

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: STATE OF NEBRASKA, Plaintiff v. STATES OF  
WYOMING AND COLORADO

CASE NO: 108 ORIGINAL

PLACE: Washington, D.C.

DATE: Tuesday, March 21, 1995

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   STATE OF NEBRASKA,                   :

4                   Plaintiff                   :

5                   v.                   :   No. 108 ORIGINAL

6   STATES OF WYOMING AND COLORADO :

7   - - - - -X

8                   Washington, D.C.

9                   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   11:08 a.m.

13   APPEARANCES:

14   DENNIS C. COOK, ESQ., Special Assistant Attorney General  
15                   of Wyoming, Laramie, Wyoming; on behalf of the  
16                   Defendant Wyoming.

17   TIMOTHY M. TYMKOVICH, ESQ., Solicitor General of Colorado,  
18                   Denver, Colorado; on behalf of the Defendant  
19                   Colorado.

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

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

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

2 (11:08 a.m.)

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

6 Mr. Cook.

7 ORAL ARGUMENT OF DENNIS C. COOK

8 ON BEHALF OF THE DEFENDANT WYOMING

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

11 This case is an original action brought by the  
12 State of Nebraska against the State of Wyoming in 1986  
13 involving the equitable apportionment of the North Platte  
14 River.

15 Questions involving the North Platte are not new  
16 to the Court. The North Platte was equitably apportioned  
17 by the Court in 1945, and unlike the case of Kansas v.  
18 Colorado that you've just heard, the Court is not called  
19 upon in this case to decide questions of fact. Instead,  
20 the Court has before it exceptions of the special master's  
21 report on Nebraska's third motion to amend its 1986  
22 petition, and Wyoming's first motion to amend its 1987  
23 counterclaims.

24 QUESTION: So there's been no trial before  
25 the -- the master hasn't found facts and reached any

1 conclusion. We're still waiting to go to trial.

2 MR. COOK: That's correct, Your Honor. Wyoming  
3 brings four exceptions. The first regards the recommended  
4 denial of Wyoming's first amended counterclaim and cross-  
5 claim, second the announced intent to have a trial on  
6 issues below Tri-State Diversion Dam, despite the  
7 exclusion of that in other parts of his ruling, third, the  
8 inclusion of Horse Creek in the claims Nebraska can  
9 litigate, and fourth, the inclusion of the groundwater  
10 issue in the litigation.

11 The decision on the issues raised by the  
12 parties' exceptions is crucial, now, to break this endless  
13 circle of debate about which claims are in this case, what  
14 the geographic limits of this case are, and that decision  
15 then will instruct the parties and will shape the course  
16 of trial in the future.

17 My argument will focus on first the unfairness  
18 of the special master's recommendation to deny Wyoming's  
19 first counterclaim and first cross-claim, and second, upon  
20 the impact of the special master's proposed trial plans,  
21 the impact those plans will have on the certainty and  
22 stability of the Court's 1945 apportionment that ended  
23 Nebraska's apportionment at Tri-State Diversion Dam.

24 With regard to the special master's  
25 recommendations on Wyoming's first counterclaim and first

1 cross-claim, Wyoming believes that it is unfair, on the  
2 one hand, to deny a trial or any affirmative relief at  
3 this stage on Wyoming's claims that Nebraska and the  
4 United States circumvent the apportionment, when on the  
5 other hand the Court and the special master would  
6 entertain a trial on very similar issues raised by  
7 Nebraska with regard to the development of tributaries in  
8 Wyoming.

9 To get to the point where the special master did  
10 to deny Wyoming's first counterclaims, he saw too much in  
11 a decision in 1993 of this Court that said there are no  
12 current limits on the State of Nebraska's diversions in  
13 this pivotal reach of the river between Whalen Diversion  
14 Dam and Tri-State Diversion Dam. He found that that  
15 answered the question completely with respect to Wyoming's  
16 counterclaims, but it did not.

17 Wyoming's counterclaim is that Nebraska  
18 circumvents. Now it is that the United States  
19 participates in the circumvention, but nonetheless,  
20 Wyoming argues that they violate the apportionment.

21 Nebraska in 19 -- throughout this case and part  
22 of the 1993 decision, ruled that -- or argued that Wyoming  
23 violated the apportionment by constructing projects on  
24 tributaries in Wyoming. The Court ruled indeed there are  
25 no restrictions on those tributaries, but yes, Nebraska,

1 you can come forward and seek to modify the decree and to  
2 add those restrictions.

3 The Court has now similarly found that there are  
4 no limits on Nebraska's diversions, but it's Wyoming's  
5 position that the Court has not rejected the possibility  
6 that Wyoming could seek to have those restrictions added,  
7 that definition of --

8 QUESTION: Well, you know, I'm a little confused  
9 because I thought that in Wyoming's requested amended  
10 counterclaim and first cross-claim that Wyoming was  
11 seeking to alter the 75 percent-25 percent apportionment  
12 approach.

13 MR. COOK: That's not correct, Your Honor.

14 QUESTION: That is not correct?

15 MR. COOK: That is not Wyoming's purpose.  
16 Wyoming's purpose is to stop the circumvention of the  
17 decree.

18 QUESTION: Did the master seem to think that  
19 that is what the first amended counterclaim and cross-  
20 claim was seeking to do?

21 MR. COOK: I believe that's correct. I believe  
22 he focused on the type of amendment that the Court might  
23 enter, how it would amend the 1945 decree, rather than the  
24 question of whether it should be amended, and where  
25 Wyoming is at at this point is the request to go to trial

1 to seek the need to amend the decree.

2 QUESTION: Well, Wyoming does want to seek an  
3 amendment, and wants to change the 75-25 percent  
4 apportionment?

5 MR. COOK: No.

6 QUESTION: No? Well then --

7 QUESTION: Well, what would the amendment be? I  
8 mean -- I'm sorry.

9 QUESTION: That's my question. If you answer  
10 no, what kind of an amendment do you want?

11 MR. COOK: Your Honor, we would add to the 75-  
12 25 apportionment further definition of Nebraska's water  
13 right, and what -- and the reason I say that, the basis  
14 for the Court granting jurisdiction over the circumvention  
15 claim as you've announced --

16 QUESTION: Well, by virtue of imposing some  
17 quantitative limitation? Is that what you're seeking, a  
18 quantitative limitation?

19 MR. COOK: That's very likely, Your Honor.

20 QUESTION: Well, then that is different than the  
21 approach taken under the decree of the percentage  
22 appointment, so the master may be right.

23 MR. COOK: It is an addition to that approach,  
24 but let me explain why it's appropriate for the Court to  
25 consider that, and it's appropriate because in 1945 the



1 United States brought the proposition to the Court that  
2 without a further definition in terms of quantity  
3 instantaneous diversion rates imposed on Nebraska's  
4 apportionment, that they would indeed circumvent the  
5 decree, or the apportionment.

6 The Court said, we won't speculate that Nebraska  
7 will do that, and we see no need to go beyond the 75-25  
8 split of the natural flow at this point in time, but if  
9 that case develops, you may come back to the Court and ask  
10 for those additional -- that additional definition on  
11 Nebraska's apportionment.

