

The Burger Court Opinion Writing Database

Colorado River Water Conservation District v. United States

424 U.S. 800 (1976)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1976

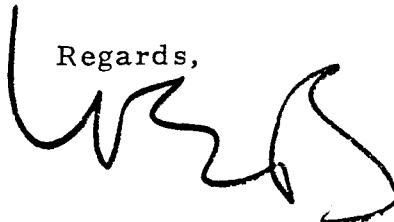
Re: (74-940 - Colorado River Water Conservation
(District v. U. S.
(74-949 - Akin v. U. S.

Dear Bill:

I join your proposed opinion dated March 16.

You have saved my "pupfish" problem of
underground water by eliminating "on the land"!

Regards,



Mr. Justice Brennan

Copies to the Conference

STATISTIC CHANGES

4, 7, 8, 10, 14, 15, 17, 18

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: ~~3/8/76~~

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-940 AND 74-949

Colorado River Water Conservation District et al., Petitioners, 74-940 <i>v.</i> United States. Mary Akin et al., Petitioners, 74-949 <i>v.</i> United States.	On Writs of Certiorari to the United States Court of Appeals for the Tenth Cir- cuit.
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[March —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The McCarran amendment, 43 U. S. C. § 666, provides that "Consent is hereby given to join the United States in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." The questions presented by this case concern the effect of the McCarran amendment upon the jurisdiction of the federal district courts under 28 U. S. C. § 1345 over suits by the United States for determination of water rights brought by it

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

W. 8, 12, 14, 15, 16, 19

From: Mr. Justice Brennan

Circulated:

Received at 3-16-76

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-940 AND 74-949

Colorado River Water Con-
 servation District et al.,

Petitioners,

74-940 *v.*
 United States

Mary Akin et al.,
 Petitioners,

74-949 *v.*
 United States

On Writs of Certiorari to the
 United States Court of
 Appeals for the Tenth Cir-
 cuit.

[March —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the
 Court.

The McCarran amendment, 43 U. S. C. § 666, provides that "Consent is hereby given to join the United States in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." The questions presented by this case concern the effect of the McCarran amendment upon the jurisdiction of the federal district courts under 28 U. S. C. § 1335 over suits by the United States for determination of water rights brought by it

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 22, 1976

MEMORANDUM TO THE CONFERENCE

Re: Nos. 74-940 & 74-949 Colorado River, etc. and
Akin v. United States

At the end of the second full paragraph on page 19,
add n. 26:

"Whether similar considerations would permit dis-
missal of a water suit brought by a private party
in federal district court is a question we need
not now decide."

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 4, 1976

Nos. 74-940 and 74-949
Colorado River Water Cons. Dist. v. U. S.

Dear Bill,

I shall in due course circulate a
dissenting opinion in this case.

Sincerely yours,

P. S.
✓

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart
 MAR 16 1976
 CIRCUIT

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-940 AND 74-949

Colorado River Water Conservation District et al.,
 Petitioners,

74-940 *v.*
 United States.

Mary Akin et al.,
 Petitioners,

74-949 *v.*
 United States.

On Writs of Certiorari to the
 United States Court of
 Appeals for the Tenth Cir-
 cuit.

[March —, 1976]

MR. JUSTICE STEWART, dissenting.

The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree.¹ The Court further says that the McCarran amendment "in no way diminished" the District Court's jurisdiction. I agree.² The Court also says that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." I agree.³

¹ "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . ." 28 U. S. C. § 1334.

² Nothing in the McCarran amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts. That law operates as no more than a *pro tanto* waiver of sovereign immunity. *United States v. District Court for Eagle County*, 401 U. S. 520; *United States v. District Court for Water Division No. 5*, 401 U. S. 527.

³ See *England v. Medical Examiners*, 375 U. S. 411, 415-416; *Meredith v. Winter Haven*, 320 U. S. 228.

1, 3, 4

To: The Co. of Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulation

2nd DRAFT

Recd.

MAR 19 1976

SUPREME COURT OF THE UNITED STATES

Nos. 74-940 AND 74-949

Colorado River Water Con-
servation District et al.,

Petitioners,

74-940 *v.*

United States.

Mary Akin et al.,

Petitioners,

74-949 *v.*

United States.

On Writs of Certiorari to the
United States Court of
Appeals for the Tenth Cir-
cuit.

[March —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK-
MUN and MR. JUSTICE STEVENS concur, dissenting.

The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree.¹ The Court further says that the McCarran amendment "in no way diminished" the District Court's jurisdiction. I agree.² The Court also says that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." I agree.³

¹ "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States" 28 U. S. C. § 1335.

² Nothing in the McCarran amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts. That law operates as no more than a *pro tanto* waiver of sovereign immunity. *United States v. District Court for Eagle County*, 401 U. S. 520; *United States v. District Court for Water Division No. 5*, 401 U. S. 527.

³ See *England v. Medical Examiners*, 375 U. S. 411, 415-416; *Meredith v. Winter Haven*, 320 U. S. 228.

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

CHAMBERS OF
JUSTICE BYRON R WHITE

March 8, 1976

Re: Nos. 74-940 & 74-949 - Colorado River Water
Conservation District v. U. S.

Dear Bill:

Please join me in your 3/8/76 circulation.

Sincerely,



Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 18, 1976

Re: Nos. 74-940 and 74-949 -- Colorado River Water
Conservation District v. United States

Dear Bill:

Please join me.

