

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: STATE OF KANSAS, Plaintiff v. STATE OF COLORADO
CASE NO: 105 ORIGINAL
PLACE: Washington, D.C.
DATE: Tuesday, March 21, 1995
PAGES: 1-53

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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 STATE OF KANSAS, :
4 Plaintiff :
5 v. : No. 105 ORIGINAL
6 STATE OF COLORADO :
7 - - - - -X

8 Washington, D.C.
9 Tuesday, March 21, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:06 a.m.

13 APPEARANCES:

14 JOHN B. DRAPER, ESQ., Special Assistant Attorney General
15 of Kansas, Santa Fe, New Mexico; on behalf of the
16 Plaintiff Kansas.

17 DAVID WILLIS ROBBINS, ESQ., Special Assistant Attorney
18 General of Colorado, Denver, Colorado; on behalf of
19 the Defendant Colorado.

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

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1 PROCEEDINGS

2 (10:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 105 Original, Kansas v. Colorado.

5 Mr. Draper.

6 ORAL ARGUMENT OF JOHN B. DRAPER

7 ON BEHALF OF THE PLAINTIFF KANSAS

8 MR. DRAPER: Mr. Chief Justice, and may it
9 please the Court:

10 The State of Kansas is here this morning in
11 support of the report of the special master in this case
12 in all respects except for three points. This is a
13 compact enforcement case. It seeks enforcement of the
14 Arkansas River Compact between Colorado and Kansas. It is
15 a Federal statute approved by Congress and signed by the
16 President in 1949.

17 Kansas is the downstream State, Colorado is the
18 upstream State. The United States intervened in the case
19 after it was filed as Federal agencies physically perform
20 some of the reservoir functions involved in the Kansas
21 claims.

22 Physically, Colorado diverts ten times as much
23 water as Kansas diverts in this basin. Colorado normally
24 diverts all of the inflows to the basin at least once, and
25 in most cases many times, before those -- the return flows

1 from those diversions reach Kansas.

2 Kansas depends on those return flows and on the
3 benefits of John Martin Reservoir, which was conducted in
4 the 1940's about 60 miles above the State line, and whose
5 benefits are apportioned by the compact. The rights of
6 Kansas under the compact are protected by Article IV-D of
7 the compact which forbids material depletions of the
8 waters of the Arkansas River in usable quantity or
9 availability.

10 Kansas claims three violations of the compact
11 have occurred. The special master has agreed with Kansas
12 on its largest claim based on increased post-compact
13 pumping in Colorado. That violation amounts to some
14 400,000 to 500,000 acre feet of water. As the volume of
15 this courtroom is about 3-1/3 acre feet, that amounts to
16 about 140,000 volumes of this courtroom, inside the
17 pillars.

18 Although the special master approved that --

19 QUESTION: Over what period of time is that?

20 MR. DRAPER: This is over the study period of
21 1950 through 1985, Mr. Chief Justice.

22 The second claim asserted a violation based on
23 the Colorado winter water storage program. The study
24 period for that claim is 1976 through 1985, a shorter
25 period. Kansas' evidence showed a depletion over that

1 period of 40,000 acre feet, or about 12,000 volumes of
2 this courtroom.

3 The third claim is based on the operations of
4 Trinidad Reservoir on the Purgatoire River, a major
5 tributary of the Arkansas River in Colorado. The amount
6 of that claim was 11,000 acre feet over a period 1979
7 through 1984, which amounts to approximately 3,300 volumes
8 of this courtroom.

9 Kansas has filed three exceptions to the
10 master's report.

11 QUESTION: I'm just curious, when you talk about
12 the courtroom, are you assuming it's full to the ceiling,
13 or just a foot?

14 (Laughter.)

15 MR. DRAPER: I'm assuming it's full right to the
16 ceiling, Your Honor.

17 QUESTION: I see. That's the first time I've
18 seen that comparison before.

19 (Laughter.)

20 MR. DRAPER: The State of Kansas has filed three
21 exceptions. It has excepted to the denial of the winter
22 water storage program claim and the Trinidad claim by the
23 special master.

24 QUESTION: Well, on those two claims,
25 Mr. Draper, the special master concluded, as I understand

1 his report and recommendation, that Kansas just failed to
2 demonstrate adequately those depletions, and if that
3 factual finding is valid, why doesn't that end the matter
4 on those claims?

5 MR. DRAPER: Your Honor, the two claims are
6 quite different with respect to the answer to your
7 question. With respect to the Trinidad Reservoir claim,
8 he did dismiss the Kansas case at the end of its evidence
9 for failure of proof, but the reason was that he believed
10 as a matter of law that Kansas had proved the wrong thing.

11 We proved that Colorado had violated the
12 operating principles adopted by the Arkansas River Compact
13 Administration for the operation of this reservoir. We
14 believe that the adoption by the compact administration of
15 principles for the operations of the reservoir which were
16 proposed by the United States Bureau of Reclamation set
17 the standard for compliance with respect to that project
18 under the compact.

19 QUESTION: Well, presumably the parties to that
20 special operating program can sue in district court to
21 enforce any rights under that separate agreement, isn't
22 that so?

23 MR. DRAPER: We don't believe that's true, Your
24 Honor. We believe that this is the only forum, certainly
25 the only meaningful forum, in which we can press a claim

1 for violation of the operating principles.

2 QUESTION: But the master found that there was
3 no damage in effect to Kansas because there was no proof
4 that the flow at State line was any different, isn't that
5 right?

6 MR. DRAPER: We believe, Your Honor, that the
7 State of Kansas received some benefits from the adoption
8 of the operating principles that correspond to the
9 allowance of the project in the first place, which was
10 being held up until --

11 QUESTION: Well --

12 MR. DRAPER: -- Kansas gave its approval.

13 QUESTION: -- could you answer my question?

14 MR. DRAPER: The answer is that it is
15 sufficient, in our view, to prove --

16 QUESTION: Well, my question was, didn't the
17 master find that there was no appreciable change in volume
18 of flow at State line?

19 MR. DRAPER: He did at least suggest that
20 strongly, Your Honor. He was looking at evidence which
21 was developed on a study period of 1925 to 1957, however,
22 and not for the operation period that we're talking about
23 in this case, which is 1979 through 1984. There is no
24 evidence as to what the effect of the departure from the
25 operating principles was for that period.

1 QUESTION: Well, then -- but then if the master
2 is right, and it's up to Kansas to show some depletion of
3 flow at the State line, Kansas still fails, it seems to
4 me, even if there's no showing one way or the other, if
5 the burden of proof is on Kansas, and this is Kansas'
6 lawsuit.

7 MR. DRAPER: Your Honor, the evidence showed
8 that the departure from the operating principles, which we
9 believe is the compliance standard for this project, did
10 cause depletions of waters that otherwise would have gone
11 to Kansas. The inflows to John Martin Reservoir --

12 QUESTION: Well, but now this is what the master
13 said, and I think I have the quote right: Kansas did not
14 attempt to establish that the flows of the Arkansas River
15 at the State line were less than they would have been if
16 the Trinidad project had not been constructed or operated
17 at all.