12 And that's the basic foundation, the unanswered  
13 question, or the reserved question the Court had agreed  
14 early on in 1987 to accept and allow Wyoming to pursue in  
15 its counterclaim, and our first counterclaim, amended  
16 counterclaim, is virtually the same counterclaim we  
17 brought to you in 1987, Your Honor.

18 QUESTION: Do I understand you correctly that  
19 one possible amendment that might satisfy you would be an  
20 amendment so the decree would read something like this:

21 Nebraska is entitled to X percent up to so many  
22 acre feet, so that there would be an acre feet limitation  
23 which in fact would be, I suppose, a limitation on the  
24 percentage. That would then give Wyoming the advantage  
25 that if there were excess usable water, that Wyoming in



1 effect would be able to either keep it or more easily  
2 claim it, so long as Nebraska got its so many acre feet.

3 Is that what it would boil down to?

4 MR. COOK: I think that's a clear  
5 characterization of where this case could end up, Your  
6 Honor.

7 QUESTION: But that, as Justice O'Connor says,  
8 whether it should be entertained or not, that would be a  
9 reconceptualization of the decree.

10 MR. COOK: That's correct, Your Honor, and let  
11 me suggest to the Court that as we've said in our briefs  
12 and throughout this amended pleadings phase that there's  
13 something different between the decree and the  
14 apportionment.

15 The apportionment is to protect lands and the  
16 irrigation of lands that received water from that critical  
17 reach of the river. The apportionment ends at Tri-State  
18 Diversion Dam.

19 The decree is merely a tool to implement that  
20 apportionment, and Nebraska -- and the Court has accepted  
21 and we recognize that we will go to trial for Nebraska to  
22 try to amend, to add injunctions against Wyoming to change  
23 that decree to give full effect to its apportionment, to  
24 bring a quantity -- to ensure that a quantity of water  
25 becomes available in that critical reach.

1 QUESTION: Other than this dispute that we've  
2 discussed over quantity and percentages, does the first  
3 exception also involve a dispute as to the waters that are  
4 subject to the reapportionment, or is that not part of the  
5 disagreement here?

6 MR. COOK: I don't believe that's part of the  
7 disagreement on the first counterclaim.

8 QUESTION: In other words, what we're concerned  
9 with is the pivotal reach area, and there's no question  
10 but that the canals are part of that?

11 MR. COOK: That's correct. The point that we  
12 make is that the Court has passed on this question. There  
13 has been no change since 1987, when you agreed to accept  
14 this claim, and there's no reason to reverse the Court's  
15 decision. Quite frankly, in 199 --

16 QUESTION: I'm still slightly mixed up. As I  
17 read the amendment, your first counterclaim seems to mix  
18 up two things. What you seem to ask for is, we'd like a  
19 certain quantitative limitation, i.e., Nebraska gets no  
20 more than what they need for beneficial use --

21 MR. COOK: Correct.

22 QUESTION: -- not a percentage limitation. But  
23 then it says, the reason that we want that is because to  
24 do the contrary would be in excess of the volumetric  
25 limitations or diversion limitations that are fixed in

1 paragraph IV of the decree, so that sounds as if what  
2 you're saying, the decree requires that.

3 And that I think is what might have explained  
4 the master saying, look, you brought this action to  
5 enforce the decree, not to modify the decree. If you want  
6 to go bring a different action and say some other rule  
7 requires us, not the decree, but we want a new decree or  
8 something, and we want to now decide they're only going to  
9 get so many acre feet, or whatever it is, then go do that,  
10 but this is quite mixed up and contrary to the way you  
11 started out, and contrary to what the Court said, where it  
12 said the decree, this Court said is a percentage  
13 allocation, not an absolute allocation.

14 Am I right in thinking that's how the master's  
15 thinking?

16 MR. COOK: He very well could be thinking that.

17 QUESTION: Well then, what's wrong with that  
18 thinking?

19 MR. COOK: The what's wrong is that Wyoming has  
20 always sought injunctions to prevent the future  
21 circumvention, the continued circumvention of the decree.  
22 Wyoming always posed the thought that there would be  
23 something new added to the decree to accomplish its  
24 purpose, so we've not -- we use the word "modify" now  
25 because the word "modify" was clearly expressed in the

1 Court's 1993 decision.

2 Pardon me?

3 QUESTION: Maybe this would get at the -- why  
4 didn't you make your first amended complaint the  
5 following: conceding for the sake of argument that the  
6 decree has nothing to do with any absolute limitation in  
7 volume, we now make a new complaint, and this is our  
8 complaint. Our complaint is, we want you to limit the  
9 amount of money they can take -- the amount of water they  
10 can take to an absolute limit of X million, or beneficial  
11 use. Why didn't you write it that way?

12 MR. COOK: I don't know. We clearly had that in  
13 mind, Your Honor, but we don't want to presume what the  
14 remedy would be, necessarily, at the beginning.

15 Let me suggest, thought, that one of the real -  
16 - another problem is that the Court has, or the special  
17 master recommends a decision on the merits of this claim  
18 after there's been clearly an understanding that even  
19 peripheral issues surrounding Wyoming's counterclaims  
20 require factual development to get at, and neither of the  
21 parties sought summary judgment in the prior proceedings,  
22 because there are questions of material fact in dispute  
23 about Wyoming's counterclaims, therefore, we're caught up  
24 in a situation where we will now be -- lose forever the  
25 opportunity to bring a circumvention claim if you adopt

1 the special master's recommendation.

2 QUESTION: Mr. Cook, do I understand correctly  
3 that the circumvention claim is not entirely out of the  
4 case as the special master sees it? Didn't he say,  
5 although he was disallowing the counterclaim, that you  
6 could make defensive use of that matter?

7 MR. COOK: Right. He suggests that we can bring  
8 it -- we can defend against Nebraska's claims with  
9 essentially the same proof, and our point is that if the  
10 case is going to have that evidence, or that type of  
11 evidence in front of it, and the Court will have that kind  
12 of evidence in front of it anyway, what is to be gained by  
13 limiting the remedies that would be available to Wyoming  
14 using that same proof, or that same type proof.

15 Further, I've never been fond of structuring my  
16 case in a responsive manner when it would rely on certain  
17 claims being brought by Nebraska to defend against. That  
18 would prevent me from maybe getting the full picture on  
19 defense from the Court.

20 QUESTION: I'm interested in Wyoming's fourth  
21 cross-claim which the master had recommended allowing to  
22 be made, but the United States and Nebraska oppose that,  
23 and would you mind addressing that a little bit?

24 The fourth cross-claim includes an allegation  
25 that the United States has not operated its upstream



1 reservoirs in accordance with various private contracts  
2 that exist for their operation.

3 MR. COOK: Wyoming's --

4 QUESTION: And why should that claim be included  
5 in this dispute?

6 MR. COOK: Because the United States has brought  
7 the operation of its Federal storage facilities and its  
8 ability to deliver water under its contracts into this  
9 case when it argued that Deer Creek should not be built  
10 because it would in fact impact that operation.

