

# The Burger Court Opinion Writing Database

*Cappaert v. United States*  
426 U.S. 128 (1976)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice Harlan  
 Mr. Justice Black  
 Mr. Justice Douglas  
 Mr. Justice White  
 Mr. Justice Clark  
 Mr. Justice Marshall  
 Mr. Justice Brandeis  
 Mr. Justice Sutherland  
 Mr. Justice Stone  
 Mr. Justice Cardozo  
 Mr. Justice Taft

File No. 74-1107

Clarendon 7000

Recirculated:

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

Nos. 74-1107 AND 74-1304

Francis Leo Cappaert et al.,  
 Petitioners,

74-1107 *v.*

United States et al.

Nevada ex rel. Roland D.  
 Westergard, State Engi-  
 neer, Petitioner,

74-1304 *v.*

United States et al.

On Writs of Certiorari to  
 the United States Court  
 of Appeals for the Ninth  
 Circuit.

[May —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the reservation of Devil's Hole as a National Monument reserved federal water rights in underground water.

Devil's Hole is a deep limestone cavern. Approximately 50 feet below the surface of the cavern is a pool 65 feet long, 10 feet wide and at least 200 feet deep, although its actual depth is unknown. The pool is a remnant of the prehistoric Death Valley Lake System. By the Proclamation of January 17, 1952, President Truman withdrew from the public domain a 40-acre tract of land surrounding Devil's Hole, making it a detached component of the Death Valley National Monument. Proclamation No. 2961, 66 Stat. C18, 17 Fed. Reg. 691.<sup>1</sup> The

<sup>1</sup> The final paragraph of the Proclamation withdrawing Devil's Hole from the public domain reads as follows:

"Now, Therefore, I, Harry S. Truman, President of the United

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 26, 1976

Re: (74-1107 - Cappaert v. United States  
(74-1304 - Nevada ex rel Roland Westergard v. United States

MEMORANDUM TO THE CONFERENCE:

Byron had some helpful clarifying suggestions in this case and I have accommodated his views. See enclosures.

Regards,



Attached to CJ 5126 Memo.  
from CJ to BW

May 25, 1976

Re: (74-1107 - Cappaert v. United States  
(74-1304 - Nevada ex rel Roland Westergard v. United States

Dear Byron:

Thank you for your memo of May 24. My references at II., p. 12, intended to relate to this case, but you are correct that the statements could be read broadly and hence should be narrowed. I suggest the following as a substitute for the material beginning with the third sentence under II, to the end of II:

"Here, however, the water in the pool is surface water. The federal water rights were being depleted because, as the evidence showed, the 'groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle.' Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, p. xxiv (1971). Here the Cappaerts are causing the water level in Devil's Hole to drop by their heavy pumping. See Corker, supra; see also, Water Policies for the Future -- Final Report to the President and to the Congress of the United States by the National Water Commission 233 (1973). It appears that Nevada itself may recognize the potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both. Nev. Rev. Stat. §§ 533.010 et seq.; 534.020; 534.080; 534.090. See generally, Trelease, Water Law -- Resource Use and Environmental Protection 457-552 (2d ed. 1974); Meyers & Tarlock, Water Resource Management 553-634 (1971). Thus, since the implied reservation of water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."

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This change will require minor conforming changes in various places where I have referred to "groundwater."

I have also incorporated the suggestion communicated by your clerk to make very explicit the fact that this case deals only with unappropriated water. Will this do it?

Regards,

Mr. Justice White

To: Mr. Justice Brennan  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Marshall  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Clark  
Mr. Justice Douglas  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Powell  
Mr. Justice O'Connor  
Mr. Justice Souter

FBI

Classification: CONFIDENTIAL  
Recipients: MAY 26, 1976

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 74-1107 AND 74-1304

Francis Leo Cappaert et al.,  
Petitioners,  
74-1107 *v.*  
United States et al.  
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Devil's Hole is a deep limestone cavern. Approximately 50 feet below the opening of the cavern is a pool 65 feet long, 10 feet wide and at least 200 feet deep, although its actual depth is unknown. The pool is a remnant of the prehistoric Death Valley Lake System and is situated on land owned by the United States since the Treaty of Guadalupe Hidalgo in 1849, 9 Stat. 922. By the Proclamation of January 17, 1952, President Truman withdrew from the public domain a 40-acre tract of land surrounding Devil's Hole, making it a detached component of the Death Valley National Monument. Proc-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 1, 1976

PERSONAL

Re: ( 74-1107 - Cappaert v. United States  
( 74-1304 - Nevada v. United States

Dear Harry:

When judges do a particularly good job on a difficult problem (and against local sentiment), the names seem to me desirable. The "designation" point does what the Court of Appeals opinion takes care of usually with a footnote and explains why a well known district judge is in the case.

