No. 80, Original

IN THE

Supreme Court of the United States

October Term, 1977

STATE OF COLORADO, *Plaintiff*

v.

STATE OF NEW MEXICO
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE OF
NEW MEXICO, *Defendants*

NEW MEXICO'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

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April 7, 1982

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

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EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

On April 16, 1979, the Court appointed Ewing T. Kerr, Senior Judge for the United States District Court for the District of Wyoming, as its Special Master. Following an extensive presentation of evidence, the Special Master reached his conclusions and made recommendations in his Report of Special Master on the Equitable Apportionment of the Vermejo River, which was accepted for filing on February 22, 1982. The State of New Mexico takes exception to the Special Master's Report in the following respects:

1) The Master's characterization of the law is founded on a manifest misunderstanding of the previous decisions of the

Court in equitable apportionment actions. For example, the Master dismissed *Arizona v. California,* 373 U.S. 546 (1963), as irrelevant because the Boulder Canyon Project Act and not equitable apportionment was determinative of the issues. (Report, p. 22). In fact, the Court observed that the Gila River, a tributary to the Colorado River flowing between New Mexico and Arizona, was "not within the regulatory provisions of the Project Act [and] the Master held that this interstate dispute should be decided under the principles of equitable apportionment." 373 U.S. at 595.

In *Arizona v. California,* New Mexico took exactly the same position as we take here, *viz.*, that priority of appropriation is the guiding principle in apportionment in the West, except that it may be varied to protect economies based upon junior uses of water. The Special Master agreed. *See,* Special Master's Report, *Arizona v. California,* Dec. 5, 1960, pp. 325-327. In both the majority and dissenting opinions, the Court adopted his analysis. 373 U.S. at 595, 607-608, and 629.

2) The Report demonstrates that the Master did not understand or properly analyze much of the technical evidence, causing him to base his recommendations on anomalous findings of fact. For example, the Master based his belief that no injury would occur in New Mexico as a result of an award to Colorado on his finding that a major irrigation district in New Mexico "is inefficient, resulting in a water loss which can run as high as 33%." (Report, p. 8). Stated the other way around, he found an efficiency of 67%.

The Master derived 33% from rounding off the figure of 32.7% appearing on page 8 of Colorado's recommended report. Not understanding Colorado's assertion, albeit mistaken, that "(t)he efficiency of the District system is 32.7 percent to the farm headgate," the Master inverted the significance of the number.Instead of finding that the District has a low efficiency of

33%, the Master found that it has an unrealistically ideal efficiency of 67%. Notwithstanding many hours of testimony on irrigation efficiency, the Master's understanding is conceptually backwards. In sum, the Master believed he had made a finding which justified his conclusion that the District would not be injured. On the contrary, he made a finding which contradicts his conclusion. As is discussed in our supporting brief, the Master's evaluation of much of the evidence is similarly flawed.

3) Based upon demonstrably erroneous legal conclusions and a disregard for critical elements of evidence, the Master's Report does not evaluate the facts essential to an understanding of this action as a matter of law, thus making it impossible for the Court to adopt, reject, or modify the Report without an independent review of the record. For example, the Master ignored 41,000 acres of irrigated lands with rights in Vermejo waters below its confluence with the Canadian River primarily on the theory that downstream users were obligated under the law of prior appropriation to make calls upon the Vermejo users in order to preserve their rights. (Report, p. 4). There is no basis in law, however, for downstream, junior users to make such calls upon senior users. N.M. Const. art. XVI, § 3. Furthermore, the Master inexplicably adopted as the amount of "historic use" of Vermejo waters in New Mexico the comparatively limited uses resulting from drought in the 1970s. While the record presents the historic use, the Master does not discuss it, thus making it impossible to ascertain the equities arising from the actual historic use. Similarly, the Master's belief that an irrigation district in New Mexico is "economically unfeasible" and should therefore be sacrificed to C.F. & I.'s proposed diversion in Colorado is based upon severe drought conditions instead of conditions of adequate supply.

4) The ultimate findings and conclusions in the Master's Report are internally inconsistent and contradictory. Following

a line of reasoning that has been expressly rejected by the Court, the Master concludes that no injury would result to New Mexico if C.F. & I. were awarded essentially all of the dependable flow of the river. Anomalously, the Master then concludes that priority of appropriation should not govern uses of Vermejo water interstate. If there were no injury there would be absolutely no reason not to apply priority of appropriation, as the Court has held in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Arizona v. California*, *supra*.

5) The Master did not expressly rule on the propriety of Colorado having abandoned its own interests in the Vermejo River to bring this action solely on behalf of Colorado Fuel and Iron Steel Corporation.

6) The Special Master has ignored the Court's reasoning in all previous equitable apportionment actions and reached the empty conclusion that the nature of the action, i.e., apportionment, compels a division of water. The Master was of the opinion that "each State is entitled to a share of a river flowing between them." (Report, p. 8). This preconceived notion that the plaintiff state should prevail in an equitable apportionment action biased the Special Master before trial began. When combined with the Master's failure to articulate the facts essential to the resolution of this case, the Master's conclusions of law render his Report wholly lacking in substance and merit.

WHEREFORE, the State of New Mexico prays that the Court reject the Master's Report, make an independent review of the record, and decide this case in accordance with the

evidence and principles of equitable apportionment as reasoned and defined in the Court's earlier decisions.

Respectfully submitted,

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BRIEF IN SUPPORT OF EXCEPTIONS TO THE REPORT OF SPECIAL MASTER

QUESTIONS PRESENTED

1. Should the principle of priority of appropriation be varied in an equitable apportionment of the Vermejo River to provide for future developments in Colorado at the expense of an existing economy in New Mexico?

2. Can Colorado obtain a decree in this action solely for the benefit of one of its citizens under the Eleventh Amendment to the Constitution?

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STATEMENT OF JURISDICTION

The original jurisdiction of the Court was invoked by Colorado under Article III, Section 2, Clause 2 of the Constitution of the United States.

STATEMENT OF THE CASE

This is an original action in which the State of Colorado seeks an "equitable apportionment" of the Vermejo River, an interstate stream flowing between southern Colorado and northern New Mexico. New Mexico disputes Colorado's right to effect an apportionment of Vermejo water without regard to the guiding principle of prior appropriation. The Court granted Colorado leave to file complaint on November 27, 1978. On April 16, 1979, the Court appointed Ewing T. Kerr, the Senior Judge for the United States District Court for the District of Wyoming, as its Special Master to take evidence and to report to the Court. Trial was conducted over a period of three weeks. The Master's Report was filed on February 22, 1982. Pursuant to the Court's Order of the same day the parties were granted 45 days to file exceptions with supporting briefs. On March 22, 1982, Colorado waived the right to file exceptions.

SUMMARY OF ARGUMENT

I

Equitable apportionment is a cause of action designed to address the situation in which intrastate appropriations of water have resulted in the simultaneous development of conflicting economies in two or more states. *Kansas v. Colorado,* 206 U.S. 46 (1907). As between states in the arid West which have adopted the doctrine of prior appropriation, the federal common law utilized in equitable apportionment suits derives from an application of common principles without regard to political boundaries. *Wyoming v. Colorado.* 259 U.S. 419 (1922).

Priority of appropriation is a fair and equitable doctrine embodied in the statutes and constitutions of nearly all of the western states. *E.g.,* Colo. Const. art. XVI, §6; N.M. Const. art. XVI, §2. In a region of the country where it is understood that there is not enough water in the natural streams to satisfy competing demands, superiority of right based on priority became the basis of sound, sensible government.

Priority of appropriation is not a mere factor in settling interstate water disputes – it is the paramount basis of decision, to be modified or varied to protect existing economies as the facts of each case warrant. Where the fortuity of a political boundary has fostered the development of conflicting demands on a finite resource and there are existing enterprises dependent on the continued flow of a stream in both states, the Court has understandably been reluctant to simply order economies, albeit based on junior appropriations, out of existence. Accordingly, the Court has held that "priority of appropriation is the guiding principle," but that "established uses should be protected even though strict application of the priority rule might jeopardize them." *Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945).

In this case appropriations of Vermejo water began in New Mexico in 1867. The river has been fully appropriated in New Mexico for nearly a century, and no use or diversion of Vermejo waters has ever been made in Colorado. In 1975, Colorado Fuel and Iron Steel Corporation (C.F. & I.) obtained an inchoate right in state court in Colorado to make a transmountain diversion of the Vermejo headwaters sometime in the future. At odds in this case are the existing equities derived from the historic use of Vermejo water in New Mexico and the possibility of an equitable interest arising in the future in Colorado.

In *Arizona v. California,* 373 U.S. 546 (1963), the Court accepted the Special Master's conclusion that "it would be

unreasonable in the extreme" to award water for a future use at the expense of existing uses. However, in this case, the Master has recommended that the Court depart from the guiding principle of priority of appropriation and instead utilize a new test which balances the economic efficiency of existing uses against the efficiency of proposed uses to determine which rights are entitled to interstate water. Instead of effecting an equitable apportionment of interstate waters, the Master would make a division of water despite the equities in this case.

II

The design of Colorado's evidentiary presentation was twofold: to minimize the need for Vermejo water in New Mexico and to inflate the amount of water available for diversion by New Mexico. On the one hand, Colorado asserted that the historic diversion demand in New Mexico should be defined as the comparatively limited uses resulting from drought in the 1970s, contrary to the law of both states and contrary to the applicable federal common law. *Nebraska v. Wyoming,* 325 U.S. 589 (1945). On the other hand, Colorado assessed the "available" water in New Mexico on the basis of average annual discharge, which the Court has expressly rejected for the purpose of determing dependable supply. *Wyoming v. Colorado,* 259 U.S. 419, 471, 476 (1922); *Colorado v. Kansas,* 320 U.S. 383, 396-397 (1943). In combination with his distorted view of the basis of equitable apportionment, the Master has inexplicably adopted Colorado's exaggerative procedures.

III

Upon learning of C.F. & I.'s decreed inchoate right, four New Mexico water users – Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District – filed suit on April 26, 1976, in federal district court, to enjoin C.F. & I. from diverting Vermejo

waters "unless and until [their] prior rights [had] been satisfied." The court enjoined C.F. & I. from an out-of-priority diversion in 1978. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244 (D.N.M. 1978). Instead of trusting its conspicuously junior priority to a stream which is historically short of supply for existing uses, C.F. & I. did not undertake its diversion, but persuaded the State of Colorado to file this action to try to circumvent the injunction. C.F. & I.'s fear of priority of appropriation demonstrates the fact that its proposed diversion of Vermejo waters would cause extensive injury to existing New Mexico uses. If no injury would occur, the existing injunction would be meaningless, and there would have been no reason for these lawsuits. Corporations are as they act, not as they say.