11 QUESTION: Well, is Wyoming a party to any of  
12 those contracts?

13 MR. COOK: No, Wyoming isn't a party, and that's  
14 why this case, there is a private suit going on, but  
15 that's why this case and this Court is a more appropriate  
16 forum, because the State parties and equitable  
17 apportionment underlies or is involved in this whole  
18 matter of interpretation of Federal contracts and Federal  
19 law.

20 QUESTION: But at this point, the master thought  
21 there was no evidence of -- that Wyoming was getting less  
22 of the natural flows than it otherwise would, so the  
23 master didn't see -- doesn't demonstrate, at least, any  
24 need for the fourth cross-claim.

25 MR. COOK: The master, we agree with his



1 proposition on the fourth cross-claim.

2 QUESTION: Well, I know he thought it should be  
3 allowed, but he also noted that at this juncture there's  
4 no evidence.

5 MR. COOK: Well, there's no evidence at all in  
6 this case, Your Honor.

7 QUESTION: I presume Wyoming would plan to  
8 introduce some evidence if it's allowed to proceed on that  
9 counterclaim.

10 MR. COOK: In fact we have -- in the process of  
11 summary judgment proceedings have affidavits that indicate  
12 the type of injury Wyoming will produce.

13 QUESTION: Could you just give me a quick  
14 summary of that? Who gets hurt in Wyoming by what the  
15 National Government is doing?

16 MR. COOK: Two types of users, those that are  
17 regulated in priority because the Federal reservoirs are  
18 unnecessarily depleted more than they should be, priority  
19 regulation, and prohibits --

20 QUESTION: They're at the end of the line --

21 MR. COOK: That's correct.

22 QUESTION: -- and if the water's gone they get  
23 left.

24 MR. COOK: And second, the Wyoming users in the  
25 pivotal reach are subject to more frequent shortages of

1 water.

2 I think I can sum up our proposition on that as  
3 that the United States cannot make the distribution of  
4 Federal storage a central issue in this case and then  
5 suggest those issues are more perfectly decided somewhere  
6 else.

7 I'd like to reserve my remaining time.

8 QUESTION: Very well, Mr. Cook.

9 Mr. Tymkovich, we'll hear from you.

10 ORAL ARGUMENT OF TIMOTHY M. TYMKOVICH

11 ON BEHALF OF THE DEFENDANT COLORADO

12 MR. TYMKOVICH: Mr. Chief Justice, and may it  
13 please the Court:

14 Colorado today joins in Exception 2, filed by  
15 Wyoming, which seeks to limit the scope of these  
16 proceedings to ripe claims that address the issues of new  
17 development and supply that the Court considered in its  
18 1993 opinion. Exception 2 seeks to exclude from the  
19 consideration in this case issues relating to  
20 nonirrigation season flows and wildlife issues that are  
21 not a part of the case.

22 Colorado really has two points to make. One is  
23 that the Court has already ruled previously that such  
24 matters should not be included in this case, and secondly,  
25 even if the Court were to think that they may play some

1 role in the case, they're not ripe for adjudication in  
2 this proceeding.

3 QUESTION: You're joining in which exceptions  
4 here, Mr. --

5 MR. TYMKOVICH: Exception 2, Your Honor.

6 QUESTION: Of which --

7 MR. TYMKOVICH: Of Wyoming.

8 QUESTION: Exception 2 of Wyoming. Thank you.

9 MR. TYMKOVICH: Twice before, this Court has  
10 been asked by Nebraska to expand the scope of proceedings  
11 to include nonirrigation season flows. First, in 1988  
12 Nebraska asked for a general global apportionment of the  
13 water resource to include downstream flows far beyond the  
14 scope of the 1945 decree. In 1988, the Court denied that  
15 request.

16 Again, in 1992, Nebraska once again sought to  
17 expand the scope of the proceeding to include those  
18 claims. In the 1993 ruling, the Court again agreed that  
19 those issues should not be a part of the case.

20 The special master, the United States, Colorado  
21 and Wyoming, all who have looked at those issues, have  
22 concluded that those issues are not ripe for adjudication  
23 in these proceedings, and we would like the Court today in  
24 this ruling to affirm that those issues should not be  
25 heard as we go to trial in the case.

1           The reasons for that are simply, first of all  
2   the special master has clearly articulated twice in both  
3   the second and third interim reports that those issues are  
4   not ripe. The United States agreed with that in their  
5   presentation last summer in considering -- in  
6   consideration of the amended proceedings. There have been  
7   no changed circumstances from the Court's earlier rulings  
8   till today that would merit the expansion of these  
9   proceedings.

10           Furthermore, many of these issues are being  
11   resolved or addressed in other forums, and would not be  
12   appropriate for consideration in this original proceeding.

13           QUESTION: Is it your concern that the evidence  
14   on wildlife as it affects the irrigation season flows just  
15   expands the litigation in the same way that the special  
16   master disclaims when he refuses to allow the evidence for  
17   all other purposes?

18           MR. TYMKOVICH: That's correct. We think the  
19   special master closed the front door on the claim,  
20   apparently, by denying the Count IV expansion. Through  
21   the back door he's let in all the evidence and all the  
22   consideration of that claim in the proceedings anyway, so  
23   what he's taken away on the one hand he's given back to  
24   the parties on the other.

25           QUESTION: But underlying your objection seems

1 to be the assumption that the seasonal flows that you're  
2 concerned with are requisite for irrigation uses only.  
3 That's not what the compact says, is it?

4 MR. TYMKOVICH: Those uses were not evaluated  
5 under the 1945 decree, and what the Court's 1993 opinion,  
6 what the proceedings to date indicate is, how do you  
7 analyze the supply issues, the new development upstream in  
8 Wyoming and what their impact is on the pivotal reach of  
9 the North Platte River? Those are the issues in the case,  
10 and the Court has never opened the door for consideration  
11 of downstream new uses, new demands, as it affects this  
12 case, so that would be a remarkable expansion of the  
13 proceedings. to permit that aspect of the case.

14 QUESTION: Why do you say it would let in all  
15 the evidence? I suppose it would let in evidence of  
16 effect on wildlife, and so on. Does it let in every bit  
17 of evidence on irrigation claims which do not yet -- or  
18 which do not exist with respect to the off season?

19 MR. TYMKOVICH: There's been a suggestion by the  
20 United States in their briefs that a limited inquiry would  
21 be not improper in this case, and the special master in  
22 his report says limited inquiry would be appropriate. We  
23 think, however, that an evaluation of the effect on  
24 wildlife usage and nonirrigation season flows would open  
25 this proceeding to a very expanded and complex evaluation



1 of the --

2 QUESTION: Well, it might do that, but you said  
3 it would let in all the evidence that was -- that would  
4 have been kept out under the earlier part of the decree  
5 saying we don't get into the nonirrigation season. Why  
6 does it let in all of the evidence?

