're wrong and what
3 would entitle him to an injunction preventing the Deer
4 Creek project.

5 QUESTION: What is the State water law in
6 Wyoming concerning municipal use of water. Wyoming's a
7 prior appropriation water law State.

8 MR. COOK: That's correct, your Honor.

9 QUESTION: And if an irrigation use has a prior
10 date than municipal use, is it the law in Wyoming that
11 then the municipal user would have to condemn and pay for
12 that right to come in ahead.

13 MR. COOK: Yes. That's a correct analysis.

14 QUESTION: But you -- do you think that the
15 Special Master interpreted paragraph X to override State
16 law on prior appropriation insofar as municipal use is
17 concerned in this decree?

18 MR. COOK: No, I don't, and no, he didn't, Your
19 Honor.

20 QUESTION: I read him as having done just that.
21 I thought the decree, paragraph X, just said the decree
22 won't determine this issue. We leave it to State law.

23 MR. COOK: And that's the position that we take
24 as well, Your Honor.

25 QUESTION: Well, it certainly isn't clear that

1 that's how the Master understood it.

2 MR. COOK: But that's how we understand it, and
3 I agree with you, Your Honor.

4 Mr. Chief Justice, I'd like to reserve my
5 remaining time.

6 QUESTION: Very well, Mr. Cook. Mr. Norton,
7 we'll hear from you -- or, I'm sorry, Ms. Norton. G-a-l-e
8 can be either a man's or a woman's name.

9 MS. NORTON: That's correct, yes.

10 ORAL ARGUMENT OF GALE A. NORTON

11 ON BEHALF OF THE STATE OF COLORADO

12 MS. NORTON: Mr. Chief Justice and may it please
13 the Court:

14 The State of Colorado is today involved only in
15 the issue of claims of Nebraska for water below Tri-State
16 Dam. For us, it is a very important issue, because it
17 determines not just the scope of issues to be tried in
18 this case, but whether Colorado is involved in this case
19 at all. The case is essentially an allegation by Nebraska
20 of decree violations by Wyoming. There is absolutely no
21 allegation that Colorado has in any way violated the
22 decree.

23 Tri-State Dam is essentially on the Nebraska-
24 Wyoming State line. The area below Tri-State Dam was
25 tried in the original 1945 decision, and in that case the

1 Court found, after there had been litigation, that the
2 area below Tri-State Dam was adequately served by local
3 supplies. Those were return flows from irrigation. Those
4 included the rain that fell in that area, but local
5 supplies were adequate without any call on the upstream
6 Wyoming and Colorado share of the river to preserve the
7 irrigation within the Nebraska areas.

8 Downstream, or upstream from Tri-State, Nebraska
9 has large rights in the water. It derives water from
10 storage rights, from reservoirs that have been built
11 upstream for the benefit of Nebraska, and it also has
12 specifically allocated to it within the decree various
13 canals and the ability to draw water from those canals.

14 What Nebraska seeks in this case is apparently
15 the ability to go beyond what has been decreed to it and
16 to introduce evidence about various equities that have
17 developed, equities developing from the fact that it has
18 had excess water beyond the limited amount that it is
19 given in the decree, and that because of that extra
20 benefit it has had through the years, it has developed
21 equities in reliance on that excess water.

22 Essentially what Nebraska is trying to do is to
23 circumvent the limited nature of the enforcement action in
24 which the Special Master is currently involved.

25 This Court agreed to hear the case essentially

1 as an enforcement action. Twice, Nebraska has attempted
2 to modify its petition in order to expand and to allow
3 amendment and modification of the decree itself. The
4 first time this Court denied outright that attempt to
5 expand the action. The second attempt is still pending
6 before this Court.

7 Nebraska's approach drastically changes the
8 nature of this action from determining whether simply the
9 four specified violations by Wyoming are, indeed,
10 violations of the compact, to a complex trial, including a
11 trial on the equities of current usage and on the issues
12 of the need for water for endangered species.

13 This, certainly for Colorado, presents the
14 potential of a reshuffling of the equities. We have
15 settled equities from the 1945 decision, and we are very
16 concerned about any attempt to reopen those equities and
17 to reweigh those equities.

18 QUESTION: -- involved?

19 MS. NORTON: We currently have very specific
20 reservation of water under the compact. If, however, it
21 is reopened to say that additional water comes from
22 upstream to supply Nebraska's needs, potentially --

23 QUESTION: This is on the Platte and the
24 Laramie, both?

25 MS. NORTON: We are concerned essentially here

1 about just the Platte, although broadly speaking, if it
2 were to reopen -- there's absolutely no need to reopen the
3 Laramie decree in this case, but we also have great
4 interest on the South Platte as well, and because the
5 Whooping Crane habitat and the habitat of the other
6 endangered bird species is about 230 miles downstream into
7 Nebraska, beyond the confluence of the North Platte and
8 the South Platte, if that were to be opened up to
9 determine what the water needs of Whooping Cranes are,
10 then that would potentially endanger our rights on the
11 South Platte as well.

