No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND PAUL G. BARDACKE,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

PETITION FOR REHEARING

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The State of New Mexico agrees that "the Report of the Special Master does not contain sufficient factual findings to enable [the Court] to assess the correctness of the Special Master's application of the principle of equitable apportionment to the facts of this case." *Colorado v. New Mexico*, 51 U.S.L.W. 4047. However, the State of New Mexico respectfully petitions the Court to grant a rehearing with respect to a critical aspect of the law of equitable apportionment as it pertains to all previous equitable apportionment actions, this action, and actions which are yet to be filed. In this regard:

1) The Court's decision misconstrues New Mexico's position;

2) The Court analyzes factors to be considered in an equitable apportionment between prior appropriation states without differentiating those factors that might justify an equitable apportionment and those that might justify a departure from the guiding principle of prior appropriation; and

3) The Court has reiterated the proposition that priority of appropriation is the guiding principle in an equitable apportionment between appropriation states. The Court has also stated that it will balance the benefits of a proposed use against the possible harm to existing uses on a fully appropriated river. The fact that the Court apparently does not discern that these two positions are contradictory, *i.e.*, that balancing the potential benefits of a future use against its harm to existing uses on a fully appropriated river *ipso facto* compels the conclusion that priority is *not* the guiding principle, suggests that the Court fails to recognize a distinction critical to a logically consistent understanding of the relation between the doctrine of priority of appropriation and the principle of equitable apportionment.

In support hereof, the State of New Mexico states:

Early in its analysis the Court recognized that priority of appropriation is the "guiding principle" in an equitable apportionment action between prior appropriation states. (51 U.S.L.W. 4047). In the same vein, the Court "recognize[s] that the equities supporting the protection of existing economies will usually be compelling" in balancing a proposed use of water against existing uses of water. (51 U.S.L.W. 4048). In concluding, however, that it is appropriate to consider " 'the pertinent laws of the contending states and *all other relevant facts*' " (51 U.S.L.W. 4047), the Court has characterized New Mexico's position as "inflexible," requiring

"the Special Master . . . to focus exclusively on the rule of priority." (51 U.S.L.W. 4047).

In contrast to this characterization of New Mexico's position, the Court has discussed certain factors it deems appropriate to consider in determining whether to apply the guiding principle or to depart from it. Three factors can be gleaned from the Court's discussion: 1) whether, consistent with historical water shortage, the rights sought to be protected have been utilized diligently and in good faith; 2) whether reasonable conservation measures are available to "offset" the proposed Colorado diversion; and 3) whether the cessation of any waste or inefficiency would effectively augment the water supply. New Mexico has not argued that these factors are not valid considerations on the Vermejo. We have maintained that given the facts of this case these factors are of no avail to Colorado.[1] More importantly, these factors are

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[1] *See*, Brief in Support of Summary Judgment, September 27, 1979, pp. 6, 11; Reply Brief, October 4, 1976, p. 3; Trial Brief, June 15, 1981, pp. 22-28; Reply Brief, July 20, 1981, *esp.*, pp. 37-94; New Mexico's Exceptions to the Report of the Special Master and Brief in Support Thereof, April 7, 1982, pp. 22-37; Motion for Leave to File Reply Brief of the State of New Mexico and Reply Brief of the State of New Mexico, June 4, 1982, pp. 8-31.

With respect to conservation, for example, New Mexico expressly conceded that it is a factor worthy of consideration on the Vermejo, but, as a matter of fact, it is of no avail to Colorado:

> It remains true that each state on an interstate stream must exercise her rights reasonably and conserve the supply. What Colorado does not mention, however, is that states must conserve 'within practicable limits. . . .' (*Wyoming v. Colorado*, supra at 484). With respect to storage, each state should regulate and equalize the natural flow also 'within limits, financially and physically feasible. . . ." (*Id.*, at 484). Both New Mexico and its water users have respectively exercised their water rights continuously and responsibly under conditions of shortage. (Op. cit., p. 28).

(Cont. p. 4)

not relevant to whether the Court should depart from the principle of priority of appropriation. Unrelated to priority, these factors go to whether any more water might be made available.

The critical flaw in the Court's analysis of the law of equitable apportionment lies in its apparent belief that these factors have some logical bearing on whether the guiding principle of priority of appropriation should be applied or departed from. The error derives from the Court's failure to distinguish between factors which might make water available for a new, junior appropriation, and factors which might warrant a restructuring of priorities interstate, assuming the water is thus made available.[2]

The Court has failed to recognize that the consideration of factors which could result in conserving the water supply or otherwise make water available for a new use does not result in or even suggest a reordering of priorities. Notwithstanding

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1 Cont. from p. 3

See, also, Defendants' Requested Findings of Fact and Conclusions of Law, July 28, 1981, for requested findings which relate directly or indirectly to efficiency, water shortage, reasonable use, diligence, and good faith by New Mexico's water users. The record also shows that there are no reasonable conservation measures that would make water available for a new use in Colorado.

[2] The Master made this mistake. Because of the Master's view that the Vermejo Conservancy District is not economically viable, the Master has concluded that the water that might be made available by discontinuing use in the district could be awarded to Colorado. Assuming the Master were right legally and factually, there would be justification for an apportionment to Colorado. There is nothing in this scenario, however, that provides a reason to also conclude that the new use in Colorado should have the first priority. Again assuming the Master had some basis in fact for his opinion, the availability of water through eliminating a priority in New Mexico would provide no basis in logic to simultaneously award the first priority on the river to the most junior use. Because of this hiatus in logic, the Master recommended awarding the first priority to CF&I notwithstanding the attendant equities of the preexisting priorities in New Mexico.

a possible larger water supply, there remains the need in the West to keep intact our system of property law which recognizes that equities predicated on prior use should be protected before the law recognizes any right in junior uses. However, because the Court does not distinguish between factors which bear on the augmentation of supply by whatever means and factors which are cogent with respect to the protection of existing equities, the Court's present decision must be read to provide an unprecedented basis for finding that water might be available for a new use in Colorado as a result of conservation measures in New Mexico *and*, without justification in law or logic, that such new use should be given the first priority on the river. As required by the doctrine of prior appropriation, any risk that the augmentation is inadequate should be borne by the new use.