7 MR. TYMKOVICH: Because if the Court goes --  
8 permits the case to proceed with an evaluation of effects  
9 several hundred miles to the East of the pivotal reach,  
10 then you're also going to have to evaluate the effect of  
11 Nebraska's conservation and waste practices and many other  
12 issues that were specifically excluded previously in the  
13 case, so in that way you get to many issues that were --  
14 where the Court --

15 QUESTION: Well, many, but not all, I suppose.

16 MR. TYMKOVICH: I think it really is the  
17 question of ripeness and the scope of the proceedings,  
18 because it would be a very expanded proceeding. I think  
19 everybody would concede that this case would be far  
20 different than it is if the Court were to grant that  
21 exception and limit the scope of the proceedings.

22 QUESTION: How could we say in advance that the  
23 master's wrong in saying that the wildlife might relevant,  
24 it might turn out to be relevant?

25 I mean, apparently the size of the stream has



1 gone down from about 70 percent or something to under 10,  
2 20 percent of what it was, that there are wildlife  
3 endangered if you don't -- you have to have some water in  
4 there, and whatever water they'd have in the winter may  
5 mean there's less in the summer.

6 I mean, it's not difficult to think of  
7 relationships. How can we say that he's wrong in saying  
8 if it turns out to be relevant, I'll let it in?

9 MR. TYMKOVICH: I think there is a matter of  
10 relationships, but that's not this case, and the special  
11 master himself, in the third interim report and in the  
12 oral argument last summer, indicated that those claims  
13 were not ripe for these proceedings. That's not to say  
14 that they won't be in the future.

15 QUESTION: I might not understand it. I thought  
16 he was saying, we're not going to have a special complaint  
17 based on wildlife, but if it turns out that this evidence  
18 of wildlife harm is relevant to what we're doing, I'm  
19 going to let it in.

20 MR. TYMKOVICH: I don't think there's a  
21 functional distinction between permitting the trial of  
22 those issues in this proceeding as opposed to granting or  
23 denying Count IV of the claim, which specifically  
24 addresses it. There will be no difference in the trial in  
25 that event, Your Honor.

1 QUESTION: Well, I take it he wants to be  
2 confident that his judgment is neither too narrow nor too  
3 broad, so he wants to have this evidence to inform him as  
4 to the effect of the ruling that he's asked to enter.

5 MR. TYMKOVICH: Again, that goes to the scope of  
6 the proceedings and whether these claims are now ripe for  
7 consideration, even regardless of their relevancy to the  
8 proceeding, because the special master has acknowledged  
9 that those issues cannot bear on the injury in this case.

10 QUESTION: Yes, but what I was thinking, it's  
11 just like a trial judge normally. Very often somebody  
12 says, let's -- he's says, I don't know. I'll wait and  
13 see. If it turns out to be relevant, I'll let it in.  
14 Otherwise, I won't.

15 And it seemed to me roughly that's what the  
16 master was doing here. If this looks as if it might be  
17 relevant, then I'll let it in later, sure, fine. If it  
18 turns out not to be, object at that time.

19 MR. TYMKOVICH: I think Your Honor is suggesting  
20 that it's the equivalent of a motion in limine, and it  
21 really goes far beyond that, because really it makes the  
22 difference of whether or no Colorado is in this case at  
23 trial and whether the special master is then going to look  
24 at the entire basin-wide effects of wildlife and  
25 endangered species issues.

1           For example, downstream in the Big Bend reach  
2 here, it is also part of the South Platte Basin, so there  
3 are far -- there are issues that range far beyond the mere  
4 enforcement, interpretation, and modification of the North  
5 Platte decree.

6           I am not saying that those issues are not  
7 relevant to a proceeding. They are not ripe for this  
8 proceeding, and it would be improper for the Court, based  
9 on its prior rulings and the existing scope of the  
10 proceedings, to open the door for that type of claim.

11           It would really be an about-face on the Court's  
12 previous limitations on geography and time. It would  
13 expand the geographical scope of the case and expand the  
14 temporal scope of the case in a way the Court has never  
15 done before.

16           Colorado's second argument is that as a  
17 prudential matter these issues are not justiciable or not  
18 ripe at this time. Even Nebraska concedes that, because  
19 they've not filed an exception to the special master's  
20 failure to grant their Count IV, and I think the reason  
21 that Nebraska has done that is that they feel they can try  
22 these issues in the back-door manner in which the special  
23 master has permitted the evidence.

24           More importantly, these issues should and must  
25 be resolved critically in another agency and another

1 forum. The endangered species and wildlife issues are  
2 currently a part of at least three proceedings, one  
3 involving Endangered Species Act interpretations on the  
4 Deer Creek and the Grayrocks Reservoirs, the issues are  
5 also in the FERC proceedings involving Lake McConaughy,  
6 and the three States have involved in a mutual cooperative  
7 approach through their Governor's office to try to  
8 accommodate and resolve the wildlife issues.

9 So importantly, I think this case ought to defer  
10 to those agencies and defer to that process to let it take  
11 its course, rather than fix in stone or enshrine in a  
12 decree of this Court the wildlife and endangered species  
13 needs involving the North Platte.

14 QUESTION: Well, speaking of deference,  
15 Mr. Tymkovich, isn't a kind of special deference owed to  
16 the master in structuring the trial? I mean, he's not  
17 opining on any issue of law. He's not really making any  
18 factual determination. He's really just trying to decide  
19 how best to let in the evidence and what should connect  
20 with what.

21 MR. TYMKOVICH: It is, however, up to this Court  
22 to define clearly the scope of the proceedings, and the  
23 case with this type of evidence, with this claim, will be  
24 far broader and more complex than the case without it,  
25 which I think is what the Court was doing when it ruled in

1 1993 in denying those previous claims and excluding the  
2 scope of the proceedings to those issues.

3 Thank you.

4 QUESTION: Thank you.

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

6 ORAL ARGUMENT OF RICHARD A. SIMMS

7 ON BEHALF OF THE PLAINTIFF NEBRASKA

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

10 Mr. Justice Breyer, I want to go back to a  
11 question you asked of Mr. Cook. You asked, I believe,  
12 something like, why didn't you just come to the Court on  
13 the theory that conditions had changed rather radically  
14 since 1945 and ask the Court to do what we think you're  
15 doing now, and that is, changing the apportionment  
16 formula?

17 The answer to that question, and it's an answer  
18 that I think Wyoming is fully aware of, the answer to that  
19 question is, had they done that, the Court would have had  
20 to start essentially with a tabula rasa. That would mean  
21 that you would start all over with today's equities in all  
22 of their forums, and redo the entire case. That's the  
23 reason they did not want to do it.

24 There are two points that I would like to make.  
25 First, I would like to explain why the so-called



1 geographical scope of this case is a conceptually  
2 ineffective way of addressing the proposed amendments, and  
3 second I would like to explain that Wyoming is attempting  
4 to convert the percentage apportionment into a mass  
5 allocation based on beneficial use limitations, an  
6 argument made by Wyoming and rejected in 1945.

7 In that regard, I would also like to explain why  
8 the Court should not upend long-settled expectations that  
9 have become an intrinsic part of the apportionment since  
10 1945.

11 The first point I want to make goes to Wyoming's  
12 second exception. That is, to Master Olpin's  
13 understanding that he must evaluate all of the interests  
14 in Nebraska against which the threat of injury would be  
15 posed by new development in Wyoming.