IV

The equity inherent in the Court's reliance on prior appropriation in equitable apportionment litigation is apparent in its logical extension: laches. Twice the Court has articulated sovereign inaction in terms of laches. *Washington v. Oregon,* 297 U.S. 517 (1936); *Colorado v. Kansas,* 320 U.S. 383 (1943). Here, the Vermejo has been fully appropriated in New Mexico without any corresponding development in Colorado. This condition has persisted for nearly 100 years. Colorado comes a little late to invoke "the high equity that moves the conscience of the court in giving judgment between states." *North Dakota v. Minnesota,* 263 U.S. 365 (1933).

V

The Eleventh Amendment prevents Colorado from lending its name to C.F. & I. The facts show that C.F. & I. persuaded Colorado to file this action after it had been enjoined in federal district court. C.F. & I. owns the entire Vermejo drainage in Colorado, and there is no other intending appropriation in Colorado. In order to file this suit, Colorado abandoned its own

interest in Vermejo waters. The last semblance of a true action *parens patriae* disappeared when C.F. & I.'s general counsel was made a special assistant attorney general to pursue the litigation. While the Court has recognized the validity of *parens patriae* claims, "this principle does not go so far as to permit resort to our original jurisdiction in the name of a state but in reality for the benefit of particular individuals." *Oklahoma v. Cook*, 304 U.S. 387, 394 (1938).

ARGUMENT

INTRODUCTION

The Vermejo River is a small, non-navigable stream formed by three tributaries rising on the southeastern slopes of the Sangre de Cristo Mountains some six miles above the Colorado-New Mexico state line. These tributaries, Ricardo Creek, Little Vermejo Creek, and the North Fork, combine to form the mainstem of the Vermejo approximately one mile below the state line. The drainage area in Colorado consists of a rugged mountain slope which drops precipitously into New Mexico. It is inaccessible for much of the year and uninhabited. The geography of the Vermejo River drainage is such that the full utilization of the Vermejo developed historically in New Mexico. No use or diversion of Vermejo waters has ever been made in Colorado.

Judged by eastern standards, the Vermejo is not large. During the summer months it is about five feet wide and one foot deep. From Colorado the Vermejo flows southeasterly into New Mexico through 35 miles of dissected plateau and across rolling plains to its confluence with the Canadian River. The climate of the Vermejo region is semi-arid.

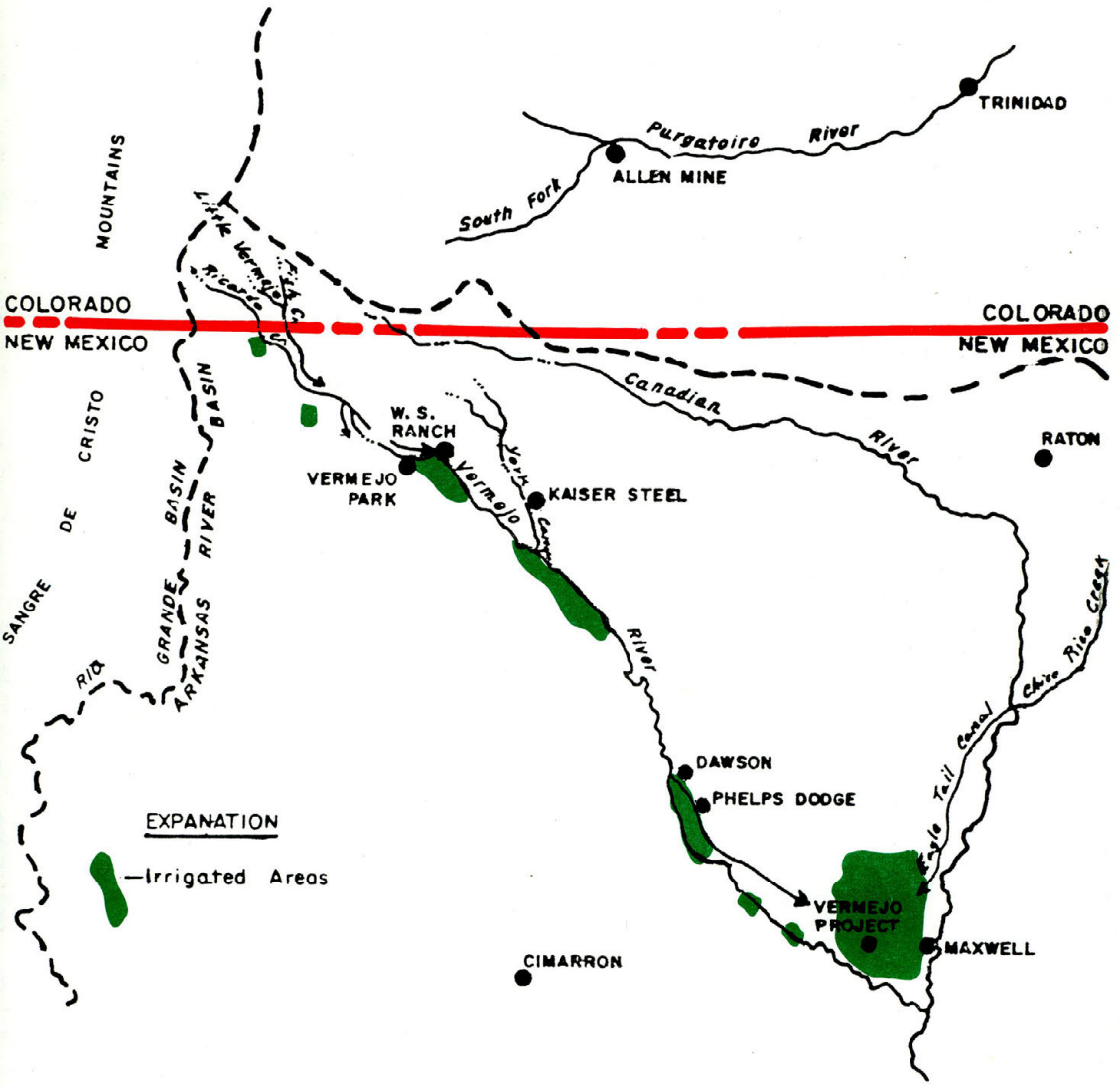
In contrast to the absence of any beneficial uses in Colorado, an agricultural and industrial economy has developed in New

Mexico from the beneficial use of Vermejo waters dating back to 1867. The river was fully appropriated in New Mexico around the turn of the century. New Mexico's present uses are depicted in the map facing this page. They depend primarily on direct flow diversions from the base flow of the river which runs down from the tributaries in Colorado in the form of snow-melt runoff during the irrigation season. No groundwater is available as a practical alternative. (Tr. at 1752-1797). In addition, New Mexico's uses must contend with chronic shortages.

The uses in New Mexico have produced an economy which the evidence has shown to be dependent on the uninterrupted flow of Vermejo water. The role that is played by these interests in the life of Colfax County is critical. The evidence has shown that there would be extensive economic injury to Colfax County if diversions were made upstream in Colorado.

On May 12, 1975, Colorado Fuel and Iron Steel Corporation (C.F. & I.) obtained an inchoate right in state court in Colorado for a proposed transmountain diversion of the headwaters of the Vermejo into the Purgatoire River system for a planned industrial development of corporate property in Las Animas County, Colorado.

Upon learning of C.F. & I.'s inchoate right, four New Mexico water users – Kaiser Steel Corporation, Phelps Dodge Corporation, Vermejo Park Corporation, and the Vermejo Conservancy District – filed suit in federal district court to enjoin C.F. & I. from diverting Vermejo waters until their senior rights have been satisfied. Applying the principles of prior appropriation indigenous to both Colorado and New Mexico, the federal district court entered an order on January 16, 1978, enjoining C.F. & I. from any out-of-priority diversion of Vermejo waters. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244, (D.N.M. 1978). The district court order


TRINIDAD
Purgatoire River
ALLEN MINE
South Fork
MOUNTAINS
COLORADO
NEW MEXICO
COLORADO
NEW MEXICO
Canadian River
RATON
W. S. RANCH
VERMEJO PARK
Vermejo
KAISER STEEL
CRISTO
DE
SANGRE
RIO GRANDE
BASIN
ARKANSAS
RIVER
BASIN
River
DAWSON
PHELPS DODGE
Eagle Tail Canal
Chico River Ditch
VERMEJO PROJECT
MAXWELL
CIMARRON
EXPANATION
—Irrigated Areas

placed upon C.F. & I. the decision whether to risk investment in its transmountain diversion works on the basis of its junior priority.

In both Colorado and New Mexico water rights are initiated and perfected pursuant to the doctrine of prior appropriation. Colo. Const. art. XVI, § 5, 6; N.M. Const. art. XVI, § 1. In both states priority of appropriation controls the internal administration of water rights. The critical feature of the doctrine is the priority of senior rights. 1 Clark, *Waters and Water Rights,* § 51.6 (1967). Senior appropriators in both states are entitled to the full protection of their interests before water is passed to junior appropriators. Colo. Rev. Stat. § 37-92-301(3); § 72-1-2, N.M.S.A. 1978. The law of prior appropriation was developed in the arid states from practice and necessity. *E.g., Atchison v. Peterson,* 20 Wall. 507 (1874); *Basey v. Gallagher,* 20 Wall. 670 (1874); *Gutierres v. Albuquerque Land & Irrig. Co.,* 188 U.S. 545 (1903). It is a doctrine of water law which is founded upon the inadequacy of water to supply competing demands.

C.F. & I. elected not to construct its proposed diversion works. Instead of trusting its strikingly junior priority, C.F. & I. persuaded the State of Colorado to file this equitable apportionment action on the theory that the state might have some sovereign right to Vermejo waters that transcended C.F. & I.'s interests.

The water right granted to C.F. & I. by the Colorado state court in 1975 is an inchoate right to divert up to 75 cfs. (cubic feet per second) annually from the headwaters of the Vermejo. According to Colorado's figures, 75 cfs. is approximately 9 times the amount of water the river has provided historically. The only other application for a water right in Vermejo waters in Colorado was filed by the state itself on November 12, 1976, seeking a minimum instream flow of 5 cfs. to protect a rare species of trout. While C.F. & I. wishes to take water out of

the river in Colorado, Colorado wishes to keep the water in the river. Notwithstanding the conflict of interest, this action was filed in Colorado's name in order to provide C.F. & I. with a second opportunity to expropriate the property rights of New Mexico citizens.

At trial New Mexico's evidence proved the existence of extensive beneficial uses which are entitled to the protection of this Court. These interests are equitable interests. They derive from the law of prior appropriation adopted by the people and applied to enterprises on the Vermejo and Canadian Rivers. Colorado has no equitable interests in this case. Her use of the word in these proceedings has been totally without substance. There is no economy and no water use in Colorado which is dependent upon Vermejo flows.

