In the

Supreme Court of the United States

October Term, 1983

No. 80, Original

THE STATE OF COLORADO,
Plaintiff,

v.

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

PETITION FOR REHEARING

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June 29, 1984

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TABLE OF AUTHORITIES

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PETITION FOR REHEARING

Pursuant to Rule 51 of the Rules of this Court, the State of Colorado hereby petitions for a rehearing for the following reasons:

1. The Opinion of this Court of June 4, 1984 states that there is no evidence of "an economic analysis" of the proposed diversion in Colorado and that "New Mexico commissioned some independent economists to study the economic effects, direct and indirect, that the diversion would have on persons in New Mexico." Slip. Op. 9, ll. The fact of the situation is that Colorado *did* present a thorough economic analysis in the form of its Exhibit 15 prepared by HOH Associates, Inc., an independent

consulting firm in Denver, Colorado (Tr. 808-845). The economic analysis submitted by New Mexico, Exhibit F-33, was of no value because it was based entirely on the assumption that with a Colorado diversion there would be no water in the Vermejo River (Tr. 2301). This New Mexico analysis says that its procedure is to compare the situation "with Vermejo water" and "without Vermejo water" (Ex. F-33, p. 35).

Thus, Colorado did prepare and submit an economic study that was related directly to the proposed uses of Vermejo River water in Colorado. New Mexico's economic study, on the other hand, did not correctly analyze the effects of Colorado's diversion. Rather than taking all of the water in the Vermejo River system, the proposed Colorado diversion would take only approximately 1/3 of the water in the Vermejo River, leaving for the New Mexico users 2/3 of the water in the system rather than no water, as assumed by the New Mexico analysis.

New Mexico's chief witness testified that the effect of a Colorado diversion would be felt essentially in its entirety by the Vermejo Conservancy District (Tr. 1323). Thus this New Mexico economic analysis was fallacious in even assessing injury to users other than the District. As stated, the Special Master found that the District's supply would be at most only partially affected by a Colorado diversion.

The Opinion of June 4, 1984 states: "If New Mexico can develop evidence to prove that its existing economy is efficiently using the water, we see no reason why Colorado cannot take similar stepts to prove its future economy could do better." Slip Op. 11, 12. Colorado did just that with its Exhibits 13 and 15. Colorado Exhibit 13 involved a study of the uses (and their efficiency) in Colorado. Colorado also proved that New Mexico was not using its water efficiently. This fact was among the find-

ings of the Special Master. Additional Factual Findings at 18-21.

This situation with respect to economic analysis demonstrates why the findings and recommendations of the Special Master are so probative of the equities in this case. He saw the exhibits and, as an experienced trial judge, he observed the examination and cross-examination of witnesses regarding these exhibits.

2. The State of Colorado is concerned about and responsible for all of the water needs in the Purgatoire River Valley which would benefit from Vermejo River water. The evidence is clear and convincing as presented by the Colorado State Engineer and officials of the Purgatoire River Water Conservancy District and the City of Trinidad that there is a shortage of water to meet existing needs in the Purgatoire Valley, which shortage far exceeds the amount of any water that would be brought over from the Vermejo River (Tr. 523-539, 624-628, 639-646, 652-669, 672-677). This shortage does not relate solely to the needs of CF&I Steel Corporation but to the needs of the entire Valley, and it is clear that there are no substitute sources to satisfy these needs.

If Colorado and its water users are to be placed by the Opinion of this Court of June 4, 1984 in a priority situation with respect to the existing users in New Mexico, then it would be in the interest of the administration of this interstate stream and the comity and orderly procedures between the two states for there to emanate from this proceeding a finding, based on the thorough presentation and discussion of the subject, as to the uses in New Mexico that should be recognized. It is respectfully suggested that Colorado is entitled to this consideration and that it would be a wastage of valuable effort and deliberation for there not to be confirmed findings in this regard.

The Opinion of the Court of June 4, 1984 concludes with the statement that "the equities compel the continued protection of the existing users of the Vermejo River's waters." Slip Op. 13. The Opinion does not specify these users nor does it specify the amount of use for which they should be recognized in connection with their "protection." It does indicate that the Court was interested in protecting "*existing*" uses.

A major part of this case as tried before the Special Master was the determination of the existing users in New Mexico and the amount of water to which each is entitled. With respect to each user or claimed user in New Mexico asserting a right to Vermejo water, there was extensive testimony and documentary evidence. This Court in its Opinion of December 13, 1982 instructed the Special Master to make specific findings with respect to the existing users of water from the Vermejo River. 459 U.S. 176, 189 (1982). Following the Court's instructions, the Special Master did make specific findings with respect to the uses of water in New Mexico that should be recognized. Additional Factual Findings 2-9.

