

# The Burger Court Opinion Writing Database

## *Colorado v. New Mexico*

467 U.S. 310 (1984)

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

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SUPREME COURT U.S.  
JUSTICE DEPARTMENT

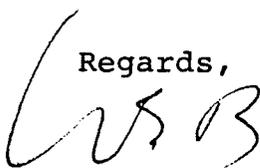
CHAMBERS OF  
THE CHIEF JUSTICE

April 6, 1984 ABR -9 A9:56

Re: 80 Original - Colorado v. New Mexico

Dear Sandra:

I join.

Regards,  


Justice O'Connor

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 27, 1984

No. 80 Original  
Colorado v. New Mexico

Dear Sandra,

I voted at Conference to overrule New Mexico's objections. However, your opinion persuades me that we should sustain those exceptions and dismiss the case. Accordingly, please join me.

Sincerely,

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 12, 1984

Re: 80 Orig. - Colorado v. New Mexico

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Dear Chief,

Sandra will try her hand at an opinion  
in this case.

Sincerely yours,



The Chief Justice  
Copies to the Conference  
cpm

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 24, 1984

Re: 80 Orig. - Colorado v. New Mexico

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Dear Sandra,

Please join me.

Sincerely,



Justice O'Connor

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 12, 1984

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

Dear Sandra:

Please join me.

Sincerely,

*T.M.*  
T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 7, 1984

RECEIVED  
SUPREME COURT U.S.  
JUSTICE MARSHALL

'84 MAR -7 P3:40

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

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

HAB

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 7, 1984

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

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor  
cc: The Conference

P.S. [to Justice O'Connor only]

There is the inevitable misspelling of that word in the first line on page 6. You may wish to have it corrected.



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 24, 1984

80 Orig. Colorado v. New Mexico

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

June 1, 1984

80 Orig. Colorado v. New Mexico

Dear Sandra:

In your third draft, responding to John, you made a change that reads as follows:

"A State can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses might be improved; assertions about the relative efficiencies of competing projects will not do." Op. 3d draft at 9.

This seems to be more categorical than necessary. If in fact the District were being operated far less efficiently than similar projects, I would think proof of that would be very persuasive. What would you think of a change along the following lines:

"A State can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses might be improved, or with clear evidence that a project is far less efficient than most other projects. Mere assertions about the relative efficiencies of competing projects will not do."

This would still leave the burden on Colorado in this case, for example, to prove that in fact the District is far less efficient.

Sincerely,

Justice O'Connor  
LFP/vde

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 1, 1984

Re: 80 Original Colorado v. New Mexico

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE STEVENS

'84 MAR 13 P2:26

March 13, 1984

Re: 80 Orig. - Colorado v. New Mexico

Dear Sandra:

My delay in responding is attributable to my hope that someone else would find reason to write in dissent. Since that hope is unfulfilled, I shall prepare a brief dissent as soon as I can get to it.

Respectfully,



Justice O'Connor

Copies to the Conference

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JUSTICE MARSHALL

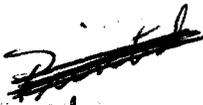
'84 MAY 30 A9:56

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

From: **Justice Stevens**

Circulated:                      **MAY 29 19**

Recirculated:                     



1st DRAFT

## SUPREME COURT OF THE UNITED STATES

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND  
RECOMMENDED DECREE

No. 80, Orig. Decided May —, 1984

JUSTICE STEVENS, dissenting.

The Special Master has recommended the entry of a decree that would establish a diversion point in the Rocky Mountains and allow Colorado to divert no more than 4,000 acre-feet of water from the Vermejo River at that point; the diverted flow would make an inter-mountain transfer to supplement the presently inadequate flow of the Purgatoire River in Colorado. Accretions to the Vermejo below the diversion point, as well as the remainder of the original flow, would be available for the four principal users of the Vermejo River. Those four users are all in New Mexico and, of course, are upstream from the point where the Vermejo flows into the Canadian River.

A gauge that is located between the second and third of those four users has measured the flow of the Vermejo since 1916. The average annual flow of the river at that point since 1921 is 12,800 acre-feet; if the highest flow years are eliminated, the average is 10,900 acre-feet; if just the 1970s, which included especially dry years, are considered, the average is 8,262 acre-feet. No matter which figure is used, the Master's findings make it perfectly clear that the supply will remain adequate to satisfy the needs of the first three of the four principal appropriators on the river. *Colorado v. New Mexico*, 459 U. S. 176, 180 (1982) (hereinafter *Colorado I*). The critical dispute concerns the impact of the proposed diversion on the fourth—the Vermejo Conservancy District.