POINT I

THE SPECIAL MASTER HAS MISCONSTRUED AND MISAPPLIED THE LAW OF EQUITABLE APPORTIONMENT, REJECTING THE JURISPRUDENTIAL UNDERPINNINGS OF THE FEDERAL COMMON LAW AND THE LAW COMMON TO BOTH STATES.

Equitable apportionment is a term that identifies a cause of action between states with conflicting interests in the use of interstate water. There are eight precedents. Each has been determined by principles which are intended to reflect the equities inherent in the actual use of interstate water within the states. In every instance the Court's primary objective has been to protect the existing economies which have developed from reliance on the use of water.

In this case all of the factors which create equities that have been recognized in equitable apportionment litigation are in

New Mexico. Because Colorado has never applied the water of the Vermejo River to beneficial use, she possesses no equities with which to justify an award of 4,000 acre-feet per annum. Instead of respecting the established uses on the river as deserving of the equitable protection of this Court, however, the Special Master has ignored them with the result that the existing social and economic reliance on Vermejo water in New Mexico is jeopardized.

Four cases are directly relevant to the facts at issue here: *Wyoming v. Colorado,* 259 U.S. 419 (1922); *Washington v. Oregon,* 297 U.S. 517 (1936); *Nebraska v. Wyoming,* 325 U.S. 589 (1945) and *Arizona v. California,* 373 U.S. 546 (1963). Like this case, each involved a suit to apportion waters between arid states which had adopted the doctrine of prior appropriation, and each except *Arizona v. California* involved a situation in which the river was either fully appropriated or nearly so. The unifying principle of these decisions is the objective of protecting existing interests which rely upon appropriations of water. This was achieved primarily through application of priority to existing diversions across the state line.[1]

Priority of appropriation is the guiding principle in equitable apportionment litigation in the western states.[2] *Nebraska v. Wyoming,* 325 U.S. at 618. Its equity is apparent. It best satisfies the purpose of protecting senior economies which depend on the diversion of water in order of priority. However,

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1. *See,* 2 Clark, *Waters and Water Rights,* §§ 132.2-132.5(B), pp. 331-347 (1967).

2. In applying the law of prior appropriation between prior appropriation states, the Court relied upon numerous federal and state court precedents involving the rights of private, interstate litigants wherein the court had uniformly reached the same result. *Willey v. Decker,* 11 Wyo. 496, 73 Pac. 210 (1903); *Howell v. Johnson,* 89 F. 556 (C.C.D. Mont. 1898); *Morris v. Bean,* 146 F. 423 (C.C.D. Mont. 1906); *aff'd, Bean v. Morris,* 221 U.S. 485 (1911).

it is not absolute. It can be varied, and has been, but only to protect junior economies which have developed in reliance on interstate water. In both cases, whether priority doctrine is applied or varied, the objective of protecting existing uses is the controlling factor. Instead of applying priority doctrine to protect New Mexico's economy in this case, the Special Master has reversed it to deny protection to that economy. By allowing C.F. & I. to divert 4,000 acre-feet annually instead of requiring that the remainder of the supply be delivered to New Mexico, the Master has given C.F. & I. the first priority on the river.

Wyoming v. Colorado, 259 U.S. 419 (1922)

The State of Wyoming sued Colorado and two Colorado corporations to prevent a proposed diversion from the Laramie River by two Colorado corporations. Wyoming asserted that the proposed diversions would not leave sufficient water to satisfy prior appropriations in Wyoming, causing irreparable injury to Wyoming's interests. Colorado denied this, arguing that she had the right to dispose of the waters within her borders "regardless of the prejudice that it may work" to Wyoming. 259 U.S. at 457.

The problem was that there were valid, established interests on both sides of the state line, additional proposed developments in Colorado, but only a finite supply of water in the river. The Court thus was required to determine and weigh the equities in the respective states in order to make a judgment on the validity of the proposed diversions in Colorado. It did so by assuring that the appropriations in both states would be respected by determining the actually divertible supply, and then allowing the excess for the proposed diversions in Colorado. 259 U.S. at 467.

The basis of the Court's opinion is that the protectable equities in the two states derive from their appropriations. Justice Van Devanter held that "*the interests of the State are indissolubly linked with the rights of the appropriators.* 259 U.S. at

468, emphasis added. His reasoning is clear. Under appropriation doctrine, where water is applied to beneficial use by different enterprises, the primary equities in the lawsuit are the actual appropriations and the social and economic dependence which results. 259 U.S. at 468. This allowed the conclusion that the apportionment should consist of the doctrine of prior appropriation applied interstate where that would satisfy the existing priorities in both states:

> We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. 259 U.S. at 470.

The Court's decree resulted in the finding that existing Colorado diversions with senior priorities were entitled to 22,500 acre-feet and that existing Wyoming rights were entitled to 272,500 acre-feet per annum. The Court's independent calculations of divertible supply concluded that there remained 15,500 acre-feet available for the proposed diversions in Colorado. 259 U.S. at 495-496. The Court was therefore able to make a division of the Laramie River simply and equitably between the two parties on the basis of their existing uses and economies. It is an apportionment that is fair because it respects the equities derived from beneficial use in both states. The Court expressly rejected Colorado's contention that she could dispose of the water within her borders to the prejudice of existing uses in another state. 259 U.S. at 466. In the instant case Judge Kerr has recommended precisely the opposite. His

recommended apportionment will result in severe injury to established interests in New Mexico, Point II, *infra*, and will enable Colorado to do exactly what she was barred from doing in *Wyoming v. Colorado* – to dispose of water within her borders without regard to interests downstream.

Washington v. Oregon, 297 U.S. 517 (1936)

In this case the State of Washington filed suit against Oregon charging that Oregon was wrongfully diverting the waters of the Walla Walla River to the prejudice of inhabitants of Washington. At issue was an insufficient supply for diverters at the Gardena Farms District, adjudged a priority of 1892 by a Washington Court for the diversion of water to irrigate 7,000 acres of land. The facts reflect that there had been a "unity of growth in the development of the whole community . . . quite independent of the dividing line between the states." 297 U.S. at 520-521. One branch of the river, the Tum-a-lum, was entirely consumed by diversions in Oregon. The Court resolved this conflict on the basis of priority of appropriation applied interstate. 297 U.S. at 526-528. The Court held that no equitable interest could arise from appropriative rights that had not been exercised for a protracted period of time:

> Laches and abandonment, chargeable to the Gardena users, are found in the report. Not till 1930 was there a claim in their behalf to the beneficial use of waters of the river arising above the bridge. Not till then was such a claim advanced by Washington itself or by any of its residents. Without a sign of challenge, the Oregon users were allowed to develop their little settlement in the faith that their enjoyment of the waters was uncontested by any one. 297 U.S. at 528.

As a consequence, the Washington claim could not divest the rights in Oregon. 297 U.S. at 523. This case is exactly on point. It provides a specific example of the appropriation of an entire interstate river by users within one state. The Court rejected

Washington's position, which Colorado has adopted in this suit, that an apportionment can be made in favor of a state without existing uses from which to derive an equitable right to interstate waters. In this case, because Colorado has never made uses from the Vermejo, the facts are more compelling. The conditional right granted C.F. & I. is a right to make a diversion in the future. New Mexico's rights are the basis of existing enterprises which support the economy of Colfax County. In equity, the inchoate right of C.F. & I. cannot deprive the existing uses in New Mexico of the water they require.

The Master's discussion of the case entirely ignores this. Instead, he wrongfully states that there would have been no corresponding benefit to awarding Washington water for the Gardena Farms right because the water would not have reached Washington. This is incorrect. The facts establish that water would not have reached Washington only during periods of shortage. 297 U.S. at 522.

Nebraska v. Wyoming, 325 U.S. 589 (1945)

The court-ordered apportionment in *Nebraska v. Wyoming* resulted from allegations by Nebraska that Wyoming and Colorado were violating the rule of priority of appropriation adopted by the three states, thus depriving Nebraska of water to which she was entitled from the North Platte. The facts reflect an uneven development of economies dependent on the river in the three states. Prior to 1907 development was more rapid in Colorado and Wyoming than in Nebraska. Subsequently, there was greater development in Nebraska. 325 U.S. at 594. The tri-state area with interests in the North Platte was a patchwork of competing claims. For purposes of the decree it was organized by the Court into six sections corresponding to six naturally defined sections of the river basin. This enabled the Court to specifically apportion water along the various reaches in order to preserve the developments in each.

The holding in this case is the clearest example of the Court's efforts to protect existing economies. Because of the complexity of diversions in three states along six reaches of a river, protection to the existing uses could not be afforded through the strict application of priority doctrine. The adjustment necessary to protect existing interests was too intricate. Priority of appropriation remained the guiding principle, but was varied to protect established economies based upon junior appropriations:

> . . . (I)f an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. 325 U.S. at 618.

The Special Master is not correct in labeling priority of appropriation as just another factor on a parity with those enumerated by Justice Douglas. Justice Van Devanter called priority of appropriation "the cardinal rule" in *Wyoming v. Colorado,* 259 U.S. at 470; Justice Douglas called it "the guiding principle" in *Nebraska v. Wyoming.* 325 U.S. at 618. When it can be utilized, priority of appropriation will be the most equitable apportionment. In *Nebraska v. Wyoming,* where the Court varied a strict application of priority, the attempt was made to treat the various segments of the river by priorities. 325 U.S. at 628-646. Where the Court was able to apply appropriation doctrine it do so. Priority was strictly applied between Wyoming and Nebraska. 325 U.S. at 627. When alternative methods were adopted for various segments, the methods were scrutinized with respect to priority. As regards the Whalen to Tri-State Dam segment, for instance, Justice Douglas held, the

"alternative method has much to recommend it because of its rather strict adherence to the principle of priority during the periods of low flow." 325 U.S. at 644. In short, the Court has never wavered in its understanding that priority should control unless its application would undermine existing economies.

Arizona v. California, 373 U.S. 546 (1963)

The most incomprehensible portion of the Special Master's analysis is his dismissal of *Arizona v. California* as irrelevant to the issues. He writes that *Arizona v. California* was controlled by the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1928) and that "no such statutory pronouncement has come from the Congress regarding the Vermejo River." (Report, p. 22).

Arizona v. California was an original action brought by Arizona to determine the apportionment of water among the lower basin states under the Colorado River Compact. Early in the opinion the Court distinguished the law applicable to the mainstem Colorado and that applicable to the tributaries. Only the former was controlled by Project Act; one tributary, the Gila River, was controlled by the principles of equitable apportionment. The Court said:

> Arizona and New Mexico presented the Master with conflicting claims to water in the Gila River, the tributary that rises in New Mexico and flows through Arizona. Having determined that tributaries are not within the regulatory provisions of the Project Act the Master held that *this interstate dispute should be decided under the principles of equitable apportionment.* After hearing evidence on this issue, the Master accepted a compromise settlement agreed upon by these States and incorporated that settlement in his findings and conclusions, and in Part IV (A) (B) (C) (D) of his recommended decree. 373 U.S. at 594-595, emphasis added.

