

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. IDAHO, EX REL.
DIRECTOR, IDAHO DEPARTMENT OF WATER
RESOURCES

CASE NO: 92-190

PLACE: Washington, D.C.

DATE: Monday, March 29, 1993

PAGES: 1-59

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'93 APR -5 AMO:39

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
UNITED STATES, :
Petitioner :
v. : No. 92-190
IDAHO, EX REL. DIRECTOR, IDAHO :
DEPARTMENT OF WATER RESOURCES :
- - - - -X

Washington, D.C.
Monday, March 29, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:42 p.m.

APPEARANCES:

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

CLIVE J. STRONG, ESQ., Deputy Attorney General of Idaho,
Boise, Idaho; on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ. On behalf of the Petitioner	3
CLIVE J. STRONG, ESQ. On behalf of the Respondent	23
REBUTTAL ARGUMENT OF JEFFREY P. MINEAR, ESQ. On behalf of the Petitioner	50

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

2 (1:42 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 92-190, the United States v. Idaho on the
5 relation of the Director of the Idaho Department of Water
6 Resource.

7 Mr. Minear, you may proceed.

8 ORAL ARGUMENT OF JEFFREY P. MINEAR

9 ON BEHALF OF THE PETITIONER

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

12 The question in this case is whether the
13 McCarran Amendment allows the State of Idaho to charge the
14 United States with filing fees to pay for the costs of
15 State water rights adjudication.

16 This case has its origins in a dispute between
17 the State of Idaho and the Idaho Power Company over the
18 Company's right to use Snake River flows for power
19 development. Idaho ultimately decided to conduct a
20 general adjudication of all water rights in the Snake
21 River Basin. And it joined the United States pursuant to
22 the McCarran Amendment, which is set forth at page 2 of
23 our brief.

24 Congress enacted the McCarran Amendment to allow
25 joinder of the United States in such adjudications, but it

1 specifically provided that the United States is exempt
2 from judgments for costs, which was the mechanism that
3 Idaho and other States commonly used to pay -- to pay for
4 those adjudications at that time.

5 Nevertheless, Idaho has now asserted that it can
6 charge the United States filing fees to the same end, to
7 pay for the adjudication. We originally estimated that
8 those fees would amount to at least \$10 million in this
9 litigation alone. We have now completed filing our
10 various water rights claims with the Department of Water
11 Resources and it appears that those fees will total at
12 least \$30 million.

13 We challenged Idaho's fee assessments through a
14 writ of mandamus, and the Idaho Supreme Court ultimately
15 held by a vote of 3 to 2 that the McCarran Amendment
16 requires the United States to pay those fees. We seek
17 reversal of that judgment.

18 As this Court has repeatedly recognized, the
19 United States is immune from cost and fee assessments
20 unless Congress expressly provides otherwise. The
21 McCarran Amendment contains no such waiver. An inspection
22 of the McCarran Amendment's text proves our point.

23 The first sentence, the so-called joinder
24 provision, allows Idaho to join the United States as a
25 defendant in the Snake River Basin adjudication, but it

1 says nothing about requiring the United States to pay
2 money. The mere consent to joinder is not consent to pay
3 for the adjudication or to pay for the expenses of other
4 parties.

5 QUESTION: Well, Mr. Minear, the last sentence,
6 the proviso, says no judgment for costs shall be entered
7 against the United in such a suit. Now, is it possible
8 that these fees could be considered costs? They're paid
9 in advance, but are they the type of fee that could be
10 considered a cost?

11 MR. MINEAR: They certainly serve the very same
12 function as a judgment for cost. In fact, the Idaho code
13 makes that quite clear. It states, on page 2 of our
14 brief, in order to provide an adequate and equitable
15 cost-sharing formula for financing the costs of
16 adjudicating water rights the Department of Water
17 Resources shall -- shall accept no claim -- notice of
18 claim, et cetera.

19 QUESTION: I found troublesome the Government's
20 argument that the United States isn't bound by any
21 procedural requirements of the State in which the water
22 litigation is conducted.

23 MR. MINEAR: Well, with all respect, Your
24 Honor --

25 QUESTION: That strikes me as pretty broad.

1 MR. MINEAR: That is -- that is not our
2 position. I think our position is that the McCarran
3 Amendment does not specifically address State procedures.
4 Now, I think that it's implicit in the join -- the notion
5 of joinder that the United States will comply with
6 reasonable procedures of the State.

7 QUESTION: I mean there may be time limits for
8 filing certain things and a whole array of State
9 procedural requirements.

10 MR. MINEAR: That is correct. And Idaho --

11 QUESTION: And if the United States isn't bound
12 by any of those, I don't see how the litigation could
13 proceed.

14 MR. MINEAR: Well, our position is that -- we
15 think that the McCarran Amendment does not expressly
16 address this issue, but we think that the United States is
17 bound by reasonable procedures. But at the same time, the
18 United States reserves its right to object to any
19 procedures that are aberrant or that are hostile to
20 Federal interests.

21 For -- assume, for example, that Idaho decided
22 to determine water rights by a coin flip. The United
23 States does not necessarily have due process rights to
24 make an objection. Its protection is in -- is based on
25 supremacy grounds, and in its protection under sovereign

1 immunity principles. And we believe the United States
2 could have kept --

3 QUESTION: But I think -- I think you could say
4 that in granting the waiver, it was assumed that the
5 procedures, if not for the sake of the United States at
6 least for the -- for the sake of other people, would
7 comply with due process of law.

8 MR. MINEAR: And that's -- and that is my point.

9 QUESTION: So do you have some other example
10 that would prove your point, because I don't find that one
11 a persuasive one?

12 MR. MINEAR: Excuse me, I'm not sure -- other
13 examples of a --

14 QUESTION: No, I'm saying since -- since I am
15 sure that the -- that the McCarran provision assumed that
16 any procedures would comply with -- with the requirements
17 of due process, I don't think that this example that you
18 give proves that -- that the McCarran Act was not meant to
19 subject the Government to procedures.

20 MR. MINEAR: And, again, I think that there's
21 nothing that the -- in the McCarran Amendment that
22 addresses State procedures specifically.

23 QUESTION: Right.

24 MR. MINEAR: And, again, we're talking about the
25 implications and not -- my point is simply that the United

1 States still has the right to raise objections to
2 procedures that are either unfair, which, I think, is the
3 point that you're making in terms of them being -- not
4 comporting with due process, or also procedures that are
5 directly hostile to Federal interests.

6 For instance, if -- suppose that in terms of
7 filing deadlines, the United States was subject to a
8 shorter period than other parties. We think that the
9 United States may well have the right to object to those
10 types of procedures.

11 QUESTION: Sure, but not on the basis of
12 sovereign immunity. On the base -- I mean, the -- on the
13 quite different basis of selective -- you know, being
14 discriminated against.

15 MR. MINEAR: That's correct, that's correct.

16 QUESTION: Okay.

17 QUESTION: Sovereign immunity has nothing to do
18 with -- with due process, in that people who concededly
19 are subject to the jurisdiction of courts can always raise
20 a due process claim.

21 MR. MINEAR: That -- that is correct. Again,
22 the point here, however, is the -- the question of
23 assessment of fees.

24 QUESTION: Yes. Now, supposing that Idaho made
25 an assessment of \$100 on everybody who is making an

1 appearance for the first time in a judicial proceeding in
2 Idaho, and that was applied across the board.

3 MR. MINEAR: The question with respect to the
4 United States is whether Congress has waived its historic
5 immunity from those types of assessments.

6 QUESTION: And do --

7 MR. MINEAR: And we -- and our answer is it has
8 not. And we would look to the three provisions of the --
9 the three relevant provisions of the McCarran Act. First
10 is the joinder provision and, as I say, all that consents
11 to is the joinder of the United States in the proceeding.
12 It does not say anything about costs or fees for which a
13 separate waiver of sovereign immunity would be required.