Regards,

W. B.

Mr. Justice Blackmun

July 17 1976

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 26, 1976

RE: Nos. 74-1107 - Caeppert v. United States  
74-1304 - Nevada ex rel Westergard v. United States

Dear Chief:

May I suggest that the paragraph beginning at the bottom of page 15 and carrying over to page 16 may need revision? I question that it accurately comments upon the holding of Colorado Water Conservation District v. United States. If you agree, perhaps something like the following might replace the paragraph:

"Federal water rights are not dependent upon state law or state procedures, and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U.S.C. §1345 to adjudicate the water rights claims of the United States. 13/ Colorado River Water Conservation District v. United States, \_\_\_\_ U.S. at [5-8]. However, while the McCarran amendment, 43 U.S.C. §666, 66 Stat. 560, is not a substantive statute, requiring the United States to perfect its water rights in the state forum like all other land owners, the federal government may be required to have its rights and rights held by it adjudicated in state forums. See Colorado River Water Conservation District v. United States, \_\_\_\_ U.S., at [16-19]."

I should also say that I believe Byron's comment has much merit, and I join his suggestion.

Sincerely,

*Wil*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 28, 1976

RE: Nos. 74-1107 & 74-1304 Cappaert and Nevada ex rel.  
Westergard v. United States, et al.

Dear Chief:

I agree.

Sincerely,

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The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 20, 1976

Nos. 74-1107 and 74-1304  
Cappaert v. United States

Dear Chief,

I am glad to join your opinion for the  
Court in these cases.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 24, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. United States

Dear Chief:

Except for Part II dealing with ground water, I am in substantial agreement with your circulating opinion in this case. As to Part II, however, it seems unnecessary to go farther than holding that reserved water rights may not be defeated by a subsequent appropriation of ground water on which the reserved rights are shown to depend. I would prefer to avoid laying down the general proposition that because "ground water and surface water are interrelated--the existence of the water right does not vary as the source of the water varies."

Ground and surface water are not always interrelated; and where they are not, I would withhold opinion on whether a shortage of surface water in dry years may be cured by drilling and pumping or diverting unrelated ground water to the detriment of prior rights dependent on that water. Query, for example: whether water rights impliedly reserved by the creation of an Indian reservation would give the United States and its wards the right to drill for and appropriate ground water that until that time had no surface manifestation but has been subject to prior appropriation by those owning non-reservation land beneath which the underground pool or stream also lies or runs.

Sincerely,



The Chief Justice

Copies to Conference

P.S. The attached article from a country newspaper in Colorado indicates the immediate impact of our recent decisions on the allocation of a scarce resource, as well as the proclivity of some government agencies to attempt to turn an inch into a mile.

B.R.W.

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 2, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. U. S.

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 2, 1976

Re: No. 74-1107 -- Cappaert v. United States  
No. 74-1304 -- Nevada v. United States

Dear Chief:

Please join me.

Sincerely,



T. M.

The Chief Justice

cc: The Conference

May 31, 1976

Re: No. 74-1107 - Cappaert v. United States  
No. 74-1304 - Nevada v. United States

Dear Chief:

In view of our conversations in the past, I wonder whether you really intend to refer to the district judges by name, as you have done on pages 6 and 7. I also wonder what the "sitting by designation," at the bottom line on page 7, really adds.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States  
Washington, D. C. 20543

✓

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 31, 1976

Re: No. 74-1107 - Cappaert v. United States  
No. 74-1304 - Nevada v. United States

Dear Chief:

Please join me in your recirculation of May 28.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 21, 1976

✓  
2

No. 74-1107 Cappaert v. United States  
No. 74-1304 Nevada v. United States

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

1fp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 25, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. United States

Dear Chief:

I agree with Byron's observations about this case, including his comments about Part II.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 3, 1976

Re: Nos. 74-1107 & 74-1304 - Cappaert v. United States

Dear Chief:

Please join me.

Sincerely,

*WRW*

The Chief Justice

Copies to the Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 20, 1976

Re: 74-1107 - Cappaert, et al. v. United States  
74-1304 - Nevada, ex rel Westergard, etc. v.  
United States

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Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference