

The Burger Court Opinion Writing Database

Colorado v. New Mexico

459 U.S. 176 (1982)

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

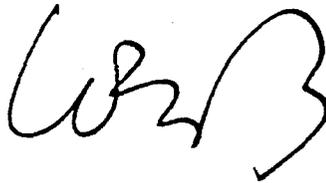
CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1982

RE: No. 80 Original, Colorado v. New Mexico

MEMORANDUM TO THE CONFERENCE:

Attached is a draft of my concurring opinion in the above captioned case.



Regards,

RE: No. 80 Original, Colorado v. New Mexico

CHIEF JUSTICE BURGER, concurring in the judgment.

This case arises from an understandably intense competition between two states over rights to a small, nonnavigable, interstate river. Because on the record before it this Court cannot make an appropriate apportionment of the water, the Court remands the case to the Special Master for further factual findings.

I emphasize that under our prior holdings these two states come to the Court on equal footing. See Kansas v. Colorado, 206 U.S. 957 (1907). Neither is entitled to any special priority over the other with respect to use of the water. Colorado cannot divert all of the water it may need or can use simply because the river's headwaters lie within its borders, Wyoming v. Colorado, 259 U.S. 419, 466 (1922). Nor is New Mexico entitled to any particular priority of allocation simply because it used the waters first. Colorado v. Kansas, 320 U.S. 383, 393 (1943). Each state through which rivers pass has a right to the benefit of the water but it is for the Court, as a matter of discretion in setting the equities, to apportion the available water equitably. As the Court's opinion states, in the process of apportioning the water, prior dependence or inefficient uses may be considered in balancing the equities. But no state has any priority over any other state. It is on this understanding of the Court's holding that I join the opinion and the judgment.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 19, 1982

Re: Colorado v. New Mexico, No. 80-Orig.

Dear Thurgood:

I agree. However, I would like to see just a bit stronger language on the importance of protecting existing economies. I suggest that the paragraph running from page 10 to page 11 could be changed to the following:

We recognize that the equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Protection of existing economies, however, does not require that users be permitted to continue in unreasonably wasteful or inefficient practices. In such a situation, the countervailing equities supporting a future use in one state may justify a detriment to existing users in another state. This approach comports with our emphasis on flexibility in equitable apportionment and also accords sufficient protection to existing uses.

Sincerely,

Bill
WJB, Jr.

Justice Marshall
The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 19, 1982

RE: No. 80 Orig. Colorado v. New Mexico & Corgin

Dear Thurgood:

I agree.

Sincerely,

Bill
7

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 30, 1982

Re: Colorado v. New Mexico, No. 80-Orig.

Dear Thurgood:

I agree with the changes that Bill Rehnquist has suggested.

Sincerely,


WJB, Jr.

Justice Marshall
The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

6 December 1982

Re: Colorado v. New Mexico, No. 80-Orig.

Dear Thurgood:

I am still with you.

Sincerely,



WJB, Jr.

Justice Marshall
Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 24, 1982

Re: 80 Original - Colorado v. New Mexico

Dear Thurgood,

I am in general agreement with your proposed opinion but would prefer that you make the changes that Bill Rehnquist and Bill Brennan have suggested to you.

Sincerely yours,



Justice Marshall

cc: Justice Rehnquist
Justice O'Connor

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 6, 1982

Re: 80 Orig. - Colorado v. New Mexico

Dear Thurgood,

Please join me in your circulation of
December 3.

Sincerely yours,



Justice Marshall

Copies to the Conference

cpm

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

From: **Justice Marshall**
NOV 15 1982

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF COLORADO, PLAINTIFF *v.* STATE OF
NEW MEXICO AND ROBERT K. CORGIN, ATTORNEY
GENERAL OF NEW MEXICO

ON BILL OF COMPLAINT

No. 80, Orig. Decided November —, 1982

JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns the proper apportionment between New Mexico and Colorado of the water of an interstate river. The water of the Vermejo River is at present fully appropriated by users in New Mexico. Colorado seeks to divert water for future uses. Invoking this Court's original jurisdiction under Article 3, §2 of the Constitution, Colorado brought this action for an equitable apportionment of the water of the Vermejo River. A Special Master appointed by the Court recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. The case is before us on New Mexico's exceptions to the Special Master's report.

the

I

The Vermejo River is a small, nonnavigable river that originates in the snow-belt of the Rocky Mountains in southern Colorado and flows southeasterly into New Mexico for a distance of roughly 55 miles before it joins the Canadian River. The major portion of the river is located in New Mexico. The Colorado portion consists of three tributaries that combine to form the Vermejo River proper approximately one mile below the Colorado-New Mexico border. At present there are no uses of the water of the Vermejo River in Colorado, and no use or diversion has ever been made in Colorado. In New Mexico, by contrast, farmers and industrial users have diverted water from the Vermejo for many years. In 1941 a New Mexico state court issued a decree

pp. 6, 4, 5, 8, 10, 11, 13

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

From: **Justice Marshall**

Circulated: _____

Recirculated: DEC 3 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF COLORADO, PLAINTIFF *v.* STATE OF
NEW MEXICO AND ROBERT K. CORGIN, ATTORNEY
GENERAL OF NEW MEXICO

ON BILL OF COMPLAINT

No. 80, Orig. Decided December —, 1982

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 12, 1982

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Dear Chief:

This note will follow up our telephone conversation of yesterday afternoon.

