

In the  
**Supreme Court of the United States**

REEVES, INC.,

PETITIONER

V.

WILLIAM STAKE ET AL.

No. 79-677

Washington, D. C.  
April 16, 1980

Pages 1 thru 57

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X  
3 REEVES, INC., :

4 Petitioner :

5 v. :

No. 79-677

6 WILLIAM STAKE ET AL. :  
7 - - - - -X

8 Washington, D. C.

9 Wednesday, April 16, 1980

10 The above-entitled matter came on for oral argument  
11 at 11:08 o'clock a.m.

12 BEFORE:

13 WARREN E. BURGER, Chief Justice of the United States  
14 WILLIAM J. BRENNAN, JR., Associate Justice  
15 POTTER STEWART, Associate Justice  
16 BYRON R. WHITE, Associate Justice  
17 THURGOOD MARSHALL, Associate Justice  
18 HARRY A. BLACKMUN, Associate Justice  
19 LEWIS F. POWELL, JR., Associate Justice  
20 WILLIAM H. REHNQUIST, Associate Justice  
21 JOHN PAUL STEVENS, Associate Justice

22 APPEARANCES:

23 DENNIS M. KIRVEN, KIRVEN AND KIRVES, 104 Fort  
24 Street, Buffalo, Wyoming 82834; on behalf of the  
25 Petitioner

26 WILLIAM J. JANLOW, ESQ., Governor of South Dakota,  
27 Pierre, South Dakota; on behalf of the Respondents  
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C O N T E N T S

ORAL ARGUMENT OF

PAGE

DENNIS M. KIRVEN, ESQ.,  
on behalf of the Petitioner

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WILLIAM J. JANKLOW, ESQ.,  
on behalf of the Respondents

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REBUTTAL ARGUMENT OF

DENNIS M. KIRVEN, ESQ.,  
on behalf of the Petitioner

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P R O C E E D I N G S

1  
2 MR. CHIEF CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Reeves, Inc. v. Stake.

4 Mr. Kirven, I think you may proceed when you are  
5 ready now.

6 ORAL ARGUMENT OF DENNIS M. KIRVEN, ESQ.,  
7 ON BEHALF OF THE PETITIONER

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

10 I represent Reeves, Inc., plaintiff in the action  
11 below and petitioner before this Court.

12 The issue presented in this case concerns the  
13 application of the Commerce Clause of the United States  
14 Constitution of a State policy favoring its own citizens over  
15 citizens of other States in the sale of products owned and  
16 manufactured by that State.

17 Petitioner is here on a writ of certiorari from the  
18 United States Court of Appeals Eighth Circuit which held that  
19 this preferential State policy did not violate the Commerce  
20 Clause.

21 The State of South Dakota owns and operates a cement  
22 plant in Rapid City, South Dakota which manufactures, sells  
23 and distributes cement. The cement plant was authorized by  
24 the citizens of South Dakota by constitutional amendment in  
25 1918.

1 QUESTION: Mr. Kirven, is there any South Dakota law  
2 or constitutional provision which would prevent a private  
3 cement plant from operating in South Dakota?

4 MR. KIRVEN: I do not know of any law which would  
5 prevent a private cement plant from operating in South Dakota.

6 QUESTION: So that in effect you have the State own  
7 one but you could also have a private one in competition with  
8 it?

9 MR. KIRVEN: There could be a private manufacturer.  
10 In 1920 there was published a 1920 report of the South Dakota  
11 Cement Commission, a published document which was a study made  
12 at that time concerning the availability of cement and  
13 feasibility of building a cement plant in South Dakota. And  
14 that report indicates that there have been two attempts by  
15 private industry to build a cement plant in South Dakota  
16 and that they had both failed. One plant was built, and the  
17 report is not clear, but it indicated that it ran out of funds  
18 and closed its doors. There was cement being supplied to the  
19 State of South Dakota by a manufacturer located out of State  
20 at that time.

21 QUESTION: But so far as you know there is no  
22 statutory prohibition against another private plant making  
23 another effort, even though it might be unsuccessful?

24 MR. KIRVEN: None that I am aware of.

25 QUESTION: Suppose these two private operations having

1 out of business -- this is hypothetical now -- and the State had  
 2 a lot of roadbuilding to carry on and so they set up their own  
 3 cement plant for their own road construction, not for commercial  
 4 purposes, not for proprietary purposes. Do you think they would  
 5 have to sell cement to non-South Dakota residents just because  
 6 they were maintaining a plant for their own purposes?

7 MR. KIRVEN: I don't think --

8 QUESTION: Or is it because they have entered into the  
 9 commercial stream of commerce that you make your point?

10 MR. KIRVEN: In the case where the cement plant --  
 11 an exclusively in-State process for the State itself and not  
 12 for the State citizens but for the public roads that are required  
 13 that a State normally supplies as a governmental service.  
 14 Then that would not be -- there would be no requirement that  
 15 a resident who comes from say the State of Wyoming would have  
 16 a right to purchase any cement or be treated in the marketplace  
 17 as any other competitor, because the State really has never  
 18 placed the cement in the interstate commerce at that point.  
 19 It is not involved as a participant in the market as they are  
 20 today. They participate in the marketplace, they solicit sales  
 21 in a 7-8 State area. In 1977, 48 percent of the shipments of  
 22 this plant went outside of the State.

23 Now, Reeves is a Wyoming corporation, it has purchased  
 24 cement from the South Dakota Cement Commission for a period of  
 25 over 20 years and during that period of time it has received

1 salesmen who have asked about the needs of the cement plant  
2 and orders been placed and the cement has been either picked  
3 up by Reeves itself or delivered to cement plants by trucks  
4 from the plant or hired by the plant.

5 QUESTION: They didn't have a long-term contract for  
6 delivery?

7 MR. KIRVEN: No, there was no long-term contract.  
8 There is no written contract, period. The customary course of  
9 dealing with ready-mix dealers is to make sales purchases over  
10 the phone, orders over the phone, primarily for the reason that  
11 you have no message capacities; most ready-mixes don't have  
12 the type of storage facilities --

13 QUESTION: Well, you can't store cement for very  
14 long after you have processed it, can you?

15 MR. KIRVEN: Well, it requires special silos which  
16 most ready-mix, small ready-mix dealers would not have, so their  
17 needs are more or less met. As their demand comes in for  
18 concrete they order more cement.

19 QUESTION: The history you have outlined about the  
20 financial failures of the private enterprise cement plants  
21 indicates that for some reason or other it is not a very  
22 profitable business. Now, is it possible that the State  
23 taxpayers of South Dakota are to some degree already subsidizing  
24 the present plant; and if they do subsidize the plant with  
25 tax revenues, which obviously they did to launch it, can't they

1 favor the people who have taken the financial risk independent  
2 of the Commerce Clause?

3 MR. KIRVEN: Well, I don't know that they are  
4 subsidizing at this time.

5 QUESTION: Well, they had to subsidize it to build it  
6 in the first place, didn't they? I assume it was built with  
7 taxpayers' money.

8 MR. KIRVEN: It was, it was built on the sale of bonds  
9 by the State and there was an assessment against the citizens  
10 to pay off the bonds.

11 QUESTION: Does the record show whether it makes a  
12 profit or not?

13 MR. KIRVEN: The record does not show that.

14 QUESTION: Yes.

15 MR. KIRVEN: I don't know whether the Court could  
16 take judicial notice of that or not.

17 QUESTION: Mr. Kirven, about 30 years ago South  
18 Dakota had a bad year for pheasants and it was decreed that  
19 no Minnesota or Wyoming or non-South Dakota hunter could come  
20 into South Dakota and hunt pheasants. The South Dakota Supreme  
21 Court upheld that ruling and this Court dismissed the appeal.

22 Do you think that has any bearing on this case  
23 under the Commerce Clause?

24 MR. KIRVEN: I don't think it does, particularly  
25 after the case of *Wick*, Your Honor, which dealt of course



1 with minerals. And they expressly overruled Geer v.  
2 connecticut which concerned the killing of wild game in  
3 Connecticut and the transportation of that game outside the  
4 State.

5 QUESTION: But Hughes was a State regulation that  
6 applied to everybody within the State, private or public, was  
7 it not?

8 MR. KIRVEN: It restricted the transportation of  
9 minerals -- natural minerals harvested from State waters for  
10 resale outside of the State.

