

The Burger Court Opinion Writing Database

Arizona v. California

460 U.S. 605 (1983)

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 15, 1983

Re: 8 Original - Arizona v. California

Dear Byron:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'B. White', written over the typed word 'Regards,'.

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

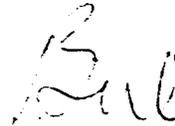
March 2, 1983

RE: No. 8 Orig. Arizona v. California

Dear Byron:

I'll try my hand at at least a partial dissent in
the above and try to have it around shortly.

Sincerely,



Justice White

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAR 10 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND
RECOMMENDED DECREE

[March —, 1983]

JUSTICE BRENNAN concurring in part and dissenting in part.

I join Part III of the Court's opinion, granting the petitions to intervene in this action filed by the Fort Mojave, Colorado River, Chemehuevi, Cocopah, and Quechan Tribes (collectively, the Tribes). I also agree with the basic premise of Part IV of the Court's opinion that in Article IX of our 1964 Decree, 376 U. S. 340, 353, we retained the power to reconsider our quantification of the Tribes' reserved water rights, as set out in Article II(D) of the 1964 Decree, *id.*, at 343-345. See *ante*, at 12. I part company with the Court, however, in its refusal to exercise that power, given the unique circumstances of this litigation and the timing of the Tribes' and United States' motions. In addition, I find inexplicable the Court's decision to sustain the exceptions of Arizona, California, and the California agencies (hereinafter States) to the Special Master's proposed solution to the boundary lands controversy.

I

The so-called "omitted" lands are irrigable areas, within the Tribes' reservations, which the United States failed to identify during the extensive proceedings before Special Master Rifkind that preceded our 1964 Decree. The fact

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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pf. 10-11

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND
RECOMMENDED DECREE

[March —, 1983]

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins, |
concurring in part and dissenting in part.

I join Part III of the Court's opinion, granting the petitions to intervene in this action filed by the Fort Mojave, Colorado River, Chemehuevi, Cocopah, and Quechan Tribes (collectively, the Tribes). I also agree with the basic premise of Part IV of the Court's opinion that in Article IX of our 1964 Decree, 376 U. S. 340, 353, we retained the power to reconsider our quantification of the Tribes' reserved water rights, as set out in Article II(D) of the 1964 Decree, *id.*, at 343-345. See *ante*, at 12. I part company with the Court, however, in its refusal to exercise that power, given the unique circumstances of this litigation and the timing of the Tribes' and United States' motions. In addition, I find inexplicable the Court's decision to sustain the exceptions of Arizona, California, and the California agencies (hereinafter States) to the Special Master's proposed solution to the boundary lands controversy.

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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pp: 1, 8, 9, 11, 15, 17

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND
RECOMMENDED DECREE

[March —, 1983]

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part and dissenting in part.

I join Part III of the Court's opinion, granting the petitions to intervene in this action filed by the Fort Mojave, Colorado River, Chemehuevi, Cocopah, and Quechan Tribes (collectively, the Tribes). I also agree with the basic premise of Part IV of the Court's opinion that in Article IX of our 1964 Decree, 376 U. S. 340, 353, we retained the power to reconsider our quantification of the Tribes' reserved water rights, as set out in Article II(D) of the 1964 Decree, *id.*, at 343-345. See *ante*, at 12. I part company with the Court, however, in its refusal to exercise that power, given the unique circumstances of this litigation and the timing of the Tribes' and United States' motions. In addition, I find inexplicable the Court's decision to sustain the exceptions of Arizona, California, and the California agencies (hereinafter States) to the Special Master's proposed solution to the boundary lands controversy.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 23, 1983

MEMORANDUM TO THE CONFERENCE

Re: No. 8 Original -

Arizona v. California

Part V of this draft, whether acceptable to a majority or not, may have to be modified to some extent with respect to the tracts adjudicated by court decisions. The exhibits and the transcript of the Tuttle hearings were not lodged here, I discovered, but are on their way now. They may reveal that the facts and inferences I drew from the Master's Report and the briefs are not wholly accurate with respect to some tracts.

The draft, however, does pose for the purpose of voting the general issues with respect to both the "omitted" and the "boundary" lands.

BR

To: The Chief Justice
Justice Brennan
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE

[February —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The problem of irrigating the arid lands of the Colorado River basin has been confronted by the peoples of that region for two thousand years and by Congress and this Court for many decades. Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River. In earlier proceedings in this case, the United States, an intervenor in the principal action, acquired water rights for five Indian Reservations that are dependent upon the River for their water. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased.

I

The Colorado River Compact of 1922 divided the waters of the Colorado River between the upper- and lower-basin states, but fell short of apportioning the respective shares among the individual states. Nor did the Boulder Canyon Project Act of 1928, 43 U. S. C. § 617 (Project Act), a vast federal effort to harness and put to use the waters of the lower Colorado River, expressly effect such an apportionment. The principal dispute that became increasingly pressing over the years concerned the respective shares of the lower-basin states, particularly the shares of California and Arizona.

To: The Chief Justice
Justice Brennan
✓ Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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- Stylistic changes throughout -
and pp. 7-8, 24, 30

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND
RECOMMENDED DECREE

[March —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The problem of irrigating the arid lands of the Colorado River basin has been confronted by the peoples of that region for two thousand years and by Congress and this Court for many decades. Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River. In earlier proceedings in this case, the United States, an intervenor in the principal action, acquired water rights for five Indian Reservations that are dependent upon the River for their water. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased.