Sincerely,

T.M.
T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1976

Re: No. 74-940 - Colorado River Water Conservation
District v. United States
No. 74-949 - Akin v. United States

Dear Bill:

I shall await Potter's forthcoming dissent.

Sincerely,

H. A. B.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 17, 1976

Re: No. 74-940 - Colorado River Water Conservation
District v. United States
No. 74-949 - Akin v. United States

Dear Potter:

Please join me in your dissent.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 17, 1976

No. 74-940 Colorado River Water Conservation
District v. United States

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 10, 1976

Re: Nos. 74-940 and 74-949, Colorado River Water
Conservation District et al. v. United States;
Mary Akin et al. v. United States

Dear Bill:

I am in general agreement with your proposed opinion and want to join it, but I do have some difficulties with parts of your treatment of the federal abstention doctrine as developed by the decisions of this Court in Part B of your draft. I think they are probably sufficiently minor that a few small changes would bring me into line.

I have no difficulty with your first "category", embodying the "classic" abstention doctrine stemming from Pullman.

I may well be wrong, but I am not sure that all of the cases that you group into your second category properly fall within your descriptive language contained on page thirteen, "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar". While you are certainly right as to Thibodaux, Kaiser Steel, and Hawks, as I read Burford and Alabama Public Service Commission, jurisdiction in those cases was based on both diversity and federal question, and the decision to abstain seems to have avoided at least a colorable constitutional question.

Your may well be right in lumping these together for purposes of the overall discussion of abstention, but I do think these factual differences between Burford and Alabama and the remaining cases should at least be mentioned.

In referring to the present case in connection with your discussion of the second abstention category, you state that "the issues involved in this case are strictly federal in nature." See your first full paragraph on page 14. Yet on page 4 you have earlier pointed out, I think correctly, that "the Government asserted reserved rights, . . . as well as rights based on State law." I know that you are more familiar with the nature of the claims than I am, but it strikes me that at least superficially there is a discrepancy between the description on page 14 of the present case and the description of it on page 4.

Finally, I have reservations about classifying Younger, City of Jeanette, and Huffman as abstention decisions. If this is simply a disagreement as to nomenclature, I would defer to your judgment. But I think there are some differences of substance between "abstention" and the Younger doctrine which is referred to as "equitable restraint" by Hart and Wechsler. Principal among these is the question of what standard is to be used for appellate review of decisions applying or refusing to apply the doctrines. In a genuine abstention case, I fully agree with your statement of the standard in your introduction to Part B: the issue is whether the decision to adjudicate or not to adjudicate a claim is "an appropriate exercise of discretion". In a Younger type case, however, I conceive there to be little or no discretion available to the District Court. If facts are adduced establishing that the case comes within those decisions, I do not think a District Court has any "discretion" to go ahead and grant equitable relief.

I feel sufficiently strongly about the Younger point that I do not feel that I could join an opinion indicating that there is a discretionary component to it without some additional and very persuasive explanation. As to the other points, it is an area with which you have dealt for much longer than I have, but I would appreciate at least getting your reactions to my reactions.

Sincerely,



Mr. Justice Brennan

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1976

Re: Nos. 74-940 and 74-949 - Colorado River Water
Conservation District v. United States, et al.

Dear Bill:

Thanks for your note of March 12th, with its proposed changes. They are entirely satisfactory to me with the one minor exception hereafter noted, and if that exception gives you no problem I shall send you a join letter forthwith.

I am not happy with the citation to Wechsler, "Federal Courts, State Criminal Law and the First Amendment", 49 N.Y.U.L. Rev. 740, 827-833 (1974). I would much rather take your word than his as to what our decisions say about abstention, and the referenced portions of the article contain statements of opinion with which I do not agree as well as descriptions of the case holdings.

Sincerely,



Mr. Justice Brennan

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1976

Re: No. 74-940 - Colorado River Water Conservation
District v. United States

Dear Bill:

Please join me.

Sincerely,

W. H. R.

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-940 AND 74-949

Colorado River Water Conservation District et al.,
 Petitioners,
 74-940 *v.*
 United States.
 Mary Akin et al.,
 Petitioners,
 74-949 *v.*
 United States.

On Writs of Certiorari to the
 United States Court of
 Appeals for the Tenth Cir-
 cuit.

[March —, 1976]

MR. JUSTICE STEVENS, dissenting.

While I join MR. JUSTICE STEWART's dissenting opinion, I add three brief comments:

First, I find the holding that the United States may not litigate a federal claim in a federal court having jurisdiction thereof particularly anomalous. I could not join such a disposition unless commanded to do so by an unambiguous statutory mandate or by some other clearly identifiable and applicable rule of law. The McCarran amendment to the Department of Justice Appropriation Act of 1953, 43 U. S. C. § 666, 66 Stat. 560, announces no such rule.

Second, the Federal Government surely has no lesser right of access to the federal forum than does a private litigant, such as an Indian asserting his own claim. If this be so, today's holding will necessarily restrict the access to federal court of private plaintiffs asserting water rights claims in Colorado. This is a rather surprising byproduct of the McCarran amendment; for there is

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 18, 1976

Re: No. 74-940 - Colorado River Water Conservation
District et al. v. United States
No. 74-949 - Akin et al. v. United States

Dear Potter:

If I may, I would like to join your dissenting opinion while adding the additional comments reflected in the attached dissent.

Respectfully,



Mr. Justice Stewart

Copies to the Conference