18 MR. DRAPER: That is technically correct, Your
19 Honor.

20 QUESTION: And Article IV-D of the compact
21 allows developments such as Trinidad, subject only to the
22 proviso that they don't materially deplete usable flows at
23 the State line.

24 MR. DRAPER: It does not mention the State line,
25 Your Honor, just flows available for use to Kansas users,

1 and during the study period, the inflows to John Martin
2 Reservoir were divided 40 percent and 60 percent between
3 the two States, and delivered to the State line with the
4 help of a trans-loss account to be sure that the flows
5 actually reached Kansas.

6 This was also the standard that the Bureau of
7 Reclamation used when it devised the operating principles
8 in 1964 and proposed those to the compacting States.

9 QUESTION: Well, is it correct, however, that
10 you made no effort to show that in fact it reduced the
11 flow from what it would have been had there been no
12 project at all? Is that an accurate enough statement?

13 MR. DRAPER: That is an accurate statement, Your
14 Honor. We show that there was a depletion of flows to
15 Kansas, usable flows to Kansas as a result of the
16 departure from the operating principles.

17 QUESTION: And the master -- you're not
18 contesting that he said -- your theory ultimately was that
19 a violation of the separate operating principles per se
20 constituted a compact violation, and that was a theory
21 that he rejected.

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

23 QUESTION: And what was wrong with his
24 observation that there were other remedies, assuming that
25 the operating principles were violated, that there were

1 remedies appropriate to that?

2 MR. DRAPER: We don't believe that is correct,
3 Your Honor. We believe that this forum is the only
4 meaningful forum that we have, that the State of Kansas
5 has to enforce the operating principles. It is basically
6 an interstate dispute, and interstate disputes, whether
7 they're under a compact or not, must be brought in this
8 forum.

9 QUESTION: What is the -- what do you rely -- as
10 I understand it, though I didn't quite understand your
11 answer to Justice Scalia, that you say that they violated
12 the procedures, these procedures.

13 MR. DRAPER: Yes, Your Honor.

14 QUESTION: All right, and then the issue -- and
15 if they violated the procedures, then they violated the
16 compact.

17 MR. DRAPER: Yes.

18 QUESTION: But the other side says, you're
19 right, as long as there was a material depletion of the
20 water available to Kansas, and you think that's shown
21 automatically by the fact they violated the procedures,
22 and they don't. So that's my understanding of it.

23 MR. DRAPER: That's correct, Your Honor.

24 QUESTION: All right. Now, if that's correct,
25 then what is it that shows that automatically violating

1 these procedures would violate the compact, without some
2 further showing of what physically happened in terms of
3 availability of water to Kansas? What is it that shows it
4 automatically?

5 The best think that I thought you pointed to is
6 this thing about a letter to the Governor of Kansas from
7 Mr. Dugan. Is that the best thing for you?

8 MR. DRAPER: Yes. That is the letter that
9 immediately preceded the adoption of the operating
10 principles by the compact administration. It appears in
11 our brief at page A-85.

12 QUESTION: The problem I had with that letter,
13 which is what I'm getting to, is it says that if they
14 don't violate the -- if they don't violate the procedures,
15 they won't materially deplete the flow. Isn't that what
16 it says? If you don't violate the procedures -- what I
17 have is, the proposed project will not materially deplete
18 the water if it's operated under the guidelines.

19 MR. DRAPER: That letter indicated that strict
20 compliance with the operating principles --

21 QUESTION: Would not deplete --

22 MR. DRAPER: -- would achieve compliance with
23 the compact.

24 QUESTION: Right, but it doesn't say what will
25 happen if you don't comply with the procedures. It leaves

1 it up in the air.

2 MR. DRAPER: Literally, that's true, Your Honor.

3 QUESTION: All right, so then if that's true,
4 then what is it that you have to prove that if you do
5 violate the procedures, that automatically depletes the
6 flow, or at least the parties thereby agreed to that, and
7 I couldn't find anything in here that said that they did
8 agree to that automatic --

9 MR. DRAPER: Your Honor, we believe that the
10 statement by the Bureau of Reclamation and the operating
11 principles themselves, the mandatory language that is
12 contained in those, in the preamble and in every operative
13 section of the operating principles, indicates that these
14 are intended to be binding in nature, and that they form
15 the standard of compact compliance for that particular
16 project.

17 QUESTION: Well, isn't Kansas' suit a suit for
18 violation of the compact?

19 MR. DRAPER: That's correct.

20 QUESTION: The SG takes the position that the
21 compact does not even empower the compact administrators
22 to amend the compact to create a new, enforceable right
23 under the compact.

24 MR. DRAPER: Your Honor, Article VIII-B(2) of
25 the compact, which appears on page 3 of our blue brief,

1 accords the administration -- that's the compact
2 administration -- the power to prescribe procedures for
3 the administration of this compact, and by the proviso of
4 that provision, it makes very clear that those are
5 proceedings --

6 QUESTION: Yes, but how does VIII-B authorize
7 the compact administrators to establish a compact
8 violation that differs from that set out in Article IV-D?
9 I mean, that's what the standard is. That's what your
10 suit was brought under. That's what the master said
11 Kansas didn't prove. I just don't see how you get where
12 you want to go.

13 MR. DRAPER: The answer, Your Honor, is that
14 the -- there is no difference between compliance with the
15 operating principles and the compact itself with respect
16 to this project.

17 It was studied by the U.S. Bureau of
18 Reclamation, it was determined what was necessary in order
19 to comply with the compact -- this is a reservoir,
20 incidentally, which is 220 miles above the State line, and
21 the compact administration was looking at the question,
22 how do we operate this project on a day-to-day basis? Do
23 we have the gates of the reservoir open today, or not, or
24 how long do we keep them open?

25 We have down, or in the compact itself the

1 general proviso that there shall be no depletion of usable
2 flows. What does that mean in terms of the daily
3 operations, and that's what the compact administration was
4 adopting here, were the exact daily operations so that the
5 dam tender who is employed by the Federal Government will
6 know when to open the gates and when to close them at
7 this project.

8 QUESTION: May I ask, are these violations of
9 the procedures ongoing, or have they been terminated?

10 MR. DRAPER: They have been terminated for the
11 moment by a letter from the Colorado State engineer, the
12 highest water official for domestic water use in Colorado,
13 that until the violations were either determined, or the
14 practices which form the basis for the violations were
15 determined not to be a violation, or the principles were
16 amended, that the reservoir would be so --

17 QUESTION: Well, has it not been determined that
18 there were violations, so doesn't that mean they will
19 cease in the future, then?

20 MR. DRAPER: I'm sorry?

21 QUESTION: There has been a determination, has
22 there not, that there were violations of the procedures,
23 and does it therefore not follow that they will be
24 discontinued in the future?

25 MR. DRAPER: There is an assumption for purposes

1 of the motion to dismiss this claim that the procedures
2 have been violated.