12 All of these issues are currently being
13 considered in an Endangered Species proceeding on Lake
14 McConahay. At every point when a new project is
15 considered, the Endangered Species issues are likewise
16 considered there. There's certainly no reason in this
17 enforcement action to open up the decree to consideration
18 of new issues like that.

19 Essentially what we ask this Court is to keep in
20 mind that the analysis should be a backward-looking
21 interpretation of the decree itself. In order to rule on
22 our motion for summary judgment, it is necessary only to
23 look at the decree, the decision of the pre-1945 record.

24 QUESTION: Do you want us to deny all three of
25 the additional counts that Nebraska wants to add? Is that

1 what you're asking?

2 MS. NORTON: We would like to -- if I understand
3 your question, we would like to see that there is no
4 modification to reopen the petition. We would like to see
5 a ruling for our motion for summary judgment, which is
6 that Nebraska is not allowed to raise additional --

7 QUESTION: What is Nebraska to do about these
8 grievances? I mean, assuming Nebraska still feels that
9 she has a good claim?

10 MS. NORTON: If there is a --

11 QUESTION: I mean, you can't run away from it
12 entirely. I'll come back sometime, I assume, right, just
13 not in these proceedings?

14 MS. NORTON: It is not necessary at all for an
15 interstate water decree to be adjusted because there are
16 increased needs in one of the downstream States. We have
17 settled responsibilities.

18 QUESTION: Well, that's a merits question.
19 You're not arguing the merits question to us. I thought
20 you were just saying, look, we've got enough
21 complications. This goes beyond what this case has been
22 about, and therefore these amendments should not be
23 allowed, right?

24 MS. NORTON: Yes.

25 QUESTION: Now you're telling me not only should

1 the amendments not be allowed, but these claims are not
2 bringable. They are surely bringable. I mean, they may
3 be no good on the merits, but you want them to start a
4 separate proceeding, is that what you think should be
5 done?

6 MS. NORTON: The proper way to address these
7 issues, if they were to be addressed, would be through a
8 modification of the decree through a petition by this
9 Court meeting the standards for a new, equitable
10 apportionment in front of this Court.

11 What we have now is only an enforcement action,
12 and whether a violation has occurred or not should be
13 determined based on looking at the existing decree, not at
14 wide open modifications of that decree.

15 I'd like to note finally that it is important to
16 understand, as Nebraska attempts to say, that there are
17 reliances by downstream water users, that their needs are
18 satisfied through the process of reuse of water. They
19 have specific claims to allow water into their irrigation
20 canals, and that water is then reused as it goes through
21 the process, and that is the way in which all of
22 Nebraska's claims are properly satisfied and that is the
23 way the decree contemplated they would be satisfied. It
24 is why this Court felt that there were adequate local
25 supplies in 1945 in order to satisfy those needs.

1 We ask the Court to give us the certainty that
2 is necessary within the context of interstate water
3 allocations.

4 If there are no further questions, thank you.

5 QUESTION: Thank you, Ms. Norton.

6 Mr. Simms, we'll hear from you.

7 ORAL ARGUMENT OF RICHARD A. SIMMS

8 ON BEHALF OF THE STATE OF NEBRASKA

9 MR. SIMMS: Mr. Chief Justice, may it please the
10 Court:

11 Colorado has just described to you the so-called
12 Tri-State issues solely in the context of Nebraska's
13 petition, and I would submit to you they have absolutely
14 nothing to do with Nebraska's petition. They relate
15 entirely to Wyoming's counterclaim, which is not before
16 you on exceptions.

17 With respect to these Tri-State issues, it is
18 imperative that you know what Wyoming and Colorado are
19 truly after. They are truly not seeking to define the
20 apportionment, as they have told you, but rather to
21 preclude the presentation of evidence underlying one of
22 Nebraska's principal defenses to Wyoming's counterclaim.

23 When the equities were evaluated in 1945 in this
24 case, one of the factors that was considered, one of the
25 most important factors that was considered by the Court,

1 was return flows. That is, flows that go from upgradient
2 lands after the primary use and can be utilized again on
3 downgradient lands.

4 At the close of the evidence, Nebraska conceded
5 that she needed no apportionment of direct flows east of
6 Bridgeport, Nebraska -- that's about 60 miles into
7 Bridgeport -- but she still maintained that she needed an
8 apportionment of direct flows for the lands between Tri-
9 State, just below the State line, and Bridgeport, some 60
10 miles in.