14 QUESTION: You don't think there's any
15 subsidiary waiver involved when it -- when it talks about
16 being joined in a proceeding.

17 MR. MINEAR: Not with respect to -- to fees and
18 costs. This Court has recognized those types of -- any
19 cost-shifting mechanism requires a separate waiver from
20 Congress.

21 QUESTION: Well, but then why does Congress say
22 at the end of this that it shall not be liable for costs,
23 if it wouldn't have been without the provision?

24 MR. MINEAR: For the very reason that it -- that
25 the provision was attached to the third provision, the

1 so-called judgment provision, which subjects the United
2 States to the judgments of the State court. And we
3 believe that Congress put in the proviso to make clear
4 that that provision did not subject the United States to
5 judgments for costs.

6 It's important to remember --

7 QUESTION: Well, Mr. Minear, the -- the statute
8 permits the United States to be joined, but what that
9 means is that the -- that there can be a general
10 adjudication of a -- of water rights in the basin, but
11 only -- and what it means is that if the United States
12 wants to get water rights, they not only are joined but if
13 they did not come in and file a claim, they would have no
14 water rights.

15 MR. MINEAR: That is correct.

16 QUESTION: And so it -- you -- the United States
17 conceded that it would have to to make a valid water right
18 claim in the State of Idaho.

19 MR. MINEAR: It would have to. In the judicial
20 proceeding it would have to make a claim.

21 QUESTION: Exactly. And you would have to take
22 the initiative.

23 MR. MINEAR: Yes, that is correct.

24 QUESTION: And you don't think that subsumes
25 compliance with some rules about how you file a claim.

1 MR. MINEAR: We believe it does not subsume
2 compliance with filing fees. Again, this -- Congress
3 has -- we require a waiver from Congress.

4 QUESTION: Well, what if it had been a \$5 fee?

5 MR. MINEAR: If it had been a \$5 fee, in all
6 likelihood we would not have challenged it because it's a
7 de minimis amount.

8 QUESTION: Well, why not?

9 MR. MINEAR: And because it -- the law does not
10 concern itself with trifles, as the Court said in Weltover
11 last year, that de minimis not curat lex.

12 QUESTION: Well, but --

13 MR. MINEAR: We simply would not --

14 QUESTION: -- The United States is not being
15 subject to filing fees that are different from other
16 parties.

17 MR. MINEAR: I think that in terms of types of
18 claims --

19 QUESTION: Is it or not?

20 MR. MINEAR: In terms --

21 QUESTION: Yes or no?

22 MR. MINEAR: That it does not discriminate
23 directly against the United States with respect to the
24 claims made by the United States. However, the types of
25 claims the United States typically makes, for instance

1 instream flows, are --

2 QUESTION: Volume.

3 MR. MINEAR: -- Require fees at a much higher
4 level.

5 QUESTION: Volume.

6 QUESTION: And the more water you claim, the
7 more you pay.

8 MR. MINEAR: Yes. And, also, certain types of
9 claims are, in fact -- or require a higher fee even though
10 there's no added expense in adjudicating those types of
11 claims. But, again, this --

12 QUESTION: And that includes the claim -- the
13 kind of claims the United States makes.

14 MR. MINEAR: Yes, the instream flow claims for
15 example.

16 But, again, the question here is not ultimately
17 one of reasonableness or fairness of the State procedures.
18 It's a question of whether Congress has consented to these
19 --

20 QUESTION: You say -- suggest that determining
21 instream flow claims is not more complicated than just --
22 just adjudicating prior appropriation claims.

23 MR. MINEAR: Well, with respect to the Federal
24 Government, the State does not carry any burden, in fact,
25 of even investigating those claims. They simply take the

1 claim of the United States, abstract it and include it in
2 the report. So there's very little cost involved to the
3 State actually examining those claims, as compared to
4 going out and investigating individual small claims.

5 But, again, we're getting, I think, removed from
6 the point that I -- I think is critical here, and that is
7 that Congress must specifically consent to the payment of
8 fees. And we think that the cost proviso indicates quite
9 clearly that Congress was not --

10 QUESTION: Let me ask you about that. You --
11 I'm -- I want to be sure I got something you said a little
12 while ago. I thought you said that the cost provision,
13 which is just an appendage to the portion of the statute
14 that deals with the entry of judgments, doesn't have any
15 relevance to the first sentence in the section. From that
16 I inferred -- and you correct me if I'm wrong -- that the
17 United States is not taking the position that the filing
18 fees in this case, which are assessed before any
19 judgment's entered, are covered by the language in the
20 proviso.

21 MR. MINEAR: We're taking the position that they
22 are not, by their terms, a judgment for costs. There
23 is -- can be distinction between a judgment for costs --

24 QUESTION: So, specifically, you rely on the
25 proviso only to sort of illuminate the meaning of the

1 whole statute as further evidence of the fact that there's
2 not a sufficiently specific waiver of sovereign immunity
3 in the earlier part of the statute.

4 MR. MINEAR: Ultimately, that is --

5 QUESTION: Rather than arguing that this is
6 covered by the proviso.

7 MR. MINEAR: That is -- that is correct.

8 QUESTION: Okay.

9 MR. MINEAR: That ultimately is correct. And I
10 think it's important to remember that when the McCarran
11 Amendment was enacted in 1952 it was against the backdrop
12 of other well-accepted principles, including the fact that
13 the United States was not liable for fees.

14 QUESTION: Mr. Minear, I assume I can agree with
15 you on the -- or, I hope I can agree with you, because
16 you're going to have trouble otherwise, on the -- on the
17 fees without agreeing with you on the procedures.

18 MR. MINEAR: Yes, I think that's --

19 QUESTION: Or do you think -- you think the two
20 go together inevitably.

21 MR. MINEAR: You don't need to resolve the
22 procedural question --

23 QUESTION: See, I don't see how sovereign
24 immunity applies to the procedures at all? I mean how
25 does sovereign immunity apply to the procedures?

1 MR. MINEAR: Well, we think -- again, this is
2 the -- this issue arises -- our basic -- let me begin with
3 this point. Our basic position is there must be a
4 separate and specific waiver before fees or costs can be
5 assessed against the United States.

6 QUESTION: Right. That's fair enough.

7 MR. MINEAR: Now, the question of procedures was
8 brought into this case by the interpretation of Idaho of
9 the pleading provision. There is a -- a second provision
10 says the United States, when any -- when a party to any
11 such suit, shall be deemed to have waived any right to
12 plead that the State laws are inapplicable.

13 We believe that the State laws was referring to,
14 in fact, the laws governing the appropriation of water
15 rights by -- under State law, the acquisition of water
16 rights themselves, not the laws -- not procedural laws.
17 Idaho's argument is that reference actually is referring
18 to procedural laws.

19 Our basic point is that procedure has nothing to
20 do about -- with this. Even if you accepted that
21 provision as -- as referring to procedural laws, the
22 United States still would not be subject to fees because
23 there is not an express waiver of the United States'
24 immunity from fees.

25 QUESTION: Well, do you think your argument as

1 to the express waiver by the United States of immunity
2 from fees is no stronger than the argument that you're not
3 subject to procedures because the -- there's no express
4 waiver as to procedures?

5 MR. MINEAR: We think our argument with respect
6 to fees is much stronger.

7 QUESTION: So do I.

8 MR. MINEAR: Yes.

9 QUESTION: I mean I think to -- if you had said
10 that you have a right to challenge an Idaho rule that says
11 you notice a deposition a certain amount of days in
12 advance, that you go just through the whole Idaho Code of
13 Procedure saying we have to look at sovereign immunity in
14 these of these after there's been a consent to joinder, I
15 think that's rather farfetched.