11 QUESTION: And here as I understood your earlier  
12 answer to my question there is no statutory prohibition against  
13 a private corporation going into the cement manufacturing  
14 business in South Dakota and competing with a State-owned one.

15 MR. KIRVEN: No, there is not. But the issue is  
16 whether or not a corporation can go to any marketplace in the  
17 United States and be free from the exploitation of that person  
18 because it happens to go into the State of South Dakota, be in  
19 the cement market. The State of South Dakota has enjoyed all  
20 of the benefits of interstate commerce. And not only has this  
21 plant been subsidized by tax dollars of the citizens of South  
22 Dakota, it has been subsidized by people who buy cement from  
23 the plant. That is their other source of revenue, with 40  
24 percent of the cement going out of the State. Other people  
25 have paid and made payments to the plant over the course of

1 dealings with that plant which have resulted in continued  
2 success.

3 QUESTION: Does this plant pay taxes to the State of  
4 South Dakota for its operation?

5 MR. KIRVEN: It pays the profit over, I think it pays  
6 the profit over that it does make to the State treasury.

7 QUESTION: But does it have other incidents of the  
8 private plants that went broke, income taxes, real estate  
9 taxes, ever?

10 MR. KIRVEN: No, it doesn't. It has the power of  
11 eminent domain, it has --

12 QUESTION: No, I am just talking about profits now,  
13 taxes. Do they tax the income, do they tax the real estate?

14 MR. KIRVEN: I do not believe they tax income. I  
15 believe that the real estate is not taxed.

16 QUESTION: Maybe that is why they can produce cement  
17 cheaply enough to induce the people of Wyoming to come over to  
18 South Dakota to buy it rather than making it themselves?

19 MR. KIRVEN: Yes, I wouldn't know the answer to that.

20 QUESTION: Well, isn't that just a matter of simple  
21 economics? If Wyoming could make it as cheaply or cheaper,  
22 wouldn't Wyoming do just what South Dakota does or private  
23 enterprisers in Wyoming set up plants?

24 MR. KIRVEN: Well, I feel that is certainly a  
25 possibility. If it reaches a point where we have a scarcity

1 of resources, whether it be cement or any other place, where  
2 a State through its police powers and its ability to exempt  
3 certain operations from say paying taxes or using its power of  
4 eminent domain to acquire a business which deals in a natural  
5 resource, it feels that it could in fact operate the plant  
6 at a less competitive price than is available by private  
7 industry, barriers between interstate commerce are going to  
8 be set up when preferences are then granted to these particular  
9 States. And that is what creates the trade barrier.

10 QUESTION: Are there cement plants in Wyoming?

11 MR. KIRVEN: There is one cement plant in Wyoming  
12 in the southern part of the State. It does not serve the area  
13 where my client is.

14 QUESTION: Where is it?

15 MR. KIRVEN: The cement plant is in Laramie, Wyoming.

16 QUESTION: Is it operating?

17 MR. KIRVEN: It is operating.

18 QUESTION: At what capacity?

19 MR. KIRVEN: It produces -- well, it may be in the  
20 records, it may be in the affidavit of the Secretary of the  
21 Cement Commission -- it produces approximately, I think,  
22 200,000 tons of cement.

23 QUESTION: Where does it get its raw material, do you  
24 know?

25 MR. KIRVEN: I do not know.

1 QUESTION: Where does the South Dakota plant get its  
2 material?

3 MR. KIRVEN: Most of those raw materials are located  
4 in the State of South Dakota. Its fuel coal comes from  
5 Wyoming, natural gas comes from North Dakota.

6 QUESTION: But the rock --

7 MR. KIRVEN: The limestone --

8 QUESTION: -- the limestone is --

9 MR. KIRVEN: Quarried right at the mine site in Rapid  
10 City.

11 QUESTION: And is that State owned?

12 MR. KIRVEN: Yes, I believe it is.

13 QUESTION: Is that the only quarry like that in the  
14 State?

15 MR. KIRVEN: I do not know.

16 QUESTION: Do you know if there has been any change  
17 in the capacity of the South Dakota cement plant since it was  
18 first put -- started operation?

19 MR. KIRVEN: July of 1978 when the cement plant  
20 experienced a shortage that we were discussing here today and  
21 they were bringing on line a new production expansion facility  
22 which would almost double its production, so they had problems  
23 with production at that time and that would have doubled the  
24 capacity, as I understand it, of the plant before 1978; the  
25 new facility would actually double its production which --

1 QUESTION: Let me ask you one other question: If  
2 the State were to restrict its sales or consumption of its  
3 output to public facilities such as public highways, public  
4 buildings, bridges and the like, would you think there would  
5 be any objection to that, any constitutional objection to  
6 that?

7 MR. KIRVEN: Only if the State was actually using  
8 the cement for its own uses and not selling it to its citizens,  
9 I would agree with that.

10 QUESTION: You say there would be no objection to  
11 that?

12 MR. KIRVEN: I would have no objection.

13 QUESTION: Your point is that once it goes into the  
14 open market it should be treated like --

15 MR. KIRVEN: Once it is sold to a citizen, in a  
16 nongovernmental type of activity where it makes a sale for a  
17 citizen.

18 QUESTION: Do you think a State can restrict its  
19 purchases of supplies for various public uses to in-State  
20 sources; could they buy all their printing and all their paper  
21 and all their own -- say they didn't operate their own thing --  
22 from local sources, just to favor local business?

23 MR. KIRVEN: Only if they -- I would say it would  
24 be unconstitutional unless they passed the balancing test this  
25 Court has traditionally employed to determine whether it only

1 has an incidental effect on interstate commerce.

2 QUESTION: Are you saying that the legislature of  
3 South Dakota couldn't pass a Buy South Dakota sort of program  
4 requiring all State purchases to be made from the State if they  
5 were available?

6 MR. KIRVEN: If that regulation has a significant  
7 burden on interstate commerce, if that were a showing, I do not  
8 believe it promotes any legitimate local interest which this  
9 Court has previously recognized, because the purpose of that  
10 I assume would be for the economic gain of the citizens of  
11 South Dakota.

12 QUESTION: I thought this Court had specifically  
13 upheld in-State printing requirements.

14 MR. KIRVEN: In American Yearbook v. Askew case,  
15 the Florida case, there was a summary affirmance of that statute  
16 but --

17 QUESTION: Let me ask you one other question.

18 There always seems to be a man named Hughes in this  
19 area, but not in your case. You mentioned Hughes v. Oklahoma.  
20 Do you think that case is closer to this one than Hughes v.  
21 Alexandria Scrap?

22 MR. KIRVEN: I would say that Hughes v. Alexandria  
23 Scrap is closer than Hughes v. Oklahoma.

24 QUESTION: And you feel then it cuts in your favor?

25 MR. KIRVEN: Hughes v. Oklahoma?

1 QUESTION: No.

2 MR. KIRVEN: Hughes v. Alexandria Scrap?

3 QUESTION: Yes.

4 MR. KIRVEN: Well, I would distinguish Hughes v.  
5 Alexandria Scrap. I do not believe Alexandria Scrap can be  
6 extended to include a preferential policy by a State which is  
7 engaged in a nongovernmental service or in this case an actual  
8 regulation of commerce. The State of South Dakota claims  
9 immunity under Alexandria Scrap. Their conduct was similar to  
10 that of Maryland in the Alexandria Scrap case. You are simply  
11 participating in the marketplace.

12 But I submit to this Court that much more than being  
13 a participant, they became a regulator of interstate commerce  
14 when they adopted the policy. Only by regulating interstate  
15 commerce could they accomplish the purpose of providing their  
16 residents with a preference.

17 QUESTION: I thought you said at least by statute  
18 or regulation they had no prohibition against anybody else going  
19 into the cement business.

20 MR. KIRVEN: Not going into the cement business, but  
21 this policy, this preferential policy of who could buy from  
22 the cement plant affects my client because no cement was  
23 available for him to buy. It was taken up by South Dakota  
24 residents. The South Dakota Cement Commission eliminated  
25 competition for its cement from residents in a six-State area

1 and that is how they were able to supply their residents with  
2 cement.

3 QUESTION: So you will distinguish then between  
4 a policy of a State producing -- a company like this that sold  
5 only to State-owned entities, which you would say is all right?

6 MR. KIRVEN: Yes.

7 QUESTION: And a policy of a State-owned entity like  
8 this which sold only to persons or entities residing within the  
9 State, which you say is bad?