11 The -- Master Doherty found, in dealing with
12 this problem, that there did not be an apportionment of
13 direct flows because the canals below Tri-State, lying
14 below Tri-State and between Tri-State and Bridgeport,
15 could be satisfied by return flows, and what he did was to
16 stop the direct apportionment at Tri-State with the
17 understanding that, as an intrinsic part of that
18 apportionment, the canals below Tri-State and above
19 Bridgeport would be satisfied by the return flows.

20 There are ten canals in that area now. Their
21 sole source of supply -- that is, their sole source of
22 natural flow -- comes from those return flows. There are
23 no tributaries in the reach. They have no alternative
24 means of obtaining water.

25 The definition that the State of Wyoming wants

1 from the Court is this: they want you to declare that,
2 quote, evidence of uses supplied by diversions below Tri-
3 State Dam is immaterial to proof of Nebraska's
4 apportionment under the decree, end quote.

5 Well, Wyoming's purpose in seeking that
6 definition is simply to enable it to pursue its
7 counterclaim without respecting the indirect apportionment
8 to the canals below Tri-State and above Bridgeport.

9 In 1945, these canals were called the optional
10 diverters. Now, if New Mexico -- or, if Nebraska's
11 evidence could be precluded, eliminating Nebraska's
12 obligation to protect parens patriae all of those users
13 relying on return flows, Wyoming could then freely pursue
14 her counterclaim to attempt to force on the primary users
15 of waters diverted at Tri-State increased efficiencies,
16 and they would do so pursuant to the Court's first
17 decision in 1980, I believe, in Colorado v. New Mexico.

18 Without going through the numbers, if you were
19 to increase the efficiency of the primary users by
20 15 percent, you would reduce the return flows by
21 50 percent. That would leave the ten canals in that
22 stretch without the source of water that was provided to
23 them by Master Doherty.

24 QUESTION: How -- this is what I don't
25 understand. Tell me how proof concerning the return

1 flows, the extent of them and so forth, has anything to do
2 with what the decree said, what, 40, 45 years ago? How
3 could --

4 MR. SIMMS: The decree apportioned the direct
5 flows at Tri-State --

6 QUESTION: Right.

7 MR. SIMMS: For lands immediately below Tri-
8 State.

9 QUESTION: Right.

10 MR. SIMMS: It did so recognizing -- explicitly
11 recognizing that returns would be utilized from the
12 primary diversion for the downstream canals. That was an
13 intrinsic --

14 QUESTION: Right.

15 MR. SIMMS: Part of the apportionment.

16 QUESTION: Right. Now, why isn't that
17 question -- that's what you -- and that's what you say,
18 and you say that therefore you have a right to those
19 flows, and they say no, you don't have a right to them.
20 Maybe it was part of the understanding, part of the reason
21 they didn't give you more of the direct apportionment,
22 maybe it wasn't, but you don't have an entitlement to
23 them -- right? That is the issue of law.

24 How can that issue of law be affected by the
25 facts concerning how substantial those return flows are?

1 MR. SIMMS: We -- Nebraska needs to be able to
2 protect parens patriae all of the users of waters
3 apportioned, whether for direct application or for return
4 flow application.

5 QUESTION: Well, I understand that, and that can
6 prove that it is very important to Nebraska that the
7 answer be X instead of Y, but I don't see how it proves
8 the answer is X rather than Y. It may prove that you're
9 losing more in getting a judgment against you, but I don't
10 see how it proves that the decree meant one thing half a
11 century ago rather than another.

12 MR. SIMMS: I believe, Justice Scalia, what it
13 proves is what the United States urged upon Master Doherty
14 in 1945. They urged this alternative for these optional
15 diverters of not providing them with a direct flow
16 apportionment at Tri-State, and the alternative was, we
17 can provide them with return flows. That is their sole
18 source. We need to be able to establish that as a factual
19 matter in order to protect those users parens patriae, and
20 all of that is embraced within the apportionment in
21 paragraph V.

22 I'd like to get on to the Deer Creek matter.
23 With respect to Deer Creek, the Special Master left open
24 the possibility of avoiding trial in giving Wyoming an
25 unconstitu -- or, an unconditional license to deplete the

1 irrigation apportionment if the proposed Deer Creek
2 project fell within Master Olpin's construction of
3 paragraph X.

4 Paragraph X in the decree states that the decree
5 shall not affect or restrict municipal uses. Reading an
6 affirmative grant into paragraph X, contrary to the plain
7 language of that paragraph, Mr. Olpin has construed
8 paragraph X as giving municipalities a right to deplete
9 the flows that were apportioned for irrigation.

10 Instead of reading paragraph X as ensuring that
11 the apportionment provisions would not restrict municipal
12 uses, as it says quite plainly, he reads paragraph X to
13 say that municipalities can restrict the apportionment.
14 What he has done, in effect, is to redefine paragraph X to
15 infer an affirmative right as a result of the paragraph's
16 elimination of restrictions.