16 MR. MINEAR: No. And I apologize to the Court
17 if I've not been clear on this. That our point is that
18 the question here is the United States' immunity with
19 respect to fees. As to procedures, we believe that we do
20 have -- do reserve the right to challenge them on the
21 basis that they are either unreasonable or hostile to
22 Federal interests, but that's not a sovereign immunity
23 question.

24 Again, that's simply the rights that we think
25 are implicit within the McCarran Amendment, and I think

1 rights that were recognized in footnote 20 of San Carlos
2 where you noticed that State procedures might be
3 inadequate to adjudicate certain types of Federal water
4 rights.

5 The -- the crucial question here, though, is
6 whether there has been an express waiver of fees. And I
7 think it's important to note that in 1952 when this act
8 was enacted, Congress was quite clear that there did need
9 to be a separate waiver for -- for fees. In fact, 2412(a)
10 at that time, 28 U.S.C. 2412(a) made that point, that
11 Congress is not liable for fees or costs unless there is
12 an express waiver.

13 And I don't think that ultimately Idaho or the
14 Idaho Supreme Court has quarreled with the need for a
15 waiver. The question has been, instead, whether the
16 McCarran Amendment is explicit or clear enough on that
17 point. And we believe that the McCarran Amendment is not.
18 It does not say anything about fees, and the only point
19 where it discusses monetary liabilities is with respect to
20 a judgment for costs.

21 QUESTION: I think just being -- just being
22 joined in a State suit for a -- for a watershed -- water
23 rights adjudication certainly doesn't determine what the
24 applicable law is. You're not -- certainly McCarran
25 didn't say that the United States can be joined and it

1 would -- and their water rights would be governed totally
2 by State law.

3 MR. MINEAR: That is correct.

4 QUESTION: It certainly didn't say that.

5 MR. MINEAR: It does not say that.

6 QUESTION: Because, probably most States -- at
7 least I know one State that doesn't recognize instream
8 flow rights, but the United States claims them all the
9 time.

10 MR. MINEAR: Yes. And as this Court recognized
11 in cases like Cappaert, Federal-reserved water rights are
12 governed by Federal law, not State law.

13 QUESTION: Yes, yes.

14 MR. MINEAR: What the McCarran Amendment
15 provides is the -- an opportunity to join the United
16 States in the adjudication so that all water rights in the
17 basin can be determined. That was the focus and the
18 principle point of the McCarran Amendment, but it did not
19 say anything about who pays for those procedures except
20 with respect to the cost proviso.

21 Now, at the time the McCarran Amendment was
22 enacted, the most common way for paying for these types of
23 procedures was through a judgment of costs at the end of
24 the litigation, and the McCarran Amendment made quite
25 clear that the United States was not subject to those

1 judgments. Now, we think that the clear implication of
2 that is the United States is not responsible for paying
3 for the adjudication or for paying the fees and expenses
4 of its adversaries in the adjudication.

5 We don't believe the cost proviso was only
6 limited to the -- to the notion that -- that you can't
7 assess the United States with the actual costs at the end
8 of the litigation, but you can assess filing fees that may
9 bear no relationship whatsoever to the costs of the
10 adjudication, and impose those against the United States.
11 We don't believe that that was Congress' concern.
12 Congress, instead, was indicating that it -- the United
13 States could be joined in these proceedings, but the
14 States would have to finance the proceedings.

15 Now, I would like to -- to turn to the pleading
16 provision, because it appears that is the provision that
17 has costs --

18 QUESTION: Well, what if the McCarran Amendment
19 had never been -- been passed and the United States
20 brought a suit in Federal court to adjudicate its water
21 rights in a certain stream in the State of Idaho. I don't
22 suppose you could have made the State of Idaho pay for the
23 costs of the adjudication.

24 MR. MINEAR: That's quite correct. That -- I
25 believe that would be correct.

1 QUESTION: Uh-huh.

2 MR. MINEAR: And we think that the --

3 QUESTION: And the United States would have had
4 to pay its own expenses for --

5 MR. MINEAR: That's right. But by the same
6 token, when the United States is brought in as an
7 involuntary defendant in State court, the United States
8 should not have to pay fees in those circumstances. The
9 general practice is that the United -- that courts
10 normally --

11 QUESTION: Well, you -- you say fees generally.
12 Now, do you distinguish at all between a uniformly applied
13 appearance fee to all defendants and the kind of very
14 expensive fees that were charged here, that are based
15 partly on reimbursing the State for the cost of
16 litigation?

17 MR. MINEAR: We draw no distinction in
18 principle, but in practical effect. The fact is that if
19 these were \$5 fees or \$1 fees, the United States, in all
20 likelihood would protest those fees, but would
21 nevertheless pay them because we simply would not want to
22 burden the courts with this disputes.

23 QUESTION: What does Idaho -- or does it
24 identify the kinds of fees -- or what do they -- how do
25 they justify these fees and what are they supposed to

1 reimburse the State of Idaho for?

2 MR. MINEAR: Well, Idaho's position does not
3 correspond exactly to what the statute itself says, but I
4 take Idaho's position to be that the fees that are
5 generated here would cover the cost of investigating water
6 rights, preparing the director's report, which is then
7 submitted to the court as a pleading before the court.
8 And in that report it would have an investigation of State
9 water claims and abstract of Federal claims. What -- they
10 will simply take our Federal claims and abstract them --
11 provide a summary and include that in the report.

12 QUESTION: Expenses that the United -- if the
13 United States had brought the suit in Federal court,
14 expenses that the United States would have had to put up
15 with.

16 MR. MINEAR: Perhaps the United States would
17 have. Well, the United States has to pay all of its fees
18 of investigating its own claims in any event.

19 QUESTION: Yeah.

20 MR. MINEAR: Idaho does not investigate our
21 claims. We investigate our claims.

22 QUESTION: Yeah.

23 MR. MINEAR: We prepare the lengthy claims and
24 all they do is provide an abstract, a secretarial service
25 in a sense. In addition, Idaho also uses those fees to

1 raise objections to water rights claims, and they would
2 also use those fees for service of process, for paying
3 attorneys. I believe that they have budgeted \$2.1
4 million in attorneys' fees that will be paid out of these
5 fees.

6 Now, that might not necessarily be --

7 QUESTION: Do they -- do they hire private
8 counsel to represent them?

9 MR. MINEAR: No. These are salaries of the --
10 of the attorneys in the Department of Water Resources.

11 QUESTION: Oh, really.

12 MR. MINEAR: And that includes the salaries for
13 conducting depositions, conducting investigation, writing
14 legal memoranda and the like.

15 In sum, these costs are not --

16 QUESTION: I take it, expenses and salaries that
17 are related to adjudicating United States claims, not
18 everybody else's.

19 MR. MINEAR: No. This applies to everyone's
20 claims. They're not distinguishing -- the money all goes
21 into a single fund, and they then use that also to pay for
22 the court, for the court procedures, to pay for the
23 Department of Water Resources work, it's general work in
24 participating as a party in the water rights adjudication.

25 Now, I believe that Idaho claims that the --

1 they fund separately the attorneys who actually appear in
2 court such as in this proceeding, but by and large they
3 are also funding water rights attorneys in the Department
4 of Water Resources.

5 Now, we believe that ultimately the -- Idaho's
6 position here just does not conform to the principles that
7 this Court has spoken to with respect to waivers of
8 sovereign immunity. We believe it must be a clear and
9 unambiguous waiver before the United States can be
10 assessed with these types of fees.

11 And this makes -- indeed, makes good sense,
12 because if the State can count on the Federal Treasury to
13 pay for these types of adjudications, it will have no
14 incentive to conduct an efficient adjudication. And it's
15 not clear, as I said, that these fees in fact have any
16 bearing or relationship on the actual costs that will be
17 incurred by the Department of Water Resources in
18 participating in this lawsuit.