16 Wyoming and Colorado's argument in this regard  
17 is that you should not look at any uses below Tri-State  
18 Dam or outside the irrigation season. Accordingly,  
19 Wyoming and Colorado are asking you not to take cognizance  
20 of admittedly existing interests outside the irrigation  
21 season or below Tri-State Dam that would or could be  
22 affected by the intended development.

23 The Court addressed this issue in 1993, and I  
24 believe rejected Wyoming's and Colorado's argument. The  
25 Court held that Nebraska had no preexisting rights on Deer



1 Creek or on the Laramie River to interpret or enforce. At  
2 the same time, however, the Court provided Nebraska with  
3 the opportunity to establish new development on Deer Creek  
4 and on the Laramie River so that those equities can be  
5 balanced against the threat of injury from new development  
6 in Wyoming.

7 Special Master Olpin has stated that he must  
8 balance all of the relevant equities. Wyoming is simply  
9 seeking to limit Nebraska's equities. In order to reach  
10 an equitable balance, we believe that the Court must  
11 juxtapose all of the equitable interests today in order to  
12 adjust the decree to meet present day conditions --

13 QUESTION: Well, how do you see this line that  
14 the master proposes? He wouldn't allow Nebraska to just  
15 claim outright some right to protect the wildlife uses,  
16 and yet he indicates that some of that evidence can come  
17 in under the proposed amendments, and just how do you see  
18 that working?

19 MR. SIMMS: I think you'd have to look at it not  
20 as a change in the scope of the case, as Wyoming would  
21 like you to see it, but as having everything to do with  
22 the scope of the potential injury.

23 What Mr. Olpin has done is to look at discrete  
24 proposed individual developments in Wyoming, think that  
25 certain injury is going to flow from any given

1 development -- for example, if a reservoir, a new  
2 reservoir would store and deplete nonirrigation season  
3 waters, which is what reservoirs, after all, are designed  
4 to do. You cannot assess the injury without looking at  
5 the nonirrigation season impacts of that reservoir, and  
6 they could be hydropower, they could be wildlife, they  
7 could be downstream irrigation.

8 All he is doing is letting -- conceptually  
9 letting his mind flow from the potential consequences of  
10 the injury that would arise from new development in  
11 Wyoming. He isn't looking at the so-called geographic  
12 scope of the case in 1945.

13 Does that answer your question, Justice  
14 O'Connor?

15 QUESTION: Well, it's quite vague, and I still  
16 don't understand what would come in, as opposed to what  
17 would be admitted if your State were allowed to amend the  
18 complaint, as it proposed.

19 MR. SIMMS: I don't think Master Olpin knows  
20 just what would come in, but what he doesn't want to do is  
21 put any preordained, arbitrary limits on the scope of the  
22 potential injury. He wants to be able to assess what  
23 actually happened as a result of new development in  
24 Wyoming.

25 QUESTION: How is that any different from

1 expanding the geographic scope of the case? Is it --

2 MR. SIMMS: In one sense --

3 QUESTION: -- anything other than that?

4 MR. SIMMS: In one sense it might expand the  
5 geographic scope of the case, but it would do so only as  
6 a response to the injury being proposed by Wyoming. It  
7 wouldn't do it on the basis of anything that Nebraska  
8 sought to do. It would only be a reaction to what we  
9 necessarily had to meet as a result of proposed new  
10 development in Wyoming.

11 QUESTION: Well, I don't see --

12 MR. SIMMS: I think he -- I think the  
13 distinction he draws is between the scope of the injury on  
14 the one hand, which could be like this, and the scope of  
15 the case on the other, and all he's saying is that the two  
16 need to be equated in terms of their latitude when you  
17 make an initial analysis of the downstream equities and  
18 weigh those in the balance with the proposed --

19 QUESTION: But normally when you define the  
20 scope of a case you try to define it in such a way that  
21 all of the injuries that seem to you significant for that  
22 case will be within the geographic reach that you've  
23 decided to examine.

24 MR. SIMMS: But the fact of the matter --

25 QUESTION: And to say, well, we've decided to

1 examine only this geographic reach, but of course, if  
2 there are injuries beyond that we must take them into  
3 account, at least defensively, is simply to say, we didn't  
4 draw our geographic scope broadly enough to begin with,  
5 and therefore we have to expand it.

6 MR. SIMMS: Well, I think the geographic scope,  
7 Justice Scalia, is really arbitrary in advance of the  
8 evidence. There is no geographic scope. You don't know  
9 what's going to happen as a result of proposed new  
10 development in Wyoming which will have depletive adverse  
11 effects downstream.

12 QUESTION: But I thought we --

13 MR. SIMMS: Those effects could go to Whalen,  
14 they could go to Tri-State, they could go to Bridgeport,  
15 they could go further downstream. The master doesn't know  
16 how far they're going to go, but he wants to be able to  
17 look at all of those effects without just cutting things  
18 off at Tri-State because that's how conditions obtained in  
19 1945.

20 QUESTION: And how does that differ from the  
21 Count IV, Exception IV that was denied? Why doesn't the  
22 same argument apply to that? You have to look at the  
23 whole picture.

24 MR. SIMMS: Well, I think the same argument  
25 should have applied to the fourth cross-claim.

1 QUESTION: I thought there was quite a  
2 difference, but don't say I'm right if I'm not right. I  
3 thought that the fourth count asked directly to apportion  
4 nonirrigation season flows, that that was the subject. Is  
5 that right?

6 MR. SIMMS: I think we're confusing two things.

7 QUESTION: I'm confusing --

8 MR. SIMMS: I think Justice Scalia's talking  
9 about the fourth cross-claim. You're talking about the  
10 fourth -- our fourth count. Am I --

11 QUESTION: I'm talking about the cross-claim.

12 QUESTION: Sorry.

13 MR. SIMMS: Okay. The fourth cross-claim goes  
14 to the storage side of the issue. Back in 1945 when the  
15 matter was addressed, everybody was fully aware when  
16 Wyoming argued that you should place beneficial use  
17 limitations on Wyoming, that you had to apportion storage  
18 water and natural flow at the same time.

19 In this regard, Wyoming made a statement in its  
20 response brief at page 19 -- let me quote it real quickly.  
21 "No one asserted in 1945, as Wyoming does now, a need for  
22 the Court affirmatively to require the Bureau's compliance  
23 with Federal law. Such compliance was assumed. Thus, the  
24 issue that Wyoming's fourth cross-claim would bring was  
25 not before the Court in 1945."



1 Well, in 1945, that statement was most certainly  
2 not true. What Wyoming did in 1945 was to assert that  
3 storage water in section 8 of the Reclamation Act as well  
4 as the related Federal and State law had to be brought  
5 before the Court's attention and had to actually be placed  
6 in the decree, in special provisions in the decree to make  
7 the decree enforceable as against the storage water  
8 contracts and the storage water deliveries.

9 Wyoming's view at the time was, if those  
10 provisions were not placed in the decree, that the only  
11 redress would be found in Federal district court. That  
12 is, the contracts would be enforced as it was assumed that  
13 they would be enforced, but that could be done only among  
14 the proper parties and in the proper forum.