10 MR. KIRVEN: That is correct.

11 The options that South Dakota had at that time for  
12 an even-handed treatment of not only its own citizens but the  
13 consumers and customers who it had traded with previously was  
14 the 50-percent allocation policy which gave all persons the  
15 allocation of cement based on a previous three years' average  
16 of the previous three years' cement purchases. And that  
17 would have been perfectly acceptable to Reeves to be able  
18 to receive that kind of allocation, because it did not  
19 discriminate against inter commerce. And the classifications  
20 of South Dakota as being either a participant in the market-  
21 place or even being in a proprietary rather than a governmental  
22 nature or activity does not preclude that State from regulating  
23 the market, because in this case with the large segment of  
24 the market in that area being handled by South Dakota it  
25 could, in effect, regulate interstate commerce.



1 QUESTION: What if this had been a municipal utility  
2 in South Dakota, that it had extended service into Wyoming at  
3 a certain time and then say it was supplied by hydroelectric  
4 power of a short season, bad season, and it simply did not  
5 have the generating capacity any more. Would it be permitted  
6 under your view of the Interstate Commerce Clause to cut back  
7 its services to only South Dakota municipalities?

8 MR. KIRVEN: If the decision was based on a rule of  
9 reason or a good business decision I don't think that anyone  
10 can object to business withdrawing from certain market areas.  
11 The position is that this was not -- our position is this is  
12 not a marketing decision. If a hydroelectric company because  
13 of its facilities must in fact cut back in its reasonable  
14 business decision, it is not based on the fact that it is  
15 where you live but it is where the distribution lines are,  
16 it is not that you are a resident of the State of Wyoming but  
17 that the distribution lines or the capacity just isn't  
18 sufficient to supply that electricity to Wyoming, then in those  
19 cases if it is a logical business reason there is no violation  
20 because there is really no discrimination against any --

21 QUESTION: What if there were some lines going to  
22 South Dakota communities that were longer than lines going to  
23 nearer Wyoming communities and the hydroelectric generating  
24 plant nonetheless said we are going to serve first South  
25 Dakota demand?

1 MR. KIRVEN: In that case I would say that is  
2 unconstitutional. I think that that is an impermissible  
3 burden on interstate commerce, because it discriminates against  
4 commerce. It is a disguise, a form of creating a benefit to  
5 its own citizens which if it was a substantial burden couldn't  
6 be overcome.

7 QUESTION: You answered some questions, both mine  
8 and Mr. Justice Stevens about once entering the stream of  
9 commerce then they took on all the burdens. Now, go back to  
10 the hypothetical I put to you that South Dakota set up a  
11 cement plant which would be exclusively to supply the contractors  
12 who were building South Dakota roads. I understood your response  
13 to that earlier was that that would be all right.

14 Has not that cement gone into the stream of commerce  
15 as soon as they begin to sell to the contractors who are  
16 building South Dakota roads, because some of them might be  
17 contractors from North Dakota, Minnesota, Wyoming and Nebraska?

18 MR. KIRVEN: Your Honor, I understood your first  
19 question as being directly used by State employees themselves.  
20 I didn't understand the contractors being in your first  
21 question.

22 QUESTION: Well, from your point of view --

23 MR. KIRVEN: O.K. The contractors in the first  
24 question, I believe that if they supply a contractor who is  
25 doing a job for a public hospital or a public road or any other

1 facility, that is interstate commerce.

2 QUESTION: South Dakota could not confine -- under  
3 Commerce Clause could not confine itself to those South Dakota  
4 public works projects?

5 MR. KIRVEN: I submit that it cannot unless it builds  
6 the hospital itself and uses the cement itself.

7 QUESTION: Mr. Kirven, I don't know whether I quite  
8 fully -- why you think Alexandria is distinguishable.

9 MR. KIRVEN: The distinction of being a participant  
10 in a marketplace, in that case it appears to me that the State  
11 was attempting to accomplish a governmental function of keeping  
12 a clean environment. Here the purpose and policy of South  
13 Dakota is not what has been traditionally defined as a govern-  
14 mental function but is one which seeks to gain economic  
15 opportunity of the citizens of the State of South Dakota.  
16 That is clear in the *Lakin v. South Dakota State Cement*  
17 *Commission* case which is cited in briefs as the State case  
18 involving the --

19 QUESTION: Well, then, as I understand it you  
20 suggest that Maryland had a State interest, an important State  
21 interest which was served by the manner in which they limited  
22 the pick up of --

23 MR. KIRVEN: Yes. And also private enterprise in  
24 Maryland, as I understand it, was in business in the scrap  
25 processing market. But they were not effectively taking care

1 of the junk cars to keep a clean environment. And so the State  
2 has stepped in and taken over that aspect to the extent that it  
3 does not clean up the environment. I presume it had some  
4 effect on cleaning the environment.

5 QUESTION: There is another distinction but I question  
6 whether it is worth anything. In Alexandria the State was the  
7 purchaser, here it is the seller.

8 Does that make any difference?

9 MR. KIRVEN: Well, it seems to me that it does,  
10 because it is difficult to resolve the differences between  
11 purchasing. It seems to me that a State needs certain  
12 purchases to operate, it needs pencils, it needs paper, it  
13 needs gasoline. There is a difference between the State buying  
14 those materials which it needs, and saying we are going to  
15 buy all the pencils for all the citizens of the State.

16 That I see as a distinction between the two  
17 purchases.

18 I would like to reserve the balance of my time for  
19 rebuttal.

20 MR. CHIEF JUSTICE BURGER: Very well.

21 Governor Janklow.

22 ORAL ARGUMENT OF WILLEAM J. JANKLOW, ESQ.,

23 ON BEHALF OF THE RESPONDENTS

24 MR. JANKLOW: Mr. Chief Justice, and may it please  
25 the Court:

1           As I begin the oral argument I would like to touch  
2 upon some of the questions that were raised by members of the  
3 Court to counsel during his argument.

4           First of all, the fact that South Dakota is in the  
5 cement business comes as a direct result of the South Dakota  
6 citizens being in the 'teens and the 'twenties some 50-60-70  
7 years ago, about 70 years ago, being unable to get the cement  
8 they needed to do the things that normal society carries on,  
9 things like building hospitals, building schools, building  
10 roads. A good analysis of this is found in the Eakin case  
11 that both of us have cited in our briefs. And the South  
12 Dakota Supreme Court made very, very specific findings in its  
13 determination in the Eakin case. It found, for example, that  
14 cement and its products are commodities that are necessary  
15 to the people of South Dakota, they cannot be produced at the  
16 present time through individual effort, that the construction  
17 of highways, bridges, streets, paving, sidewalks and public  
18 buildings within the State, cement is necessary. It found  
19 that the use of cement is rapidly increasing in South Dakota,  
20 that a serious shortage of the supply of cement is threatening  
21 the people of the State, that there had been a shortage on  
22 many occasions during the previous years, that the shortage  
23 has interfered with and delayed both public and private  
24 enterprises, that the materials for making of cement are found  
25 in large quantities and at necessary points within the State.

1 I think that answers a couple of questions that have  
2 been raised.

3 In addition to that, nobody can cite any statute,  
4 any place, in the history of South Dakota that says anybody  
5 who wants to, including Mr. Reeves from Wyoming, can come to  
6 South Dakota and go in the cement business. There is no  
7 statute that says that Mr. Reeves cannot come over and haul  
8 our raw materials over to Wyoming and make cement. There is  
9 no regulation.

10 QUESTION: Governor, supposing the State owns all the  
11 land on which the raw materials for cement are available, would  
12 your argument be the same?

13 MR. JANKLOW: Sure, it would, as far as South  
14 Dakota.

15 QUESTION: How could someone else come in and go  
16 into the cement business if you own all the raw material?

17 MR. JANKLOW: You mean throughout the entire State of  
18 South Dakota. I think --

19 QUESTION: Assume they are concentrated in a certain  
20 area and that you happen to own that as public land.

21 MR. JANKLOW: I think that as long as it wasn't  
22 opened up to anyone that they wouldn't have an argument. I  
23 think once it was opened up to some private people it would be  
24 a different situation. But that is not even approaching the  
25 case we have in this situation.

1 QUESTION: But you have opened up the cement market  
2 to private people by selling to private people.

3 MR. JANKLOW: But that is no different than a private  
4 individual. Unless it is being suggested that somehow in  
5 the history of the Commerce Clause that there has been a dual  
6 standard set up that is different for government than it is  
7 for private individuals.