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

21 QUESTION: Very well, Mr. Minear.

22 Mr. Strong, we'll hear from you.

23 ORAL ARGUMENT OF CLIVE J. STRONG

24 ON BEHALF OF THE RESPONDENT

25 MR. STRONG: Mr. Chief Justice, and may it

1 please the Court:

2 The McCarran Amendment, in clear and unequivocal
3 language, requires the United States to comply with those
4 State laws that govern the conduct of general stream
5 adjudications.

6 QUESTION: Where does it say that?

7 MR. STRONG: Your Honor, we believe it says that
8 in the second sentence of the McCarran Amendment when it
9 says --

10 QUESTION: What does that say?

11 MR. STRONG: It says, Your Honor, when the
12 United States -- when a party to any such suit shall be
13 deemed to have waived any right to plead that the State
14 laws are inapplicable or that the United States is not
15 amendable thereto by reason of its sovereignty.

16 It's the State's contention --

17 QUESTION: Well, you don't think that State
18 law -- that the entire body of State is what -- is to
19 applied in adjudicating the United States water rights.

20 MR. STRONG: Your Honor, we believe the
21 reference to State laws has to refer to those laws that
22 govern the conduct of two types of suits, because it
23 refers back to the first sentence. It has to refer to
24 suits for adjudication and suits for administration. It's
25 those bodies of law --

1 QUESTION: All right, all right.

2 MR. STRONG: -- That are being incorporated.

3 QUESTION: But what about the substantive law
4 that's applied -- say the United States wants to have
5 established a instream flow right. Is State law going to
6 govern that?

7 MR. STRONG: Your Honor, it depends --

8 QUESTION: Yes or no?

9 MR. STRONG: Perhaps. I have to say perhaps
10 because it depends upon how the water right is acquired.
11 Under State law you can acquire an instream flow, and the
12 United States has gone through that process to have those
13 created. You can also have a water right reserved under
14 Federal law, for instream flow purposes.

15 QUESTION: Well, if -- if the claim is that this
16 is a reserved right, why it's going to be adjudicated
17 under Federal law rather than under State law.

18 MR. STRONG: You're correct, Your Honor.

19 QUESTION: Yes.

20 MR. STRONG: That was the point that I was
21 attempting to make, was that the substantive law that
22 governs the type of water right is dependent upon the
23 origin of what -- of where that claim comes from.

24 QUESTION: Well, then --

25 MR. STRONG: If it's a Federal reserved water

1 right, then Federal law --

2 QUESTION: Then the McCarran Act doesn't really
3 say that the United States -- that this whole proceeding
4 is to be governed by State law.

5 MR. STRONG: And that's not our contention, Your
6 Honor. Our contention is simply that those procedures and
7 substantive parts of State law that govern the conduct of
8 general stream adjudications and suits for administration
9 is what the second sentence refers to.

10 To give you an example of the problem that would
11 encompass if that reference was not in the procedure, it
12 would be the claims filing periods, the procedures that
13 are all set forth by statute -- and you have to understand
14 that in Western States the general stream adjudications
15 are not a creature of court, but rather a creature of
16 statute.

17 All the aspects of those proceedings are
18 governed by those State statutory procedures. Absent a
19 waiver as to those State laws, the State would not be able
20 to apply its statutory procedures to the United States.
21 And that's the contention that we have before the Court,
22 is that it's necessary to have that waiver and the second
23 sentence reaches those instances.

24 QUESTION: Well.

25 MR. STRONG: If you accept the United States'

1 interpretation that it only -- that the second sentence
2 only extends to those laws governing the acquisition of
3 water rights, then it would be rendering meaningless the
4 same phrase with respect to suits for administration.
5 Because in suits for administration, the issue is not the
6 acquisition of a State water right, it's a question of how
7 the decree is going to be administrated.

8 And for example, the futile call doctrine, which
9 says that if a senior water right could call for water but
10 by calling for that water there would not be sufficient
11 water to meet the purposes of that water right, you could
12 not exercise it against a junior water user. That
13 provision has to be incorporated, otherwise you would not
14 be able to administer the particular decrees. So what
15 we're contending is simply that the State laws must refer
16 to those bodies of law that deal directly with
17 administration and adjudication of water rights.

18 QUESTION: Mr. Strong, do you think it was the
19 intent of the McCarran Amendment to change in any way the
20 substantive law governing Federal water rights? Take the
21 Winters case, you know, something quite controversial as
22 to reserved rights on reservations. Do you think the
23 McCarran Amendment contemplated that Idaho might come up
24 with a rule that would overturn, say, the Winters
25 doctrine?

1 MR. STRONG: Absolutely not, Your Honor. Our
2 contention is that as to the laws that govern the
3 determination of those water rights, it will be based upon
4 either Federal or State law. But in the context of making
5 those determinations, the McCarran Amendment is a
6 procedural statute that was designed to allow the States
7 to apply those laws that govern the conduct of their
8 adjudications to the United States. And in this instance,
9 it allows the imposition of filing fees, because filing
10 fees are part and parcel of those procedures.

11 One of the reasons the McCarran Amendment was
12 enacted was to ensure the availability of the
13 comprehensive State proceedings. Those proceedings
14 originally started out as a quite title action in which
15 there was an adversarial relationship, but over time the
16 Western States developed a specialized procedure that
17 moved away from that process and instead developed a
18 process that's more akin to an interpleader action or an
19 in rem action, in which all parties are brought in who may
20 have a claim to that resource. And by bringing them all
21 into the case, then everyone is able to have certainty
22 that the water rights that are decreed in that
23 adjudication are final.

24 QUESTION: Mr. Strong, let me make sure I
25 understand your position, because it's a strong point if

1 it's -- if it's correct. You say that under the second
2 sentence it is impossible that the phrase "waived any
3 right to plead that the State laws are inapplicable," it's
4 impossible that that could apply to the State's
5 substantive law concerning water rights.

6 MR. STRONG: I'm saying that if --

7 QUESTION: Do you really say that no -- no State
8 laws concerning water rights effect the Government?

9 MR. STRONG: Your Honor, if I might take a
10 moment to explain. When the United States acquires a
11 water right pursuant to State law, in accordance with the
12 historic policy of Congress that this Court has
13 recognized, the United States by voluntarily acquiring a
14 water law under State law, submits to the procedures and
15 substance for the definition of that water right. Absent
16 those -- those procedures, there would be no water right
17 for the United States to have.

18 QUESTION: Yeah, but I'm talking about the
19 substance, the substance. You contend that in these
20 proceedings the United States is not bound by any
21 substantive Statewater law.

22 MR. STRONG: No, Your Honor, I'm not contending
23 that.

24 QUESTION: Okay.

25 MR. STRONG: The contention I'm making --

1 QUESTION: Well that's what --

2 MR. STRONG: -- Your Honor, is that if a water
3 right is acquired pursuant to State law under the
4 historical policy of deference to State water law, the
5 United States, by the acquisition of that water right, has
6 already submitted itself to the substantive laws governing
7 the acquisition of that water right.

8 QUESTION: Oh, you say this water -- this waiver
9 is unnecessary because it's already there.

10 MR. STRONG: Exactly, Your Honor. The waiver
11 wasn't even necessary.

12 QUESTION: Well that's a much weaker argument, I
13 think. Okay, I got ya, all right.

14 QUESTION: Well, that's -- that's the way that,
15 usually, appropriated rights are acquired.

16 MR. STRONG: Correct, Your Honor. That's the
17 point that we're attempting to make, is the McCarran
18 Amendment is not a substantive statute and it doesn't
19 create water rights. It recognizes that a State may have
20 the ability, by this waiver, to adjudicate those water
21 rights.

22 And the substantive rules that govern the actual
23 acquisition of those water rights have already been
24 established long before you ever get to the adjudication.
25 When you get to the adjudication, you're simply

1 determining the relationship of the rights as with respect
2 to one another.