15 We do believe that there is an inconsistency  
16 between the master's recommendation with respect to the  
17 first counterclaim on the one hand and the fourth cross-  
18 claim on the other, but I think an analysis of what he did  
19 and a close evaluation of the briefs would lend itself  
20 more to our view than his on that matter.

21 The second point I would like to make is that  
22 the Court rejected the theory of beneficial use  
23 limitations in 1945 for three sound reasons. First of  
24 all, the Court found that this river fluctuates at polar  
25 extremes. In the pivotal reach, the Court found that you

1 had to have some sort of --

2 QUESTION: Is this addressed to a particular  
3 exception?

4 MR. SIMMS: This is addressed to Wyoming's first  
5 exception, Mr. Chief Justice.

6 QUESTION: Wyoming --

7 MR. SIMMS: Yes.

8 QUESTION: Thank you.

9 MR. SIMMS: The Court found that you had to have  
10 some formula that was responsive to changes in supply.  
11 The second reason the Court did not adopt the beneficial  
12 use limitations is that the Court knew that storage was  
13 essential to doing any kind of mass allocation based on  
14 beneficial use.

15 Third, the Court did not adopt the beneficial  
16 use theory because that would have required placing  
17 limitations on individual irrigation districts and private  
18 canals that were not in the case, and the Court simply  
19 doesn't do that kind of stuff in parens patriae actions.

20 Those three conditions have not changed. The  
21 river still fluctuates wildly, you would still have to  
22 apportion both storage water and natural flow, and you  
23 don't define private rights in parens patriae cases.

24 Given that problem, what distinguishes the so-  
25 called inconsistency argument that Wyoming has made, what

1 distinguishes what we're proposing and what Wyoming is  
2 proposing, is that Wyoming has something in the nature of  
3 a res judicata problem, or at least a repose and finality  
4 problem.

5 Finally, this Court has always been reluctant to  
6 reopen an apportionment, and you've been reluctant to do  
7 that for good reason. Once an apportionment is adopted,  
8 and this one is some 50 years old, all kinds of  
9 socioeconomic institutional reliance develops in layers on  
10 that apportionment.

11 In this case, Wyoming wants to completely upend  
12 that apportionment and replace it, and we do not think  
13 that that would be a wise idea. We do not want you to  
14 upset long settled expectations on the North Platte.

15 Finally, I would point out that in all of these  
16 pleading amendments Nebraska wants no new water. Wyoming  
17 does. Nebraska wants to maintain the status quo, Wyoming  
18 wants to upset the status quo. Nebraska wants to -- I see  
19 my time is up.

20 Thank you very much.

21 QUESTION: Thank you, Mr. Simms.

22 Mr. Minear.

23 ORAL ARGUMENT OF JEFFREY P. MINEAR

24 ON BEHALF OF THE UNITED STATES

25 MR. MINEAR: Thank you, Mr. Chief Justice, and

1 may it please the Court:

2 The United States excepts to the special  
3 master's allowance of Wyoming's fourth cross-claim, which  
4 alleges that the United States has failed to operate  
5 Federal reservoirs in accordance with the reclamation laws  
6 and storage water contracts. We believe that it would be  
7 inappropriate to address that claim in this original  
8 action for three related reasons going to the law, the  
9 parties, and the availability of another forum.

10 First, this Court's 1945 decree does not govern  
11 Wyoming's claim. Paragraph VI and XII(b) of the North  
12 Platte Decree explicitly state that the decree shall not  
13 affect storage water or in any way interfere with the  
14 Federal Government's operation of water storage  
15 facilities.

16 The Court included those paragraphs in  
17 recognition that the Federal reclamation projects predated  
18 the 1945 apportionment, that private parties had  
19 contracted for storage water from those projects, and  
20 their rights in the operation of the projects were fixed  
21 by the contracts.

22 Simply put, the decree at issue in this  
23 proceeding does not address the distribution of storage  
24 water because the contracts between the Bureau and the  
25 individual water users govern who receives that water.

1           This Court was mindful of the Bureau's need to  
2 store water in priority with other users to satisfy its  
3 storage water contracts in 1945, but the Court made  
4 absolutely clear that the decree would not affect the  
5 delivery of storage water. Instead, any disputes would  
6 continue to be governed by the legal mechanisms that were  
7 already in place and available to the contracting parties.

8           QUESTION: Mr. Minear, why can't the special  
9 master just take that into account when you make your  
10 case?

11           MR. MINEAR: Well, the problem here is that  
12 Wyoming is seeking affirmative relief affecting the  
13 allocation of storage water, and that is exactly what the  
14 North Platte Decree currently states. The decree does not  
15 govern. Instead, Wyoming has to rely on the individual  
16 contracts between the Bureau and the water users, and  
17 those are matters that we believe are better left to a  
18 different forum.

19           QUESTION: Does Wyoming agree with this  
20 characterization of the case? Does it join issue with you  
21 on this argument, or would it quarrel with your  
22 formulation?

23           MR. MINEAR: Well, Wyoming, it's a bit like  
24 hitting a moving target here, because Wyoming has moved  
25 back and forth in terms of exactly what its pleading



1 amounts to, but I think the best source of this is  
2 Wyoming's pleading itself, and it is framed completely in  
3 terms of the allocation of storage water.

4 Paragraph 31 at E-11 says the United States has  
5 failed to operate the Federal reservoirs in accordance  
6 with applicable Federal and State laws, and has failed to  
7 abide by the contracts governing the use of storage water.  
8 Specifically, the United States has allocated storage  
9 water in a manner, et cetera. It then goes on to make  
10 various specific claims.

11 But the fact of the matter is that they're  
12 challenging how we can allocate storage water, and the  
13 storage water, you must remember, is defined in the  
14 decree, and it is only water in addition to what is  
15 natural flow. When the Bureau provides water to the  
16 individual water users, it makes releases from the  
17 reservoirs, and in accounting for that water, it always  
18 ensures that the natural flow portion of the river is  
19 passed through the reservoir, and the storage water is  
20 only allocated thereafter, and this is all primarily an  
21 accounting procedure that only takes place after the water  
22 has been released.

23 QUESTION: Can you tell me how specifically you  
24 address Mr. Cook's answer to my question, and that is that  
25 Wyoming simply cannot -- if I understand it Wyoming simply

1 cannot litigate its claim insofar as it relates to Wyoming  
2 users with the least priority without, in effect, taking  
3 up this very issue of the propriety of the Federal storage  
4 water practice.

5 MR. MINEAR: I think that is just incorrect.  
6 Again, remember that the natural flow requirements are  
7 satisfied first when we do the water accounting, and the  
8 only question then is who gets the storage water.

9 Now, the dispute here is not really between  
10 Wyoming and the United States, and this brings me to my  
11 second point. It really is between two different classes  
12 of irrigators, the North Platte irrigators and the Warren  
13 Act contractors, and they're mentioned specifically in the  
14 amended pleading here in the fourth cross-claim.

15 The problem that we have here is --

16 QUESTION: Well, then you are -- are you saying  
17 that in fact the extent of availability of water for  
18 storage, and hence its effect on the Wyoming users with  
19 the least priority, can be determined in this action  
20 without bringing in the issue of the practices of the  
21 United States in storing and releasing its storage water?