8 QUESTION: Well, Governor, do you think that South  
9 Dakota could charge one price to local residents and a higher  
10 price to people in Wyoming?

11 MR. JANKLOW: No, sir, not with the Fourteenth  
12 Amendment in place, I don't.

13 QUESTION: Why not?

14 MR. JANKLOW: Because I think Equal Protection of the  
15 Laws Clause would apply.

16 QUESTION: Do you think the Wyoming purchasers are  
17 entitled to be treated equally with the South Dakota purchasers?

18 MR. JANKLOW: In terms of price?

19 QUESTION: In terms of price.

20 MR. JANKLOW: I would, yes.

21 QUESTION: In terms of quantity, then?

22 MR. JANKLOW: Pardon me?

23 QUESTION: Then why not in terms of quantity?

24 MR. JANKLOW: Because I think that when you talk  
25 about a discrimination under the Fourteenth Amendment if there

1 is a valid State purpose they don't go behind it. You have  
2 got a different standard completely when you talk about a  
3 Fourteenth Amendment case.

4 QUESTION: I don't understand the distinction between  
5 subsidizing local residents by giving them a bargain and  
6 subsidizing local residents by letting them have all the  
7 available supply.

8 MR. JANKLOW: Well, the issue is what is government  
9 formed for. And we have government in South Dakota, as they  
10 do every place else, that take care of the needs of its  
11 citizens. Our government in South Dakota doesn't function for  
12 Wyoming's citizens, or Iowa's or Florida's or anybody else's.  
13 It generally functions for the needs of the citizens of South  
14 Dakota and the endeavors and the engagements and the functions  
15 that we get into are those things that have been determined  
16 as a legislative policy to be the things that the citizens of  
17 South Dakota need.

18 QUESTION: Does this record show what is the invest-  
19 ment of the people of South Dakota in the cement plant?

20 MR. JANKLOW: I don't believe the record shows it.

21 QUESTION: Well, I suppose that is a matter of public  
22 knowledge somewhere.

23 MR. JANKLOW: I think the Court can take judicial  
24 notice of the fact it is around \$40 million, because the  
25 records in South Dakota, which are public records, would



1 indicate it is about \$40 million.

2 QUESTION: Over what period of time?

3 MR. JANKLOW: Over the period of time since the  
4 cement plant was built, the capital.

5 QUESTION: Suppose you sold the cement plant to a  
6 private company and then the legislature passed a law saying  
7 the company may not sell outside the State?

8 MR. JANKLOW: We couldn't do that, that would be an  
9 absolute constraint against the Commerce Clause and we agree to  
10 that.

11 QUESTION: And yet as long as the State owns the  
12 plant you can do it?

13 MR. JANKLOW: Yes, we can do it as long as the State  
14 owns the plant. And this Court has indicated that in previous  
15 decisions. In the Alexander case, the Maryland case, this  
16 Court, Justice Powell's decisions specifically alluded to that.

17 QUESTION: If the plant were owned not by the State  
18 but by a private company, could that private company decide  
19 to break off all its sales to out-of-State residents?

20 MR. JANKLOW: Absolutely.

21 QUESTION: Sell only within the State of South  
22 Dakota?

23 MR. JANKLOW: There has never --

24 QUESTION: It clearly could, couldn't it?

25 MR. JANKLOW: Absolutely; there is no question about

1 it.

2 We think the key issue in this case is are we a  
3 regulator or are we a proprietary aspect of government? If  
4 we are regulating interstate commerce in a direct sense, even  
5 in an indirect sense, then we think that we fall under the  
6 Commerce Clause. If we are not, we don't think we fall under  
7 it at all. And that is what we think the key distinctions of  
8 this case are. This is no different than colleges, the  
9 governments get into colleges, we charge people tuition; some  
10 States more, some States less. But nobody would argue that  
11 South Dakota can't prohibit all out-of-Staters from coming to  
12 its State schools because of the investment we have made in  
13 trying to educate our people. Now, as matter of fact all  
14 States allow out-of-Staters but there is a discriminatory  
15 policy that every State has, that basically favors their own  
16 citizens. And providing an education isn't really any  
17 different than providing the buildings that people go to to  
18 get their education or the houses that they live in when they  
19 are growing up.

20 As far as paying taxes the question was raised, and  
21 I think the Court could take judicial notice of the statutes  
22 of South Dakota although it is not in the record, that the  
23 State cement plant does pay severance taxes to the State  
24 government just exactly like Homestake Gold Mine, the gravel  
25 pits and the other aspects of enterprise that deal with the

1 severability or that deal with the severable resources being  
2 taken from the States.

3 QUESTION: Do they pay income taxes?

4 MR. JANKLOW: Pardon me?

5 QUESTION: Do they pay income taxes?

6 MR. JANKLOW: We are one of three States that doesn't  
7 have that. We don't have any income taxes, Mr. Chief Justice;  
8 we have property taxes and the property tax fever going on in  
9 our State also. But the property taxes are paid to local  
10 government by the State cement plant and again under a statute  
11 authorized by the State legislature.

12 QUESTION: Governor, you mentioned that \$40 million  
13 has been invested in the plant. Do the public records disclose  
14 whether or not over the period of its life the plant has been  
15 profitable or unprofitable?

16 MR. JANKLOW: It has been both.

17 QUESTION: Taking the entire period into account?

18 MR. JANKLOW: Over the entire period of time, I can't  
19 answer that. I can tell you there are years when its cash  
20 flow is a plus and years when its cash flow is a minus. But  
21 I don't think you can call that profit or nonprofit, because  
22 the State governmental accounting doesn't take into consideration  
23 historically the payment of taxes. It doesn't take into  
24 consideration depreciation.

25 QUESTION: You can't tell me whether the plant made

1 money or not?

2 MR. JANKLOW: I can tell you that it ends up some  
3 years with a cash surplus but in terms of a bottom line net,  
4 in terms of proper accounting, I can't tell you if that is a  
5 profit. But I can tell you every year for the last several  
6 years, for example this year the legislature in the preparation  
7 of its annual budget has ordered that \$9 million will be  
8 transferred from the State cement plant to the State general  
9 fund to assist in reaching a balanced budget. Last year it  
10 was \$7 million, the previous year it was \$5 million. But  
11 there have been years when nothing has been transferred, because  
12 there wasn't any excess cash.

13 QUESTION: Have there been years in which general  
14 revenues have been applied to the fund to keep it from losing  
15 money, to keep it going?

16 MR. JANKLOW: To my knowledge, no.

17 QUESTION: Well, then, isn't it a fair inference  
18 that the plant has over the years made money?

19 MR. JANKLOW: No, it has had positive cash but that  
20 is not making money. You can end up with excess cash at the  
21 end of the year and lose money, because they may not be funding  
22 their depreciation. They may not be putting funds aside  
23 for --

24 QUESTION: But if every year in which they do  
25 something it is always giving money to the general revenue,

1 it seems to me the inference is inescapable that they made  
2 money.

3 MR. JANKLOW: There are years when they borrow money  
4 when they are short. Several years ago they borrowed several  
5 million dollars.

6 QUESTION: Have they ever defaulted on any of those  
7 loans?

8 MR. JANKLOW: Pardon me?

9 QUESTION: Have they ever defaulted on any of those  
10 loans?

11 MR. JANKLOW: No, sir; to my knowledge, no, sir.

12 QUESTION: But you don't know whether the plant has  
13 made money or not. That is the bottom line as far as your  
14 answer to my question?

15 MR. JANKLOW: That is right, in an accounting sense  
16 I can't answer that.

17 QUESTION: But in any event the plant operation is  
18 at risk of losing or making, just the way Chrysler Corporation  
19 has been?

20 MR. JANKLOW: Or any other private enterprise. And  
21 I think the thing that we have to keep into context is that  
22 both briefs will indicate what happened in 1978 to cause this  
23 problem. We had a new kiln coming on line and the new kiln  
24 was really to replace the old kilns which were built about 70  
25 years ago. They have a lot of pollution and this new kiln will

1 equal the production of the old ones. It just so happens there  
2 was such an incredible demand for cement about the time this  
3 was done, they didn't shut the old ones down, they have been  
4 pumping it out as fast as they could ever since. But there is  
5 a limited lifespan available to those other ones.

