

The Burger Court Opinion Writing Database

United States v. New Mexico

438 U.S. 696 (1978)

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

June 10, 1978

Re: 77-510 - United States v. New Mexico

Dear Bill:

I join.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 5, 1978

RE: No. 77-510 United States v. State of New Mexico

Dear Bill:

I'll circulate a dissent in the above in due course.

Sincerely,



Mr. Justice Rehnquist
cc: The Conference

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 15, 1978

RE: No. 77-510 United States v. New Mexico

Dear Lewis:

Please join me in your fine opinion. May I suggest a few additions that I regard as important. Our clerks have discussed these in detail and I'll only briefly mention them.

1. In the discussion of the necessity of maintaining minimum instream flows, could you indicate that the state claims the right, which the Court recognizes, to allow diversion of all of the water from the stream which of course would have the result that the Gila trout would necessarily be extinguished.
2. With respect to the stockwatering issue, I agree that the United States failed to prove that stockgrazing was necessary to preserve and protect the forest. In light of the argument in its brief that it is, however, should you add a footnote mentioning that argument and that we agree with the Court that it failed here but only for want of proof?

With respect to the 1960 Multiple Use Sustained Yield Act, could you point out that although Bill's opinion purports to hold that the Act does not reserve water for fish and wildlife purposes in forests established prior to the Act, the discussion is obiter dictum in light of the parties' statement of the issues and briefs explicitly saying that that issue is not presented?

Sincerely,

Bil

Mr. Justice Powell

⑥ *Brennan 77*

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 1, 1978

Re: No. 77-510, U.S. v. New Mexico

Dear Bill,

I am glad to join your opinion for the
Court.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

Re: No. 77-510, U. S. v. New Mexico

Dear Bill,

The changes you propose on
pages 17 and 18 of your opinion are entirely
satisfactory to me.

Sincerely yours,

P.S.
1

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 23, 1978

Re: 77-510 - United States v. New Mexico

Dear Lewis,

You have sold me on the birds and
bees. Please join me in your partial dis-
sent in this case.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1978

Re: No. 77-510 - U.S. v. State of New Mexico

Dear Bill:

I shall await the dissent.

Sincerely,

T.M.

T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 23, 1978

Re: No. 77-510, United States v. New Mexico

Dear Lewis,

Please join me in your dissent.

Sincerely,

Jm,

T.M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1978

Re: No. 77-510 - United States v. New Mexico

Dear Bill:

Please join me in your proposed opinion as amended by the changes set forth in your memorandum of June 2.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1978

No. 77-510 United States v. New Mexico

Dear Bill:

I am with Bill Brennan in partial dissent, and
one of us will write.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

From: Mr. Justice Powell

Circulated: 16 JUN 1978

Recirculated: _____

No. 77-510, United States v. New Mexico.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law. See ante, at 3, 5-6, 8-9. I also agree that the Organic Administration Act of 1897, 30 Stat. 11, cannot fairly be read as evidencing an intent to reserve water for recreational or stockwatering purposes in the national forests.^{1/}

I do not agree, however, that the forests which Congress intended to "improve and protect" are the still, silent, lifeless places envisioned by the Court. In my view, the forests consist of the birds, animals, and fish - the wildlife -- that inhabit them, as well as the trees,

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: 28 JUN 1978

P.4

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-510

United States, Petitioner, | On Writ of Certiorari to the
v. | Supreme Court of New Mexico.
State of New Mexico.

[June —, 1978]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting in part.

I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law. See *ante*, at 3, 5-6, 8-9. I also agree that the Organic Administration Act of 1897, 30 Stat. 11, cannot fairly be read as evidencing an intent to reserve water for recreational or stockwatering purposes in the national forests.¹

¹ I express no view as to the effect of the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U. S. C. § 528 *et seq.*, on the United States' reserved water rights in national forests that were established either before or after that Act's passage. Although the Court purports to hold that passage of the 1960 Act did not have the effect of reserving any additional water in then-existing forests, see *ante*, at 16-19, this portion of its opinion appears to be dicta. As the Court concedes, "Petitioner does not argue that the Multiple-Use Sustained-Yield Act of 1960 reserved additional water for use on national forests." *Ante*, at 17 n. 21. Likewise, the State argues only that, "No reserved rights for fish or wildlife can be implied in the Gila National Forest *prior to the enactment of the Multiple-Use Sustained-Yield Act of June 12, 1960 . . .*." Brief for New Mexico 44 (emphasis supplied); see also *id.*, at 1 ("questions presented"). Indeed, the State has gone so far as to suggest that passage of the 1960 Act may well have expanded the United States' reserved water rights in the national forests, presumably with a priority date for the additional reserved rights of 1960. See Brief in Opposition 16-17. Read in context, the New

*EX-2
PACIFIC*

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

From: Mr. Justice Rehnquist
Circulated: MAY 31 1978

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-510

United States, Petitioner,
v.
State of New Mexico. } On Writ of Certiorari to the
Supreme Court of New Mexico.