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

From: Justice Stevens

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Recirculated: \_\_\_\_\_ MAY 31 1984

P. 2, 3, 4, 5, 7, 8

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND  
RECOMMENDED DECREE

No. 80, Orig. Decided June —, 1984

JUSTICE STEVENS, dissenting.

The Special Master has recommended the entry of a decree that would establish a diversion point in the Rocky Mountains and allow Colorado to divert no more than 4,000 acre-feet of water from the Vermejo River at that point; the diverted flow would make an inter-mountain transfer to supplement the presently inadequate flow of the Purgatoire River in Colorado. Accretions to the Vermejo below the diversion point, as well as the remainder of the original flow, would be available for the four principal users of the Vermejo River. Those four users are all in New Mexico and, of course, are upstream from the point where the Vermejo flows into the Canadian River.

A gauge that is located between the second and third of those four users has measured the flow of the Vermejo since 1916. The average annual flow of the river at that point since 1921 is 12,800 acre-feet; if the highest flow years are eliminated, the average is 10,900 acre-feet; if just the 1970s, which included especially dry years, are considered, the average is 8,262 acre-feet. No matter which figure is used, the Master's findings make it perfectly clear that the supply will remain adequate to satisfy the needs of the first three of the four principal appropriators on the river. *Colorado v. New Mexico*, 459 U. S. 176, 180 (1982) (hereinafter *Colorado I*). The critical dispute concerns the impact of the proposed diversion on the fourth—the Vermejo Conservancy District.

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

From: Justice O'Connor

Circulated: FEB 24 1984

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

~~SDO~~  
Please join me  
M

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80 Orig.

STATE OF COLORADO, PLAINTIFF *v.* STATE OF  
NEW MEXICO AND PAUL G. BARDACKE, ATTORNEY  
GENERAL OF NEW MEXICO

ON BILL OF COMPLAINT

[February —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. — U. S. — (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

### I

The facts of this litigation were set forth in detail in our opinion last Term, see *id.*, at — — —, and we need recount them here only briefly. The Vermejo River is a small, nonnavigable stream, originating in the snow belt of the Rocky Mountains. The river flows southeasterly into New Mexico for roughly 55 miles before feeding into the Canadian River. Though it begins in Colorado, the major portion of the Vermejo River is located in New Mexico. Its waters historically have been used exclusively by farm and industrial users in that State.

pp. 6

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

From: Justice O'Connor

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Recirculated: MAR 19 1984

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SUPREME COURT U.S.  
JUSTICE O'CONNOR

'84 MAR 19 A9:21  
2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80 Orig.

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

[March —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. — U. S. — (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

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pp. 67-11

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JUSTICE MARSHALL

'84 MAY 30 A9:56

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

From: Justice O'Connor

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

Recirculated: MAY 29 1984

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80 Orig.

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

[May —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. — U. S. — (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

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PP. 8, 9

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JUSTICE MARSHALL

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

From: Justice O'Connor

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Recirculated: MAY 30 1984

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80 Orig.

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

[June —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. — U. S. — (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

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Stylistic Changes Throughout

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

From: Justice O'Connor

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Recirculated: MAY 31

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80 Orig.

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

[June —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. 459 U. S. 176 (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 1, 1984

No. 80 Orig. Colorado v. New Mexico

Dear Lewis,

I am happy to make the change you suggest  
and will do so.

Sincerely,

*Sandra*

Justice Powell

PP. 9

V

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

84 JUN -4 A9:52

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

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: Justice O'Connor

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**SUPREME COURT OF THE UNITED STATES**

No. 80 Orig.

STATE OF COLORADO, PLAINTIFF *v.* STATE  
OF NEW MEXICO AND PAUL G. BARDACKE,  
ATTORNEY GENERAL OF NEW MEXICO

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT

[June 4, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action, the State of Colorado seeks an equitable apportionment of the waters of the Vermejo River, an interstate river fully appropriated by users in the State of New Mexico. A Special Master, appointed by this Court, initially recommended that Colorado be permitted a diversion of 4,000 acre-feet per year. Last Term, we remanded for additional factual findings on five specific issues. 459 U. S. 176 (1982). The case is before us again on New Mexico's exceptions to these additional findings. We now conclude that Colorado has not demonstrated by clear and convincing evidence that a diversion should be permitted. Accordingly, we sustain New Mexico's exceptions and dismiss the case.

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