6 Is plaintiff in this case arguing that we could force  
7 them to buy cement from us if they ever quit buying from us  
8 on the theory that their refusal to buy from us is an inter-  
9 ference in their State commerce? For them to be logical they  
10 are going to have to concede that point. They can't just  
11 put all the burden on us and say if they choose they can come  
12 to us and buy but we can't choose to force them to buy from  
13 us. And the logic would be the same.

14 QUESTION: Does South Dakota have any other special  
15 enterprises like this cement plant? Your neighbor to the  
16 north has the Bank of North Dakota.

17 MR. JANKLOW: Yes, sir, it does, Mr. Justice White.

18 QUESTION: Are you in any other business besides --

19 MR. JANKLOW: We were in the coal business in the  
20 'Thirties and we went broke. And we were in rural credits  
21 in the 'Thirties and we went broke. These are enterprises  
22 that flow from that flow from that old LaFollette, Wild Bill  
23 Langer in North Dakota --

24 QUESTION: Sure.

25 MR. JANKLOW: -- Norbeck in South Dakota tradition

1 that grew up back in the 'Twenties and 'Thirties where that  
2 populous tradition got the government into those fundamental  
3 services that wasn't being provided and couldn't be provided  
4 at that time by private enterprise. We consider ourselves a  
5 very conservative State and have a State-owned cement plant.  
6 North Dakota has got a bank in there and is in the grain  
7 business and I think they also still have a coal mine in North  
8 Dakota. Nebraska is in the power business, and we don't  
9 allege for a minute that we can go down to the Nebraska Public  
10 Power District and force them to sell us electricity because  
11 they do go across State lines in the grid, they are hooked  
12 into the national grid. And that was brought up in the Court  
13 of Appeals.

14 QUESTION: If I might be bold as to suggest, I think  
15 Minnesota is also in the municipal power business in many  
16 parts of the State. There has been competition between public  
17 and private power sources, has there not?

18 QUESTION: That is usually local governments, is it  
19 not?

20 MR. JANKLOW: It is local governments, the Rural  
21 Electric Administrations and private -- the investor-owned  
22 utilities, the REA's and municipal governments. There are  
23 many communities that had their own municipal power plants  
24 throughout the entire upper Midwest, some of whom still have  
25 them, most of whom are now hooked into the major power

1 companies.

2 QUESTION: When you were in the rural credits  
3 business did you lend on farms outside of South Dakota?

4 MR. JANKLOW: Pardon me?

5 QUESTION: Did you lend on farms outside?

6 MR. JANKLOW: To my knowledge, no, we didn't lend on  
7 farms outside of South Dakota.

8 But if you go all the way back to 1920, how did we  
9 start selling to Wyoming? Way back in 1920, the record will  
10 disclose in the appendix that the minutes of the Commission  
11 back in 1920 specifically stated that if they ever had any  
12 excess over and above the needs for South Dakotans, they would  
13 make it available to other people. And when we ran into this  
14 problem in 1978, what did our Commission do? It said, we  
15 will give preference to South Dakotans and everybody we have  
16 a contract with.

17 Now, Reeves comes in here and argues, and has come  
18 to all the courts and argued, we didn't have a contract. The  
19 briefs will show of the record will show that we had 75,000  
20 tons under contract at the time we ran into trouble. And  
21 our cement plant said, we will fulfill those contracts  
22 irrespective of where those people happen to be located any  
23 place in America, plus we will take care of South Dakotans;  
24 and after we have taken care of South Dakotans and fulfilled  
25 our contracts, we will go first come, first served to everyone.



1 What they are complaining about is the policy we established.  
2 There's would be that you take it on the order of either  
3 first come, first served, which is nonsense, you force people  
4 to just go put in a big order, bigger than they needed so they  
5 could sell it to others in terms of a shortage, or (2) if it  
6 was on a prorata basis, to put in a bigger order than they  
7 needed, hoping to get a larger share of what they actually  
8 needed.

9 What they are complaining about really, Reeves is  
10 complaining that he didn't have the foresight to go sign a  
11 contract with the cement plant.

12 QUESTION: Did you say that the end use today of  
13 the production of this cement plant is in every case in a  
14 public building or a public road or something --

15 MR. JANKLOW: No, sir.

16 QUESTION: It could go into an apartment building?

17 MR. JANKLOW: It does.

18 QUESTION: As long as the purchaser is a South  
19 Dakotan? Where he wants to put it, he may.

20 MR. JANKLOW: Well, everybody may today. Since  
21 June of a year ago there has been no restriction, again, because  
22 the production is up so everybody is being taken care of.  
23 But I would answer your question "Yes," the South Dakotans  
24 would come first but it does not go into just the public  
25 enterprises.

1 QUESTION: Do you have any idea what the percentage  
2 is that goes into private as against public enterprises?

3 MR. JANKLOW: I can tell you that a year ago, I  
4 think the record would show that of the 750,000 tons -- some-  
5 place around there -- 278,000 just went into highway paving  
6 contracts in the State of South Dakota. A year ago we had to  
7 stop the building of the poor Indians housing on the  
8 reservations, and the record reflects that. We had to stop  
9 the building of the school in Spearfish, South Dakota, and  
10 the record will reflect that. We had to stop the building of  
11 hospitals in South Dakota because everybody ran out of cement,  
12 there just wasn't any.

13 QUESTION: Well, this was before you built the new  
14 facility?

15 MR. JANKLOW: No, sir, this was after.

16 QUESTION: After?

17 MR. JANKLOW: This was afterwards. There was -- the  
18 only reason we don't have another year like that this year is  
19 because interest rates are 20 percent and only the Arabs can  
20 afford to buy right now, to build anything; nobody else can.  
21 We can't, there isn't anybody in the Midwest that can afford  
22 to build at 20 percent interest rates. We couldn't and  
23 wouldn't spend our money building anything out there.

24 QUESTION: You have emphasized in much of your  
25 argument the necessity from the viewpoint of your State to

1 have their cement plant. Would that apply to a sporting goods,  
2 equipment plant, for example? What I am interested in is how  
3 far down the road of governmental necessity would your theory  
4 take you, is there any sort of manufacturing plant that you  
5 would say the State could not operate and impose these  
6 restrictions on its product?

7 MR. JANKLOW: To be logical, I have to say "Yes."  
8 I can't think of any.

9 QUESTION: But what about my example of say a plant  
10 that manufactured ski equipment?

11 MR. JANKLOW: You would have to look at first of  
12 all -- well, my answer would be if a private business can say,  
13 if Coor's Beer can say, we are not selling in South Dakota,  
14 if Wilson Sporting Goods could say, we are only selling east  
15 of the Mississippi River, then I think that a government can  
16 do it. I don't think the Commerce Clause draws a distinction  
17 between what the government does and private business does  
18 when you are talking about proprietary functions as opposed  
19 to regulatory functions.

20 QUESTION: It is not likely to happen in this  
21 country but in theory at least, a State I suppose could  
22 socialize most of its businesses. And could it then deny to  
23 interstate commerce the product of all of those businesses?

24 MR. JANKLOW: I would say "Yes, but," and my "but"  
25 is on condition that Congress has the right under the Constitution

1 to say that it can't be done that way. They haven't clearly  
2 enunciated that. But Congress does have the right because  
3 everything to some respect touches commerce, and we don't even  
4 argue that, interstate commerce. And as a result Congress  
5 could prescribe that and you would have a different issue, set  
6 of issues. But we don't have that here.

7 QUESTION: Governor, you rely heavily on the  
8 distinction between proprietary government functions and you  
9 argue, as I understand you in substance, that you are just  
10 like a private proprietor who can make a private decision not  
11 to sell to somebody he doesn't want to sell to.

12 MR. JANKLOW: Yes, sir.

13 QUESTION: But is the decision to confine your sales  
14 to local residents really motivated by proprietary considerations  
15 or by governmental interest in the welfare of the local citizen?

16 MR. JANKLOW: It is by governmental interest in the  
17 local citizens but that puts us into the proprietary business.  
18 There are some people that go into business for good will and  
19 not for profit but they end up making a profit.

20 QUESTION: If this were a privately owned entity,  
21 is there any reason in the world why it would limit its sales  
22 to local residents?

23 MR. JANKLOW: I have to say "Yes," because I know  
24 that, for example, half of America is screaming they want  
25

1 Coor's beer, and they won't sell it to them; only some States  
2 get it. I don't know why but we can't get it. So there must  
3 be sometimes when a business decision is made to limit it to  
4 certain geographical territories.

5 QUESTION: So presumably that is done for economic  
6 gain of the seller. But you don't contend that this is an  
7 economically motivated business?