22 MR. MINEAR: No, Your Honor. We're saying that  
23 the river operates under two separate regimes. There's  
24 the natural flow, which is taken care of by the decree.  
25 In addition, we have storage water that supplements the

1 available sources for the various irrigators.

2 The storage water is governed by the contracts  
3 between the Bureau and the individual water users. They  
4 have those -- we are simply a deliverer of water for those  
5 parties. They have --

6 QUESTION: The point made is that the decree was  
7 drawn with a view to what would happen to the storage  
8 water and the nonflow water, that the decree assumed  
9 certain dispositions, and to distort those dispositions is  
10 necessarily, therefore, to distort the decree.

11 MR. MINEAR: No, Your Honor, because the  
12 decree -- and the Court in 1945 knew these contracts were  
13 in place. They knew that there was a mechanism with which  
14 to enforce those contracts, and they assumed if any  
15 disputes arose over the enforcement of the contracts, or  
16 the allocation of those waters, those waters would be  
17 allocated -- would be dealt with separately. That's --

18 QUESTION: But the contracting parties may not  
19 have a -- may not be hurt in any way here. The claim here  
20 is that a third party is being hurt by the way the  
21 contracts are being administered, and it may be that the  
22 contracting parties have nothing to complain about and  
23 hence will never litigate.

24 MR. MINEAR: Well, if the contracting parties  
25 have nothing to complain about, it's very difficult to see

1 how Wyoming could be a third party beneficiary of the  
2 contracts in some respects. In fact, we think the problem  
3 is exactly the opposite, namely that the --

4 QUESTION: Nonthird party beneficiaries, but  
5 independent individuals whose interests in effect are  
6 being foreclosed by a maladministration of the contract.

7 MR. MINEAR: But the problem here, Your Honor,  
8 is that the contract water itself is already allocated in  
9 a sense. It has been distributed by virtue of the  
10 compact, or by the contracts that have been entered into,  
11 and the natural flow is dealt with completely separately  
12 in the decree, and we just do not agree that there is any  
13 linkage between the effect of our allocation of storage  
14 water on the decree itself. Now --

15 QUESTION: Mr. Minear, you distinguish between  
16 the natural flow and the storage water. Where does the  
17 storage water come from if it's not from the natural flow?

18 MR. MINEAR: Yes. It comes from the  
19 nonirrigation season natural flow. The water begins --  
20 according to the decree, the irrigation season ends in  
21 October, and beginning in October, the United States has  
22 the senior water rights for storage. It takes all of the  
23 water, all of the inflows and puts it into storage during  
24 the nonirrigation season.

25 QUESTION: Because it's not needed elsewhere.

1 MR. MINEAR: It's not needed elsewhere, that's  
2 right.

3 Beginning in May, at that point the irrigation  
4 season begins, and any person that wants water can call  
5 for water upstream and the Bureau releases water to those  
6 parties as they need it. If they do not need it, the  
7 water will continue to go into storage, rather than to  
8 allow it to simply go down to Nebraska and be wasted, and  
9 then, if there is insufficient water during the year, that  
10 storage water is used to make up whatever natural flow --  
11 whatever is needed in addition to natural flow.

12 QUESTION: And some of those parties who draw on  
13 that water are Wyoming parties and some are Nebraska  
14 parties, is that it?

15 MR. MINEAR: Yes, and there are --

16 QUESTION: What if the Nebraska parties who  
17 normally would draw upon that flow have found that they  
18 can get water elsewhere, and perhaps even cheaper, and  
19 therefore don't care if the Corps of Engineers is running  
20 this thing wrong, and if they are not getting their  
21 contractual rights, they don't care about it?

22 MR. MINEAR: Then there is more water for  
23 everyone else, because they draw --

24 QUESTION: Well, for everyone else, but not for  
25 Nebraska. But not for Nebraska, because other usable



1 water in Nebraska is being used by this Nebraska  
2 contracting party, so the State of Nebraska is hurt even  
3 though the party to the allocation of the stored water  
4 contract is not hurt.

5 MR. MINEAR: I'm afraid I'm not following your  
6 question here with respect to how the water is allocated.  
7 Maybe I --

8 QUESTION: I'm saying one of the parties to this  
9 contract can be getting water elsewhere, and therefore not  
10 give a darn about whether the contract is being  
11 implemented properly.

12 MR. MINEAR: Yes, that is correct.

13 QUESTION: That would hurt Nebraska, even though  
14 it doesn't hurt the contracting party.

15 MR. MINEAR: Well, it might not hurt -- well, I  
16 think what happens in that situation, the contractors pay  
17 what amounts to a fixed cost for their irrigation water  
18 whether they use it or not. If they do not use it, then  
19 that water is available for both Nebraska and Wyoming  
20 parties to draw upon. That is simply the way the water is  
21 being administered.

22 The problem we have here, I think, is that  
23 Wyoming is not the appropriate party to seek enforcement  
24 of the legal or contractual rights.

25 QUESTION: As I understood it, Nebraska says to

1 Wyoming, hey, you're not giving us enough water. We're  
2 getting 75 percent all right, but it's 75 percent of  
3 nothing. There's no water in the river.

4 And then Wyoming says, yes, yes, but there would  
5 be 75 percent -- there would be a hell of a lot of water  
6 in the river if only the United States was doing what it  
7 promised to do in the contract in which we premised this  
8 whole decree upon, and if that's the case, or something  
9 roughly like it is the case -- I'm exaggerating it -- I  
10 don't understand why Wyoming couldn't defend against  
11 Nebraska by saying, look, it's not our fault, it's the  
12 United States' fault, and they should live up to their  
13 contract and then there wouldn't be a problem, and I don't  
14 see anything in the decree that says they can't say that.

15 MR. MINEAR: Wyoming is suing the United States  
16 with respect to the allocation of storage water. The one  
17 thing that --

18 QUESTION: Alloc -- that's right --

19 MR. MINEAR: -- it says does not govern -- shall  
20 not affect the storage --

21 QUESTION: That's -- no, that isn't saying you  
22 can't make the United States live up to its promises in  
23 the contract, where their failure to do so wrecks the  
24 whole premise of the decree.

25 MR. MINEAR: And in --

1 QUESTION: What it says is that storage water  
2 shall not be affected by this decree.

3 MR. MINEAR: Yes.

4 QUESTION: As I read that, that means that they  
5 don't intend for this decree to govern storage water.  
6 That's -- I mean, we're allocating the river. We're not  
7 allocating storage water.

8 MR. MINEAR: Yes, and the storage water instead  
9 is governed by the contracts. If Wyoming seeks -- has  
10 some complaint about how we are operating the river,  
11 operating the reservoirs, they can bring an APA action  
12 against the Bureau.

13 And this brings me to my third point, and that  
14 is that there is another alternative dispute mechanism or  
15 forum available for all the parties that makes far more  
16 sense --

17 QUESTION: Is this the district court action in  
18 Wyoming?

19 MR. MINEAR: A district court action would be  
20 available.

21 QUESTION: Yes. We're told there is such an  
22 action and the Government has pleaded sovereign immunity.

23 MR. MINEAR: We raised a sovereign immunity  
24 defense in that case. We have withdrawn that upon further  
25 consideration, so there is no --

1 QUESTION: Consideration of the argument in this  
2 case?

3 (Laughter.)