It would be in accord with this Court's Opinion of December 13, 1982 that there be confirmation of the findings of the Special Master with respect to the uses in New Mexico. The Special Master's findings first recognized the maximum duty of water for irrigation to be 2.0 acre feet of water per annum per acre of land irrigated for the users other than the Vermejo Conservancy District, and 1.5 acre feet of water per annum per acre of land irrigated for the Vermejo Conservancy District. *Id.* at 2. The following are the acreages found to be irrigated by irrigation users other than the Vermejo Conservancy District:

	Acres Found To Be Irrigated Id. at 3-8	Acres Claimed By New Mexico Under Decree, Brief of August 11, 1983 at 21
Vermejo Park Corporation (out of the Vermejo River just below the State line)	250	870.20
Phelps Dodge Corporation	150	301.19[2]
Pompeo	50	101.50
Odom	113	264.69
Porter	14	16.49
Duell-Messick	48.40[1]	48.40[2]
Vermejo Park Corporation (out of the District canal)	46.73	46.73
Totals	672.13	1,649.20

As to Kaiser Steel Corporation, the Special Master found the maximum use to be 361.47 acre feet. Additional Factual Findings at 4. New Mexico claims Kaiser has rights to 630 acre feet. As to the Vermejo Conservancy District, the Special Master found that it "irrigates an average of 4,379 acres." *Id.* at 8. The Special Master also noted the "substantial evidence that the District receives one-third to one-half of its water from sources other than the Vermejo River." *Id.* at 8.

If the findings of the Special Master are confirmed and actual existing usage is recognized, the Vermejo Conservancy District would gain protection as against claims from these senior rights to the extent of 2,222.67 acre feet, i.e., the difference between actual

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[1]This amount is stated by New Mexico in its Brief of August 11, 1983 at 32.

[2]The Phelps-Dodge and Duell-Messick amounts are adjusted to show the lease to Kaiser of 200 acre rights (400 acre feet) of Phelps Dodge and the sale to Kaiser of 115 acre rights (230 acre feet) of Duell-Messick.

existing usage in acre feet of the irrigators and Kaiser and the amount in acre feet claimed by New Mexico[3]. It is submitted that this figure of 2,222.67 acre feet, as well as the elimination of waste as discussed below, is most relevant in considering the usage which should be recognized for Colorado. This elimination of potential paper claims for water rights over and above actual usage is a conservation factor that would offset an allocation to Colorado. Certainly these paper claims if they had any validity should be junior to the Colorado decree. This Court has considered intrastate priorities in equitable apportionment proceedings. *Nebraska v. Wyoming,* 325 U.S. 589 at 629 (1945).

It is respectfully urged that this case at the very least needs direction of the type that was given in *Wyoming v. Colorado,* 259 U.S. 419 (1922). With a recognition of existing uses in New Mexico, there should be a specification as to how much water each state is to be accorded. There is no interstate administration, no compact and, as testified to, there is not even any administration in New Mexico (Tr. 2422-2437). If uses in New Mexico are to be given "protection" by this Court's Opinion, then these uses should be specified so a Colorado user may know when he may take water and New Mexico should not be permitted to expand its uses at the expense of Colorado's rights.

3. The effect of the Court's Opinion of June 4, 1984 could be that the more flagrant a state is in its lack of administration and record keeping in the use of water from an interstate stream, the more secure it is likely to be in that usage. In order to prove conservation that could be undertaken, there must be proof of waste. Without

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[3]Actually, the small Porter right is junior to the District but the District has apparently not sought to exercise its seniority despite claims of shortage. Additional Factual Findings at 7.

records, the precise amount of waste cannot be determined. Colorado employed all of the evidence available to show waste in New Mexico and to demonstrate conservation practices that might there be undertaken. Yet, this Court's burden of proof imposed on the state seeking an equitable apportionment is such that it will encourage states not to keep records, and follow New Mexico's lead.

There was of course in this case one very precise determination of waste in the form of New Mexico's own Exhibit E-3 regarding the closed system for stock and domestic water, discussed below. Beyond that, however, the lack of records and administration in New Mexico were a factor. Colorado did show by Bureau of Reclamation documents the obvious waste of water in the District's system, but due to lack of records of New Mexico's water diversions, the precise amount of this waste could not be quantified (Colo. Exs. 37, 38, 41, 44, 46). Again in the form of New Mexico's own Exhibit A-130, it was shown that one of the users was taking water out of the river after the close of the irrigation season. There were no records to show how much this user had taken during the entire year but this one record demonstrated a clear situation of over usage and waste.