8 MR. JANKLOW: Not at all, it is a governmentally  
9 motivated business, a public policy motivated business.  
10 Mr. Justice Powell said in the Alexandria case, and I hate  
11 to just lift certain language out of it, but it ties into the  
12 whole thing that the case is discussing:

13 "Nothing in the purposes animating the Commerce  
14 Clause forbids the State, in the absence of  
15 congressional action, from participating in the  
16 market and exercising the right to favor its own  
17 citizens over others."

18 QUESTION: Governor, I take it then that if you have  
19 -- if you open a contract, put out bids for a building a  
20 highway, do you let foreigners bid on that?

21 MR. JANKLOW: Yes, sir; we do, sir.

22 QUESTION: And even though they aren't residents of --

23 MR. JANKLOW: Yes, sir.

24 QUESTION: Say an individual contractor from Denver  
25 operating in his own name comes up to bid up there, do you take

1 his bid?

2 MR. JANKLOW: Yes, sir.

3 QUESTION: Would you sell him cement?

4 MR. JANKLOW: In South Dakota?

5 QUESTION: Yes.

6 MR. JANKLOW: Sure.

7 QUESTION: Doesn't this restriction provide for  
8 sales only to South Dakota residents?

9 MR. JANKLOW: Yes.

10 QUESTION: So that even the cement was going to be  
11 used in South Dakota you would nevertheless bar a sale to a  
12 nonresident. That is the way I take the restriction to be.

13 MR. JANKLOW: As I understand it, that is correct.

14 QUESTION: So that you might say you want the cement  
15 to be used in South Dakota but you really are saying that you  
16 want it to be used in South Dakota by South Dakota citizens?

17 MR. JANKLOW: No.

18 QUESTION: Well, that is the way it operates.

19 MR. JANKLOW: Well, except only at one period of  
20 time when they run out and, honestly, it never came into  
21 discussion.

22 QUESTION: Well, I just ask you again: If a Denver  
23 contractor came up and bid on a South Dakota, he might just as  
24 well stay at home, because he couldn't buy cement up there?

25 MR. JANKLOW: No, sir, no, sir, if he had a contract

1 he would have been taken care of.

2 QUESTION: He is not a resident.

3 MR. JANKLOW: Everybody that bids -- in the bidding  
4 industry a contractor has got a firm price on cement before he  
5 goes and bids.

6 QUESTION: Well, he wouldn't bid, because you  
7 wouldn't sell him cement.

8 MR. JANKLOW: At that particular time, that is  
9 probably correct.

10 QUESTION: At that time -- well, I know, but that is  
11 the way the restriction is.

12 MR. JANKLOW: I understand that. And at that time --

13 QUESTION: He could nonetheless bid on a South  
14 Dakota road project and if his bid were a low bid it would be  
15 accepted.

16 QUESTION: It would be accepted but he couldn't buy  
17 South Dakota cement.

18 MR. JANKLOW: I slightly hesitated because we do have  
19 provisions under our State law that give preference to South  
20 Dakota bidders and I do know that in the purchase of materials,  
21 personal property, that there is a preference for South  
22 Dakotans just like the Florida case, the Askew case, but I  
23 can't tell you whether or not that goes all the way to road  
24 bidding. So I don't know if I am being correct factually in  
25 the way I respond. I don't know that it carries that far.

1           QUESTION: In calling for bids you could provide, I  
2 assume, that the successful bidders would be permitted to buy  
3 South Dakota material?

4           MR. JANKLOW: Not really.

5           QUESTION: Why not?

6           MR. JANKLOW: The State cement plant is an independently  
7 run organization. I have now power. A Governor -- the  
8 legislature would have to change the law to tell the cement  
9 plant what to do. They have independent Commissioners that  
10 once they are appointed they are almost sovereign in terms of  
11 how they do their own business, consistent with the law.

12          QUESTION: But by agreement?

13          MR. JANKLOW: By agreement, yes.

14          QUESTION: By agreement that could be accomplished,  
15 the successful bidder would be able to get his cement in South  
16 Dakota from this plant.

17          MR. JANKLOW: For plaintiff to be correct you would  
18 have to look at a whole litany of -- it just so happens that  
19 we happen to be dealing in cement. Other States that deal  
20 with power, every State with their educational institutions,  
21 Maryland when it was trying to get rid of junk cars, all of  
22 these things that when you get in a quasi-proprietary or  
23 proprietary area you find the argument that somehow it is  
24 a restraint on interstate commerce. It just doesn't apply.  
25 Nobody would argue that a private business couldn't do



1 exactly the same thing. I as a person that wanted to build  
2 a new private factory could provide that only South Dakotans  
3 bid. I could provide that anybody who gets the contract must  
4 buy their cement from the South Dakota cement plant. And  
5 certainly I wouldn't be here as restraining interstate commerce.

6 QUESTION: Well, suppose I am individual in the  
7 retail business and I have a chain and I would like to come  
8 up and establish a retail outlet in South Dakota and I have  
9 to build. So I want to buy some cement in South Dakota and  
10 they say, are you a citizen? And I say, no. And you say,  
11 sorry, no cement.

12 Right?

13 MR. JANKLOW: Well, yes but. And I say "but" --

14 QUESTION: All right, let's take for the period of  
15 shortage, you would say, sorry, you are not a citizen.

16 MR. JANKLOW: I can't, because under the Privileges  
17 and Immunities Clause we are dealing with a corporation here  
18 and I do draw a distinction between -- the Privileges and  
19 Immunities Clause says I can't do that to citizens.

20 QUESTION: But anyway, you only sell South Dakota  
21 cement to South Dakota citizens?

22 MR. JANKLOW: To residents.

23 QUESTION: Residents.

24 MR. JANKLOW: Residents.

25 QUESTION: South Dakota residents?

1 MR. JANKLOW: That is correct.

2 QUESTION: And you say to this fellow, are you a  
3 South Dakota resident? And he says, no, I just want to do  
4 business in South Dakota, I want to build a building.

5 MR. JANKLOW: But that is --

6 QUESTION: Sorry, bring in your cement from Wyoming.

7 MR. JANKLOW: What we are doing is what a private  
8 business can do, and nobody argues they can't.

9 QUESTION: Governor, you are not limiting the sales  
10 because a private business would do that. When you limit  
11 the sales you are acting like a government. And I don't see  
12 why it is different for the government to limit its own sales  
13 when it is doing it for governmental purpose and for it to  
14 limit the sole private seller in the State for a governmental  
15 purpose. And you admit you couldn't do the latter.

16 MR. JANKLOW: I don't follow you, sir. I am sorry.

17 QUESTION: I thought you admitted that if there  
18 were a private owner of a plant the government of South Dakota  
19 could not accomplish the purpose it sought here by saying  
20 you may only sell to South Dakota.

21 MR. JANKLOW: That is correct.

22 QUESTION: That governmental purpose would not justify  
23 that regulation.

24 MR. JANKLOW: That is correct.

25 QUESTION: Now I think you have also acknowledged

1 that in operating the plant, although you normally operate it  
2 like a private entrepreneur, with respect to this particular  
3 decision to limit the sale to South Dakota residents you are  
4 acting for governmental reasons.

5 MR. JANKLOW: That is correct.

6 QUESTION: And part of the governmental reasons  
7 would be that the taxpayers of South Dakota -- I take it this  
8 is one factor for you -- have invested \$40 million and they  
9 might turn out like Chrysler Corporation?

10 MR. JANKLOW: We could lose. If someone opens a  
11 competing modern cement plant, Rapid City is only 30 miles from  
12 Wyoming, across the border in Wyoming or in the same city,  
13 they could drive us out of business. We may be inefficient,  
14 like all government we may not be able to compete with private  
15 enterprise if they set up. We don't know, but if they did  
16 we wouldn't be here complaining that somehow their competition  
17 violates the Commerce Clause. What they are complaining about  
18 is they made poor market decisions. They didn't plan ahead  
19 any better than we did and now somehow they want us to bear  
20 the brunt of the responsibility for the lack of their foresight  
21 in making a wise management decision. The record will show that  
22 we went out and tried to buy cement. We bought cement,  
23 thousands of tons of it, all over America and moved it into  
24 South Dakota and sold it at a cheaper price than we bought it  
25 for, to try and take care of people, to fulfill our contracts

1 and to take care of others. We were in an absolutely emergency  
2 situation because the production didn't equal the demand.