3 QUESTION: And also that they've been
4 terminated, is that correct?

5 MR. DRAPER: They are terminated for the moment,
6 but that is only by letter of the Colorado State water
7 official, and that letter could be revoked.

8 QUESTION: Mr. Draper, what has the practice of
9 the parties been under the agreement? Has it, in fact,
10 been the Arkansas River Compact Administration that has
11 prescribed procedures for the administration of this
12 project?

13 MR. DRAPER: These are the only operating
14 procedures for this project, Your Honor.

15 QUESTION: And are they given authority to
16 prescribe those procedures by some document other than
17 this compact?

18 MR. DRAPER: No, Your Honor. The compact itself
19 is the basis of that authority.

20 QUESTION: The statute that sets up the project
21 does not authorize them to prescribe procedures?

22 MR. DRAPER: The statute that sets up the
23 project requires that the project be operated in
24 compliance with the Arkansas River Compact.

25 QUESTION: That's all it says.

1 MR. DRAPER: That's correct.

2 QUESTION: And in fact, it would seem the
3 parties have behaved as though Article VIII-A and VIII-B
4 does consider these procedures part of the compact.

5 MR. DRAPER: Yes, we believe so. Kansas agreed
6 to those procedures and required that they be adopted, and
7 gave its approval, which was essential for the funding to
8 construct the project. Once it got into -- was built and
9 began to operate, the State of Colorado immediately stored
10 more water than is allowed under the --

11 QUESTION: That's true, that may be true --
12 assume it's true. They had procedures, the procedures
13 bind them, it's all part of a deal, but don't you have to
14 show that they also agreed that's part of this deal that
15 if we violate the procedures, that fact in and of itself
16 demonstrates a material depletion? It's that part that I
17 thought the special master didn't agree with you about.

18 Maybe you did violate the procedures. Then go
19 work out some deal for that, but have you automatically
20 shown a material depletion without showing what happened
21 physically, and where is the agreement to that, that the
22 violation of the procedures automatically shows a material
23 depletion?

24 MR. DRAPER: I would suggest, Your Honor, that
25 it is inherent in the principles themselves, and it is --

1 QUESTION: Is there anything you could read to
2 me that would suggest it was inherent in the principles?
3 I read that letter -- or I mean, I don't want you to -- if
4 something comes immediately to mind, or something.

5 MR. DRAPER: No. We base our position on the
6 compact and the preamble and the text of the operating
7 principles themselves, and the precedent --

8 QUESTION: But where do you go from that --
9 supposing you're right, and we agree with you. What
10 remedy would be appropriate? Assuming there's been no
11 material loss of water, what's the remedy, just stop
12 violating?

13 MR. DRAPER: The first remedy would be an
14 injunction to discontinue the violation.

15 QUESTION: And if the master thought that this
16 letter that says we're not going to do it any more is
17 sufficient, would you then -- do you still want the
18 injunction? But it's -- the only question is whether you
19 should have an injunction or not. There's no -- they're
20 not going to get more water, or anything like that.

21 MR. DRAPER: Well, we have shown that we were
22 deprived of 11,000 acre feet by the failure to abide by
23 the operating principles.

24 QUESTION: If there was no change in the flow at
25 the State line, how do you know there was such a

1 deprivation, and where did it take place?

2 MR. DRAPER: The assumption of your question,
3 Mr. Chief Justice, does not exist. There is no showing
4 that there was no change at the State line.

5 QUESTION: Well, but there was no showing there
6 was a change at the State line.

7 MR. DRAPER: That's correct. There was a
8 showing that water that otherwise would have been
9 available to Kansas users in John Martin Reservoir was
10 depleted by 11,000 acre feet.

11 QUESTION: Isn't what you're in fact saying that
12 had they followed the procedures, you would have gotten
13 more water than the original compact contemplated? You
14 sort of didn't get the full benefit that you're seeking.
15 Is that what it boils down to?

16 MR. DRAPER: Well, there is a certain amount of
17 tradeoff that's inherent in the principles. There are
18 depletions during certain periods, and you end up with a
19 slight accretion, but there is no indication that Kansas
20 is getting any benefit beyond compliance with the compact
21 by enforcement of the operating principles.

22 QUESTION: But you would if you got this 11,500
23 feet, wouldn't you?

24 MR. DRAPER: No, Your Honor.

25 QUESTION: Then it wouldn't be a benefit.

1 MR. DRAPER: No, Your Honor.

2 QUESTION: Well, you're saying that if they had
3 followed the principles there would have been another
4 11,000 acre feet in the river, it had to go somewhere, and
5 Kansas is where it would have gone, is that what you're
6 saying?

7 MR. DRAPER: We're saying --

8 QUESTION: Even though the record is agnostic
9 with respect to measurements at the State line, you're
10 saying there would have been another 11,000 that went into
11 the river, and it had to go to us, and so therefore we
12 must have lost it. Is that your argument?

13 MR. DRAPER: Well, the evidence is that a total
14 of --

15 QUESTION: No, but is that your argument?

16 MR. DRAPER: That is our argument.

17 QUESTION: Okay.

18 MR. DRAPER: That water would have come to
19 Kansas.

20 QUESTION: And I -- as I -- but as I understand,
21 the difficulty is it's 11,000 square feet more than would
22 have been -- it's the difference between complying with
23 the procedures for this reservoir and not complying with
24 the procedures.

25 MR. DRAPER: Yes.

1 QUESTION: It's not the difference between what
2 the flow would have been without the reservoir and
3 complying with the procedures.

4 MR. DRAPER: That's correct.

5 QUESTION: And that's the nub of the
6 disagreement.

7 MR. DRAPER: That's correct.

8 QUESTION: It's also -- there's a stretch of the
9 river below John Martin Reservoir in Colorado. Couldn't
10 it just as easily have come from additional pumping there?

11 MR. DRAPER: The water we're talking about, the
12 11,000 acre feet, would be routed down the river with
13 extra water added to cover transit losses to arrive at the
14 State line intact.

15 QUESTION: Why does it necessarily follow that
16 if 11,000 acre feet leaves John Martin Reservoir, an
17 additional 11, that 11,000 necessarily shows up at the
18 State line when the river flows in Colorado for a number
19 of miles above the State line, and there surely could have
20 been either pumping or diversion there?

21 MR. DRAPER: Much of what you say, Mr. Chief
22 Justice, is correct. However, the Kansas deliveries are
23 measured at the State line.

24 QUESTION: I think what people -- am I right
25 that it's the Trinidad project operating principles, is

1 that right?

2 MR. DRAPER: These are the Trinidad --

3 QUESTION: Right, and then if the water leaves
4 Trinidad, it goes to the John Martin Reservoir, is that
5 right?

6 MR. DRAPER: Yes.

7 QUESTION: All right, so maybe this 11,000 feet,
8 or I don't know what that number came from, but it would
9 go down to the John Martin Reservoir, and maybe people had
10 enough water anyway in the John Martin Reservoir, so
11 whether they had 11,000 or not 11,000 didn't make any
12 difference to Kansas in terms of what happened in the
13 past.