[June —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Rio Mimbres rises in the southwestern highlands of New Mexico and flows generally southward, finally disappearing in a desert sink just north of the Mexican border. The river originates in the upper reaches of the Gila National Forest, but during its course it winds more than 50 miles past privately owned lands and provides substantial water for both irrigation and mining. In 1970, a stream adjudication was begun by the State of New Mexico to determine the exact rights of each user to water from the Mimbres.¹ In this adjudication the United States claimed reserved water rights for use in the Gila National Forest. The State District Court held that the United States, in setting the Gila National Forest aside from other public lands, reserved the use of such water

¹ The suit was initially filed in 1966 as a private action by the Mimbres Valley Irrigation Co. to enjoin alleged illegal diversions from the Rio Mimbres. In 1970, the State of New Mexico, pursuant to New Mexico Stat. Ann. § 75-4-4, filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. Under 43 U. S. C. § 666 (a), "[c]onsent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source," including the reserved rights of the United States. See *United States v. District Court for Eagle County*, 401 U. S. 520 (1971); *United States v. District Court for Water Div. No. 5*, 401 U. S. 527 (1971).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 2, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-510 United States v. State of New Mexico

John has suggested that I insert a footnote at page 18 of the first draft of this proposed opinion, to the effect that we express no opinion as to whether after the enactment of the 1960 Act there might be reservations of national forests to which a broader doctrine of reserved water rights would apply. I have no objection to the insertion of the footnote, and the related changes in the draft delineated hereafter, but since Potter had already joined I thought I would circulate to the Conference in order to try to elicit the preference of those at Conference who voted to affirm with respect to this point.

The changes I propose are as follows:

- 2 -

Page 17: Eliminate the first sentence of the second paragraph on that page, and rewrite the second sentence so as to read: "The House Report accompanying the 1960 legislation indicates that recreation, range, and 'fish' purposes are 'to be supplemental to, but not in derogation of, the purpose for which the national forests were established' in the . . . etc."

Page 18: Following the sentence beginning "Without legislative history", drop a footnote numbered 21 reading as follows: "We intimate no view as to whether Congress, in the 1960 Act, authorized the subsequent reservation of national forests out of public lands to which a broader doctrine of reserved water rights might apply."

Realizing that I have no power to compel testimony, but hoping that it may be given on a voluntary basis, I would appreciate hearing from any of you inclined to respond.

Sincerely,

W.W.

STYLISTIC CHANGES THROUGHOUT
PP 17-18
Footnotes Renumbered

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

From: Mr. Justice Rehnquist

Circulated:

Recirculated: JUN 8 1973

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-510

United States, Petitioner, *v.* On Writ of Certiorari to the
State of New Mexico. Supreme Court of New Mexico.

[June —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Rio Mimbres rises in the southwestern highlands of New Mexico and flows generally southward, finally disappearing in a desert sink just north of the Mexican border. The river originates in the upper reaches of the Gila National Forest, but during its course it winds more than 50 miles past privately owned lands and provides substantial water for both irrigation and mining. In 1970, a stream adjudication was begun by the State of New Mexico to determine the exact rights of each user to water from the Mimbres.¹ In this adjudication the United States claimed reserved water rights for use in the Gila National Forest. The State District Court held that the United States, in setting the Gila National Forest aside from other public lands, reserved the use of such water

¹ The suit was initially filed in 1966 as a private action by the Mimbres Valley Irrigation Co. to enjoin alleged illegal diversions from the Rio Mimbres. In 1970, the State of New Mexico, pursuant to New Mexico Stat. Ann. § 75-4-4, filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. Under 43 U. S. C. § 666 (a), "[c]onsent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source," including the reserved rights of the United States. See *United States v. District Court for Eagle County*, 401 U. S. 520 (1971); *United States v. District Court for Water Div. No. 5*, 401 U. S. 527 (1971).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 19, 1978

Re: No. 77-510, United States v. New Mexico

Dear Lewis:

In response to your dissent in this case, I am making the following addition to my opinion on page 14 at the end of Part IIA:

National park legislation is not the only instructive comparison. In the Act of March 10, 1934, 48 Stat. 400, 16 U.S.C. § 694, Congress authorized the establishment within individual national forests of fish and game sanctuaries, but only with the consent of the Senate legislatures. The Act specifically provided

"That for the purpose of providing breeding places for game birds, game animals, and fish on lands and waters in the national forests not chiefly suitable for agriculture, the President of the United States is hereby authorized, upon recommendation of the Secretary of Agriculture and the Secretary of Commerce

PF 13-134
FOOTNOTES
Renumbered

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

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 31 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-510

United States, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of New Mexico.
State of New Mexico.

[June —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Rio Mimbres rises in the southwestern highlands of New Mexico and flows generally southward, finally disappearing in a desert sink just north of the Mexican border. The river originates in the upper reaches of the Gila National Forest, but during its course it winds more than 50 miles past privately owned lands and provides substantial water for both irrigation and mining. In 1970, a stream adjudication was begun by the State of New Mexico to determine the exact rights of each user to water from the Mimbres.¹ In this adjudication the United States claimed reserved water rights for use in the Gila National Forest. The State District Court held that the United States, in setting the Gila National Forest aside from other public lands, reserved the use of such water

¹ The suit was initially filed in 1966 as a private action by the Mimbres Valley Irrigation Co. to enjoin alleged illegal diversions from the Rio Mimbres. In 1970, the State of New Mexico, pursuant to New Mexico Stat. Ann. § 75-4-4, filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. Under 43 U. S. C. § 666 (a), "[c]onsent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source," including the reserved rights of the United States. See *United States v. District Court for Eagle County*, 401 U. S. 520 (1971); *United States v. District Court for Water Div. No. 5*, 401 U. S. 527 (1971).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1978

RE: No. 77-510 - United States v. New Mexico

Dear Bill:

Please join me.

Respectfully,



Mr. Justice Rehnquist

Copies to the Conference