Our point is that if the Court intends to depart from the guiding principle of priority of appropriation upon consideration of possible augmentation by conservation measures, by finding claimed rights invalid, or otherwise, its opinion has provided no reason to do so. The Court has attempted to explain the law of equitable apportionment without seeing an analytical dichotomy essential to the preservation of the equities on an interstate stream. By analyzing the above mentioned factors as if they provided a basis upon which to rearrange priority of appropriation, the Court is inadvertently authorizing the Master to continue to ignore the equities inherent in the order of priorities. Following the Court's analysis, the Master could again award the first priority on the river to the most junior use without offering the slightest bit of explanation of why he had done so. Such an award could flow only from failure to distinguish between factors which might justify modifying the order of priorities already there.

It is one thing to consider the factors enumerated above to justify an equitable apportionment. These factors, however,

do not relate to priorities. In this case they also depend upon factual findings that the Master did not and, we believe, cannot fairly make. It is quite another thing, however, to jump to the conclusion that water availability for a new use in Colorado provides a basis in reason or logic why the new use should be given the first priority on the river.

Because the Court does not make this essential distinction, the Court is able to reach the simultaneous conclusion, on the one hand, that it can balance future uses against the equities of existing uses on a fully appropriated river, and on the other hand, that priority of appropriation remains the guiding principle. To make its opinion logically consistent, the Court must recognize that it might *equitably apportion* water for a new use through consideration of factors which might augment the supply, but that this would not justify a departure from priority of appropriation. If the Court in addition wishes to depart from priority of appropriation – and wishes to do so reasonably – it must consider factors it has not yet discussed.[3]

If the Court's opinion is not changed, it will continue to appear to have gone "dangerously far" toward establishing an entirely new standard upon which to equitably apportion interstate water, *i.e.*, a standard of economic value for future

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[3] The only factor the Court has ever considered is an existing economy predicated on junior uses. Justice O'Connor is correct in pointing out that "(i)n equitable apportionment litigation between two prior appropriation states concerning the waters of a fully appropriated river, [the] Court has never undertaken this. . . balancing task outside the concrete context of. . . two established economies in the competing states dependent upon the waters to be apportioned. . . ." (51 U.S.L.W. 4049). With respect to the second context she alludes to, *i.e.*, "to satisfy a demonstrable need for a potable supply of drinking water," the states involved were not prior appropriation states and the rivers were not fully appropriated. On the contrary, both *Connecticut v. Massachusetts*, 282 U.S. 660, and *New Jersey v. New York*, 283 U.S. 336, involved riparian states and turned on the availability of unappropriated water.

uses that is unrelated to the equities inherent in existing priorities. If we are wrong, and the Court intends to establish a new standard that is indeed incompatible with retaining priority of appropriation as the guiding principle in order to protect the equities inherent therein, the Court should reason to that conclusion; it has not done so yet. Its reasons should also be strong, because such a standard of equitable apportionment could not be more subversive of the security of existing property rights or more radically a departure from existing precedent.[4] The equity of such a standard can perhaps be better appraised by hypothesizing a prior appropriation state undertaking to administer water rights in a fully appropriated source by requiring the priority of water rights to change without compensation upon a balancing of the benefits of a proposed use against the harm to the owner of an existing right which

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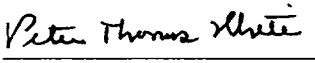
[4] In footnote 10 the Court gives some indication that it interprets *Wyoming v. Colorado*, 259 U.S. 419, as having departed from the guiding principle of priority of appropriation for some reason other than the protection of an existing economy based on junior rights. It is true that the Court did not fix the relative priorities of the users in Wyoming and Colorado, but it did not do so because hundreds of water users were involved. *See*, 2 R. Clark, *Waters and Water Rights* §§ 132.4, 132.5, at pp. 339, 340 (1967). Instead of applying priorities literally, the Court applied a "mass allocation" designed to protect the senior users. The object was to afford the same protection a mechanical application of priorities would have afforded by limiting the new use in Colorado "to an amount not exceeding the unappropriated flow," as Justice Roberts later described in *Colorado v. Kansas*, 320 U.S. 383, 392 (1943), and as the Court which decided *Wyoming v. Colorado* indicated in a case decided the same day, *Weiland v. Pioneer Irrig. Co.*, 259 U.S. 498, 502-503 (1922).

favors the new use. Fortunately, due process requirements would almost certainly prohibit the realization of such an hypothesis.

Respectfully submitted,

PAUL G. BARDACKE
Attorney General of New Mexico



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January 7, 1983

CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

Peter Thomas White

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Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Peter T. White, hereby certify that I am a member of the bar of this Court and counsel of record for the defendants and that on January 6, 1983, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Petition for Rehearing, by first class mail, postage prepaid, to the following officials of the State of Colorado:

The Honorable Richard D. Lamm
Governor of the State of Colorado
136 State Capitol
Denver, Colorado 80203

The Honorable J. D. MacFarlane
Attorney General of the State of Colorado
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I certify that on January 6, 1983, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Petition for Rehearing, by first class mail, postage prepaid, to the following counsel:

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I certify that all parties required to be served have been served.

Peter Thomas White

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