14 I mean, is all this explored in the record? I
15 had the impression that you were virtually conceding that
16 the issue is whether or not these operating principles
17 automatically show a violation thereof is a violation of
18 the compact.

19 MR. DRAPER: That is essentially correct, Your
20 Honor, and those flows are flows into John Martin
21 Reservoir which typically empties every season. It's not
22 a large pool of water that's sitting there year after
23 year. It typically empties within a few weeks at the
24 beginning of the irrigation season, except under very
25 unusual circumstances.

1 QUESTION: Then you don't depend on the argument
2 that you said was your argument in response to my
3 question?

4 MR. DRAPER: If you could --

5 QUESTION: Technically, you don't care, for the
6 sake of the argument, what happened to the 11,000 gallons.
7 What you care about is the proposition that if the
8 principles are violated, that, as a matter of law, is
9 tantamount to a measurable depletion. That's what you
10 really care about.

11 MR. DRAPER: That is the nub of our argument.

12 QUESTION: Yes.

13 MR. DRAPER: Yes.

14 QUESTION: Thank you.

15 QUESTION: And do you take issue with the
16 special master's example that if the operating principles
17 are followed meticulously and nonetheless there is a
18 substantial depletion, there is nothing that Kansas can
19 complain about?

20 MR. DRAPER: We take issue with that, Your
21 Honor. That is for a different period, 1925 to 1957.
22 This project did not exist then. Our claim is based on
23 actual operations, 1979 through 1984.

24 Thank you.

25 QUESTION: Thank you, Mr. Draper.

1 Mr. Robbins, we'll hear from you.

2 ORAL ARGUMENT OF DAVID WILLIS ROBBINS

3 ON BEHALF OF THE DEFENDANT COLORADO

4 MR. ROBBINS: Mr. Chief Justice, and may it
5 please the Court:

6 Colorado similarly supports the master's report,
7 but has taken four exceptions to the report.

8 I would first like to address some comments to
9 the Court concerning the Kansas argument. I wish to make
10 it clear that the master did not make a finding on the
11 amount of actionable depletion as to the post compact
12 wells in Colorado. Counsel's description of the amounts
13 of depletion when he was discussing how full the courtroom
14 might be, or how many times it might fill, were strictly
15 Kansas' allegations at the close of the evidence in this
16 case.

17 Second, with regard to Trinidad, Kansas sought
18 to use Article IV-D to show a material depletion.
19 However, it admittedly did not show that there was a
20 material depletion to State line flows. Remember,
21 Article IV-D is designed to permit additional beneficial
22 development in both States of the unused water, and it is
23 Colorado's position, and it was the master's
24 determination, that Kansas had to show that there was, in
25 fact, a material depletion to the water that would

1 otherwise be available to Kansas.

2 Simply showing that operating principles had
3 been violated -- and I wish to point out, operating
4 principles that were negotiated not between the State of
5 Colorado and the State of Kansas but between the
6 Purgatoire River Water Conservancy District, a
7 governmental entity within Colorado, the Bureau of
8 Reclamation, and the State of Kansas, principles which
9 were then subsequently submitted to the administration for
10 their imprimatur, or approval.

11 QUESTION: May I ask you a question about
12 definition, and it didn't occur to me that I had this
13 question before, but when you speak -- when you use the
14 term, material depletion, does that term refer solely to
15 volume of water, without any reference to the capacity of
16 the recipient of that water to use it beneficially?

17 MR. ROBBINS: There are two -- there are -- if I
18 may, there are two concepts that are important here. The
19 first one is material depletion, which refers to a
20 depletion as a volume of water.

21 QUESTION: Okay.

22 MR. ROBBINS: The compact negotiators in the
23 compact negotiations discuss this, and they wanted to be
24 sure that a change in Colorado that was not terribly
25 significant did not trigger litigation.

1 QUESTION: But that's merely a change in acre
2 feet.

3 MR. ROBBINS: That's correct.

4 QUESTION: Yes.

5 MR. ROBBINS: It was a -- what they were
6 concerned about was, if you simply use the term,
7 depletion, Kansas and Colorado might be here every year
8 arguing about some small glitch, and you must remember
9 that this is a river that has average -- that has flow
10 conditions that on the average are a number of, you know,
11 600,000 or 800,000 acre feet, but rise into the millions
12 and drop into the 200,000 and 300,000 each year, so you
13 have this huge variability in the system, and they didn't
14 want us here all the time arguing about little numbers, so
15 material depletion was intended to cover that.

16 Secondly, there is the concept of usability. It
17 was important to the framers of the compact that waters be
18 usable in each of the States if there was to be a call, or
19 if there was going to be a demand on John Martin
20 Reservoir.

21 The idea was that there was water, as the
22 compact was negotiated, passing Garden City, Kansas,
23 unused, and they wanted to be certain that that water was
24 developable in each State. They didn't want to have a
25 situation where Kansas was making insistence upon Colorado

1 for water when in fact they had supplies within Kansas
2 passing unusable out of the area covered by the compact.

3 The procedures -- I want to make it clear, the
4 procedures that were approved, that were included within
5 this agreement among the district, the Bureau, and Kansas,
6 approved by the compact, not pursuant to rules and regs
7 authority inherent in the compact but simply approved as a
8 resolution, those procedures did not prescribe daily
9 operation for Trinidad Reservoir. They were based upon
10 Bureau of Reclamation studies that dealt with averages.

11 Next. The State engineer of Colorado did, in
12 fact, terminate by order the aggrieved use of the
13 operating principles, the allegation that those principles
14 weren't being followed. That order is in effect today.
15 There is absolutely no reason to assume that it will not
16 remain in effect. Colorado is not in the business of
17 seeking to violate its agreements.

18 Next. In response to Justice Scalia, the
19 parties did not treat the procedures as being part of the
20 compact. In fact, as far as the State of Colorado was
21 concerned, they were in agreement among three parties that
22 it was brought to the compact in Colorado because Kansas
23 requested approval by the Commission, voted aye that those
24 procedures should, in fact, be approved by the compact and
25 utilized.

1 QUESTION: Where do you go to enforce them?

2 MR. ROBBINS: My judgment would be that you
3 would go to enforce them in the district court, bringing
4 in the parties to the agreement, namely, the Purgatoire
5 district, the Bureau, and the entities which are, in fact,
6 operating the project.

7 QUESTION: No --

8 MR. ROBBINS: They also joined the Colorado
9 State engineer, who was the appropriate water official.

10 QUESTION: But no -- you have no administrative
11 appeal. You go right to the court.

12 MR. ROBBINS: That would be my interpretation.
13 That's correct, sir.

14 There's no administrative agency that really is
15 involved in this. You have a Federal agency that built
16 and manages the project, you have a Colorado entity, the
17 district, whose water rights were the rights, the
18 interests that were brought into the reservoir that are
19 being managed, you have the State of Kansas, that sought
20 the operating principles --

21 QUESTION: The compact administration, as I
22 understand you, simply approved these procedures at the
23 outset and has had nothing more to do with them.