3 QUESTION: What was the original reason for  
4 constructing the South Dakota cement plant?

5 MR. JANKLOW: It is all in that 1920 South Dakota  
6 Supreme Court decision. They enumerate about 12 reasons but  
7 the reasons were there were no cement plants, I believe the  
8 record shows, within 175 miles of the State of South Dakota.

9 QUESTION: If there was going to be any cement  
10 available in South Dakota it had to be supplied by this  
11 government-operated plant?

12 MR. JANKLOW: There was none available in South  
13 Dakota. There was no cement plant in South Dakota and I  
14 believe that case says within 175 miles of South Dakota borders.

15 QUESTION: So conceivably the plant could have  
16 supplied cement and nonetheless supplied it at a loss to the  
17 citizens of South Dakota?

18 MR. JANKLOW: There are times when it did provide it  
19 at a loss. Reeves said in their argument today we have got  
20 cement piled up all over the place, there is no demand now  
21 because there is no construction. We are not suing him counter  
22 claim, but arguing that he ought to take 50,000 tons from us  
23 because the place is swimming in clinker and cement because  
24 nobody will buy it right now.

25 So they happened to have run into a bad time last

1 year. We are in a bad time now, and we are not suing anybody,  
2 we are eating our loss.

3 QUESTION: Had the Commission suspected this?

4 MR. JANKLOW: As of a year ago June, as of last  
5 June.

6 QUESTION: Now it will sell to anybody?

7 MR. JANKLOW: Now it sells to anybody because it has  
8 the product available again; it can take care of everybody.

9 QUESTION: And so Reeves can get all it wants now?

10 MR. JANKLOW: Reeves got 72 tons yesterday, as a  
11 matter of fact. I checked this morning. He has been getting  
12 it for a year.

13 QUESTION: What is left of this suit right now, why  
14 isn't it moot?

15 MR. JANKLOW: I have no idea.

16 QUESTION: Have you suggested it is moot?

17 MR. JANKLOW: No, we haven't.

18 QUESTION: I suppose you have suggested in a time of  
19 shortage that you are very likely going to restrain your sales  
20 to citizens?

21 MR. JANKLOW: We would, and I wouldn't be honest if  
22 I didn't say so.

23 MR. CHIEF JUSTICE BURGER: We will resume there at  
24 1:00 o'clock, Governor.

25 (Whereupon, a luncheon recess was taken.)

## AFTERNOON SESSION

(1:00 P.M.)

MR. CHIEF JUSTICE BURGER: Governor, you may continue.

MR. JANKLOW: Mr. Chief Justice, and may it please the Court:

I would like to draw a correction if I may to some of the facts that I stated this morning I think in response to Mr. Justice Stevens' questions. I draw your attention to three pages in the appendix, pages 31, 25 and 13. It deals with what the policy is of the Cement Plant Commission and I will read it:

In 19 --

QUESTION: Where is that?

MR. JANKLOW: On pages 31, 24 and 13 of the appendix. It has been stated three times historically. The first time was in 1920 where they said, and I quote:

"There would be a ready market for the entire output of the State within the State. In case there is a surplus a ready market is available in adjoining States."

Then in 1974 the Commission in its minutes, and I quote from the minutes:

"The Commission expressed its desire that South Dakota customers and South Dakota contracts" -- not residents but South Dakota customers and South Dakota

1 contracts --

2 "be given preference in compliance with the  
3 constitutional statutes of the State."

4 And finally in 1978 --

5 QUESTION: Where were you reading from?

6 MR. JANKLOW: That was page 24 in the appendix.

7 At the bottom.

8 And finally on page 13 of the Commission meeting  
9 minutes of 1978, June 1, and I quote:

10 "The Commission discussed the plant's major  
11 commitments requiring approximately 218,000 tons  
12 of cement for 1978 paving projects only. After  
13 discussing all these matters at considerable length  
14 the Commission reaffirmed its policy of supplying  
15 all South Dakota customers first and to honor all  
16 contract commitments with the remaining volume  
17 allocated on a first come, first served basis."

18 So to be correct we should state we are not giving  
19 preference to residents but to customers in South Dakota and  
20 contractual commitments across the board.

21 QUESTION: Would a Minnesota contractor who came out  
22 there and was the low bidder on a road contract and set up an  
23 office and ordered some cement, would he be a --

24 MR. JANKLOW: This would indicate --

25 QUESTION: -- a customer?

1 MR. JANKLOW: This would indicate that he is a  
2 customer. It doesn't say preferences to South Dakota residents.

3 QUESTION: I suppose he doesn't make a bid until he  
4 knows what his cement costs are.

5 MR. JANKLOW: That is the policy but I can't say it  
6 always happens that way.

7 The appellant in this --

8 QUESTION: Excuse me, Governor, but a South Dakota  
9 customer, I gather he would have to be one who did what the  
10 Chief Justice said, namely, establish a place of business in  
11 South Dakota?

12 MR. JANKLOW: I don't know that that is necessarily  
13 the case.

14 QUESTION: Well, could Reeves do that?

15 MR. JANKLOW: For a job in South Dakota?

16 QUESTION: Would Reeves be a South Dakota customer  
17 if it came to the Commission?

18 MR. JANKLOW: This was discussed in the lower court  
19 and it is in the transcript. There wasn't a trial in this case,  
20 it all was done on a TRO and there were arguments of counsel  
21 with no testimony, it all came on affidavits. But in some of  
22 the discussion, the testimony from the trial court from the  
23 hearing on the TRO, you can see where the discussion was made.  
24 The State's counsel said that a South Dakotan could even  
25 buy this cement and we couldn't prohibit them from selling it



1 to Mr. Reeves.

2 QUESTION: Let me come back to what we talked about  
3 a little bit this morning, or someone did, with cement running  
4 out of your briefcase now, literally, is there a case here  
5 since it is a TRO, no damages?

6 MR. JANKLOW: I would assume -- I would like to say  
7 "No." But I would assume there is only because we still have  
8 the policy. It just so happens we are not short right now,  
9 so it may be moot for today. But if we run short again, I  
10 would have to tell you that we would again --

11 QUESTION: This isn't the kind of thing that would  
12 evade review, it would be of some long lasting period?

13 MR. JANKLOW: That is correct. It has never happened  
14 before; in 70 years it has never happened before.

15 QUESTION: Suppose -- I am not quite sure what your  
16 answer is -- suppose a South Dakota contractor bids on the job  
17 in Wyoming and he is a citizen of South Dakota, he is a  
18 resident of South Dakota, he does business in Wyoming. Will  
19 you sell him cement to take out of the State for the Wyoming  
20 job?

21 MR. JANKLOW: I would say "Yes." We would, he would  
22 be a South Dakota customer.

23 And finally I would like to say that --

24 QUESTION: A South Dakota contractor can compete  
25 in Wyoming with South Dakota cement but a Wyoming contractor

1 cannot.

2 MR. JANKLOW: Well, that is no different -- I would  
3 say "Yes."

4 QUESTION: It is a "Yes" or "No."

5 QUESTION: Well, let me ask you this question, because  
6 I would have read Appendix 24 differently than your answer to  
7 Mr. Justice White's question suggests where it says the  
8 Commission expressed its desire that South Dakota customers  
9 and South Dakota contracts be given preference.

10 Now, supposing that Peter Kewitt, which when I was  
11 practicing was located in Omaha, came out and bid on a facility  
12 to be erected in South Dakota. Would that be a South Dakota  
13 contract?

14 MR. JANKLOW: Yes, I believe it would be, that would  
15 be a South Dakota contract. There is no other way to define  
16 the term "contract" as it is used in this context. It doesn't  
17 say contract only entered into in South Dakota.

18 QUESTION: So that Mr. Justice White's question  
19 before the recess about the Denver contractor doing a job in  
20 South Dakota is answered differently now than you answered it  
21 before?

22 MR. JANKLOW: That is why I brought this up. I am  
23 sorry.

24 QUESTION: But you still agree that -- apparently  
25 that Peter Kewitt from Omaha, if he was doing a job in northern

1 Nebraska and wanted to buy cement from South Dakota couldn't  
2 buy cement from South Dakota, whereas a South Dakota contractor  
3 bidding on that same job could?