4 MR. MINEAR: What?

5 QUESTION: On consideration of the forthcoming  
6 argument in this case?

7 MR. MINEAR: On consideration of the issue -- on  
8 consideration of the issue itself. In this case, our  
9 objection.

10 First of all, let me make it clear, the United  
11 States has never argued that these issues cannot be  
12 litigated in district court. Our objection in the Goshen  
13 litigation was that the United States was sued under a  
14 provision of reclamation law that allows joinder of the  
15 United States. Our objection was, you need to have all  
16 the necessary parties there in order to resolve this  
17 dispute.

18 Subsequently, eight of the irrigation districts,  
19 eight of the thirteen irrigation districts joined into  
20 this suit. Now, looking at this with all the parties  
21 there, our objection is rather technical in terms of the  
22 fact that the United States was sued first, not -- rather  
23 than sued later, so that is the reason why we have  
24 withdrawn that objection.

25 But overall, I think the important thing to

1 recognize in this suit is that it does provide a forum for  
2 all of the necessary parties to litigate the issue.

3 The contractors themselves have a very strong  
4 interest in the protection of their contracts. They  
5 currently are not parties to this suit. This suit has  
6 been involved -- this original action has been going on  
7 for 8 years, and is rather complex, and there are  
8 certainly going to be claims, if you allow the fourth  
9 cross-claim to go forward, for those parties to intervene  
10 in this action. You will have to deal with that issue as  
11 well.

12 QUESTION: The State as well? Can the State get  
13 into that action?

14 MR. MINEAR: The State did not get into the  
15 Goshen district court litigation. They were not involved  
16 in the district court.

17 QUESTION: Can they?

18 MR. MINEAR: Could they? Yes, they could join.  
19 I think that they -- well, let me put it this way. They  
20 could certainly file an amicus brief.

21 I'm not sure that they have the interest  
22 sufficient to indicate that they would qualify under Rule  
23 24 for purposes of intervention, and that's the same  
24 problem that we believe that they have here. They simply  
25 are not a party to the contract, and I think their



1     allegations with respect to their interest in these  
2     contracts are very, very vague.

3             The problem we have here is that there is a  
4     forum that is available for the parties that are most  
5     interested in the enforcement of the contracts to litigate  
6     the claims with respect to how that allocation of storage  
7     water ought to be performed.

8             QUESTION: Is it your view that the parties to  
9     those contracts would have a right to intervene in this  
10    proceeding?

11            MR. MINEAR: We think it might be difficult for  
12    them under this Court's precedents. This Court's  
13    decisions, they do discourage intervention by private  
14    parties in ongoing original actions, but our concern is  
15    more of a practical one, and that is the fact that sooner  
16    or later this case should go to trial, and we should have  
17    the parties that -- we should have the necessary parties.  
18    If we're going to add this fourth cross-claim in this  
19    forum rather than in another alternative forum, it is  
20    going to complicate this litigation tremendously.

21            QUESTION: Do you also envision any potential  
22    conflict in the adjudication in this original action and  
23    in the district court if you --

24            MR. MINEAR: Well -- excuse me.

25            QUESTION: -- if the counterclaim is in --

1 MR. MINEAR: The -- actually the conflict --

2 QUESTION: -- the cross-claim?

3 MR. MINEAR: Excuse me. The conflict that we  
4 think is going to arise is the fact that there are Warren  
5 Act contractors and North Platte contractors in Wyoming,  
6 and the same with respect to Nebraska. This is  
7 illustrated in the map at Appendix B of the special  
8 master's report. So neither one of these States can  
9 represent all of the contractors' interests that are  
10 involved here.

11 We think it would make more sense, now that this  
12 case has been fully briefed in the district court, to  
13 allow that proceeding to go forward first. If at some  
14 later point that question -- the issues that are resolved  
15 there implicate issues with respect to the decree, Wyoming  
16 can come back and seek an amendment of the decree, or seek  
17 whatever type of relief that they might think is  
18 appropriate at that point, but this -- these issues have  
19 been litigated in the district court. We think that that  
20 litigation should run its course rather than trying to  
21 complicate this litigation still further.

22 As a separate matter, the United States objects  
23 to Wyoming's exceptions to the special master's report.  
24 Wyoming is mistaken at the outset in characterizing this  
25 suit as an action to define the existing apportionment,

1 but regardless of characterizations, the special master  
2 properly concluded that Wyoming's first counterclaim and  
3 first cross-claim should be denied insofar as they seek to  
4 replace this Court's percentage-based apportionment  
5 formula.

6 Thank you.

7 QUESTION: Thank you, Mr. Minear.

8 Mr. Cook, you have 2 minutes remaining.

9 REBUTTAL ARGUMENT OF DENNIS C. COOK

10 ON BEHALF OF THE DEFENDANT WYOMING

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

13 Last things first. Issues in the GID case  
14 versus the issue in our fourth cross-claim, our fourth  
15 cross-claim is much broader. It is our claim that the  
16 operation of the storage facilities was a predicate of the  
17 75-25 apportionment, as Justice Breyer has noted, and  
18 therefore, as that predicate operation changes and is no  
19 loner according to law, or according to contracts, then  
20 that clearly skews the entire process, and quite frankly  
21 the Court left open the door to look at allocation and  
22 storage. It did not foreclose that, and furthermore it  
23 has allocated storage in both paragraph III and paragraph  
24 IV of the decree.

25 Further --

1 QUESTION: But wouldn't the interest of others  
2 who are not in this proceeding now be implicated if that  
3 cross-claim is adjudicated?

4 MR. COOK: The interests of others, all  
5 residents of the State, are implicated in this case any  
6 time we are here in the Court's original jurisdiction.

7 QUESTION: But I mean the parties to the  
8 agreements.

9 MR. COOK: They are, but in one respect we stand  
10 in judgment in parens patriae for the overall operation.  
11 Individual disputes on individual years, individual  
12 grievances, those can be adjusted, but what we're talking  
13 about is the broader failure to follow the law that  
14 impacts the apportionment.

15 Let me say also that beneficial use is a  
16 predicate. It was not necessary to say that word in the  
17 decree because it's such a fundamental concept that this  
18 Court has continued to recognize, and I say that because  
19 the opposite side of beneficial use is waste and misuse,  
20 and this Court has never sanctioned one State to waste and  
21 misuse water at the expense of another.

22 Finally, I agree that this Court is reluctant to  
23 open apportionments and revisit those. I disagree that  
24 there is not an established apportionment at Tri-State  
25 that sets the established expectations of the parties.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cook.  
2 The case is submitted.

3 (Whereupon, at 12:08 p.m., the case in the  
4 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  
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The United States in the Matter of:*

STATE OF NEBRASKA, Plaintiff v. STATES OF WYOMING AND COLORADO  
CASE NO.: 108 ORIGINAL

*and that these attached pages constitutes the original transcript of  
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BY Ann Marie Federico

(REPORTER)