24 MR. ROBBINS: Well, the compact administration
25 received a complaint from Kansas under Article VIII-H,

1 which was the investigation section of the compact,
2 seeking to obtain an investigation by the administration
3 of those procedures, and that investigation was, in fact,
4 approved.

5 QUESTION: Well, that's sort of inconsistent
6 with saying that they're out of the picture. They not
7 only approved the procedures at the outset, but they have
8 been exercising some supervisory authority over the
9 implementation of those procedures, is what you're telling
10 me.

11 MR. ROBBINS: Mr. Justice Scalia, I jumped over
12 myself. There is an administrative procedure before the
13 compact. However, if you had been dissatisfied with how
14 those procedures were operated, you were entitled, in my
15 opinion, to take the matter to a district court.

16 QUESTION: I understand, but what's the
17 authority of the administration to do anything with regard
18 to those procedures? Where do they get any authority?
19 Why do people go to them at all?

20 MR. ROBBINS: They've no authority to do
21 anything about the procedures unless it is there -- unless
22 they find that there is a material depletion, and their
23 authority comes in through material depletion, not through
24 those operating principles.

25 QUESTION: So if somebody says it's being

1 operated out of compliance with the procedures, you don't
2 go the administration.

3 MR. ROBBINS: I do not believe that the
4 administration has authority to order the change in those
5 procedures.

6 QUESTION: Even if you're right that they could
7 go to the district court, assuming that there was an
8 ongoing violation, why couldn't that be addressed in an
9 original jurisdiction case? I don't quite understand why
10 it can't be.

11 MR. ROBBINS: Well, the parties to the
12 agreement, one of the major parties to the agreement is
13 not here before you, and that's the Purgatoire district,
14 one of the entities that gave up its members, agreed to
15 the subordination or use of its water rights within this,
16 pool and made that agreement in part through these
17 operating principles.

18 QUESTION: But the violation, if they're right,
19 is one committed by Colorado, isn't it?

20 MR. ROBBINS: The violation needs to be a
21 material depletion under Article IV-D. I do not want the
22 Court to assume for one minute that simply by not -- you
23 have to wrap these procedures, Mr. Justice Stevens, into
24 the compact. They don't just --

25 QUESTION: I understand. Let's assume there's

1 no violation of IV-D, would you, but assume there is a
2 violation of VIII-B. They set out procedures and all the
3 rest. You're saying they have no remedy in this
4 proceeding, even if they were -- that you just said -- you
5 told us Colorado doesn't disobey its, or violate its
6 promise.

7 Supposing Colorado took a position, there's
8 nothing you can do about it. We're going to follow our
9 own procedures and forget about what we've agreed to.
10 You'd say there'd be no remedy in this proceeding.

11 MR. ROBBINS: Had those procedures been adopted
12 pursuant to VIII-B, you're exactly correct, Your Honor.

13 QUESTION: But they were not adopted pursuant to
14 the agreement between the two States?

15 MR. ROBBINS: They were simply approved by the
16 two States. They were not adopted pursuant to an
17 agreement by the two States. The principles were adopted
18 by the Purgatoire District, the Bureau, and the State of
19 Kansas.

20 QUESTION: If they had been adopted by the
21 States, would it be operative without ratification by
22 Congress? Would it have taken separate ratification if it
23 was a State agreement?

24 MR. ROBBINS: If the purpose was to modify the
25 way in which the compact's no material depletion standard

1 was applied, yes, it would.

2 I'd like to move on, if I might, to Colorado's
3 exception, which involves the defense of laches. Colorado
4 does not argue, and I want to make this clear, that Kansas
5 should be estopped from obtaining prospective relief under
6 the Arkansas compact. However, Colorado believes that
7 this Court should consider laches for any well-pumping
8 occurred -- that occurred prior to 1985.

9 In response to the position stated in the
10 Kansas --

11 QUESTION: What's the difference there,
12 Mr. Robbins? What sort of relief might the master give if
13 he didn't apply laches to the well-pumping that occurred
14 before 1985?

15 MR. ROBBINS: As far as prospective relief, Your
16 Honor?

17 QUESTION: No. So what is the kind of relief
18 you think should be barred by laches?

19 MR. ROBBINS: Damages in money or water for
20 past -- any past depletions that are found to violate
21 usable flow, and I want to make it clear, the master did
22 not find a quantity of water. He simply said that from
23 all of the evidence he believed that there was, in fact, a
24 violation of Article IV-D of the compact based upon first
25 compact well-pumping in Colorado. He did not quantify

1 that amount. That is left for a subsequent phase of this
2 proceeding.

3 QUESTION: You would say that any wells that
4 went up with knowledge of Kansas can be closed down.
5 That's future relief, right?

6 MR. ROBBINS: Prospectively?

7 QUESTION: Yes.

8 MR. ROBBINS: Well, I think the prospective
9 relief would have to wait, but that would be one facet of
10 the relief. Kansas is entitled to one --

11 QUESTION: You don't think laches would extend
12 to that?

13 MR. ROBBINS: Well, laches would cover past
14 relief. We are not arguing for estoppel, which would seek
15 to prevent Kansas from enforcing the compact in the future
16 based upon their acquiescence in the past activity. We're
17 simply --

18 QUESTION: This is new to me. I've never heard
19 that laches is limited that way. I would normally think
20 that when somebody has done something for a long time and
21 you haven't made any complaint about it -- is that the
22 normal operation of laches, that it operates only as to
23 past damages, not as to future?

24 MR. ROBBINS: I believe that there are cases,
25 Your Honor, that are in the patent area in particular

1 where that is exactly how laches is applied, and there is
2 the analysis in those cases -- they are cited in our
3 brief -- in which a patent holder fails to enforce his
4 patent over a period of time, then identifies the problem,
5 and very often, in at least the Circuit Court decisions,
6 there is language to the effect that the enforcement can
7 occur prospectively, but as to claims for damages or
8 recovery for past activities, they are barred.

9 QUESTION: And even if I have built up a whole
10 business upon that misuse of the patent, which is a very
11 small part of my entire business, but nonetheless
12 essential to it, in the future I'd have to close down the
13 business.

14 MR. ROBBINS: It depends --

15 QUESTION: Is that the way it works? I don't --

16 MR. ROBBINS: -- on the facts of the case.

17 No, the point I'd like to make with regard to
18 the Kansas position is that in its reply brief to the
19 Court at pages 8, and again at 19, it states that it had
20 no knowledge or reason to know, before 1984, that pumping
21 in Colorado was violating the terms of the compact, and I
22 would -- however, I would direct the Court to an earlier
23 position taken by Kansas.

24 I refer to the March 4, 1986 reply brief filed
25 by Kansas with this Court in support of the bill of

1 complaint at page 10, and I would like to quote: "The
2 implication Colorado offers the Court is that Kansas has
3 sat on its hands, idly watching the State line flows
4 decline over the years. The actual history is quite the
5 contrary.

6 "As early as its meeting on December 11, 1956,
7 the administration held considerable discussion concerning
8 the activity of well-drilling and its effect on
9 conditions. Since then, well depletion has been
10 discussed, both formally and informally, at numerous
11 meetings of the compact administration."