4 MR. JANKLOW: That is correct. And we could do the  
5 same thing to his kids who wanted to go to school in our State.

6 The final thing is this case was sent back to the  
7 Eighth Circuit by this Court for a reconsideration in light of  
8 the Court's decision in Hughes v. Oklahoma. And even the  
9 appellants in this case agree that that case does not apply  
10 and they try and evade it. We all agree that Hughes v. --  
11 the Alexander case, the Hughes case from Maryland is the one  
12 that really is the one that is most controlling and is more  
13 despositive of the case.

14 QUESTION: Let me ask you one other question, Governor.

15 Are there quarry lands available in private hands in  
16 South Dakota, does the record show, or does the State condemn  
17 and purchase up all of the quarry lands from which cement  
18 material is obtained?

19 MR. JANKLOW: Our public records would show that  
20 virtually the entire State of South Dakota could be used for  
21 making cement, and the State of Wyoming. It is limestone coal  
22 that you get from the Powder River Basin, they have part of  
23 the ingredients. The materials that are readily available,  
24 virtually all of America west of the Mississippi River. There  
25 is nothing unique about these particular spots where we happen

1 to have our plant located. Our original plant was in Yankton,  
2 South Dakota, 300 miles east -- 400 miles east and was moved  
3 to Rapid City. You can put them up any place. Minnesota is  
4 considering doing it right now.

5 QUESTION: Mr. Kirven, you may have heard the  
6 question I just put to the Governor. This being only a TRO  
7 and in light of the subsequent discussion, do you think we  
8 still have a case here?

9 MR. KIRVEN: Yes, Your Honor, I do. The question of  
10 the policy being enforced at any time if South Dakota  
11 declares there is a shortage, it has an immediate effect on  
12 my client. And that effect, any period of time which it takes  
13 to have that matter resolved is going to cost my client money.

14 Now, it --

15 QUESTION: That alone is not enough reason to keep  
16 the case alive. It always costs money to litigate.

17 MR. KIRVEN: Well, there is no assurance that the  
18 policy won't be enforced against Reeves at the end, as soon  
19 as a shortage occurs. In fact in May of 1979 the policy was  
20 enforced against Reeves and Reeves received an allocation  
21 formula based on expected needs of South Dakota being met  
22 first and then Reeves received an allocation in May of '79,  
23 Your Honor, after '78 and the shortage occurred.

24 So it is obvious that they intend and in all  
25 probability will enforce the policy the next time --

1 QUESTION: I understood you got some 72,000 units  
2 yesterday, was it. Are you getting all you need now, is  
3 Reeves getting all ---

4 MR. KIRVEN: At the present times, yes, Your Honor.

5 QUESTION: And the prospect is that you may be able  
6 for some while to get all you need?

7 MR. KIRVEN: I would assume that during the summer  
8 of this year with the economic conditions in the housing  
9 industry and with demand being less, that there will be no  
10 problem this year. But the problem arises is in Wyoming with  
11 the short construction season, the critical point for my  
12 client, in that period of time if that policy is enforced  
13 again, even the time that was lost in this suit which was only  
14 19 or 21 days, well, actually it was about 30 days. The harm  
15 to my client is tremendous.

16 QUESTION: Well, what is the construction season?

17 MR. KIRVEN: Well, the construction season for the  
18 ready-mix concrete begins about June and goes through October  
19 for my client.

20 QUESTION: Does your client compete with any South  
21 Dakota contractors in Wyoming?

22 MR. KIRVEN: He competes with South Dakota ready-mix  
23 dealers in Gillette, Wyoming, at their plant. And that is  
24 really the essence of our claim, is without South Dakota cement  
25 we cannot compete in the Gillette market with South Dakota

1 ready-mix dealers.

2 QUESTION: And they can buy the cement and you can't?

3 MR. KIRVEN: That is correct.

4 QUESTION: So they are bringing the cement across  
5 the State line --

6 MR. KIRVEN: That is correct.

7 QUESTION: -- and you can't?

8 MR. KIRVEN: Well, we cannot go into the State.

9 QUESTION: Well, yes, but they won't let you buy it?

10 MR. KIRVEN: That is right.

11 QUESTION: Because you are neither a South Dakota  
12 contractor nor a South Dakota job?

13 MR. KIRVEN: That is correct.

14 QUESTION: Or a customer.

15 QUESTION: "Customer" is the word as well as contractor,  
16 isn't it?

17 MR. KIRVEN: Well, it says South Dakota customer but  
18 we apparently do not fit that definition. I think that implies  
19 that you are a South Dakota resident, as used in that policy.

20 QUESTION: There would seem to be some very practical  
21 ways that that could be met by setting up an office in Rapid  
22 City with a telephone operator, apparently.

23 MR. KIRVEN: Well, the comparison between other types  
24 of activities like electricity in Nebraska is not the same,  
25 because you cannot drive to Nebraska and say, give me a bottle

1 of electricity, I live in Wyoming and want to take it with  
2 me, that is all we are asking for. That involves a different  
3 type of an activity. We are not saying to this Court that  
4 South Dakota is forced to enter into any market areas, that  
5 they are forced to sell in any one State, that they must put  
6 distribution lines or open up. All we are saying is that  
7 Reeves, Inc. has a right to go to any State in this national  
8 marketplace and be treated in the same manner under that  
9 Commerce Clause without any barriers imposed.

10 QUESTION: As South Dakota customers.

11 MR. KIRVEN: As South Dakota customers.

12 QUESTION: You don't draw the line between South  
13 Dakota as a State and South Dakota as an operator of a cement  
14 plant?

15 MR. KIRVEN: Well, our position is --

16 QUESTION: You don't draw any line.

17 MR. KIRVEN: The State ownership of this product does  
18 not make it immune from the implications of the Commerce  
19 Clause.

20 QUESTION: It is different though, isn't it; you  
21 don't recognize any difference?

22 MR. KIRVEN: Well, in --

23 QUESTION: If it were not owned by South Dakota, you  
24 would have no case?

25 MR. KIRVEN: Well, I don't know that I wouldn't have

1 any case. The assumption that a private enterprise would be  
2 able to do this carries only so long as they do it absent anti-  
3 competitive motives, because that private enterprise is  
4 governed by the Sherman Act --

5 QUESTION: There is a single defendant here, you  
6 don't have any possibility of a conspiracy or an agreement with  
7 anybody else.

8 MR. KIRVEN: Unless it is --

9 QUESTION: And a private cement clearly could do this,  
10 couldn't it, under the established law?

11 MR. KIRVEN: Absent anticompetitive motives and  
12 assuming no violation of the Sherman Act --

13 QUESTION: You don't have any agreement, no possibility  
14 of any agreement and you don't have a monopoly here, do you?

15 MR. KIRVEN: Well, I don't know if there hasn't been  
16 a conspiracy among the citizens of South Dakota and its State --

17 QUESTION: Well, if you have a private enterprise  
18 how could you have a conspiracy among the citizens of South  
19 Dakota? A private enterprise that might be a conspiracy  
20 among their directors and officers to sell -- not to sell to  
21 you. That is no violation of the antitrust laws.

22 QUESTION: A private seller could refuse to sell to  
23 you because he didn't like your necktie.

24 QUESTION: Exactly.

25 MR. KIRVEN: Well, that is true and my only statement



1 was that if there is a violation of the Sherman Act, which I  
2 don't know that there isn't a conspiracy with the citizens, the  
3 Governor went into State court representing not only the State  
4 but the South Dakota general contractors of that State to  
5 have the 50-percent allocation policy enjoined.

6 QUESTION: But when you say therefore that State  
7 ownership doesn't immunize this antitrust law, you are implying  
8 that a private cement mill would be violating the antitrust  
9 law. It wouldn't at all, would it?

10 MR. KIRVEN: Not under the --

11 QUESTION: No. And individual cement mill wouldn't  
12 at all, would it?

13 MR. KIRVEN: If there was a conspiracy of some kind  
14 it would.

15 QUESTION: Well, how could there be a conspiracy with  
16 only one seller?

17 MR. KIRVEN: Well, if a private cement mill in South  
18 Dakota conspired to sell with all of the citizens of South  
19 Dakota to them exclusively, I think there might be a violation.

20 QUESTION: Mr. Kirven, isn't really your point that  
21 there is no reason why a private seller would restrict his  
22 sales for a governmental purpose.

23 MR. KIRVEN: Well, that is true.

24 QUESTION: That is the only reason they are doing it,  
25 as they have said themselves, it is for a governmental reason

1 and not for any private economic reason.

2 MR. KIRVEN: That is correct.

3 Thank you for your attention.

4 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
5 case is submitted.

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