New Mexico cited this case to the Special Master as the most important recent instance of the protection of existing appropriations in equitable apportionment litigation.

In *Arizona v. California,* New Mexico had argued that the doctrine of prior appropriation should be varied as applied to the Gila so that New Mexico's junior uses could be protected. The Special Master recommended:

> New Mexico seeks a confirmation of existing uses in that state from the Gila River System. Despite the fact that many of these uses are junior in time to uses downstream in Arizona, I conclude that they should not be disturbed.
>
> Although priority of appropriation has been characterized as the guiding principle of equitable apportionment in the arid regions of the United States, *Nebraska v. Wyoming,* 325 U.S. 589 (1945); *Wyoming v. Colorado,* 259 U.S. 419 (1922), it is by no means necessarily conclusive of the rights in dispute. In *Nebraska v. Wyoming, supra,* at 618, the Court said:
>
> > "Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to the downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made."
>
> It is worthy of note that the Court, in an equitable apportionment suit, has never reduced junior upstream existing uses by rigid application of priority of appropriation. Indeed, the tendency has been to protect existing uses wherever possible. See *Washington v. Oregon,*

297 U.S. 517 (1936); *Kansas v. Colorado,* 206 U.S. 46 (1907). Special Master Report, *Arizona v. California,* Dec. 5, 1960, pp. 325-327.

As recognized by the Master in this case, C.F. & I.'s proposed diversion will destroy the Vermejo Conservancy District in New Mexico. When there is no conflicting economy in Colorado, but only the possibility of a future economy, there can be no basis upon which to strike an equitable balance. If the Court were to adopt the Master's recommendations, it would effectively manufacture the conflict it is ordinarily called upon to resolve in equitable apportionment actions.[3]

These cases show that the Court has fashioned its decrees in equitable apportionment suits between western states adhering to appropriation doctrine when possible. As in *Wyoming v. Colorado* and *Washington v. Oregon,* priority of appropriation has been applied directly across state borders when that would result in an apportionment that preserved the existing uses. As in *Nebraska v. Wyoming* and *Arizona v. California,* it has been varied to protect an established economy created by junior appropriations.

3. The Special Master's discussion of one case, *Hinderlider v. La Plata,* 304 U.S. 92 (1938) further illustrates his failure to comprehend the cases on which the Report is based. He believed that in *Hinderlider* the State of Colorado had unsuccessfully sought to set aside the La Plata River Compact between Colorado and New Mexico to protect rights within Colorado which were extinguished by provisions of the compact. (Report, p. 17). He writes: "*Hinderlider* is important because it reaffirms the Court's position that the doctrine of equitable apportionment is still the guiding principle, even though senior appropriators in one or both states may be damaged." (Report, p. 18). In fact, *Hinderlider* only stands for the validity of interstate water compacts. At no time did the State of Colorado challenge the compact. The state's position was the opposite. Colorado argued that the compact must be upheld. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider,* 93 Colo. 128, 25 P.2d 187 (1933). *Hinderlider* was an effort by private appropriators to overcome the state's action.

Similarly, in two cases which involved apportionment questions between appropriation and riparian jurisdictions, the Court sought to protect the equities derived from actual appropriations. *Kansas v. Colorado,* 206 U.S. 46 (1907); *Colorado v. Kansas,* 320 U.S. 383 (1943). In both cases the issue was the extent to which Kansas could enjoin established uses in Colorado to maintain the flow of the Arkansas River which she alleged was essential to her interests. The Court's opinion in the prior case took careful note of the existing uses in Colorado. Between 1884 and 1891 considerable development took place in Colorado, and pursuant to the doctrine of prior appropriation the waters of the river were being diverted in growing amounts to non-riparian lands. 206 U.S. at 52. In 1902 there were 300,115 acres of actual irrigation in Colorado. 206 U.S. at 108. The Court recognized the equity inherent in Colorado's diversions and denied Kansas' suit. 206 U.S. at 102.

Subsequently, in *Colorado v. Kansas,* the Court reached the same result to avoid injuring those equities. The Special Master's Report, which would have tolerated injury to Colorado, was partially rejected:

> On this record there can be no doubt that a decree such as the Master recommends or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It migh indeed result in the abandonment of valuable improvements and actual migration from farms. 320 U.S. at 394.

In this case Colorado has no uses and no economy dependent on the Vermejo. In New Mexico, the river is fully appropriated and supports an economy which is entirely dependent upon uninterrupted flows from the tributaries. (Tr. at 2364-2365; N.M. Ex. No. F-33 and Tr. at 2279; 2295; 2299). The purposes

for which the Court has varied prior appropriation doctrine are here served by applying it. Instead, the Master has recommended that virtually the entire base flow be given to Colorado for the purposes of a transmountain diversion into the adjacent Purgatoire system. New Mexico could not even benefit from return flows.

In this regard, it is evident from the Master's discussion of *Colorado v. Kansas* that he does not understand the significance of return flow in making adjustments between existing uses in equitable apportionments. He pointed out that in considering whether the Colorado diversions caused injury to the riparian rights in Kansas, the Court considered many factors, including return flow. He then concludes that "(n)one of these factors are relevant to the current action because . . . there is no possibility of a return flow as the Colorado diversion would be to another watershed. . . ." (Report, p. 18). The Master fails to comprehend that the Court considered return flow on the Arkansas because it would have benefited the Kansas users and mitigated any injury caused by the Colorado diversions. Return flows, of course, become part of the regimen of the stream and are available to downstream users. Instead of understanding the objective of the Court's analysis, the Master dismissed return flows here as irrelevant in the circumstance in which they are most relevant.[4]

In making his recommendation, the Master states that "any damages to New Mexico must be weighed against benefits which

4. In his discussion of *Colorado v. Kansas,* the Master similarly misunderstood the consideration of ground water, stating that it is irrelevant "to the current action because there is no ground water to speak of . . . ." (Report, p. 18). He is correct as a matter of fact; New Mexico put on evidence to show that its users would have no alternative source of supply if C.F. & I. took their water. (Tr. 1752-1797). What he doesn't understand is the concept. The Master dismisses an entire area of evidence as irrelevant in the circumstance in which it is most relevant.

will accrue to Colorado" and "injury if any, will be more than offset by the benefit to Colorado." (Report, pp. 17, 23). Legally, the Master relies on Colorado's status as a state and on his belief that the New Mexico uses are inefficient in comparison with the "corresponding benefits" from C.F. & I.'s proposed use. On both counts he's wrong. Sovereignty is not an equity; by itself the political status of a state is meaningless with respect to interstate streams. As Justice Van Devanter put it, "the interests of [a] state are indissolubly linked with the rights of the appropriators." *Wyoming v. Colorado,* 259 U.S. at 468. As to the balancing of comparative benefits, the Court has been explicit: "The fact that the same amount of water might produce more in lower sections of the river is immaterial." *Nebraska v. Wyoming,* 325 U.S. at 621.

Perhaps even more outrageous is the Master's balancing of existing equities and C.F. & I.'s proposed use. In this regard, *Arizona v. California* is directly on point again:

> New Mexico also claims the right to water for future requirements. It is here, however, that priority of appropriation has its greatest effect. *It would be unreasonable in the extreme to reserve water for future use in New Mexico when senior downstream appropriators in Arizona remain unsatisfied.* It was so held as to Colorado's claim in *Nebraska v. Wyoming,* 325 U.S. 589 (1945). Special Master Report, *Arizona v. California,* Dec. 5, 1960, p. 331, emphasis added.[5]

In this case it would be "unreasonable in the extreme" to award water for C.F. & I.'s future use when the senior downstream appropriators in New Mexico remain unsatisfied.

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5. It should be noted that New Mexico made the claim for future uses in *Arizona v. California* in anticipation of the future construction of then authorized storage facilities, which would have enabled new uses to be made without injury to existing uses in Arizona. *See,* Special Master Report, *Arizona v. California,* Dec. 5, 1960, p. 331. No such possibility is in evidence in this case. As Colorado's own case proves, C.F. & I. simply proposes to take the water to the detriment of New Mexico users.

POINT II

THE LEGAL CONCLUSION THAT THE COURT WILL BALANCE DETRIMENT TO EXISTING USES WITH BENEFIT FROM A FUTURE USE IS ERRONEOUS, AND THE SPECIAL MASTER'S CONCLUSION THEREUPON OF NON-INJURY TO NEW MEXICO INTERESTS IS NOT SUPPORTED BY THE EVIDENCE OR JUSTIFIABLE AS A MATTER OF LAW.

As a matter of law it is clear that priority of appropriation should control in an apportionment between states adhering to prior appropriation doctrine and that the application of priority has been varied only to avoid the disruption of an economy built upon junior appropriations. *See, e.g.,* 2 Clark, *Waters and Water Rights,* §§132.2-132.5(B), pp. 331-347 (1967); 3 Hutchins, *Water Rights Laws in the Nineteen Western States,* pp. 69-70 (1977). Accordingly, Colorado has been forced to ignore the obvious conclusion that it would be unreasonable in the extreme to make an award for a future use when existing uses remain unsatisfied. *Arizona v. California,* 373 U.S. 546 (1963).

Instead of making any sense out of law and equity, Colorado sought to establish a right to Vermejo waters by denigrating the amount, character, requirements, and extent of the existing New Mexico uses. The purpose of Colorado's evidence was twofold: to minimize the need for Vermejo water in New Mexico and to inflate the amount of water available for diversion by New Mexico rights. On the one hand, Colorado asserted that the historic diversion demand in New Mexico should be defined as the comparatively limited uses resulting from drought in the 1970s; on the other hand, Colorado's analysis of available Vermejo water equated total discharge, i.e., base flow and flood water, with divertible water.

With no legal explanation and no discussion of the operative facts, the Special Master reduced the amount of historically

irrigated acreage in New Mexico to the amount irrigated during a period of drought. He did not discuss the federal common law or the law of both Colorado and New Mexico which uniformly recognizes that the right to use water is not forfeited for non-use beyond the control of the appropriator. *Nebraska v. Wyoming,* 325 U.S. 589 (1945); *Beaver Brook Res. & Canal Co. v. St. Vrain Res. Co.,* 6 Colo. App. 130, 40 P. 1066 (1895); *State ex rel. Reynolds v. South Springs Co.,* 80 N.M. 144, 452 P.2d 478 (1969). The Master did indicate that "average annual flow data is not helpful in determining the availability of a dependable supply, particularly if the averages include flood waters," but he proceeded to use averages in any event on the mistaken understanding that New Mexico, like Colorado, used average annual discharge as a measure of the available supply. (Report, p. 19).