3 And the benefits of the State system that
4 Congress deferred to, I think really informs this
5 particular statute. Because, as I was suggesting, it's an
6 in rem action where all parties, whether you have a water
7 right or not, are brought in to make sure that the final
8 decree is binding on everyone. And in order to do that,
9 it's a very complicated process where everyone in a State
10 has to be served who has potential interest. Once that
11 service is done, then you have to take all of the claims
12 and relate them to one another.

13 In the Snake River Basin adjudication, for
14 example, the trial court, with the assistance of the
15 Department of Water Resources, will have to evaluate
16 120,000 claims. Those claims will all be consolidated
17 into one single report that will list where those water
18 rights are from an area that's the size of the State of
19 Massachusetts, New Hampshire, Vermont, and New York
20 combined, and say how they relate to one another.

21 Then the parties come in and file objections to
22 that report. That report frames what issues are in
23 dispute. It allows an efficiency in the process that
24 would not otherwise exist in the traditional quiet title
25 action where every party would be responsible for

1 conducting those very activities that the State, through
2 the use of the filing fees, has been able to consolidate
3 in the director and make the proceeding more efficient.

4 QUESTION: Mr. Strong, the United States says
5 that the sort of fees that you intend to charge it could
6 amount to as much as \$10 million. These don't certainly
7 sound like ordinary filing fees in the sense one
8 ordinarily uses that. Is the Idaho system structured so
9 as to make the litigants pay for the entire cost of the
10 proceeding?

11 MR. STRONG: Your Honor, the Idaho proceeding
12 was structured by the legislature to require those who
13 benefit, the claimants, to pay for the cost of that
14 proceeding. And I might add, it includes the State of
15 Idaho. Every claim that the State of Idaho submits by its
16 other agencies, it's required to pay a filing fee.

17 The director is not a claimant in the action.
18 He has no water rights. But if the State of Idaho has a
19 water right that it wants to put forward in a proceeding,
20 it has to pay the filing fee. And contrary to the United
21 States' assertion, those instream flow claims that they
22 assert are so large are applied against the State of Idaho
23 as well as the United States.

24 QUESTION: Because I suppose they have -- does
25 Idaho law provide for instream flow rights?

1 MR. STRONG: Yes, Your Honor, it does. The
2 State --

3 QUESTION: And I suppose Idaho has -- owns a lot
4 of property along the Snake River.

5 MR. STRONG: Yes, Your Honor, it does. The
6 State of Idaho has paid in excess of \$3 million for
7 instream flow claims in the adjudication up to this point
8 in time.

9 QUESTION: What percentage of Idaho land is
10 owned by the Federal Government?

11 MR. STRONG: Your Honor, 65 percent of the State
12 of Idaho is owned by the Federal Government.

13 QUESTION: Does that include Indian
14 reservations?

15 MR. STRONG: Your Honor, that would be total
16 Federal holdings within the State of Idaho.

17 QUESTION: Including Indian lands.

18 MR. STRONG: Yes. Your Honor, turning back to
19 the point of the filing fees and why they're a critical
20 part of the process, when Congress enacts a general
21 waiver, and our contention is that the McCarran Amendment
22 is a general waiver, it waives sovereign immunity as to
23 ordinary incidents of those procedures or proceedings.
24 And in this case, because of the structure of the
25 statutory procedures, the filing fees are an integral part

1 of that.

2 Indeed, in 1916 in the Pacific Live Stock v.
3 Lewis case, this Court specifically examined a system,
4 that was similar to Idaho's, in the State of Oregon in
5 which a variable fee was charged for claimants to have
6 their water rights adjudicated in the Oregon comprehensive
7 adjudication procedure. And the Court found that the
8 imposition of these fees was an appropriate action by the
9 State because of the benefits received by the claimants
10 from the services provided by the State engineer in those
11 adjudications.

12 The importance of that case comes, I think, in
13 terms of the references in the legislative history and the
14 congressional report that was submitted in conjunction
15 with the McCarran Amendment. In Senate Report 755, the
16 report specifically refers to the Pacific Live Stock v.
17 Lewis case as an example of the type of proceedings that
18 this -- that Congress intended to reach within the context
19 of a general stream adjudication.

20 QUESTION: Where -- where is that cited in your
21 brief, the Pacific Live Stock v. Lewis?

22 MR. STRONG: Your Honor, just a second.

23 QUESTION: I'm looking through the index. I
24 don't see it. Perhaps I have the wrong first name or
25 something.

1 MR. STRONG: It -- unfortunately, Your Honor,
2 it's been referred to in two different ways, Pacific Live
3 Stock v. Lewis, and in the congressional report as Pacific
4 Live Stock v. Oregon. It's cited at pages 33, 34, 44, and
5 47.

6 QUESTION: And is it -- okay, thank you.

7 MR. STRONG: The State's contention is simply
8 that the McCarran Amendment intended to provide
9 flexibility to the States in the way they conduct these
10 general stream adjudications. And contrary to the United
11 States' assertion, at the time of the enactment of the
12 McCarran Amendment these were not normally recovered by
13 judgments for costs.

14 Indeed, an examination of those statutes will
15 show that in the States of Oregon, Arizona, and Nevada,
16 variable filing fees were used; in the States of
17 Washington, Colorado, and California, fixed fees were
18 used; and in other States, the fees were simply
19 apportioned. The director was not a part of those
20 particular adjudications, but was invited by the court to
21 come in as a special expert, and then the court
22 apportioned those fees amongst all parties.

23 And so rather than the uniformity of a judgment
24 for costs as a way to recover these costs in 1952, the
25 state of the body of law shows that it was quite differing

1 aspects in all States of how those particular costs or
2 expenses were recovered. And the point --

3 QUESTION: Mr. Strong, on that point what about
4 Idaho? Was it -- is it not correct that Idaho's procedure
5 was to treat them as part of the judgment for costs?

6 MR. STRONG: Your Honor, it's not entirely
7 correct. The way it worked in Idaho in 1952 was that the
8 State engineer was invited into the proceeding by the
9 court, and he would make an estimate of the expenses that
10 he would incur in preparing the director's report.

11 Once those expenses were calculated, he would
12 submit those to the State auditor who would take them to
13 the board of examiners for evaluation and then finally
14 that would be referred back to the court. The court, at
15 the end of the case, would enter an order apportioning
16 those expenses, and then they would become a lien upon the
17 property.

18 QUESTION: But it -- but would they not be
19 called a judgment for costs? Wouldn't -- wouldn't the
20 judgment for costs at the end of the proceeding encompass
21 the expenses that are now covered by filing fees?

22 MR. STRONG: Your Honor, we don't agree that
23 that's what was intended by the word judgment for costs.
24 We believe that --

25 QUESTION: Oh, I understand that. That's not my

1 question. My question is at the time the statute was
2 enacted back in '52, I guess it was, that's the way Idaho
3 collected the money that it needed to perform the same
4 function that's now performed by the filing fees. Is that
5 correct?

6 MR. STRONG: Your Honor, there would be an order
7 entered, and I guess you could call that a judgment if you
8 wanted.

9 QUESTION: Well, that's what the court would
10 call it, isn't it, judgment for costs, in Idaho?

11 MR. STRONG: And it became -- automatically, by
12 statute, it was made a lien upon the property, was the way
13 it worked.

14 QUESTION: And wasn't the word costs used
15 somewhere in describing that amount of money in Idaho --
16 as a matter of Idaho practice?

17 MR. STRONG: I believe you're correct, Your
18 Honor. That in -- in the statute somewhere --

19 QUESTION: But you're saying that that was not
20 true in Oregon, Arizona, and Nevada and these other
21 States.

22 MR. STRONG: That's correct, Your Honor.

23 QUESTION: They had a different label for it.

24 MR. STRONG: And not just a different label, but
25 a different procedure entirely. And again pointing back

1 to the McCarran Amendment, there's nothing in the McCarran
2 Amendment that specifically excepts out from the general
3 waiver as to those State laws governing the conduct of
4 general stream adjudications, filing fees. And Congress
5 is presumed to have known at the time of the enactment of
6 the McCarran Amendment of the State of the laws that it
7 was incorporating through this body.