The Special Master, despite the uncalled for criticism and denigration of him by New Mexico in its briefs, evaluated all of the evidence that he had and that could be obtained for him by the diligence of both sides; he evaluated the credibility of witnesses; and he concluded that 4,000 acre feet of water was an equitable allocation to Colorado. He evaluated the Vermejo Conservancy District against what it should be doing in regard to its own efficiency and conservation, not primarily as it compared with other districts, and he evaluated New Mexico against its interstate obligations to preserve the common supply. *Wyo. v. Colo., supra,* at 484. His findings should be confirmed.

4. As to the closed system recently installed by the Vermejo Conservancy District for the delivery of livestock and domestic water, Colorado respectfully states that this Court has overlooked the following:

a. New Mexico's own Exhibit E-3 shows that over the past nearly thirty years approximately 2,000 acre feet of water were released annually from the District reservoirs for the purpose of supplying water for livestock which consumed only approximately 35 acre feet of water per yer. Therefore, there was over a 98% wastage of water. Under the law of New Mexico as interpreted by the Tenth Circuit in *Jicarilla Apache Tribe v. United States,* 659 F.2d 1126 (1981), this degree of waste means there there was no beneficial use of this water wasted. If as a result of the new system water previously wasted is now to be used, then the use of that water is a new use with a priority junior to the priority awarded under the Colorado decree. To conclude otherwise would be to ignore waste and the interstate obligation to protect the common supply. *Wyo. v. Colo., supra,* at 484. It would allow a person, who after decades of waste eliminates it, to stand in a position as though waste had not taken place.

b. The closed system was conceived as a means of supplying domestic water to the households in the Vermejo Conservancy District and as a means of supplying stockwater through 12 months of the year rather than 9-1/2 months as was the case under the open ditch system (N.M. Ex. E-3). Thus, the expense to the District is for considerations and benefits, domestic water and year round stockwater, quite apart from replacing the 9-1/2 months stockwater supply system and conserving water for irrigation. New Mexico Exhibit E-3 indicates that the financing of the closed system would be partially through loans and partially through grants, and thus not entirely by the District "at its own expense." Slip Op. 8.

c. The New Mexico testimony is that with respect to water released for irrigation there is approximately a 1/3 loss of water from the reservoirs to the farms (Tr. 1315). There is approximately a 2/3 loss of water from the river through the reservoirs to the farms (Tr. 1271, 1286, 1315). Thus the 2,000 acre feet of water saved at the reservoirs by the closed system would produce approximately 1,667 acre feet at the farms and 4,000 acre feet of water taken from the river would produce approximately 1,667 acre feet at the farms. This is clear and convincing evidence that a conservation measure eliminating this waste of 2,000 acre feet and making it available at the reservoirs would, mathematically and on the basis of New Mexico's own evidence, offset the effect of a Colorado diversion of 4,000 acre feet from the river.

d. There were questions to counsel at both oral arguments in this case regarding the effect of the Colorado diversion in dry years as compared with normal or wet years. It was pointed out that Colorado's take would of course be lower in dry years since it would be taking only a portion of what Colorado produced. The significant point on this subject, however, is that the closed system will eliminate the wastage of 2,000 acre feet of water whether the year be a dry year or a wet year because the District gave first priority to the stockwater (Tr. 1316). A Colorado diversion will thus be more than offset in a dry year in that the 2,000 acre feet at the reservoir will offset a 4,000 acre feet diminishment at the point of diversion from the river, and yet Colorado in a dry year would not be taking 4,000 acre feet of water because such would not be available at the Colorado diversion points.

For the foregoing reasons, it is respectfully requested that there be a rehearing of this case.

Respectfully submitted,

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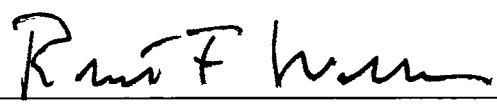

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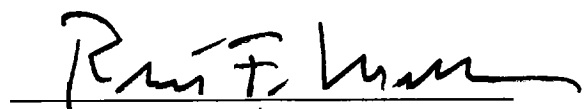
CERTIFICATE OF COUNSEL

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



ROBERT F. WELBORN
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am a member of the bar of this Court and counsel of record for the plaintiff and that on June 28, 1984, 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 New Mexico:

The Honorable Toney Anaya
Governor of the State of New Mexico
State Capitol
Santa Fe, New Mexico 87503

The Honorable Paul G. Bardacke, Esq.
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I certify that on June 28, 1984, 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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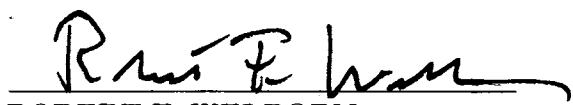
I certify that all parties required to be served have been served.



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