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp. 2, 5, 7-8, 12, 15-16, 20-22,
30, 32-35; footnotes renumbered;
stylistic changes

From: Justice White

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Recirculated: _____ MAR 17 1983

sl
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND
RECOMMENDED DECREE

[March —, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The problem of irrigating the arid lands of the Colorado River basin has been confronted by the peoples of that region for two thousand years and by Congress and this Court for many decades. Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River. In earlier proceedings in this case, the United States, an intervenor in the principal action, acquired water rights for five Indian Reservations that are dependent upon the River for their water. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased.

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To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp. 15, 21, 35
and stylistic changes

4M draft

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

From: _____

Circulated: _____

Revised: _____
MAR 28 1983

SUPREME COURT OF THE UNITED STATES

No. 8 Orig.

STATE OF ARIZONA, PLAINTIFF *v.*
STATE OF CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND
RECOMMENDED DECREE

[March 30, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The problem of irrigating the arid lands of the Colorado River basin has been confronted by the peoples of that region for two thousand years and by Congress and this Court for many decades. Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River. In earlier proceedings in this case, the United States, an intervenor in the principal action, acquired water rights for five Indian Reservations that are dependent upon the River for their water. The United States, and the Tribes which ask to intervene in the action, now seek to have those water rights increased.

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The Colorado River Compact of 1922 divided the waters of the Colorado River between the upper- and lower-basin states, but fell short of apportioning the respective shares among the individual states. Nor did the Boulder Canyon Project Act of 1928, 43 U. S. C. §617 (Project Act), a vast federal effort to harness and put to use the waters of the lower Colorado River, expressly effect such an apportionment. The principal dispute that became increasingly pressing over the years concerned the respective shares of the lower-basin states, particularly the shares of California and Arizona.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 3, 1983

Re: No. 8 Orig.-Arizona v. California

Dear Byron:

I await the dissent.

Sincerely,

JM.
T.M.

*Justice White
has been sent - [unclear]*

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 4, 1983

Re: No. 8 Orig., Arizona v. California

Dear Byron:

I shall wait to see what the partial dissent has to say in this case.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 11, 1983

Re: No. 8 Orig., Arizona v. California

Dear Bill:

Please join me in your opinion concurring in part
and dissenting in part.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal flourish underneath.

Justice Brennan

cc: The Conference

February 28, 1983

8 Orig. Arizona v. California

Dear Byron:

I am joining your opinion, but have one suggestion.

In ruling that the Eleventh Amendment does not bar the Indian Tribes' intervention, you rely on the States' voluntary agreement to adjudication of Indian water rights in this action. I am a little troubled by this "waiver" rationale. The issue of Indian water rights was brought into the litigation by the United States. Since the Eleventh Amendment does not bar a suit by the U.S. against a State, it seems to me that the States had no choice as to whether the Indian water rights were adjudicated. Any question of waiver, therefore, may be irrelevant.

I think the more telling point you make, and one you might emphasize instead of waiver, is that once the U.S. has brought Indian water rights into the case, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the states' sovereign immunity protected by the Eleventh Amendment is not compromised." (p. 8) I would prefer to rely on this simple rationale rather than to invoke a theory of waiver that might have effects beyond original actions.

One further point. You mention the role of the U.S. in "prepar[ing] the Indians to take their place as independent qualified members of the modern body politic." (p. 9) This suggests that Indians are not yet "independent qualified members of the modern body politic." If this is viewed as a patronizing statement, do you think you might join your fellow Coloradian on the Indian "hit list"?

Sincerely,

Justice White

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 28, 1983

8 Orig. Arizona v. California

Dear Byron:

Please join me.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 3, 1983

Re: 8 Original, Arizona v. California

Dear Byron,

Please join me.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 7, 1983

Re: 8 Orig. - Arizona v. California

Dear Byron:

Because I am still somewhat uncertain about the positions you take in Part IV and Part V-D, I shall await Bill Brennan's partial dissent.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1983

Re: 8 Original - Arizona v. California

Dear Bill:

Your dissent is most persuasive and I would like to join it. I am a little troubled, however, by some of the implications of the discussion toward the bottom of page 10 and over onto page 11, in which it seems to me you may cast more aspersions on the motives of the federal government than is really necessary, particularly since it appears that in this case the failure to do a better job is the result of inadvertence rather than any kind of improper political pressure.

Specifically, I wonder if you should not revise the sentence that begins at the bottom of page 10 stating that the United States is slow to press Indian claims "whenever they conflicted with those of politically influential non-Indian interests." Perhaps you could say something like the United States has "sometimes been slow to press Indian claims when they conflicted. ..."

Similarly, I wonder if your point would not be made just as effectively if you merely cited the Pyramid Lake Paiute Tribe case and the Senate hearings referred to in the middle paragraph on page 11. I have the impression that this paragraph is sort of a diversion from an otherwise extremely strong presentation.

Respectfully,



Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 14, 1983

Re: 8 Orig. - Arizona v. California

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 1, 1983

No. 8 Orig. Arizona v. California

Dear Byron,

Please join me.

Sincerely,



Justice White

Copies to the Conference