12 QUESTION: This is a witness?

13 MR. ROBBINS: No, sir, this is a statement of
14 counsel in the brief supporting the bill of complaint in
15 this case.

16 QUESTION: Well, the master canvassed all these
17 facts, the arguments pro and con about inexcusable delay
18 on the part of Kansas, and found against Colorado on that,
19 did he not?

20 MR. ROBBINS: The master -- yes. The master
21 found --

22 QUESTION: So why should we overturn that
23 finding?

24 MR. ROBBINS: The master acknowledged that
25 laches was an appropriate remedy in proceedings of this

1 sort.

2 Kansas introduced no evidence to suggest why the
3 delay occurred. They relied solely upon the position that
4 laches did not apply to a sovereign, period. The master
5 in part speculated that Kansas was relying upon Colorado's
6 efforts, which are replete in the record, to deal with the
7 issue of well-pumping depletion, but there is no evidence
8 to that effect. It is just that, speculation, because
9 Kansas did not introduce any evidence at all.

10 QUESTION: But there is also, you have -- to
11 prevail on laches you have to show you're prejudiced and
12 there, I take it, there was evidence, and the master went
13 through it, and he said, well, even if Kansas should have
14 complained sooner, it didn't hurt Colorado, because
15 Colorado would have had to collect, I guess, this data of
16 what was being pumped out of wells very early, years and
17 years and years ago, and you'd have to speculate that if
18 they had complained sooner, Colorado would, in fact, have
19 collected this data sooner, and I can't tell, says the
20 master, and I don't find any prejudice. So there was a
21 finding on that prejudice part --

22 MR. ROBBINS: Justice Breyer --

23 QUESTION: -- and evidence.

24 MR. ROBBINS: -- that is correct, but the
25 master's finding is again based upon speculation,

1 because --

2 QUESTION: No, he said you'd have to speculate
3 in order to support you. He has -- he lists the two
4 witnesses who died, he lists the hydrological survey, he
5 lists all kinds of stuff. Didn't sound like speculation.

6 MR. ROBBINS: He says Colorado would not have
7 collected the data -- would not have collected the data
8 had it been given the opportunity to do so.

9 QUESTION: He said it's highly speculative that
10 they would have done.

11 MR. ROBBINS: That's correct, but that flies in
12 the face of all of the studies that were done in the State
13 of Colorado during this period seeking to collect that
14 very sort of data, and it suggests, without any
15 opportunity for Colorado to respond, suggests that somehow
16 Colorado would not have intensified its efforts to collect
17 data if it knew it was on the griddle, but Colorado didn't
18 know it was on the griddle.

19 Kansas knew throughout this period, as the two
20 witnesses, one Kansas and one Colorado, suggest. One
21 Kansas witness said in 1956 I was sent into Colorado to
22 look at wells because of depletions in State line flows
23 for the -- counsel says, we operated, throughout this
24 period we were continually talking about this problem but
25 no complaint was filed.

1 The master says that he speculates that Colorado
2 wouldn't have done it anyway, but the facts to my mind
3 suggest quite to the contrary. The State of Colorado
4 consistently worked with the GS throughout this period
5 trying to get a handle on this very problem, and there's
6 no reason to speculate that if the State in this compact
7 had said, we wish an investigation under the compact into
8 the impacts of wells, that it would not have redoubled its
9 efforts. Without that complaint, it was already trying to
10 do that.

11 So in our view you have the State of Kansas at
12 the commencement of this proceeding acknowledging that it
13 knew and that it talked about this issue as it went along.
14 It also acknowledged in its reply brief that it in fact
15 did nothing until 1984-1985 about it.

16 So you have, by Kansas, admissions on both of
17 the important issues here, and the next issue is only
18 prejudice, and to our view, the fact that we lost the
19 opportunity to inquire of the USGS person who did the
20 important study in the 1960's and who came up with the
21 estimates of 1940 pumping, which had an adverse
22 consequence to us when it came time to deal with post
23 compact or precompact pumping.

24 We weren't able to defend ourselves in that
25 regard because we couldn't get an explanation of how the

1 1940 through 1949 numbers were derived. We were unable to
2 get power coefficients or power records. All of the
3 witnesses in the case, Kansas and Colorado and the United
4 States, acknowledge that in these early periods there was
5 effectively no hard data.

6 QUESTION: Mr. Robbins, does Colorado concede
7 that although it isn't quantified, there has been some
8 material depletion of usable State line flows as a result
9 of groundwater depletion?

10 MR. ROBBINS: Colorado's witnesses, Justice
11 O'Connor, said that --

12 QUESTION: I think you could say yes or no.

13 MR. ROBBINS: Yes, ma'am.

14 QUESTION: Thank you.

15 MR. ROBBINS: The answer is yes. Now, I'd like
16 to explain that Colorado has conceded that there were
17 reductions in State line flow, but I want to go back to my
18 response about usable flow. My answer, yes, is qualified
19 that we have not had a quantification of depletion to
20 usable State line flow, which is --

21 QUESTION: But does that go to the violation or
22 simply to damages? Isn't there a violation if there is,
23 in fact, a material depletion? There may be no damage
24 remedy unless there is a further showing that usable --
25 that the usable quantities were reduced, too, isn't that

1 correct?

2 MR. ROBBINS: That's not correct --

3 QUESTION: Okay.

4 MR. ROBBINS: -- in my interpretation, Justice
5 Souter. I believe that the violation is a material
6 depletion to usable flows, because excess flows could be
7 fully depleted in one State or the other without there
8 being a violation.

9 QUESTION: Well then, I want to get this
10 straight. I misunderstood your earlier answer, because I
11 thought your earlier answer was that material depletion
12 referred simply to quantity, not to usable quantity, and I
13 think you're now saying the opposite, and I want to know
14 which it is.

15 MR. ROBBINS: I -- what I tried to do earlier --

16 QUESTION: You were too subtle for me. Help me
17 out.

18 (Laughter.)

19 MR. ROBBINS: Material depletion relates to
20 depletions to usable flow, and I tried to explain the two
21 concepts.

22 QUESTION: Okay. So it's not just quantity.

23 MR. ROBBINS: That's correct. It's quantity --
24 it's depletion to usable quantity.

25 QUESTION: Thank you, Mr. Robbins.

1 MR. ROBBINS: Thank you, Mr. Chief Justice.

2 QUESTION: Mr. Minear.

3 ORAL ARGUMENT OF JEFFREY P. MINEAR

4 ON BEHALF OF THE UNITED STATES

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

7 I would like to address the issues in the order
8 that they are presented in our brief. First, the master
9 correctly resolved the Trinidad claim. Kansas has
10 predicated that claim on the theory that Trinidad
11 operations have breached the compact, but the only
12 relevant limitation that the compact imposes on new
13 projects like Trinidad is that they cannot materially
14 deplete usable flows.

15 Kansas has made no showing that Trinidad has had
16 that effect. Instead, Kansas has attempted to show that
17 Colorado has allowed a local irrigation district to
18 violate reservoir operating principles, but those
19 operating principles are not a part of the compact, and
20 hence their violation cannot establish a violation of the
21 compact.