I feel that No. 80 Original should not be assigned to me, and should be reassigned. According to my notes, there were five votes (CJ, WJB, BRW, TM, and WHR) to vacate and remand; two votes to sustain the objections of New Mexico (LP and SOC); and two to overrule the objections of New Mexico (JPS and HAB). I therefore am not a member of the majority.

I thus have no assignment for the first week.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

80 orig.

11-20-82 on lunch

Supreme Court of the United States
Memorandum

Bill _____, 19

Colo v N. Mex

Let you circulate your
suggestions to TM? SDP
refers to them, but I do not
know what they are

I showed them to
SOC & BRW - the other
two "westerners" - but
write only to TM. There is
no big secret - would you like
a copy?

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1982

Re: No. 80 Original - Colorado v. New Mexico

Dear Thurgood:

You will recall that at the conference vote on this case John and I were inclined to overrule New Mexico's objections and thus in effect "affirm" the Special Master. He and I have discussed your first draft of the proposed opinion and have concluded that, despite our conference vote, we could both join your opinion if it would give you a Court. We conclude, however, that if the changes suggested by Bill Rehnquist and Bill Brennan are accepted, we cannot join. You, of course, need one more vote besides ours.

Sincerely,



Justice Marshall

cc: Justice Stevens

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

December 7, 1982

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Re: No. 80 Original - Colorado v. New Mexico

Dear Thurgood:

I shall go along. Please join me in your
recirculation of December 3.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 16, 1982

80 Orig. Colordao v. New Mexico

Dear Thurgood:

I will await further writing.

Sincerely,



Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 29, 1982

80 Orig. Colorado v. New Mexico

Dear Thurgood:

At Conference I expressed views similiar to those of Sandra.

I have noted her letter to you of November 24, and I also think I could join you if the suggested changes are made.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

December 8, 1982

80 Orig. Colorado v. New Mexico

Dear Sandra:

I like your opinion a great deal more than that of Thurgood, and will be glad to join it.

I have a slight preference for calling it a concurrence in the judgment, but - as you say - could join a dissent with equal enthusiasm.

Sincerely,

Justice O'Connor

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 9, 1982

80 Orig. Colorado v. New Mexico

Dear Thurgood:

Now that you have a solid Court for your opinion (six votes), and you no longer need me, I will join Sandra's concurring opinion.

It is closer to the views I expressed at Conference.

Sincerely,

Lewis

Justice Marshall

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 9, 1982

80 Orig. Colorado v. New Mexico

Dear Sandra:

Please join me in your opinion concurring in the judgment.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

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

17.7

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 22, 1982

Re: No. 80 Orig. Colorado v. New Mexico

Dear Thurgood:

You probably remember that the three "Westerners" at Conference took positions in varying degrees more favorable to New Mexico in this case than some other Members of the Conference. While I don't think that Byron, Sandra, and I are in complete agreement as to how we would decide the case, I did run the suggestions contained in this letter by them in order to make sure that they would not disapprove of your including them if you were inclined to do so.

I agree with almost all of your draft and will be happy to join if you can see your way clear to accommodating the following relatively minor suggestions. My principal concern, which motivated this letter, is the implication in the Master's Report that one of the three reasons why Colorado was entitled to prevail was that the Vermejo originated in Colorado. Your present draft does not approve that suggestion, but I would like to see it expressly disapproved because I think it is inconsistent with our earlier cases. I would also like to persuade you to make several other minor changes in the language. If you are agreeable, I will join your opinion.

1. Page 4, paragraph beginning "The Special Master's ...". Recite that there are three grounds, not two, and that one is that "each [state] is entitled to a benefit from the interstate river flowing within its borders." Report of the Special Master, p. 8.

2. Page 6, paragraph beginning at the top of the page. Revise the first two sentences to read something like the following:

"We conclude that two of the three criteria relied upon by the Special Master comport with the doctrine of equitable apportionment as it is evolved in our prior cases. While we reject the Special Master's view that Colorado was entitled to some share of the waters of the Vermejo simply because it rose in Colorado, we also reject New Mexico's contention that the Special Master was required to focus exclusively on the rule of priority."

3. Page 8, first sentence in first full paragraph on page: Insert after the words "duty to" in the third line of the paragraph the phrase "take reasonable steps to."