HISTORICALLY IRRIGATED ACREAGE IN NEW MEXICO

Vermejo Park Corporation

The Vermejo Park Corporation operates a cattle ranch containing farming operations and recreational activities. The ranch has decreed rights to irrigate 870.2 acres of land from the mainstem of the Vermejo with priority dates of 1873, 1876, and 1878. The irrigation rights are used in the production of improved grass and hay. Colorado described the historically irrigated acreage of the Vermejo Park Corporation in this way:

> The Vermejo Park Corporation only irrigates 230 to 250 acres (Charlesworth, Tr. 2068, 1097). (Post Hearing Brief at 50).

The source of the quotation is Jim Charlesworth, the manager of the Vermejo Park Corporation. Colorado intended the statement to define Vermejo Park's irrigation requirements in terms of its historical needs. Colorado's conclusion is directly contradicted by four elements of evidence: the complete testimony of

Mr. Charlesworth, the testimony of Mr. Armijo, the decreed acreage, and the evidence of drought.

Mr. Charlesworth testified that 250 acres had been cultivated since 1974, at the beginning of a drought cycle, and that there was additional acreage under cultivation in previous years. The testimony was as follows:

> A. It's quite obvious on Vermejo Park that sometime during the 60's there was a tremendous amount of more acreage irrigated than there is today due to the lack of water.
>
> Q. How do you know that?
>
> A. Well, when you drive down the Vermejo River and every field you see hay stacks of larger than this room, you know it's obvious at one point in time there was a lot of hay stored in these areas. They wouldn't build a hay stack just for the exercise of it.
>
> Q. Did the testimony you gave in your description purport to make a statement as to "historically irrigated acres" or to discuss the amount of acres irrigated prior to the time when you came on in 1974?
>
> A. No, sir. My deposition was referring only to the period of time since my employment with Vermejo Park Corportation. (Tr. at 2074).
>
> * * *
>
> Q. I would like you to characterize the statement that appears in Colorado's Exhibit No. 6 from the standpoint of your deposition testimony.
>
> Would you say that any interpretation or conclusion of your testimony to the effect that 200 acres was the historically irrigated amount of acreage on the Vermejo Park Corporation was a correct conclusion or an incorrect conclusion?
>
> A. That is an incorrect conclusion. (Tr. at 2075).

Mr. Charlesworth's testimony was supported by Mr. Armijo. Mr. Armijo has been employed on the Vermejo Park

property since 1963. He testified that approximately 700 acres of land had been irrigated at Vermejo Park from the time he began work until the early 1970s.[6]

Kaiser Steel Corporation

Kaiser Steel Corporation owns mineral rights to 500,000 acres of land containing an estimated 1,000,000,000 tons of coal reserves and presently operates a mine at York Canyon which produces about $60,000,000 worth of coal annually. (Tr. at 1721). To obtain the water necessary to mine the coal, Kaiser purchased 230 acre-feet of rights and leased 400 acre-feet with priorities of 1867, 1877, 1883, and 1887. While the Master agrees that Kaiser's decreed rights total 630 acre-feet, he concludes that the corporation "diverts an average of only 251.28 acre feet per year." (Report, p. 5).

In 1980 Kaiser diverted 311 acre-feet of its water right. (Tr. at 1738). Each year Kaiser makes the difference between its total right of 630 acre-feet and the amount actually diverted the subject of an application to the State Engineer for an extension of time within which to apply the water to beneficial use. *See,* §72-5-14 (N.M.S.A. 1978). As Kaiser develops its coal reserves, its water rights will be exercised on a gradually expanding basis.

Apparently forgetting the testimony of Mr. Taylor, Kaiser's Director of Coal Operations and Engineering from Oakland, California, to the effect that the water rights were obtained in anticipation of planned expansion (Tr. at 1727-1732), the

6. Mr. Armijo testified to the amount of acreage irrigated from each ditch in the sixties as follows:

(a) Shy Ditch – 40 acres
(b) Young Ditch – 400 acres
(c) Baca-Vigil Ditch – 50 acres
(d) Reed Ditch – 40 acres
(e) Montoya Ditch – 60 acres
(f) Torres Ditch – 100 acres

(Tr. at 2124-2126).

Special Master castigated Kaiser for "never [having] diverted its full decreed appropriation, although the flow . . . would indicate that more than enough water [was] available . . . ." (Report, p. 5). Presumably on the basis of his view that Kaiser should have been diverting its full right and Colorado's baseless assertion that Kaiser's rights "appear to have been abandoned" (Post Hearing Brief at 52), the Master has limited Kaiser to a water right which not only thwarts its development plans but takes Kaiser back in time.[7]

Kaiser's rights are essential to maintaining production at its York Canyon Mine. Kaiser Steel is the major employer in Colfax County, and the mine accounts for nearly $32,000,000 in annual revenues to the economy. (Tr. at 1733). Based on a misunderstanding of Kaiser's operation and water requirements, the Master makes water for C.F. & I. by taking it from Kaiser.

Phelps Dodge Corporation

The Phelps Dodge Corporation owns rights to irrigate 501.19 acres of land. The priority is 1867. Two hundred acres of rights or 400 acre-feet of water have been leased to Kaiser Steel. The remaining land is farmed under lease to the CS Cattle Company which is obliged to divert the necessary water to preserve the irrigation right. (Tr. at 2140-2141). The Master described the right as no more than 150 acres. (Report, p. 7).

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7. Colorado's suggestion that the rights have been abandoned is groundless. Under New Mexico water law no right may be changed in purpose or place of use when such a change would impair the exercise of existing rights. §§72-5-23 & 72-5-24 (N.M.S.A. 1978). Each applicant desiring to effect a change in place or purpose of use is required to prove the nature and extent of his right. *Spencer v. Bliss,* 60 N.M. 16, 287 P.2d 221 (1955). The issue of abandonment is thus implicit in a transfer. It was considered at the time of the Kaiser's transfer, and the court determined that the rights had not been forfeited. *W. S. Ranch Co. v. Kaiser Steel Corporation,* 79 N.M. 65, 439 P.2d 714 (1968).

As Mr. Porter's testimony showed, the historically irrigated amount of acreage is more than 150 acres of land. Mr. Porter is the ranch foreman on the Phelps Dodge property. He has been employed by the CS Cattle Company for 45 years and has worked on and been familiar with this property since 1935. (Tr. at 2171-2172). He testified as follows to the irrigated acreage on the property:

> Q. I want to refer to a period of time now that will be before the flood that has been testified to by Mr. Davis that occurred in 1965. In referring to that period of time, do you know whether Phelps Dodge farmed or actually farmed the Vermejo acreage prior to that time?
>
> A. Yes, to my knowledge they did.
>
> Q. Are you able to testify to the extent of acreages or the extent of acres that were under cultivation at that time?
>
> A. I believe there were 450 to 500 acres to the best of my knowledge. (Tr. at 2174).

Following the flood, Phelps Dodge recognized that the damage to the property was so extensive that irrigation would not be possible until the acreage had been reclaimed and a new diversion system built. The corporation therefore entered into a lease with Kaiser Steel to avoid any possibility that the rights would be forfeited under New Mexico law. (N.M. Ex. No. E-20; Tr. at 2145-2146).

Vermejo Conservancy District

The Vermejo Conservancy District is an association of sixty-three farms, in addition to the Maxwell Wildlife Refuge, which irrigates 7,380 acres of land. The Special Master's Report makes no findings of fact with respect to the District's rights. Implicit throughout the Report is that the District's rights and requirements are irrelevant because it is inefficient and should not have been established:

> The Vermejo Conservancy District has never been an economically feasible operation. Payments for the project have not been made for many years and the possibility of future payments being made is remote. Most of the people in the area have income from sources other than farming and ranching. (Report, p. 23).

The Master seems to recognize that his recommendations will result in injury to the District, but he believes that for the reasons quoted above that this would not be inequitable to New Mexico. Additionally, he said:

> It should be noted that the facts of this case establish that the Vermejo Conservancy District does not have an economically feasible operation. There is no competent evidence which would indicate that the District will ever be able to meet its debts and live up to its expectations, and for this reason, the impact of a Colorado diversion on New Mexico users, as a whole, would be minimal. (Report, p. 10).

In other words, the Special Master believes that because the District has experienced chronic water shortages, it cannot assert its rights as equities in this suit.

The Master is mistaken. Mr. Robert Weimer, the Southwestern Regional Director of the Bureau of Reclamation, testified that repayment by the District to the United States Government for the capital costs of the project were made in 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974 and a partial payment in 1975. (Tr. at 1519). He testified that the lack of payments since 1975 was due to the shortage of water supply which affected the ability of the District to make its repayment obligation. (Tr. at 1519-1520). Mr. Weimer testified further that to the best of his knowledge the District had always met its operation and maintenance obligations. (Tr. at 1525-1526).

The Vermejo Conservancy District is operating and delivering the divertible water supply of Vermejo River and Chico Rico

Creek to its water users. Even with the severe water shortages experienced in the 1970s, the District was able to provide for the operation and maintenance of its works and to deliver water. The record shows that an award of 3,650 acre-feet to Colorado would reduce the historic supply available to the Vermejo Conservancy District by 33%. (Tr. at 1324). The Master's recommendation of 4,000 acre-feet for C.F. & I. would effectively destroy the District, including the United States' Maxwell Wildlife Refuge, and transform approximately 8,000 acres of irrigated farmland into desert.

Other Uses Diverting From the Vermejo Canal

The Special Master makes no analysis at all of the needs of five interests diverting from the main canal of the Vermejo Conservancy District. These include farms belonging to Carl Odom, Ray Porter, Joseph Pompeo, Eual Messick and a tract belonging to the Vermejo Park Corporation. They are not members of the Vermejo Conservancy District. They own water rights for the irrigation of 478 acres of land. There is no indication or description of any kind in the Special Master's Report of the needs of these individuals or of the impact of his recommendation on their interests. These equities are excluded from the Report, apparently because the Master did not consider either their existence or the injury they would suffer as a consequence of his recommendation as equitable factors in this case.

In sum, the Special Master's Report fails to provide an accurate or complete picture of water use from the mainstem Vermejo River by which to evaluate New Mexico's equities. While C.F. & I.'s future needs were carefully considered, New Mexico's existing uses were not. The Special Master made no specific findings of fact for the amount of acre-feet of water historically required by the Vermejo Park Corporation or the Vermejo Conservancy District. (Report, pp. 5, 7). He completely

omitted the five individual appropriators from the Report. His discussion of the Kaiser Steel and Phelps Dodge rights would impose a forfeiture of the major portion of their water rights. (Report, pp. 6, 7).[8]

The Master's analysis is illogical and inequitable. It contrasts sharply with the practice in previous apportionment actions in which the Court has specified and quantified irrigation rights at great length. *Kansas v. Colorado,* 206 U.S. 46 (1907); *Wyoming v. Colorado,* 259 U.S. 419 (1922); *Washington v. Oregon,* 297 U.S. 517 (1936); *Nebraska v. Wyoming,* 325 U.S. 589 (1945).