22 Simply put, Kansas cannot predicate its compact
23 action based on conduct that the compact does not forbid.

24 QUESTION: Do you agree --

25 QUESTION: Now --

1 QUESTION: -- that all of this can be litigated
2 in the district court if somebody wants to litigate it?

3 MR. MINEAR: We believe an action could
4 conceivably be brought based on the operating principles
5 in another forum. Whether it would be the district court
6 or a State court would depend on the parties that are
7 bringing the suit.

8 QUESTION: Brought by the State?

9 MR. MINEAR: The State has a problem here. I do
10 think that the State's best argument here is a compact
11 violation based on a material depletion of the usable
12 flow. If there's been no material depletion of usable
13 flows, they're going to encounter a standing objection
14 wherever they raise the claim later on.

15 QUESTION: The operating principles, were they
16 because of the approval of them by the compact
17 administrators? Did that become a rule and regulation of
18 the compact administration?

19 MR. MINEAR: We agree with the special master it
20 did not. The special master canvassed the records and he
21 concluded that there was no showing that the parties, or
22 the compact administration itself, viewed this as a
23 regulation of the compact.

24 Instead, what had happened here was the Bureau
25 of Reclamation had formulated these operating principles

1 in anticipation of the completion of construction of the
2 Trinidad project. They circulated the operating
3 principles to interested parties to see if they agreed
4 with the operating principles. The compact administration
5 was included among those parties that they consulted, but
6 that was simply a consultation method -- measure, and
7 nothing more.

8 The master also correctly concluded that Kansas
9 had failed to prove its winter water storage claim. The
10 master carefully examined the evidence, he discerned
11 numerous serious problems with the Kansas water model, and
12 he concluded that Kansas had failed to show that the
13 winter water storage program had caused material State
14 line depletions. The record fully supports that
15 conclusion.

16 Kansas seeks to overcome the master's finding by
17 arguing that Colorado should bear the burden of disproving
18 Kansas' allegations. That argument, however, is
19 inconsistent with the Hornbook rule that the plaintiff,
20 the party that seeks to alter the status quo, bears the
21 risk of nonpersuasion.

22 QUESTION: What is Kansas' burden of proof here?
23 Is it by clear and convincing evidence, or by a
24 preponderance --

25 MR. MINEAR: It would be our view --

1 QUESTION: -- of the compact violation?

2 MR. MINEAR: It is our view that it would make
3 sense to employ the clear and convincing standard in this
4 situation.

5 The reason we reach that conclusion is because
6 this Court has recognized that the clear and convincing
7 standard applies in actions between the States in other
8 interstate disputes, most frequently in actual
9 apportionment measures, and the factors that lead to the
10 application of the clear and convincing standard, namely
11 the sensitive nature of litigation between States, and
12 also the disruptive effect of disturbing settled water
13 uses, both call for a clear and convincing standard to
14 make sure that there is not a mistake.

15 QUESTION: Although we have suggested that a
16 preponderance standard is appropriate for violations of a
17 decree, is it?

18 MR. MINEAR: I think that the Court -- this -- I
19 think you're speaking to the 1993 decision in Nebraska v.
20 Wyoming, and in that case the Court noted that a party
21 does not need to prove injury in order to enforce a
22 decree. You need only show that there was a violation of
23 the decree itself, but the Court did not speak to the
24 question of the burden of proof, or the standard of proof
25 in that situation.

1 QUESTION: Well, do you take the position that
2 the standard of proof would be clear and convincing even
3 when there has been a decree and the issue is whether it's
4 been violated?

5 MR. MINEAR: We take the position that it should
6 be the same, because otherwise you're going to encounter
7 difficulties in litigating --

8 QUESTION: Well, why --

9 MR. MINEAR: -- these cases and determining
10 which standard would apply. Often --

11 QUESTION: No, but isn't -- is that going to be
12 a difficult question? I mean, I understand the argument.
13 I guess I agree with it with respect to the burden of
14 proof prior to the establishment of a -- of liability, but
15 after there has been a decree, the truth is the
16 sovereignty of the State or States, in fact, bound by the
17 decree has already been compromised.

18 I mean, they have already, subject to this
19 higher burden, been made subject to the jurisdiction of a
20 court and a degree entered, and once the sovereignty is no
21 longer pristine, if you will, why should the burden of
22 proof be different from what it would be for any normal
23 litigant who has lost and who is charged with having
24 violated a decree?

25 MR. MINEAR: Again, we're looking to what the

1 Court's precedents say, and the other factor that the
2 Court looked at was the disruptive effect of disrupting
3 settled water uses.

4 QUESTION: Yes, but the disruption theoretically
5 has occurred by the decree. The only question is the
6 enforcement of the decree, and it seems to me that that
7 does not implicate the same sort of disruption in settled
8 usage. The assumption is a different one, that the usage
9 ought to be according to the decree.

10 MR. MINEAR: Well, I respectfully disagree with
11 that, because the problem here is really one of the
12 question of the level of confidence you have with respect
13 to the factual findings that are made, and this case
14 nicely illustrates that.

15 The Kansas model here had numerous serious
16 problems. There's no doubt that everyone was concerned
17 through the course of travel about the accuracy of its
18 predictions, and nevertheless, the results of relying on
19 that model could be very serious for the State of
20 Colorado.

21 QUESTION: Oh, but that doesn't have to do with
22 the burden of proof. I mean, if a study is not reliable,
23 it's not reliable.

24 MR. MINEAR: Well, this does go to the standard
25 of proof, though, whether or not, to what degree of

1 confidence the Court has in its staff findings.

2 QUESTION: No, I -- you're that there is certain
3 evidence which does not carry with it a high probative
4 value, and it seems to me you can make out a perfectly
5 good case for that, whether you're talking about a
6 preponderance standard or a clear and convincing standard.
7 You're saying, this isn't good enough to get you across
8 the line for preponderance.

9 QUESTION: Just because you have an overall
10 preponderance standard, I don't think it means that you
11 let in a study if, you know, its 51 percent chance is that
12 it's accurate.

13 MR. MINEAR: Well, that --

14 QUESTION: I mean, the overall case is a
15 preponderance standard, but each individual item of
16 evidence, including whether you've showed, you know, a
17 particular study is valid or not, you don't let it in if
18 the chances are 51-49 that it's valid.

19 MR. MINEAR: Well, I think as the Court said in
20 Colorado v. New Mexico that the question of the standard
21 of proof does go to the level of confidence the Court
22 brings to bear --

23 QUESTION: To the whole case.

24 MR. MINEAR: -- with respect to the whole case.
25 To the whole --

1 QUESTION: To the whole case, and why should we
2 favor downs -- upstream States all the time? I mean,
3 that's what happens with adopting something other than a
4 preponderance standard.

5 MR. MINEAR: Why would this case settle --

6 QUESTION: So long as you're upstream, the
7 downstream State has to show, you know, beyond a
8 reasonable -- let's use beyond a reasonable doubt.

