

# The Burger Court Opinion Writing Database

## *Arizona v. San Carlos Apache Tribe of Arizona*

463 U.S. 545 (1983)

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



*File*

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

CHAMBERS OF  
THE CHIEF JUSTICE

March 22, 1983

Re: (81-2147 - Arizona v. San Carlos Apache Tribe of Arizona  
(  
(81-2188 - Montana v. Northern Cheyenne Tribe of Northern  
Cheyenne Indian Reservation)

MEMORANDUM TO THE CONFERENCE:

The somewhat novel motion of the Blackfeet Indian Tribe perhaps  
needs a response. At Friday's Conference we can decide whether  
to "CFR" and take no further action now.

Regards,

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
THE CHIEF JUSTICE

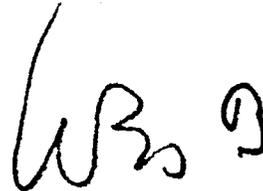
June 14, 1983

Re: No. 81-2147, Arizona v. San Carlos Apache Tribe  
81-2188, Montana v. Northern Cheyenne Tribe

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WB' followed by a circled '9'.

Justice Brennan

Copies to the Conference

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

16

From: **Justice Brennan**

Circulated: JUN 8 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

6/9 7

Nos. 81-2147 AND 81-2188

ARIZONA, ET AL., PETITIONERS

81-2147

v.

SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.

MONTANA, ET AL., PETITIONERS

81-2188

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN  
CHEYENNE INDIAN RESERVATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

These consolidated cases form a sequel to our decision in *Colorado River Conservation District v. United States*, 424 U. S. 800 (1976). That case held that (1) the McCarran Amendment, 43 U. S. C. § 666, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications,<sup>1</sup> provides state courts with juris-

<sup>1</sup>The McCarran Amendment provides in relevant part:

“(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, (2) for the administration of such rights, where it appears that the United States is the 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 United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that

STYLISTIC CHANGES THROUGHOUT.  
 SEE PAGES: 5, 9, 11, 16, 17, 23

Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: 6/13/83

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-2147 AND 81-2188

ARIZONA, ET AL., PETITIONERS  
 81-2147  
 v.  
 SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.

MONTANA, ET AL., PETITIONERS  
 81-2188  
 v.  
 NORTHERN CHEYENNE TRIBE OF THE NORTHERN  
 CHEYENNE INDIAN RESERVATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

These consolidated cases form a sequel to our decision in *Colorado River Conservation District v. United States*, 424 U. S. 800 (1976). That case held that (1) the McCarran Amendment, 43 U. S. C. § 666, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications,<sup>1</sup> provides state courts with juris-

<sup>1</sup>The McCarran Amendment provides in relevant part:

“(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, (2) for the administration of such rights, where it appears that the United States is the 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 United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

June 30, 1983

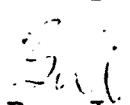
MEMORANDUM TO THE CONFERENCE

Re: No. 81-2147 -- Arizona v. San Carlos Apache Tribe  
No. 81-2188 -- Montana v. Northern Cheyenne Tribe

If there is no objection, I intend to add the following  
footnote off the last sentence of my opinion:

The motion of the Blackfeet Indian Tribe, filed March 22, 1983, to suspend all proceedings in this Court rejecting the water rights of the Blackfeet Indian Tribe, Browning, Montana, and to preclude the Solicitor General or any other attorney of the Department of Justice from purporting to represent that Tribe in these proceedings is denied. The motion of the White Mountain Apache Tribe and the Blackfeet Indian Tribe, filed June 3, 1983, for leave to file a motion to dismiss for lack of in personam and subject matter jurisdiction in this Court over the state court water rights adjudication proceedings is denied. Treating the papers whereon the motion filed June 3, 1983 was submitted as a motion for leave to file a brief amicus curiae, and treating the accompanying papers as a brief amicus curiae, leave to file the brief is granted.

Sincerely,

  
W.J.B., Jr.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 10, 1983

Re: 81-2147 and 81-2188 -  
Arizona v. San Carlos Apache Tribe of Arizona  
Northern Cheyenne Tribe of the Northern  
Cheyenne Indian Reservation

---

Dear Bill,

I agree.

Sincerely yours,



Justice Brennan

cc: 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

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

June 28, 1983

No. 81-2147 -- Arizona v. San Carlos Apache Tribe of Arizona

No. 82-2188 -- Montana v. Northern Cheyenne Tribe

JUSTICE MARSHALL, dissenting.

In Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), this Court recognized a narrow rule of abstention governing controversies involving federal water rights. We stated that in light of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" id., at 817, "[o]nly the clearest of justifications," id., at 819, will warrant abstention in favor of a concurrent state proceeding. Substantially for the reasons set forth in JUSTICE STEVENS' dissenting opinion, I believe that abstention is not appropriate in these cases. Unlike the federal suit in Colorado River, the suit here is brought by Indian tribes on their own behalf. These cases thus implicate the strong congressional policy, embodied in 28 U.S.C. §1362, of affording Indian tribes a federal forum. Since §1362 reflects a congressional recognition of the "great hesitancy on the part of

Justice Brennan  
Justice White  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Marshall

Circulated: \_\_\_\_\_

Recirculated: JUN 29 1983

PRINTED  
1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 81-2147 AND 81-2188

ARIZONA, ET AL., PETITIONERS  
81-2147 v.  
SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.

MONTANA, ET AL., PETITIONERS  
81-2188 v.  
NORTHERN CHEYENNE TRIBE OF THE NORTHERN  
CHEYENNE INDIAN RESERVATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE MARSHALL, dissenting.

In *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), this Court recognized a narrow rule of abstention governing controversies involving federal water rights. We stated that in light of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" *id.*, at 817, "[o]nly the clearest of justifications," *id.*, at 819, will warrant abstention in favor of a concurrent state proceeding. Substantially for the reasons set forth in JUSTICE STEVENS' dissenting opinion, I believe that abstention is not appropriate in these cases. Unlike the federal suit in *Colorado River*, the suit here is brought by Indian tribes on their own behalf. These cases thus implicate the strong congressional policy, embodied in 28 U. S. C. § 1362, of affording Indian tribes a federal forum. Since § 1362 reflects a congressional recognition of the "great hesi-

↗  
s/are

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 28, 1983

Re: No. 81-2147 - Arizona v. San Carlos Apache Tribe  
No. 81-2188 - Montana v. Northern Cheyenne Tribe

Dear John:

Please add my name to your dissenting opinion.

Sincerely,



Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 10, 1983

81-2147 Arizona v. San Carlos Apache Tribe

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lewis".

Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

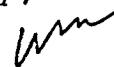
June 10, 1983

Re: No. 81-2147 Arizona v. San Carlos Apache Tribe

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

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

June 27, 1983

From: Justice Stevens

No. 81-2147 -- Arizona v. San Carlos Apache Tribe Circulated: JUN 27 '83

No. 82-2188 -- Montana v. Northern Cheyenne Tribe Recirculated: \_\_\_\_\_

JUSTICE STEVENS, dissenting.

"Nothing in the McCarran Amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts." Colorado River Water Conservation District v. United States, 424 U.S. 800, 821 n. 2 (1976) (Stewart, J., dissenting). That amendment is a waiver, not a command.<sup>1</sup> It permits the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States' right to litigate in a federal forum and it is totally silent on the subject of Indian tribes' rights to litigate anywhere. Yet today the majority somehow concludes that it commands the federal courts to defer to state court water rights proceedings, even when Indian water rights are involved. Although it is customary for the Court to begin its analysis of questions of statutory construction by examining the text of the relevant statute,<sup>2</sup> one

<sup>1</sup>See ante, at 1, n. 1 (quoting the statutory text).

<sup>2</sup>See, e.g., Bankamerica Corp. v. United States, \_\_\_ U.S. \_\_\_ (June 8, 1983) (slip op. at 5-7); Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs, \_\_\_ U.S. \_\_\_ (May 24, 1983) (slip op. at 5-7); Griffin  
Footnote continued on next page.

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

From: Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ JUN 28 '83

*Printed*  
 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 81-2147 AND 81-2188

ARIZONA, ET AL., PETITIONERS  
 81-2147 v.  
 SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.

MONTANA, ET AL., PETITIONERS  
 81-2188 v.  
 NORTHERN CHEYENNE TRIBE OF THE NORTHERN  
 CHEYENNE INDIAN RESERVATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE NINTH CIRCUIT

[June —, 1983]

JUSTICE STEVENS, dissenting.

"Nothing in the McCarran Amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts." *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 821 n. 2 (1976) (Stewart, J., dissenting). That amendment is a waiver, not a command.<sup>1</sup> It *permits* the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States' right to litigate in a federal forum and it is totally silent on the subject of Indian tribes' rights to litigate anywhere. Yet today the majority somehow concludes that it commands the federal courts to defer to state court water rights proceedings, even when Indian water rights are involved. Although it is customary for the Court to begin its

<sup>1</sup>See *ante*, at 1, n. 1 (quoting the statutory text).

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 10, 1983

Re: No. 81-2147) Arizona v. San Carlos Apache Tribe  
81-2188) Montana v. Northern Cheyenne Tribe

Dear Bill,

Please join me.

Sincerely,



Justice Brennan

Copies to the Conference