The incompleteness of the Report as respects New Mexico's uses makes one conclusion inescapable. The Special Master could not have completely considered New Mexico's interests in making his recommendations to the Court. They are not represented in the Report.

SUPPLY TO THE CANADIAN RIVER

The Special Master has erred in excluding 41,150 acres of irrigated land on the Canadian River from his considerations together with the storage rights of Conchas and Ute Reservoirs amounting to 300,000 acre-feet and up to 350,000 acre-feet, respectively. (Report, p. 4). New Mexico's testimony shows that all of these rights are supplied in part by the Vermejo. (Tr. at 1044; 1131-1132). Under New Mexico law these users have rights in Vermejo waters. In the words of Colorado's witness, however, the Canadian River users of Vermejo water were not "deemed to be relevant." (Tr. at 303).

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8. The Court's analysis of irrigated acreage is found in these cases as follows:
   1. *Kansas v. Colorado* at pages 51 and 108-113.
   2. *Wyoming v. Colorado* at pages 475-495.
   3. *Washington v. Oregon* throughout the opinion.
   4. *Nebraska v. Wyoming* at pages 621-656 and in the decree.

Colorado provided no analysis of use on the Canadian for three reasons: 1) the Vermejo Conservancy District has never relinquished water to downstream users; 2) there is no requirement to relinquish water; and 3) neither New Mexico nor the downstream users have made calls on Vermejo uses to pass water down to them. (Tr. at 282-283). All three reasons are absurd, particularly the last, which the Master relied upon. (Report, p. 4). Under New Mexico's law of prior appropriation, the date of priority provides the senior right and entitlement to water. N.M. Const. art. XVI, §2; §72-7-1 (N.M.S.A. 1978). The same is true of all appropriation states. Junior users cannot call upon seniors unless they are exceeding their right. The Canadian rights are junior to those on the Vermejo.

The second reason the Master refused to consider the Canadian users was his incomprehensible opinion that "(t)here was no competent evidence of any dependency on Vermejo water by users downstream from the Vermejo Conservancy District." (Report, p. 4). The Master apparently overlooked or disregarded conclusive evidence to the contrary by the New Mexico users and officials from the New Mexico Interstate Stream Commission and the U.S. Bureau of Reclamation. For instance, New Mexico Ex. No. F-47 shows that for the period 1950-1979, the average peak discharge of the Vermejo was 2,200 cfs., nearly four times the capacity of the Vermejo Canal, and on 74 separate occasions the discharge exceeded the capacity of the canal. In the Definite Plan Report for the Vermejo Project prepared by the Bureau of Reclamation (N.M. Ex. No. C-2 at 41), an operation study was performed to evaluate the project performance based on the plan that was subsequently adopted. The study was based on 32 years of streamflow records of the Vermejo River. The study computed the average annual spill at the Vermejo diversion to be nearly 7,100 acre-feet. *See, also,* N.M. Ex. Nos. F-26 and F-48. The testimony also showed that Vermejo water supplies the Canadian users.

(Tr. at 1044; 1131-1132). Mr. Strawn, a Director of the Arch Hurley Conservancy District, testified to the interest of Canadian users in Vermejo water. (Tr. at 2218-2236). A recommendation by the Master which ignores these facts is valueless.[9]

THE DIVERTIBLE SUPPLY OF WATER IN NEW MEXICO

It is critical to draw a distinction between average annual flow and divertible supply. The Court has recognized that average flows are necessarily inflated by flood flows which are not divertible. *Wyoming v. Colorado, supra* at 471, 476; *Colorado v. Kansas*, 320 U.S. 383, 396-397 (1943). The objective of New Mexico's evidence was to present the Master with the available and divertible supply of water. This was misunderstood by the Special Master. He writes that "of major importance" is the fact that average annual flow data is not helpful in determining the availability of a dependable supply, particularly if the averages include flood waters." (Report, p. 19). But he then concludes: "Both Colorado and New Mexico used average flows in their testimony and exhibits before the Special Master." (Report, p. 19).

The sole portion of New Mexico's evidence which relied on estimates of average annual flow was that portion of the Vermejo lying within Colorado for which data was not available

9. One item in evidence may have impressed the Master. Colorado utilized data from a flow duration curve introduced by New Mexico to display stream flow and basin characteristics. N.M. Ex. No. F-18. The figure Colorado produced is superficially impressive, *i.e.*, the flow of the Vermejo exceeded the capacity of the Vermejo Conservancy District's diversion works one tenth of one percent of the time. In reality, Colorado's conclusion has little meaning because it does not purport to analyze amounts. The flow duration curve was developed entirely from mean daily flow data, *i.e.*, without peak flow data. Colorado used the mean data as if they were peak data, which, rather obviously, is not very telling.

to precisely determine annual flows. (N.M. Ex. No. F-20). For the rest of its hydrologic analysis, New Mexico's evidence included annual precipitation data, annual, monthly, and daily stream flow data; a monthly study of the historic water supply to the Vermejo Conservancy District summarized on an annual basis in Defendant's Exhibit F-29; monthly streamflow hydrographs and monthly irrigation diversion requirements, daily streamflow for flow duration and peak flow analysis; and annual data on irrigated acreage and water prorations for the Vermejo Conservancy District. New Mexico's evidence compared monthly streamflow records measured against the monthly diversion requirements of the irrigators during the irrigation season. Colorado simply used an average yearly figure from the gage at Dawson for the 1955-1979 period and therefore failed to show the divertible supply and the existence of shortages on the Vermejo.[10] Colorado's evidence was thus distorted by the presence of flood flows.

Flood flows are largely unusable to irrigators because they rush past the headgates carrying debris and silt. (*E.g.*, Tr. at 2199).

In *Colorado v. Kansas, supra,* the Court described the "critical matter" with respect to Kansas' alleged injury as "the amount of divertible flow at times when water is most needed for irrigation. Calculations of average annual flow, which include flood flows, are, therefore, not helpful in ascertaining the dependable supply of water usable for irrigation." 320 U.S. at 396-397. The point was emphasized further by the Court in *Wyoming v. Colorado:*

10. New Mexico's evidence of shortage consisted in part of the testimony of the water users who are faced with it. Charlesworth (Tr. at 2077-2078; 2080; 2084); Taylor (Tr. at 1741-1742); Porter (Tr. at 2177); Odom (Tr. at 2214). Colorado's evidence of non-shortage consisted of the belief of one witness with no experience on the river that shortages did not really exist. (Tr. at 2611-2615).

> Colorado's evidence, which for convenience, we take up first, is directed to showing the average yearly flow of all years in a considerable period, as if that constituted a proper measure of the available supply. We think it is not a proper measure. This is because of the great variation in the flow. . . .259 U.S. at 471.
>
> * * *
>
> Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years. Only when the water is actually applied does the soil respond. 259 U.S. at 476.

Colorado's conclusions on the water flow in the Vermejo are composed entirely of average annual flows.

INJURY TO NEW MEXICO

The Special Master's Report provides no justification for his conclusion that New Mexico interests would not be injured by a diversion of 4,000 acre-feet per annum in Colorado. It ignores the extent of New Mexico's existing rights, dismisses entirely the rights of the Vermejo Conservancy District and the five private users diverting from the District's works, and distorts the divertible supply of water for those rights. It rejects the claims of users downstream on the Canadian River with rights in Vermejo water. New Mexico's decreed and licensed rights are depicted on Appendix B.

New Mexico's expert testimony as well as the testimony of the water users themselves unequivocally shows that extensive injury to established interests would result from the Special Master's recommendation. The uncontroverted evidence in this case is that no excess water exists in the Vermejo River for new uses or for export.

Appendix A depicts the effects on existing New Mexico users from C.F. & I. taking 3,600 acre-feet annually, 400 acre-

feet less than the Master's recommendation. While New Mexico does not agree that Colorado has correctly determined the amount of historic use in New Mexico, Appendix A was calculated on the basis of Colo. Ex. Nos. 69 and 70. Even on the basis of Colorado's inaccurate figures, it is clear that there will be injury to the mainstem Vermejo users, not to mention the Canadian users. In essence, the Special Master's recommendation would deprive New Mexico rights of the base flow essential for their diversions. Because of the physical characteristics of the Vermejo, the drainage in Colorado receives the greatest amount of precipitation in low flow years and provides the essential snowmelt runoff during the early part of the irrigation season.

N.M. Ex. No. A-130 is a seepage investigation made on the Vermejo River in September and October, 1980 which measured visible accretions and diversions from the river and which shows no gain between the state line and the Dawson gage. The seepage run demonstrates conclusively that 94% of the water in the Vermejo River at York Canyon came from the Colorado portion of the drainage area and that the net gain between the state line and York Canyon is only 0.47 cfs., 50% of Kaiser Steel's daily diversion demand at York Canyon. It shows that the river lost 1.4 cfs. between York Canyon and the Dawson gage.

The impact of the diversions in Colorado would be greatest in the Vermejo Conservancy District. The severe annual water shortages to the Vermejo Conservancy District are shown in Defendant's Exhibits F-22 and F-37. The average annual shortage to the demand of the Vermejo Conservancy District was computed to be 6,300 acre-feet per year for the period 1955-1979, inclusive, or 57% of the demand of the District's 7,380 irrigated acres. (Tr. at 1309-1311).

Depending on the conditions in a given year there would be injury to all of the users on the Vermejo in the form of in-

creased shortages, caused by C.F. & I.'s reduction of the base flow by diversions from the tributaries, a concern expressed by Mr. Taylor of Kaiser Steel. (Tr. at 1739).[11] These diversions would increase the severe shortages experienced by the District (Tr. at 1311), and by the direct flow users such as Vermejo Park, Kaiser, Ray Porter, Joe Pompeo and Carl Odom. (Tr. at 1323). Particularly during low flow months in the irrigation season both Vermejo Park Corporation and Kaiser Steel as well as the private users would suffer. (Tr. at 1379-1380). The effects on Vermejo Park and Kaiser Steel are also shown by N.M. Ex. No. F-21 Revised and N.M. Ex. No. F-30, the latter of which uses Colorado's own figures for water production from the tributaries. N.M. Ex. No. F-30, in particular, demonstrates the effects on Vermejo Park and Kaiser of diversions in Colorado during individual months. (Tr. at 1260-1261). For example, if in May of 1977 diversions of 340 acre-feet had been made in Colorado increased shortages would have been felt by Vermejo Park and Kaiser. Similarly, had C.F. & I. taken 180 acre-feet in September of 1977, the river at Dawson could have been dry. (Tr. at 1260). Neither Vermejo Park nor Kaiser can afford not to have water during the low flow periods. (Tr. at 1262). For Vermejo Park, this would reduce the yield of perennial crops to zero. For Kaiser, the lack of water would force the mine to cease operations. (Tr. at 1262).