17 Doherty's -- Master Doherty's explanation of
18 that paragraph in 1944 I think conclusively establishes
19 that Master Olpin is wrong.

20 QUESTION: Then you take the position that yes,
21 municipal uses can be made of the water but they're
22 chargeable under the apportionment formula, I take it, to
23 each State -- to the State that takes it. Is that your
24 position?

25 MR. SIMMS: I'm not certain I understand your

1 question, Justice O'Connor.

2 QUESTION: Well, the decree apportioned waters
3 out of, let's say, the Laramie, in a certain percentage to
4 each State. Now, if Wyoming takes water that was
5 apportioned to it for municipal -- it takes water out of
6 its 25 percent, or whatever it is, and uses it for
7 municipal purposes, does that still count toward the
8 25 percent that was apportioned to Wyoming?

9 MR. SIMMS: That 25 percent went only to the
10 irrigation apportionment.

11 What we are saying is that the paragraph itself
12 plainly said and was meant to remove any possible
13 restriction on municipalities by the operation of the
14 coercive aspects of the decree.

15 Master Doherty, when he made his recommendation
16 to the Court for the decree provisions, said, and I'm
17 quoting, the parties are agreed that there should be no
18 restriction upon the diversion from the North Platte River
19 in Colorado or Wyoming of water for ordinary and usual
20 domestic and municipal purposes and consumption. Nothing
21 in the injunctions recommended is intended to or will
22 interfere with such uses, diversions and uses, end quote.

23 By reference to the injunctions, Master Doherty
24 I believe was explaining what was meant a little bit more
25 specifically, and what he was explaining was that the

1 coercive parts of the decree should not affect
2 municipalities. He was not indicating in the slightest
3 manner that paragraph X somehow gave an affirmative right
4 to deplete the apportionment for irrigation purposes.

5 QUESTION: How would Nebraska be injured by the
6 Deer Creek project?

7 MR. SIMMS: Nebraska would be injured in three
8 different areas. The proof shows that it would, during a
9 period of drought, make it impossible to meet
10 requirements.

11 The proof also shows that there would be a
12 reduction in upstream Federal reservoirs in large sums.

13 The proof also shows that Deer Creek, which
14 would in large part deplete winter flows, would adversely
15 interfere with the Inland Lakes, and the proof weighs very
16 heavily -- very heavily, beyond any standard that might be
17 imposed under Celotex or Liberty Lobby.

18 QUESTION: But the immediate effect is to take
19 water out of the mainstream of Deer Creek.

20 MR. SIMMS: Pardon me, Justice White?

21 QUESTION: The effect of Deer Creek is that it
22 would deplete -- take water out of the mainstream of the
23 North Platte. It would divert water from the mainstream
24 and store it.

25 MR. SIMMS: The proposal is this. The City of

1 Casper sits upstream.

2 QUESTION: Yes, I understand that.

3 MR. SIMMS: Downstream are senior agricultural
4 users --

5 QUESTION: Right.

6 MR. SIMMS: Who could call out Casper. Casper
7 has junior rights.

8 QUESTION: Yes.

9 MR. SIMMS: The entire purpose of this scheme is
10 to take tributary flows in an intermediate tributary, Deer
11 Creek, store them in the winter, then release them to the
12 downstream seniors so the downstream seniors theoretically
13 would not call out the City of Casper.

14 Even as to its alleged municipal component --
15 and bear in mind that there are many other components to
16 Deer Creek, but even as to its alleged municipal
17 component, all it is doing is providing a supplemental
18 supply to downstream senior irrigators and in effect
19 changing the concept of priority in Wyoming contrary to
20 paragraph XII(a) of the decree.

21 QUESTION: And how does that hurt Nebraska, you
22 say?

23 MR. SIMMS: It hurts Nebraska in three different
24 ways. It hurts Nebraska in terms of her apportionment at
25 Tri-State, it hurts Nebraska in terms of her right to have

1 the Inland Lakes filled with nonirrigation waters during
2 the winter, it also injured Nebraska in that the yield --
3 if the yield of Deer Creek were 9,600 acre-feet annually,
4 it would severely reduce the amount of water -- carryover
5 storage water in upstream reservoirs, so there are three
6 ways in which Nebraska would be hurt.

7 QUESTION: How would it do that? How would it
8 reduce the storage upstream?

9 MR. SIMMS: It would do that by virtue of the
10 way in which the water in the different reservoirs accrued
11 to accounts as opposed to physically accruing to the
12 reservoirs, and it's a very complicated explanation, but
13 nevertheless the evidence, both of the United States and
14 Nebraska's evidence, establishes that beyond a doubt.