8 QUESTION: Do you -- do you acknowledge that the
9 costs provision here would have made the prior Idaho costs
10 not payable by the United States?

11 MR. STRONG: Your Honor, I --

12 QUESTION: Did it cover the prior Idaho system
13 or not, in '52?

14 MR. STRONG: Your Honor, I don't believe, in our
15 interpretation of what the term "judgment for costs"
16 means, that that is what Congress intended. The State's
17 contention is that judgment for costs is a term of art
18 that means the imposition of the expenses incurred by a
19 prevailing party on an opposing party.

20 In this instance, the United States has not been
21 asked to pay the expenses of a prevailing party. In no
22 way is the director a claimant in the proceeding. In no
23 way does the director get any relief from the proceeding.
24 He simply provides a service, services that are provided
25 by governmental unit or fee.

1 QUESTION: And the United States -- I suppose
2 most claimants, the majority of the claimants expect to
3 prevail and have a water right.

4 MR. STRONG: Your Honor, the -- in the context
5 of a general stream adjudication, that's right, they
6 expect to prevail and have a water right. And they expect
7 not only that they will prevail as to their own water
8 right, but they may be --

9 QUESTION: At least a lot of them are going to
10 prevail, including the United States, and they will be
11 awarded water rights and they're prevailing parties, if
12 you have to find somebody who's a prevailing party.

13 MR. STRONG: That's right. But the director is
14 not a prevailing party. The director is simply providing
15 a service. His service is for the purpose of trying to
16 facilitate adjudication. In absence --

17 QUESTION: Excuse me, you don't -- who paid
18 these costs, then, if -- if it was understood that almost
19 everybody wins, who loses and pays the costs? I don't
20 understand that. You're saying the costs provision had no
21 meaning at all.

22 MR. STRONG: No, Your Honor, I'm not saying the
23 cost provision had no meaning.

24 QUESTION: Well, it had a -- it had an easy
25 meaning if it applied to this kind of thing.

1 MR. STRONG: Your Honor, the meaning it had was
2 to refer to those instances where the claimants -- and you
3 have to think of the adjudication. It has the claimants,
4 with a nominal party bringing the action, where the
5 claimants, as between themselves, were suing one another
6 over whether they had a valid water right. That, in our
7 opinion, is what the judgment for costs provision was
8 intended to reach, to prevent the United States from
9 having 119,000 other claimants come in and try to impose
10 their costs in perfecting their water right against the
11 United States.

12 On the other hand, we don't believe the Congress
13 intended to prevent a special expert, a court-appointed
14 expert in this instance, to be able to recover the
15 expenses that they incurred in providing a service that is
16 of uniform benefit to every single claimant.

17 QUESTION: Well, what about the salaries that
18 the United States mentioned? Does the fee purport to
19 cover various salaries, all the salaries of people who --
20 State employees who work on this adjudication?

21 MR. STRONG: Your Honor, let me set the record
22 straight on that, because it's substantially different
23 than as portrayed by the United States. There is a clear
24 division as -- stated as what the United States serves in
25 many different capacities. It serves in the capacity of a

1 claimant and also serves in the capacity of a special
2 expert.

3 With respect to what the director's doing in
4 this adjudication, the expenses that are being covered out
5 of that account are the service of process that the
6 director served on all people for the benefit of the
7 claimants. If that had not been done, you would have had
8 individual claimants trying to join people and you would
9 not have a comprehensive determination.

10 450,000 claims. The director also prepares a
11 report. He does through and he takes the claims that are
12 submitted. He reviews them against the files that he has
13 in his own records. He reviews them against the
14 hydrologic information that's available.

15 QUESTION: Well, Justice White asked you whether
16 the salaries of public officials in Idaho were being paid
17 by -- I think you can answer without the long recitation.

18 MR. STRONG: I'm sorry, Your Honor, I'll give a
19 much shorter response. Yes, some salaries are being paid,
20 but those salaries are for the purpose of preparing the
21 director's report and doing the services that every single
22 claimant would benefit from. If the director does not
23 perform those services, then the individual claimants
24 would have to perform those services in absence of him
25 doing it.

1 QUESTION: Do you have any notion about -- about
2 what the total fees charged private claimants in this
3 water adjudication would have been? You've said that --
4 you've said that the State of Idaho has already paid \$3
5 million.

6 MR. STRONG: In -- private claimants have
7 paid -- it's not in the record, but to my recollection
8 somewhere in the neighborhood of \$15 million.

9 QUESTION: Is any of that \$15 going to be used
10 to pay outside experts, independent experts?

11 MR. STRONG: No, Your Honor. Those --

12 QUESTION: So that -- it's the -- the Idaho
13 procedure is that there will be a further assessment at
14 the end of the case for the cost of -- of expert
15 witnesses.

16 MR. STRONG: No, Your Honor. Idaho's
17 contemplation is that the services that are being provided
18 by the director will carry through and form the director's
19 report, which -- from which objections are filed. Once
20 people then make objections to that report, they will each
21 be responsible for whatever expenses they incur, including
22 the State of Idaho, in pressing their claim forward
23 against another claimant.

24 QUESTION: Well, are those fees -- excuse me.

25 QUESTION: No, go ahead, I'm sorry.

1 QUESTION: Are those fees going to be -- the
2 expert witness' fees at stage two going to be subject to
3 a -- a cost assessment by the -- by the Idaho courts,
4 depending on how the case turns out?

5 MR. STRONG: No, Your Honor. Under the McCarran
6 Amendment --

7 QUESTION: Well, then let me just go to my final
8 question, what is left, then, of the proviso? What work
9 is it going to accomplish, on your theory?

10 MR. STRONG: Okay, Your Honor the point I was
11 getting ready to make, as to the United States the
12 McCarran Amendment proviso would preclude the imposition
13 of those judgment for costs as between one claimant
14 against the United States. There is nothing that would
15 prevent the court from imposing a judgment for costs as
16 between two private claimants in this adjudication. And,
17 in fact, that is routinely done. As claimants fight with
18 one another, if one prevails they can recover expenses.

19 QUESTION: Well when the -- when the report of
20 the director comes in, people can attack it.

21 MR. STRONG: That's correct, Your Honor.

22 QUESTION: And does the -- does the director
23 defend it or not?

24 MR. STRONG: Yes, Your Honor, the director
25 defends it. And let's define what defend means. He --

1 QUESTION: So --

2 MR. STRONG: He explains what his report says.

3 QUESTION: So the United States files a big
4 objection to the report and the director may incur a lot
5 of expense defending against that attack, so the United
6 States is supposed to pay the salaries that -- of the
7 people opposing their claim.

8 MR. STRONG: No, Your Honor, the director is not
9 opposing the claim. The director is serving in the
10 capacity of a special expert. His role is simply to
11 provide the court with the information that he has
12 gathered from the investigation of the claims and the
13 hydrologic information. Now, that's his sole purpose. He
14 doesn't have any interest or stake in the outcome.

15 QUESTION: Yeah, but the director's role isn't
16 finished when he files his report. You don't suggest
17 that.

18 MR. STRONG: I'm not suggesting that, Your
19 Honor. Under the Idaho system, the way it is now, we
20 would contend that --

21 QUESTION: The director and his helpers will --
22 would be available as witnesses and probably would call
23 themselves as witnesses.

24 MR. STRONG: And I would expect will be called
25 by the United States and by all the other parties, as it

1 serves their interest in presenting their particular case.

2 QUESTION: Mr. Strong, I've been glancing over
3 this report of Pacific Live Stock Company against the
4 Oregon Water board. It doesn't appear to me the United
5 States was a party in that case.