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11. The following testimony complements Appendix A. It represents the impact of Colorado's diversions as seen by New Mexico's witnesses and the water users themselves. Mr. Mutz, (Tr. at 1324-1326); Mr. Charlesworth of Vermejo Park Corportation, (Tr. at 2090-2092); Mr. Taylor of Kaiser Steel, (Tr. at 1730-1732); Mr. Ochs of the Bureau of Reclamation, (Tr. at 1652-1653); Mr. Odom, (Tr. at 2216-2217); Mr. Pompeo, (Tr. at 2205); Mr. Knox of the Vermejo Conservancy District, (Tr. at 1837-1838); Mr. Spencer of the Vermejo Conservancy District, (Tr. at 1964-1965); and Mr. Brock of the Maxwell National Wildlife Refuge, (Tr. at 2045).

Finally, the evidence shows the economic injury and the disruption of the economy dependent on Vermejo flows in Colfax County that would result from diversions by C.F. and I. Steel Corporation in Colorado. Defendant's Exhibit No. F-33 establishes the interdependence and reliance of industry and agriculture on the flow of the river in terms of both primary and indirect benefits. (N.M. Ex. No. F-33 at 40-48). Dr. Brown, who prepared Exhibit No. F-33, concluded his testimony by discussing the effects of diversions in Colorado. The impact of C.F. & I.'s proposed diversion on labor in New Mexico would be nearly 2,000 lost jobs or 31% of the work force in Colfax County. The impact in dollars would be astronomical. (Tr. at 2257-2260; 2294-2296; 2299-2300).

POINT III

C.F. & I.'s PARTICIPATION IN THIS LAWSUIT DEMONSTRATES THAT EXISTING APPROPRIATORS IN NEW MEXICO WOULD BE INJURED BY C.F. & I.'s PROPOSED DIVERSION.

The Report of the Special Master is ambiguous. There are two ways to analyze his treatment of the evidence with respect to injury to the existing New Mexico appropriations. Either he found, as a matter of fact, that C.F. & I.'s proposed diversion would not cause injury in New Mexico or he concluded, as a matter of law, that the Court should balance injury to existing rights in one state against potential benefit from a future use in another, thus enabling him to say that there would be no injury because it would be offset. (Report, pp. 10, 17, 23).[12]

12. The latter was ruled upon by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and expressly rejected as a basis for apportioning interstate water. 325 U.S. at 621.

We believe he did the latter, which is legally erroneous, but we expect that Colorado will urge that he did the former. If the Master did make a finding that no injury would result in New Mexico, he could have done so only because he did not understand the evidence or evaluate it completely, which we have addressed in Point II, *supra.* Here, we discuss the ultimate contradiction of finding, on the one hand, that Colorado would not receive any Vermejo water if priority of appropriation were applied and, on the other, that no injury would result from C.F. & I.'s proposed diversion. (Report, pp. 10, 17, 21). The two are mutually exclusive. If there would be no injury there would be no reason not to apply priority of appropriation.

With few exceptions the principle of priority of appropriation prevails in the water rights jurisprudence of the West. *See, Jennison v. Kirk,* 98 U.S. 453, 457-458 (1878); *Arizona v. California,* 298 U.S. 558, 565-566 (1936). It is embodied in the constitutions of most western states, including Colorado and New Mexico. Colo. Const. art. XVI, §6; N.M. Const. art. XVI, §2. The priority of a particular appropriation is represented by a date. All appropriations of water from the same source of supply having earlier dates of priority are senior in right and all having later dates of priority are junior in right. In practice each senior appropriator is constitutionally entitled to receive his whole supply before any subsequent appropriator has any right. Priority is so important that a water right in the West is commonly referred to as a priority. In the words of the Colorado Supreme Court:

> Property rights in water consist not alone in the amount of the appropriation, but, also, in the *priority* of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream. Hence,

> to deprive a person of his *priority* is to deprive him of a most valuable property right. *Nichols v. McIntosh*, 19 Colo. 22, 27, 34 P. 278, 280 (1893).

Given the shortage of supply in the eleven arid and semi-arid western states, priority of appropriation has formed the basis of security in investment and enterprise.

The one fact common to all of the western states and territories which adopted priority of appropriation is the inadequacy of water to supply all of the competing demands. If every appropriator from a given stream were free to divert the full amount of his right without regard to priority, injury to others and chaos in administration would prevail. The constraint of priority, however, is designed to prevent injury to those with senior rights and to maintain order in times of shortage. It is only when there is sufficient water in the stream to satisfy all rights simultaneously that priority is insignificant.

By erroneously equating flood flows with useable, divertible flows, C.F. & I. urged that there is sufficient water in the Vermejo to satisfy all existing New Mexico uses and its proposed diversion.[13] C.F. & I.'s tack before the Master, however, should be contrasted with its true belief. The existing injunction against C.F. & I. does not enjoin the company from constructing its works and making a diversion, but rather it enjoins the company from making any out-of-priority diversion. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation*, Civil No. 76-244 (D.N.M. 1978). If C.F. & I. truly believed there were sufficient water to satisfy all existing New Mexico uses and its proposed diversion, the corporation would not have invested considerable

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13. Colorado, however, ignores some 41,000 acres of irrigation on the Canadian River in New Mexico which are entitled to Vermejo water and are chronically short. Point II, *supra*.

sums and numerous years in pursuing this litigation. The company simply would have constructed its works and undertaken its diversion, and we all would have lived happily ever after.

The fact of the matter is that an award of 4,000 acre-feet to C.F. & I. with the first priority on the river would destroy the Vermejo Conservancy District and the rights of the private individuals who utilize the District's works and cripple Kaiser Steel's coal mining operations during periods of low flow. Severe injury would also result to Vermejo Park Corporation. Point II, *supra.* The uncontradicted evidence shows that an award of 3,650 acre-feet per annum would comprise 33% of the average historic water supply received by the Vermejo Conservancy District during the period 1955-1979. (N.M. Ex. Nos. F-20, F-37; Tr. at 1324).

In assessing the evidence of water supply in the Vermejo, the Master looked only to the expert testimony. He stated incorrectly that "both Colorado and New Mexico computed and used statistical averages in their exhibits and analysis, . . . [resulting in Colorado's] figure of 11,035 acre feet at the [Dawson] gauge, while New Mexico's computations resulted in a figure of 9,800 acre feet."[14](Report, p. 2). More importantly,

14. These averages are merely the summation of annual flows for the period selected, divided by the number of years in the period. Computations of stream flow do appear in Colorado's estimation of flow at the state line, where Colorado calculated 284 months of flow on the basis of 16 months of record. The Master did not understand this either, characterizing Colorado's calculations as "actual measurements." (Report, p. 4). In contrast to these "actual measurements," the Master characterized New Mexico's altitude-runoff relationship as a "statistical analysis which is based upon rainfall in other areas and the subsequent calculation of

(Cont. p. 41)

however, there is no mention in the Master's report of the lay testimony with respect to chronic water shortage in New Mexico. This testimony is the most significant because it displays the actual experience of the irrigators.

Colorado produced at trial no witness with anything other than a brief, academic familiarity with the Vermejo River. New Mexico, on the other hand, produced numerous farmers and farm managers who have lived and farmed on the river for decades. Their testimony uniformly complemented the testimony of New Mexico's experts. For example, Mr. Charlesworth of Vermejo Park Corporation testified to his efforts to irrigate more land and his intention of doing so if water were available. (Tr. at 2084).

> Q. Why aren't you irrigating more acres?
>
> A. Well, as I have repeatedly stated, each year in a majority of the years since Pennzoil has owned Vermejo Park, since Vermejo Park bought the property, we have tried to develop additional acreage to grow the crops that are necessary for us.
>
> We can get one watering on them, but the predictability of getting another watering on them or two more waterings on them is nearly impossible. It has proven impossible. (Tr. at 2077-2078).

Mr. Porter of C.S. Cattle Co. testified that he is presently irrigating as much as he feels is possible. (Tr. at 2180). New

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14. (Cont. from p. 40)

probabilities." (*Id.*, p. 4). The Master was mistaken. New Mexico's analysis involved no probabilities. It was based on actual altitudes and actual, measured discharge in the Vermejo and several adjacent watersheds. It was undertaken because of the paucity of actual data that C.F. & I., by contrast, elected to use.

Mexico Exhibit No. F-37 shows – without contradiction – that the Vermejo Conservancy District has historically received only 57% of the water supply necessary to irrigate the project acreage. The testimony of farmers in the District described their problems with shortage in more graphic terms. (Tr. at 1811-1817; 1945; 1983-1988; 2010-2012). This evidence reflects years of experience. Colorado's expert witness, by contrast, testified that he didn't believe that shortages really existed in New Mexico. (Tr. at 2611-2615).

If the Court were to consider that the evidence of the experts is balanced, the lay testimony of the farmers would be dispositive. We submit that no fair and reasonable fact finder could ignore the testimony of Bureau of Reclamation officials, farmers, and ranchers who know the river from experience. Judge Kerr apparently did, and we believe his conclusion is patently wrong. C.F. & I.'s fear of priority of appropriation confirms our position.

POINT IV

COLORADO IS BARRED BY LACHES FROM AN APPORTIONMENT OF THE VERMEJO THAT WOULD IMPAIR EXISTING RIGHTS IN NEW MEXICO.

The clearest expression of the Court's reliance on prior appropriation as the guiding principle in equitable apportionment litigation has been its use of laches. This occurred in circumstances virtually identical to those at issue here. In *Washington v. Oregon,* 297 U.S. 517 (1936), the Court decided an original action in which the State of Washington claimed the right to the use of interstate waters which were fully appropriated in Oregon. The stream in question, the Tum-a-lum,

was tributary to the Walla Walla River and was claimed in its entirety by Oregon on the basis of senior priorities. An interest in Washington, Gardena Farms, had undertaken diversions from the Tum-a-lum in the 1890s and claimed a priority for these rights of 1892. The Court found that beneficial use of the waters had not been made until 1930. 297 U.S. at 528. The earlier effort to establish beneficial use had been abandoned. The court concluded that it would be inequitable to deprive the existing economy in Oregon for the benefit of a claim derived from such a tenuous history of use. This was articulated in terms of laches:

> To restrain the diversion at the bridge would bring distress and even ruin to a long established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right. This is not the high equity that moves the conscience of the court in giving judgment between states. *North Dakota v. Minnesota, supra; Connecticut v. Massachusetts, supra; Kansas v. Colorado,* 206 U.S. 46, 109. Far from being that, it is rather "the *summum jus* of power." *Mutual Life Insurance Co. v. Johnson,* 293 U.S. 335, 339. In default of reasons for removal more urgent and compelling, the tillers of the soil will be left where they have settled. *Cf., Hough v. Porter,* 51 Ore. 318; 415; 95 Pac. 732; 98 Pac. 1083; 102 Pac. 728; *Matheson v. Ward,* 24 Wash. 407, 411; 64 Pac. 520. 297 U.S. at 523.