15 With respect to the Laramie River, the question
16 may simply be one of semantics. We -- it is our opinion
17 that it was apportioned 75-25, 75 percent to the State of
18 Nebraska, when those inflows arrived at the Whalen Tri-
19 State reach. It is clear, and I think all of the parties
20 are agreed, that those flows were arithmetically included
21 in the fund of water that was apportioned in that reach.

22 QUESTION: In 1945.

23 MR. SIMMS: In 1945. In 1945, there was no
24 standard, really, to make a judgment beyond the 75-25
25 apportionment.

1 QUESTION: Thank you, Mr. Simms.

2 MR. SIMMS: I see my time is done. Thank you.

3 QUESTION: Mr. Minear, we'll hear from you.

4 ORAL ARGUMENT OF JEFFREY P. MINEAR

5 ON BEHALF OF THE UNITED STATES

6 MR. MINEAR: Mr. Chief Justice and may it please
7 the Court:

8 The Special Master has recommended a proper
9 disposition of the pending motions for summary judgment.
10 He has skillfully articulated the issues in this
11 complicated, ongoing case, and I would like to address
12 those issues in the same order that he chose.

13 I turn first to the Master's recommendation with
14 respect to the Inland Lakes which directly affects the
15 United States' responsibilities under the reclamation
16 laws.

17 The Master has correctly concluded that the
18 Bureau of Reclamation is entitled to continue its 80-
19 year-old practice of diverting water to the Inland Lakes
20 during the nonirrigation season to meet the needs of the
21 North Platte project.

22 Wyoming's challenge to that practice is flawed
23 in four fundamental respects. First, the Bureau does have
24 a State water permit with a 1904 priority date to divert
25 water for the North Platte project. The Inland Lakes are

1 an essential component of the North Platte project and are
2 therefore embraced within that permit.

3 Second, the Inland Lake diversions that are at
4 issue here have occurred continuously since the
5 commencement of the North Platte project operations in
6 1913. If Wyoming truly believed that the Federal
7 Government's diversions were unlawful, it should have
8 raised its objections at that time, or at the latest, at
9 the outset of the proceedings in this case.

10 QUESTION: Well, yes, but your first argument is
11 that even if it had raised it, whenever, they should lose.

12 MR. MINEAR: That's right, but even to the
13 extent --

14 QUESTION: Well, I know, but what --

15 MR. MINEAR: That they might contest that --

16 QUESTION: Don't pass over so quickly what you
17 say is an inviolable right of the Bureau of Reclamation to
18 put into this canal the nonirrigation system flows.

19 MR. MINEAR: Why, I certainly don't mean to pass
20 over it too quickly.

21 QUESTION: Well, you have pretty quickly. You
22 just say it was just a part of the -- the reason is that
23 that kind of a flow in the canal was part of the project.

24 MR. MINEAR: Yes. When the --

25 QUESTION: For which, what?

1 MR. MINEAR: When the project --

2 QUESTION: For which they had a permit from
3 Wyoming.

4 MR. MINEAR: That is correct. That is correct,
5 and the project that was -- the permit that was filed in
6 1904, of course, was describing the project in very
7 general terms because it had not yet been built, but when
8 it did go into operation in 1913, the canals had been
9 sized, and these off-canal reservoirs, the Inland Lakes,
10 were being used.

11 QUESTION: When were the Inland Lakes
12 constructed?

13 MR. MINEAR: They were constructed between 1904
14 and 1913. Now, if -- as I said --

15 QUESTION: And did Wyoming ever say that if the
16 Inland Lakes was actually part of the project, that the --

17 MR. MINEAR: They'd be covered by the permit --
18 yes. Yes, in fact the Special Master notes that at page
19 25 of his report. In 1934, the engineer for the State of
20 Wyoming did note that if the Inland Lakes are a part of
21 the project, then in fact they would be covered by that
22 permit.

23 Now, the third point that I'd like to make with
24 respect to this is that the Bureau's Inland Lakes
25 diversions were specifically considered in the 1934

1 proceedings, and are, in the Special Master's words, a
2 vital underpinning of the apportionment that was
3 ultimately made.

4 QUESTION: The 1934 proceedings being those
5 which led to the 1945 decree.

6 MR. MINEAR: That is correct.

7 Indeed, Wyoming itself specifically urged that
8 the Bureau's winter diversions to the Inland Lakes be
9 taken into account by the Special Master in order to
10 reduce Nebraska's apportionment during the irrigation
11 season.

12 QUESTION: Why do you think the early -- or,
13 decree never mentioned them at all?

14 MR. MINEAR: Well, the decree does not mention a
15 good number of things. I think it's important to
16 recognize that all the decree does is implement the
17 Court's decision. The Court's decision in 1945 is long
18 and complex, and it's an extraordinary matter, as Mr. Cook
19 has stated, to enjoin a State.

20 The decree only imposed injunctions where it
21 felt it was necessary to do so. Nevertheless, the decree
22 is founded upon those assumptions and those decisions that
23 are contained in the Court's decision, and an important
24 part of those decisions was this wintertime diversion to
25 the Inland Lakes.

1 QUESTION: Yes, but the other side says that
2 it's not a matter of just being silent about it, that
3 Article IV of the decree seemingly excludes it.

4 MR. MINEAR: No, it certainly does not expressly
5 exclude it, and Article IV of the decree does something
6 quite different. All Article IV of the decree is
7 concerned with doing is determining the relationship
8 between certain senior Nebraska canals, so-called State
9 line canals and the French Canal, and the irrigation
10 reservoirs of the Bureau of Reclamation, and what
11 paragraph IV essentially says is you have to fill -- you
12 have to supply water to these canals at a certain rate
13 before you can begin to fill the reservoirs.

14 Now, it's not clear from reading the decree that
15 that's what it does. You have to go back and read the
16 opinion again to understand this, but that is the actual
17 operational purpose of the decree.

18 Now, the fourth point that I would like to make
19 is that as the Special Master recognized, the result
20 Wyoming advocates here will impair the Bureau's ability to
21 fulfill its water delivery contracts and will upset
22 settled expectations on the North Platte River. This
23 manner of operation has been in effect for a long, long
24 time. Likewise, our temporary storage in Guernsey and
25 Glendo to effectuate this apportionment has been in place

1 for a good number of years as well, and that is simply an
2 operational practice of the Bureau, and I think it's
3 beyond challenge by Wyoming.

4 Now, the Special Master also refused to grant
5 summary judgment on three other issues on this case,
6 concluding that the issues were not yet ripe for
7 resolution, or that they involved disputed issues of
8 material fact.

9 The Special Master's recommendations on those
10 interlocutory matters should be respected, particularly in
11 light of his familiarity with the record of this case, a
12 record that is still being developed.

13 Specifically, the Special Master correctly
14 recommended that this Court should deny summary judgment
15 motions with respect to the Laramie River's contributions
16 to the North Platte.

17 There are two critical considerations with
18 respect to this matter. First, Wyoming's argument that
19 this matter is controlled by the Laramie decree is
20 untenable, because that decree only apportions flow down
21 to the Wheatland project on the Laramie River. Post-
22 Wheatland accretions continue to flow into the North
23 Platte River, so that decree does not control matters.

24 QUESTION: What about the provision in the
25 1955 -- was it '55 or '57 Laramie River decree?

1 MR. MINEAR: Yes. Now, that decree, of course,
2 was entered simply by consent between Colorado and
3 Wyoming, and the provision of the decree that applies here
4 talks about the decree heretofore entered. The 1945
5 decree, of course --

6 QUESTION: I understand that, but what did the
7 1955 decree say?

8 MR. MINEAR: I believe it said, just in general
9 terms, that all the water is divided between those two
10 States, but that has to be read in light of this Court's
11 decision in 1945.

12 QUESTION: Well, what did that mean? Did the
13 two States -- the decree did say that -- did it say that
14 all the water flowing in the Laramie River belonged to one
15 or the other of the States? Is that what it said?

16 MR. MINEAR: I don't think it said it in quite
17 that broad of terms. It was a rather general statement,
18 and I think it consisted --

19 QUESTION: Well, what did it say?

20 MR. MINEAR: I don't have the exact words before
21 me, but I think it could just as easily have been read to
22 state that this is conditioned upon the --

23 QUESTION: Nebraska wasn't a party to that
24 case --

25 MR. MINEAR: Nebraska was not part to that case,

1 and what's more, when this Court in 1945 apportioned the
2 North Platte, it included those Laramie inflows -- the
3 post-Wheatland Laramie inflows as part of that pool of
4 water between Whalen and Tri-State that's divided up among
5 the States, and again, it is a central assumption that
6 went into the apportionment in this case.

7 Now, Special Master Olpin correctly concluded
8 that since the North Platte water supply that this Court
9 apportioned in 1945 is composed in significant part of
10 Laramie contributions, Nebraska has a right to seek relief
11 for depletions of those flows. Wyoming is wrong in
12 arguing --

13 QUESTION: Could it seek relief in this
14 proceeding?

15 MR. MINEAR: Yes, I believe that it could.

16 QUESTION: Wouldn't that amount to an amendment,
17 or is it just something at the foot of the decree?

18 MR. MINEAR: I think this is simply a matter of
19 enforcing the decree, because what you're really doing --
20 you have to remember, what we have here is the North
21 Platte River that is -- the decree imposes certain
22 injunctions on the upper reaches and then apportions a
23 flow of water, 75 percent to Nebraska and 25 percent to
24 Wyoming, in a certain pivotal stretch of the river.