Delete or revise footnote 9, which I think presently reflects an inaccurate view of western water law. I don't think "beneficial use" is a synonym for "reasonably efficient and diligent" use, at least in many western states, and forfeiture upon non-use or abandonment is a much more limited concept than inefficient use of water.

4. Page 13, final sentence in footnote 14: I would like to see this sentence either deleted or modified, because it seems to me that in its present form it is somewhat "loaded." If it is to be kept in, why not something like this? "Upon remand, the Special Master is free to reaffirm his original recommendation or to make a different recommendation on the basis of the evidence and applicable principles of equitable apportionment."

As I said earlier, I have shown a copy of this letter to Byron and to Sandra, to make sure that my suggestions would not trouble them.

Sincerely,



Justice Marshall

80 orig.

11-22-32 on lunch

Supreme Court of the United States
Memorandum

Bill

19

Colo + 72 mail

Did you circulate your
suggestions to TM? SOC
refers to them, but I do not
know what they are

I showed them to
SOC & BRW - the other
two "westerners" - but
wrote only to TM. There is
no big secret - would you like
a copy?

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 29, 1982

Re: No. 80 Orig. Colorado v. New Mexico

MEMORANDUM TO THE CONFERENCE

Since others have referred to my letter to Thurgood,
I am sending copies to all.

Sincerely,



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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 4, 1982

Re: No. 80-Orig. Colorado v. New Mexico

Dear Thurgood:

Please join me.

Sincerely,



Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 7, 1982

Re: 80 Original - Colorado v. New Mexico

Dear Thurgood:

Please join me.

Respectfully,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 13, 1982

Re: 80 Orig. - Colorado v. New Mexico

Dear Chief:

If you would like company, I would like to join your separate concurring opinion because it reflects my views as well.

Respectfully,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 24, 1982

No. 80 Orig. Colorado v. New Mexico

Dear Thurgood,

If you are willing to include the change suggested by Bill Brennan, and the changes suggested by Bill Rehnquist, I could join your opinion, although I would probably also write a separate concurring opinion to explain why I join.

Sincerely,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 7, 1982

No. 80 Orig. Colorado v. New Mexico

Dear Lewis,

Thurgood did not incorporate the suggestions made by Bill Brennan, which disappoints me greatly. I could write a dissent with as much enthusiasm as a concurrence in the judgment.

I enclose a draft of a concurrence in the judgment but if you think it is preferable to dissent, please let me know. I have not circulated this to anyone else as yet.

Sincerely,

Sandra

Justice Powell

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

From: **Justice O'Connor**

Circulated: DEC 8 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF COLORADO, PLAINTIFF *v.* STATE OF
NEW MEXICO AND ROBERT K. CORGIN, ATTORNEY
GENERAL OF NEW MEXICO

ON BILL OF COMPLAINT

No. 80, Orig. Decided December —, 1982

JUSTICE O'CONNOR, concurring in the judgment.

The doctrine of prior appropriation includes the requirement that the appropriator's use of water be beneficial and reasonable. What is reasonable, of course, does not admit of ready definition, being dependent upon the particular facts and circumstances of each case. In this case, the Special Master has cast an accusatory finger at the Vermejo Conservancy District, concluding that "[t]he system of canals used to transport the water to the fields is inefficient." Report of the Special Master, p. 8.

Undoubtedly, there is evidence in the record indicating that large losses of water occur through seepage and evaporation in transporting waters of the Vermejo through open ditches for irrigation and stock watering. Tr. 1315. It is a leap, however, from observing that large losses occur to concluding, as Colorado would have the Court do, that the practices of the Conservancy District are wasteful or unreasonable. As the Court observes, *ante*, at 8, 9, the extent of the duty to conserve that may be placed upon the user is limited to measures that are "financially and physically feasible," *Wyoming v. Colorado*, 259 U. S. 419, 484 (1922), and "within practicable limits." *Ibid.*¹ Nevertheless, in concluding that

¹ It is significant to note that in *Wyoming v. Colorado*, 259 U. S. 419 (1922), upon which the Court relies for the proposition that an affirmative duty to conserve may be imposed on the States, *ante*, at 8, the Wyoming appropriators *already* had storage facilities in place for equalizing the river's natural flow. In answering Wyoming's objection that she should not

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

From: Justice O'Connor

Circulated: _____

Recirculated: DEC 10 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF COLORADO, PLAINTIFF *v.* STATE OF
NEW MEXICO AND ROBERT K. CORGIN, ATTORNEY
GENERAL OF NEW MEXICO

ON BILL OF COMPLAINT

No. 80, Orig. Decided December —, 1982

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins,
concurring in the judgment.

The doctrine of prior appropriation includes the requirement that the appropriator's use of water be beneficial and reasonable. What is reasonable, of course, does not admit of ready definition, being dependent upon the particular facts and circumstances of each case. In this case, the Special Master has cast an accusatory finger at the Vermejo Conservancy District, concluding that "[t]he system of canals used to transport the water to the fields is inefficient." Report of the Special Master, p. 8.

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