6 MR. STRONG: That's correct, Your Honor.

7 QUESTION: So how does it support your position
8 here?

9 MR. STRONG: That case was decided in 1916. At
10 that time the waiver of sovereign immunity was not in
11 place. The point that I made was in the Senate Report
12 755, that case is cited as an example of the type of
13 adjudications that the McCarran Amendment was intended to
14 reach.

15 QUESTION: Mr. Strong, the text of the statute
16 says the United States, when a party shall be deemed to
17 have waived any right to plead that the State laws are
18 inapplicable. I mean it says -- it doesn't say the State
19 laws shall be applicable. It says shall be deemed to have
20 waived any right to plead that they are inapplicable.

21 That suggests to me that what you're talking
22 about is laws that are the subject matter of the
23 litigation, that would be the subject of a pleading. I don't
24 know that you'd file a pleading that would say I am not
25 subject to the -- to the filing fees. That'd be a very

1 strange pleading, don't you think?

2 MR. STRONG: Your Honor, obviously words can be
3 construed in different ways. What we have been able to
4 discern, though, from looking at the McCarran Amendment
5 language specifically, that in order to apply the State
6 procedures there has to be a waiver. If there is no
7 waiver, then the State has no ability to go forward with
8 its adjudications.

9 That's the only plausible reading you can give
10 to the second sentence. If you give it any other reading,
11 then there is no basis for the State to conduct its
12 general stream adjudications because those are statutory
13 creatures and absent a waiver of the Supremacy Clause,
14 they would not be applicable to the United States.

15 So if you give it the only plausible
16 construction --

17 QUESTION: Wait, wait. The Supremacy Clause
18 only prevents your compelling the United States to do
19 something, to appear, to pay money, to do various things,
20 right?

21 MR. STRONG: That's correct, Your Honor. And
22 what the Idaho adjudication statutes and all other
23 statutes do is to compel the United States to submit a
24 claim at a specific point in time, pursuant to a specific
25 procedure. If that law is not applicable to the United

1 States, then there is no way to force the United States to
2 file its claims. It would be back to -- what the United
3 States is suggesting is that it can pick and choose which
4 procedures are going to be applicable to it in the conduct
5 of the adjudication.

6 QUESTION: Yes, but I would say that that is all
7 covered by the first part of it. Consent is given to join
8 the United States as a defendant. I would say that the
9 obligation to compel with all those procedural rules that
10 go with the suit, that's the waiver for that. I don't
11 have to resort to the -- to the later one to achieve that.

12 MR. STRONG: Your Honor, if -- if you take that
13 position, then on basis -- it would seem to me that it
14 would subject the United States to the judicial
15 procedures, the simple joinder of the United States. But
16 what in that waiver is broad enough to encompass a waiver
17 of the intergovernmental immunity provisions regarding
18 State laws, the second aspect of the waiver of sovereign
19 immunity. I see nothing in the first sentence that would
20 support that conclusion.

21 QUESTION: Has the United States at any time in
22 this litigation suggested that your -- that your fees are
23 unreasonably high, or is there only argument of sovereign
24 immunity?

25 MR. STRONG: Your Honor, they have suggested

1 that the fees are unreasonably high. This case has gone
2 forward based upon summary judgment motions. The United
3 States' claims had not been filed until last week. And so
4 on its face -- the court has ruled on its face that the
5 services that are being provided are reasonably related to
6 the fee.

7 Now if, upon receipt of those particular
8 claims --

9 QUESTION: And I guess the only issue brought
10 before us is sovereign immunity.

11 MR. STRONG: That's correct, Your Honor. If --
12 if, on the other hand, and I want to emphasize this point.
13 If, on the other hand, once the claims are filed, that
14 there is some question as to whether the fees relate to
15 the services being provided, then the United States will
16 have an opportunity to go back and object to that.

17 QUESTION: I thought they had to pay the fee up
18 on the filing.

19 MR. STRONG: It's required to pay it up on the
20 filing, but they could object at the time of the filing to
21 the payment of that fee, if they believe that it is going
22 to be unfair or unreasonable based upon the facts. The
23 only thing we've tried so far is this case based upon --

24 QUESTION: Sort of like paying your tax first
25 and asking for a refund later.

1 MR. STRONG: They might try it that way, or the
2 other option would be to bring another mandamus action
3 saying that based upon the claims they're filing, that the
4 fees are not rationally related to the services being
5 provided.

6 QUESTION: Can I ask one last question. It
7 doesn't really relate to your case, just a point of
8 curiosity. One of the justices in his opinions chose to
9 follow the dissent in one of our cases rather than the
10 majority. Does that happen very often in Idaho?

11 (Laughter.)

12 MR. STRONG: It's a good question, Your Honor.
13 I would be surprised --

14 QUESTION: I know it's different out there. I
15 wasn't sure.

16 (Laughter.)

17 MR. STRONG: Well, I would invite you out to
18 enjoy the environs of Idaho.

19 The point that we would like to -- to make here
20 is simply that these are complex proceedings that absent
21 the ability of the States to --

22 QUESTION: It's nice to know they read dissents
23 in Idaho.

24 (Laughter.)

25 MR. STRONG: We have a lot of dissents in Idaho.

1 The point that we would really like to close with the
2 Court is simply that these are complex proceedings, that
3 the State engineer has unique knowledge and skills that
4 need to be used in these adjudications if we're going to
5 complete them in a timely fashion.

6 Otherwise, we will revert back to the situation
7 where we're doing simply in rem actions where every single
8 party is going to be going out preparing their own
9 reports, doing their own investigations, all at the same
10 time that everyone else is doing the same thing, and the
11 court's going to have to sort through a plethora of paper.

12 The procedures that the States have developed
13 and the Congress recognized avoid that difficulty. They
14 develop a uniform procedure for the application of State
15 laws.

16 QUESTION: Thank you, Mr. Strong.

17 MR. STRONG: Thank you.

18 QUESTION: Mr. Minear, you have 8 minutes
19 remaining.

20 REBUTTAL ARGUMENT OF JEFFREY P. MINEAR

21 ON BEHALF OF THE PETITIONER

22 QUESTION: Mr. Minear, can I ask you one
23 question before you get into your rebuttal?

24 MR. MINEAR: Yes, Your Honor.

25 QUESTION: Does the United States think it would

1 be permissible -- this is a sovereign immunity case,
2 basically. Would it be permissible for the Court to look
3 at legislative history to try and unravel this puzzle?

4 MR. MINEAR: We think, as a general matter, that
5 the expression of sovereign immunity must be clear on the
6 face of the statute.

7 QUESTION: Well, I understand. But do you think
8 in this case?

9 MR. MINEAR: And we believe it would be
10 impermissible.

11 QUESTION: It would be impermissible.

12 MR. MINEAR: Impermissible to look to
13 legislative history. This case.

14 QUESTION: Mr. Minear, also before you get
15 started, so then you'll just have a lot of free time with
16 no questions after we're all done.

17 (Laughter.)

18 QUESTION: What is the Government's position as
19 to whether that clause 1, the second clause 1, the United
20 States -- in the second sentence.

21 MR. MINEAR: Yes.

22 QUESTION: Do you acknowledge that that is a
23 submission of the United States to substantive State laws?
24 And if so, what substantive State laws?

25 MR. MINEAR: We think that the provision as a

1 whole recognizes several points. First of all, when the
2 United States -- it begins, when a party to such suit,
3 shall be deemed to have waived any right to plead that the
4 State laws are inapplicable.

5 We believe the State laws they are referring to
6 are the State laws that are referred to in the prior
7 sentence, the State laws by which water is appropriated
8 under State law. The point of this sentence is that the
9 United States cannot raise a sovereignty objection to the
10 procedures that a State has for perfecting a State water
11 right.

12 We have to raise -- if we have an objection to
13 those procedures, we have to raise them at that time when
14 the procedure -- when we first apply for a water right.
15 We cannot come in later on in a general water rights
16 adjudication and then raise that claim.