9 MR. MINEAR: In fact in the Colorado v. New
10 Mexico case, it was just the opposite. It was the
11 upstream State that was burdened by the clear and
12 convincing standard. It was Colorado with respect to the
13 Navajo River that was burdened in that case.

14 QUESTION: That's very rare.

15 MR. MINEAR: But in any event, I think that the
16 question here really is a question of consistency, whether
17 or not you think the clear and convincing standard, one
18 single standard should apply when there are actions
19 between the States, or whether you wish to switch back and
20 forth between the standards.

21 QUESTION: Let me ask you a different question,
22 if I may. If we assume for the sake of argument that once
23 there has been a decree the burden of proof for someone
24 claiming a violation is a preponderance, not clear and
25 convincing -- we're going to make that distinction. Clear

1 and convincing in order to get a decree. After a decree,
2 proof of violation may be made by a preponderance.
3 Assuming that, would it make good consistent sense to say,
4 preponderance should also be the standard when there is a
5 claim of violation of a compact?

6 MR. MINEAR: I would think that the
7 enforcement -- the principle that you apply to the
8 enforcement of a decree should apply to the enforcement of
9 the compact as well. Those two -- the compact operates
10 very similar to a decree in terms of --

11 QUESTION: Well, we really don't have to decide
12 this question of the burden of proof in this case, do we?

13 MR. MINEAR: That is absolutely right. The
14 special master noted that the -- under any standard of
15 proof his conclusions would have been the same.

16 QUESTION: You say ultimately this question of
17 burden of proof, clear and convincing, preponderance, is
18 academic, but that is not so, as I understand it, of your
19 position on laches. You are supporting Colorado on that.

20 MR. MINEAR: We are not actually supporting
21 Colorado directly on laches. We have simply made the
22 observation that this Court in the past has taken into
23 account equitable considerations such as laches, waiver,
24 and acquiescence, in resolving claims.

25 QUESTION: Would you say the same would apply

1 against the United States? Here you are saying yes, it
2 can apply against a State.

3 MR. MINEAR: We would say that the different
4 principles have been recognized with respect to litigation
5 involving the United States. Generally, laches has not
6 been recognized in suits between a private party against
7 the United States, because of the nature of a private
8 sovereign dispute. Here, where you have a dispute where
9 there are sovereigns on each side, the Court has shown a
10 willingness to consider laches and acquiescence and those
11 such factors at least as respect to the remedy that would
12 be provided.

13 QUESTION: And there is such a doctrine in
14 international law, isn't there, in public international
15 law?

16 MR. MINEAR: I believe that is correct. I
17 believe the special master cited to that.

18 QUESTION: But now you've made an important
19 qualification, at least as to remedy. It may not preclude
20 a claim, but it may affect the character of the remedy.

21 MR. MINEAR: Yes. Our belief is that it would
22 not foreclose a claim completely, but nevertheless, it
23 would affect the remedy that would be involved.

24 QUESTION: Thank you, Mr. Minear.

25 Mr. Draper, you have 5 minutes remaining.

1 REBUTTAL ARGUMENT OF JOHN B. DRAPER

2 ON BEHALF OF THE PLAINTIFF KANSAS

3 MR. DRAPER: Thank you, Mr. Chief Justice.

4 I'd like to respond to the United States
5 initially.

6 With respect to the winter water storage program
7 claim, I believe that there is some confusion here as to
8 the appropriate question that the Court needs to address,
9 and that is, while there may be dispute about the
10 quantification of the depletions of usable flow caused by
11 the Colorado winter water storage program, we would assert
12 for your review that there is no meaningful dispute with
13 regard to the existence of depletions.

14 We showed 40,000 acre feet of depletions of
15 usable flow. Colorado did not take it to the usable
16 ultimate answer, but when it analyzed the 27 years of our
17 general study period in which the program didn't operate,
18 it still found depletions.

19 In addition, their expert took our model and
20 made modifications, made it better for him. He still said
21 it wasn't what he would do, but he could not make those
22 depletions go away. It's a very robust result as to
23 whether there are depletions or not, and before you now is
24 not what is the exact quantification of those usable
25 depletions, but whether there has been a violation of

1 Article IV-D at all.

2 QUESTION: What's the utility of recognizing
3 a -- let's say a proof of vague violation when it's simply
4 going to lead to damages and the vagueness there is going
5 to preclude a reliable damage remedy?

6 MR. DRAPER: Because there are both
7 retrospective and prospective remedies potentially
8 available, and the prospective remedy is very important to
9 the State of Kansas.

10 With respect to the burden of proof, we believe
11 that by relatively clear implication the Court in Nebraska
12 v. Wyoming has indicated that the appropriate burden is
13 preponderance of the evidence. We believe that if you
14 tilt the playing field by adopting a clear and convincing
15 standard for enforcing compact rights, that you are
16 favoring the defendant State, which in most cases will be
17 the upstream State.

18 With respect to Mr. Robbins' comments on the
19 Trinidad operating principles, that they were not adopted
20 under VIII, Article VIII-B of the compact, we would assert
21 that they are just exactly the kind of procedures that are
22 laid out in Article VIII-B(2), and that it is very clear
23 that the compact administration was acting in compliance
24 with that provision.

25 He also asserted that there was no agreement

1 between the States. On the contrary, when this interstate
2 compact entity makes a decision, it is an agreement
3 between the States pursuant to the terms of the compact.

4 We believe also that the Court's ruling in Texas
5 v. New Mexico in 1983 is very instructive with respect to
6 the utility of observing and honoring and giving effect to
7 operating procedures such as those that were adopted for
8 the Trinidad project.

9 It would save this Court from micromanaging the
10 operation of Trinidad Reservoir as to when those gates
11 should be open and when they shouldn't, it would solve
12 other problems that are before the Court on these
13 exceptions such as burden of proof, the question of
14 laches.

15 It's immediately clear when someone fails to
16 follow a procedure. There is a baseline conduct that is
17 agreed to, and where it has been approved by it, even
18 proposed by the United States, the owner of the project,
19 we believe that it makes good sense to honor that set of
20 procedures.

21 I would simply point out with respect to the
22 laches argument that Mr. Robbins made that Colorado does
23 have the burden of proof on its affirmative defense and
24 that the key difference which the special master
25 recognized in his report is the type of knowledge that

1 they are accusing Kansas of having, and the knowledge has
2 to be of a compact violation or sufficient to lead to an
3 investigation of the existence of a compact violation, and
4 not simply the existence of wells upstream.

5 That is a much more complicated and less direct
6 piece of knowledge, and the assertion over the years in
7 the reports that Mr. Robbins has referred to was that the
8 primary if not only effect of pumping in Colorado was on
9 the downstream surface diverters who had less water to
10 divert in their canals.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Draper.

13 The case is submitted.

14 (Whereupon, at 11:06 a.m., the case in the
15 above-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 KANSAS, Plaintiff v. STATE OF COLORADO

CASE NO.:105 ORIGINAL

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

BY *Don Mani Federico*

(REPORTER)