25 Now, any interference with water flowing into

1 that critical stretch we would view as something that is
2 contrary to the decree and is a proper subject of an
3 enforcement action, and that is why we view this as a
4 proper matter in this proceeding here.

5 QUESTION: Well, Nebraska's filed a motion to
6 amend, I think.

7 MR. MINEAR: Yes, it has.

8 QUESTION: And what do we do with that, then?

9 MR. MINEAR: I believe that the motion that is
10 currently pending before this Court is a motion to
11 apportion nonirrigation season flows.

12 Now, the nonirrigation season flows were to a
13 large extent not divided between the States. They go into
14 storage for the various reservoirs.

15 The United States believes that matter should
16 not be held -- it could be dismissed without prejudice,
17 for example, but it should not be resolved until these
18 enforcement matters are resolved first.

19 What this case is basically about is Wyoming's
20 desire to change the delicate balance of the river by
21 including new, upstream diversions, and that is what
22 Nebraska is complaining about here.

23 The United States is, of course, concerned about
24 it, because it affects the operation of our projects. We
25 have contract obligations to deliver waters to senior

1 appropriators, and any loss in water supply anywhere in
2 the river will affect our operations.

3 Now, I would also like to specifically discuss
4 the Deer Creek issue. The Special Master acted
5 appropriately in rejecting Wyoming's motion for summary
6 judgment on Deer Creek issues based on three crucial
7 factors. First, paragraph XIII of the decree allows
8 Nebraska to seek relief based on the downstream effects of
9 tributary storage developments, including the proposed
10 Deer Creek project. Now, Nebraska has put forward
11 substantial evidence showing such effects, and there is
12 therefore a material issue of fact.

13 QUESTION: Well, what about the Master's
14 interpretation of paragraph X exemption?

15 MR. MINEAR: Like Nebraska, we're troubled by
16 this interim interpretation, but it is interim at this
17 point. We believe that the Special Master should be free
18 to reconsider this issue once he has actually developed
19 the facts with regard to the municipal-use exception.

20 I think it is important to realize that there
21 are factual issues with regard to the municipal-use
22 exception as well. This project, the Deer Creek project,
23 although it ostensibly is providing municipal water, none
24 of the water it provides will go to Casper. It's actually
25 downstream of Casper. It's actually being devised to

1 provide what is called exchange water.

2 Now, it's not clear that this would be a
3 municipal use, and I think before we interpret the scope
4 of the municipal-use exception, we ought to determine what
5 the scope of the underlying project might be.

6 QUESTION: There's also an issue about what
7 Casper's need is, I suppose.

8 MR. MINEAR: That is correct. That also is at
9 issue here.

10 QUESTION: Finally, there's the question of how
11 Deer Creek will be administered. If Deer Creek is
12 administered under the State system junior to all the
13 senior appropriators, and if respect is made for
14 Nebraska's apportionment, then it might well be that the
15 municipal use here will have no real effect on the river.

16 The important point at this juncture is that
17 summary judgment on the issue would be premature. The
18 Special Master should be left free to reconsider the
19 meaning of the municipal-use provision in a concrete
20 fashion when he applies the law to the facts established
21 at trial.

22 QUESTION: Should we suggest that he ought to
23 reconsider?

24 MR. MINEAR: Well, certainly we think that the
25 United States would not object to giving him free rein to

1 reconsider his decision. We believe he has that.

2 QUESTION: Or -- you would object to our saying
3 that he was wrong.

4 MR. MINEAR: We would not object to you saying
5 that he was wrong. I think it would be difficult for this
6 Court also, though, to interpret exactly how the
7 municipal-use provision should apply in the absence of a
8 concrete, factual situation in which to apply it.

9 The same --

10 QUESTION: At least we shouldn't say he's right.

11 MR. MINEAR: I would agree with that, Your
12 Honor.

13 (Laughter.)

14 MR. MINEAR: The Special Master also correctly
15 resolved the so-called below Tri-State issues. As you
16 have heard, Wyoming and Colorado seek to preclude Nebraska
17 from offering evidence concerning injuries downstream of
18 the Tri-State Dam. The Special Master properly concluded
19 that he should not enter an abstract order preventing
20 Nebraska from presenting its evidence as to this matter
21 because it would deny him an opportunity to evaluate
22 Nebraska's legal theory in the context of specific facts.

23 QUESTION: Of course, that's really the purpose
24 of a motion for summary judgment, is to prevent the
25 admission of a lot of extraneous evidence if, in fact, it

1 wouldn't have any bearing on the legal outcome.

2 MR. MINEAR: That is correct, Your Honor, but I
3 think the motion here is more akin to a motion in limine,
4 where in fact the -- Wyoming is seeking to limit the
5 amount of evidence that can come in with respect to
6 certain issues that might be controverted, and I think
7 that great respect should be given to the Special Master
8 in his role in determining the content of the record here
9 as to whether or not those additional facts do need to be
10 available, or at what point they might be cut off. It
11 might be the Special Master will determine at a later
12 point that no, these matters are irrelevant.