17 QUESTION: Not -- not the procedures of the
18 adjudication.

19 MR. MINEAR: No.

20 QUESTION: The procedures for obtaining a water
21 right.

22 MR. MINEAR: For the applying for a permit for
23 the water right.

24 QUESTION: Right.

25 MR. MINEAR: Now that explains why this only

1 applies "when a party" -- the language, "when a party to
2 any such suit." It recognizes that if we're not a party
3 to that suit, if we're just applying for a water right and
4 Idaho imposes some burden that we believe is
5 impermissible, we can raise that challenge at that time.

6 It is, in a sense, more like an exhaustion
7 requirement than anything else. It requires that we raise
8 our objections to a State permitting requirement at the
9 time we apply for the permit.

10 That also explains why it uses the language "any
11 right to plead." If Idaho was correct that the point of
12 this whole provision was to subject us to State
13 procedures, you would think that Congress would simply
14 have said the United States shall be subject to State
15 procedures.

16 Now, I think the important point in this case is
17 it's about fees and it's about costs. And in 1952, the
18 costs -- the general costs provision of the U.S. Code said
19 this: "The United States shall be liable for fees and
20 costs only when such liability is expressly provided for
21 by act of Congress."

22 The revisor's note notes that this follows the
23 well known common law rule that a sovereign is not liable
24 for costs unless specific provision for such liability is
25 made by law. This is a corollary to the rule that a

1 sovereign cannot be sued without his consent, and
2 that's --

3 QUESTION: Is it remarkable that the reference
4 to fees was omitted from this proviso, whereas it was
5 included in the language from the general statute that
6 you've just quoted?

7 MR. MINEAR: No, I don't think so, because that
8 general statute would have exempted the United States from
9 both fees and costs. However, when Congress wrote the
10 McCarran Amendment, it also provided the second clause --
11 the second clause of the pleading provision: The United
12 States, when a party to any such suit, shall be subject to
13 the judgments, orders, and decrees of the court having
14 jurisdiction, provided that no judgment for costs shall be
15 entered against the United States.

16 Now, the purpose of the cost proviso was to make
17 absolutely clear that the mere fact that we are subject to
18 judgments for costs -- for judgments generally, did not
19 mean we were subject to judgments for costs. And that
20 explains why it -- read in the context of section 2412(a),
21 the cost proviso was inserted there, to make it absolutely
22 clear that the United States was not expected to pick up
23 these expenses.

24 QUESTION: But that doesn't really explain, I
25 don't think, your answer to Justice Souter's question as

1 to why fees were later -- later omitted.

2 MR. MINEAR: Omitted in the section 2412(a).

3 QUESTION: Yeah, yes.

4 MR. MINEAR: The reason why -- there's simply no
5 mention of them one way or another, and that means the
6 common law rule would still be in effect.

7 QUESTION: Well, I know, but I mean they -- they
8 were once present in the statute, they are now omitted.

9 MR. MINEAR: Yes. And, in fact, it's -- I
10 suppose by negative implication what's -- what is
11 indicated is that although a prevailing party can now
12 collect costs under the present version of 2412(a), he
13 cannot collect fees. And that's reflected in the various
14 statutes of the Federal Code.

15 QUESTION: Well, a party doesn't collect fees,
16 the court collects fees. And a party may charge a paid
17 fee as a cost, but the Supreme Court of Idaho is certainly
18 right as to the distinction between fees and costs, I
19 think.

20 MR. MINEAR: Why, I think so. But nevertheless,
21 the United States still does not pay fees even to a court.
22 That's made clear in the notes of 28 U.S.C. 1914, for
23 instance, where it recognizes that although fees may be
24 assessed against parties, the United States does not pay
25 fees in the courts.

1 Now, that's the common law rule that's been
2 followed here, and I think that Idaho has really seized
3 upon the absence of the word filing fees to turn what used
4 to be judgments for costs into filing fees. They mention,
5 for instance, the court-appointed experts, the fact that
6 we're simply paying for a court-appointed expert. A
7 court-appointed expert is an assessable cost under section
8 1920 of the judicial code. That is one of the costs that
9 a person could, in fact, get compensation for.

10 So I think it's clear that what they've really
11 done is taken a procedure whereby the State was precluded
12 from charging the United States with the expense of the
13 litigation by the cost proviso, and tried to get around
14 that by collecting the fees up front through filing -- a
15 filing fee system, which may bear very little relationship
16 to the actual costs incurred.

17 QUESTION: Mr. Minear, do you -- you implicitly,
18 then, I take it, dispute Mr. Strong's representation that
19 at the time this statute was enacted, there was in effect
20 in Idaho and other Western States the practice of charging
21 fees up front.

22 MR. MINEAR: I believe there was no practice in
23 Idaho of charging filing fees in a court adjudication.
24 There were three States that charged filing fees in a
25 administrative adjudication, but those are not subject to

1 the McCarran Amendment in any event. The McCarran
2 Amendment only provides suits -- applies in suits.

3 QUESTION: So that in no -- you are representing
4 that so far you know, in no judicial proceeding were fees
5 charged up front like this.

6 MR. MINEAR: No. There were three States, we
7 believe, that did charge a filing fee.

8 QUESTION: In a judicial proceeding?

9 MR. MINEAR: In a judicial proceeding.
10 California charged \$5 per claimant, and I believe that
11 Washington and Colorado also had a minor charge along
12 those lines. But both of those States ultimately provided
13 for the final payment of the adjudication through a
14 judgment for costs. That was the -- the most common way
15 in which these suits were adjudicated and --

16 QUESTION: So, in any case, the fees were not
17 comparable to these fees.

18 MR. MINEAR: Certainly not comparable to these
19 fees.

20 QUESTION: I see.

21 MR. MINEAR: The only comparable fee would have
22 been the Oregon -- Oregon did have a variable fee, but it
23 only applied in administrative proceedings. And as I
24 said, the McCarran Amendment does not waive the United
25 States' immunity to administrative proceedings as compared

1 to judicial proceedings.

2 QUESTION: What was the practice in Nevada, Mr.
3 Minear, do you remember?

4 MR. MINEAR: I believe in Nevada, that there was
5 a filing fee in administrative proceedings. But there
6 also was a separate track for the -- a water right suit
7 could be brought in court, and in the court suits a
8 judgment for costs was provided. And, of course, the
9 McCarran Amendment put the United States on the track of
10 the judicial proceedings in those contexts.

11 QUESTION: And Senator McCarran might be
12 familiar with those procedures.

13 MR. MINEAR: Yes. That's -- that might be. I
14 think, as a general matter, we cannot presume that the
15 Congress was familiar with the 17 different sets of State
16 laws that were in effect. They're available in the
17 exhibits that Idaho provided in these proceedings and
18 they're quite voluminous, and it's difficult to believe
19 that the Congress was really aware of all the different
20 procedures there. And I think they were probably thinking
21 in terms of general judicial procedures instead. And as I
22 said, in the general course of a judicial proceeding the
23 plaintiff pays the costs.

24 QUESTION: But the report did cite that Oregon
25 case.

1 MR. MINEAR: It did cite that case, but it cited
2 it in the context that everyone should be brought together
3 in an adjudication. It did not cite it in the context of
4 paying fees. There's no mention at all of judicial fees
5 in the -- in the report at all. That simply was not a
6 matter of discussion.

7 The concern in the legislation -- I see my time
8 has expired.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.
10 The case is submitted.

11 (Whereupon, at 2:41 p.m., the case in the
12 above-entitled matter was submitted.)

13
14
15
16
17
18
19
20
21
22
23
24
25

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: 92-190

United States, Petitioner v. Idaho, Ex Rel. Director

Idaho Department of Water Resources

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

BY *Ann Marie Federico*

(REPORTER)