13 QUESTION: Well, what has this issue got to do
14 with the claims that Nebraska makes that Wyoming is
15 violating the decree?

16 MR. MINEAR: Well, Your Honor, part of the
17 difficulty here is it's not completely clear what Wyoming
18 is concerned about here with regard to this evidence. One
19 way that this evidence might be relevant is with respect
20 to the Deer Creek issue. If, in fact, there is a question
21 under paragraph XIII or Article XIII of the decree as to
22 the effect of Deer Creek, one issue might be, well, what
23 is the effect on the people below Tri-State?

24 For instance, suppose this water, the Deer
25 Creek, actually impairs the availability of those return

1 flows from interstate canal that Mr. Simms alluded to?

2 The water goes through the interstate canal and
3 irrigates certain lands and then the return flows are then
4 used to irrigate other properties. What if the Deer Creek
5 project affects those return flows? Is that, in fact, an
6 effect that should be considered in determining
7 appropriate relief?

8 We believe it might be, and we think it's
9 important for that reason not to foreclose the entry of
10 that evidence until it's quite clear exactly what the
11 context of that evidence will be.

12 Finally, Special Master Olpin was also correct
13 in rejecting Wyoming's argument that Special Master
14 Doherty's determination of canal requirements in the 1934
15 proceedings imposed limits on the water that could be
16 diverted to the various canals.

17 I see that my time has expired. Thank you.

18 QUESTION: Thank you, Mr. Minear.

19 Mr. Cook, you have 2 minutes remaining.

20 REBUTTAL ARGUMENT OF DENNIS C. COOK

21 ON BEHALF OF THE STATE OF WYOMING

22 MR. COOK: Thank you, Mr. Chief Justice, and may
23 it please the Court:

24 We agree with our statement of the record as far
25 as Deer Creek, and on summary judgment, we're confident

1 that that record will sustain our view.

2 On the Laramie River issue, the clear evidence
3 is, and what happened in the past was that Nebraska and --
4 Nebraska said in 1945, you can't prevent us from looking
5 and seeking an apportionment of the Laramie River because
6 we weren't a party to the debate between Colorado and
7 Wyoming over its use.

8 The Court agreed with Nebraska, gave them their
9 day in court, and in the end said, you're not entitled to
10 an apportionment of the Laramie River.

11 The Special Master in this case agrees that they
12 have no specific apportionment of the Laramie River. He
13 agrees that there's no restriction on Wyoming's use --

14 QUESTION: But he thinks the -- he thinks the
15 original decree contemplated that the Laramie would
16 contribute to the flow of the North Platte.

17 MR. COOK: Well, he suggests that, Your Honor,
18 but if there's no restriction on Wyoming's use, and no
19 apportionment to Nebraska, then the trigger needs to be
20 pulled and say there's no violation of the decree by those
21 proposed uses. Then Nebraska has --

22 QUESTION: So you think the upstream States --
23 Wyoming and Colorado -- are entitled to any of the water
24 that is flowing in the Laramie River.

25 MR. COOK: Until Nebraska obtains an

1 apportionment, and we suggest that if they try to do that
2 they will be relitigating a factual matter that's already
3 been put to rest in this case.

4 On the estoppel argument with regard to the
5 Inland Lakes issue, I just want to make the point --

6 QUESTION: Well, on that basis, the Deer Creek
7 issue becomes moot.

8 MR. COOK: Well, that's our -- the Laramie River
9 issues are not the Deer Creek issue, Your Honor. Laramie
10 involves --

11 QUESTION: Pardon me. Where is the Deer
12 Creek --

13 MR. COOK: Deer Creek is on a separate tributary
14 that's apart from the Laramie River. The two --

15 QUESTION: Well, what about the --

16 MR. COOK: What I would suggest is the two --

17 QUESTION: What about the other project that --

18 MR. COOK: The two projects, Corn Creek and
19 Grayrocks, are on the Laramie River, Your Honor, and
20 they --

21 QUESTION: Yes, those --

22 MR. COOK: They are no longer an issue in this
23 case if there's no apportionment.

24 The United States' estoppel argument on the
25 Inland Lakes makes a clear admission that that issue was

1 not decided in 1945.

2 Thank you, Your Honor.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cook.

4 The case is submitted.

5 (Whereupon, at 2:11 p.m., the case in the above-
6 entitled matter was submitted.)

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CERTIFICATION

Alderson 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:

State of Nebraska, Plaintiff v. States of Wyoming and Colorado

Case No: 108 Original

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BY *Ann Marie Federico*

(REPORTER)