In this case the facts are far stronger. As the evidence has shown, the region dependent on the Vermejo in New Mexico was settled and developed between the mid-1860s and the admission of the territory to statehood in 1912. During this time there was no corresponding development in Colorado. Water from the Vermejo tributaries flowed downstream across the border where it was put to beneficial use without competing diversions and without objection from the upstream state. This condition persisted for nearly 100 years.

Similarly, in *Colorado v. Kansas,* 320 U.S. 383 (1943), the Court was sensitive to the impact that would have occurred to Colorado's uses as a result of Kansas' inaction. In refusing to adopt the Master's proposed decree, which would have enjoined existing Colorado uses, the Court stated:

> Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs and farms. The progress has been open. The facts were of common knowledge.
>
> The controversy was litigated in 1901. Kansas was denied relief in 1907. The dispute between appropriators in the two States was brought into court in 1910 and settled in 1916. The Finney County Association sued Colorado appropriators in 1916 and 1923. Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.
>
> These facts might well preclude the award of the relief Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case. 320 U.S. at 394.

In deciding these cases on the basis of laches, the Court resolved two equitable apportionment actions by preserving the economies dependent on existing beneficial uses. There are two elements in the Court's reasoning. Reliance on existing uses of interstate water is the dominant equity. From the opposite prespective, the failure of a state to display some sovereign interest in interstate waters acts as a bar to disrupting the existing dependence in another state. The instant case provides the clearest example for the application of this principle.

POINT V

A STATE CANNOT MAINTAIN AN ORIGINAL ACTION *PARENS PATRIAE* FOR THE SOLE PURPOSE OF NULLIFYING AN INJUNCTION AGAINST A SINGLE CORPORATION.

After being enjoined by the federal district court, C.F. & I. persuaded the State of Colorado to file this action in its behalf. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244 (1978). Notwithstanding Colorado's conflicting desire to maintain minimum instream flows (*see,* Cause No. W-4530, Water Division No. 2), Colorado abandoned its own interest and filed this suit in an attempt to undo the injunction issued by the federal district court.[15] This action, therefore, must be scrutinized under the Eleventh Amendment to the United States Constitution.[16]

Before filing suit Colorado and C.F. & I. decided to enter "compact negotiations" for the sake of appearances. A memorandum that was meant to be a confidential communication to Governor Lamm, but was inadvertently sent to Governor Apodaca of New Mexico, reads:

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15. C.F. & I. has tried to explain that the conflict is resolved by C.F. & I.'s senior priority, i.e., 1975, as opposed to the Colorado Water Conservation Board's priority of 1976 to maintain the flow in the stream instead of diverting it trans-mountain. However, the fact that there is only enough water to satisfy a senior water right is no reason to conclude that the junior rightholder no longer has an interest in having his right satisfied. Also, as a practical matter, the Colorado Water Conservation Board could have declined to recommend that this suit be filed, thus effectively protecting its junior right.

16. Amendment XI (1798): "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The rawbone facts are as follows:

1. C.F. & I. Steel Corp. obtained a conditional water right decree from the state water court in Water Division No. 2 for a certain volume of water out of Fish Creek, Ricardo Creek and Little Vermejo Creek, all tributary to the Vermejo River and the North Canadian River in New Mexico. These streams rise on the southern edge of the Maxwell Land Grant and flow south into the State of New Mexico where they have traditionally been used by water interests within the State of New Mexico.

2. The water in these streams has never been utilized for beneficial purposes within the State of Colorado except for stock watering by free roaming stock on the Maxwell Land Grant.

3. C.F. & I. Steel Corporation proposes to erect diversion structures on the three streams and divert a substantial portion of the water therefrom through tunnels and conduits over the Divide to the drainage of the Purgatory River for use in coal mining operations in and around Trinidad.

* * *

It is the opinion of this office and counsel for C.F. & I. that such a nonjudicial approach is far favorable to filing an immediate proceeding in the U.S. Supreme Court between the two states and might well place this state on a better footing should such an original proceeding have to be filed in the future.[17] (N.M. Ex. No. E-19).

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17. The "compact negotiations" were promptly terminated by New Mexico because it was apparent that Colorado was in no position to claim an interest in the Vermejo:

> An equitable apportionment arises out of the necessity to compromise existing conflicting interests. New Mexico has an existing vested interest in the form of historic water uses, on which, as I mentioned earlier, is predicated an economy. Colorado would appear to have no existing vested interest . . . .
>
> One view of these negotiations, accordingly, would be to lend

(Cont. p. 47)

The memorandum reveals that the only interest under consideration in the proposed litigation was that of C.F. & I. and that counsel for C.F. & I. was participating actively in planning the lawsuit. No others participated in negotiations with state officials. (Tr. at 776-779). When the suit was filed, C.F. & I.'s general counsel was commissioned as a Special Assistant Attorney General to pursue the litigation.

In an early Eleventh Amendment case, the Court put the issue this way: "whether a State can allow the use of its name in . . . a suit for the benefit of one of its citizens." *New Hampshire and New York v. Louisiana,* 108 U.S. 76, 88 (1883). The Court held that its original jurisdiction could not extend to an action that, as Louisiana had described, was "merely a vicarious controversy between individuals." 108 U.S. at 84.

In Oklahoma v. Cook, 304 U.S. 387 (1938), the Court's analysis was designed to reveal the real party in interest and thus to determine if there was jurisdiction under article III, §2.

> To bring a case within that jurisdiction, it is not enough that a State is plaintiff. *Florida v.Mellon,* 273 U.S. 12, 17. Nor is it enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hampshire v. Louisiana,* 108 U.S. 76. 304 U.S. at 392.
>
> * * *
>
> The underlying point of decision was that in determining the scope of our original jurisdiction under

17. (Cont. from p. 46)

> the appearance of bargaining power for the purpose of . . . subsequent litigation. (Vermejo River Negotiations Between Appointed Representatives of the States of New Mexico and Colorado, Tuesday, May 19, 1977, at 56-64, Colo. Ex. No. 53).

New Mexico believed the negotiations were specious, straining comity between the two states.

> clause 2 of section 2 of article 3 of the Constitution, we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest. 304 U.S. at 393.

The Court recognized the validity of *parens patriae* claims, but held:

> . . . this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy. 304 U.S. at 394.

In circumstances where it is apparent that a state is effectively intervening to vindicate a claim or interest of a single corporation, the Court has held that the Eleventh Amendment is a bar to suit. In *Kansas v. United States,* 204 U.S. 331 (1907), a railroad company was involved:

> In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction can not be maintained. 204 U.S. at 341.

The facts in this case show that the real interest of Colorado is in maintaining minimum instream flows in the Vermejo tributaries pursuant to Colo. Rev. Stat. §§37-93-102 and 103. This was the purpose of the Colorado Water Conservation Board's filing on November 12, 1976, for a minimum instream flow of 5 cfs. in the Vermejo tributaries in Cause No. W-4530, an action which undermined C.F. & I.'s efforts and in the words of C.F. & I.'s general counsel, created "apparent inconsistencies." (Vermejo River Negotiations Between Appointed Representatives of the States of New Mexico and Colorado, Tuesday, May 19, 1977, at 54). There are no other potential users of Vermejo water in Colorado, except by contract with C.F. & I.

In securing the enactment of the Eleventh Amendment its proponents were not seeking to bar the redress of private grievances – C.F. and I. certainly has recourse to the lower federal courts to litigate issues pertaining to its conditional right. Indeed it has done so and lost. We ask that the Court recognize the real party in interest in this suit and refuse to permit C.F. & I. to pull itself up by Colorado's bootstraps.

CONCLUSION

The federal common law in disputes over interstate waters in the West is unarguably that "the guiding principle" of priority of appropriation should be applied except to protect an existing economy based on established junior uses. Judge Rifkind expressed the principle succinctly when he stated that "it would be unreasonable in the extreme" to reserve water for a future use to the detriment of existing uses. *Arizona v. California,* 373 U.S. 546 (1963).

The guiding principle is directly applicable to the facts in this case. The Special Master correctly identified the factual circumstance which distinguishes this case from previous equitable apportionment cases:

> The unique circumstance which confronts the Master in this case is Colorado's failure to divert water and put it to beneficial use at any time in the past. New Mexico has applied the water and has existing economies which are dependent upon that water. (Report, p. 21).

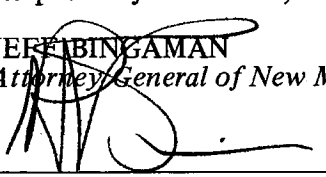
What the Master fails to discern is that priority of appropriation is perfectly suited to the protection of existing equities on the Vermejo River.

The Special Master has characterized the cause of action in this case – equitable apportionment – as "the guiding principle itself." (Report, p. 17). His approach is unprecedented. Instead

of applying the body of federal common law that defines the substance of equitable apportionment, the Master started from the radical proposition that the water must be divided despite the existing dependence in the State of New Mexico. As a consequence, the Master has recommended that the Court decree a profound change in the nature of the property rights in this interstate stream. No longer would junior appropriations be property rights contingent upon the prior satisfaction of senior rights. Instead, junior rights would assume coercive force when they would have been legally meaningless before, and senior rights would be emptied of their heretofore inviolate legal status.

In the past the Court has applied priority of appropriation because it protects the integrity of existing property rights and the economies established thereupon. In this case the Master's approach does the opposite; he recommends that the Court disregard the existing economies which are dependent upon Vermejo water because, in his view, the benefit Colorado would reap from C.F. & I.'s proposed diversion would "offset" the injury to New Mexico. We submit that the Master's recommendation is alien to the jurisprudence of the Court.

Respectfully submitted,



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April 7, 1982

APPENDIX A

Effect on New Mexico Water Users of Colorado Taking
3600 ac. ft. of Vermejo River Water from Colo. Exhibits 69 and 70[1/]

Item	Supply Available Without Diversion by CF&I	Supply Available With CF&I Diverting 3600 Ac. Ft.	Effect on New Mexico
Flow at State Line	5500 ac. ft.	1900 ac. ft.	- 3600 ac. ft.
Vermejo Park depletions	600 ac. ft.	230 ac. ft.	- 370 ac. ft.
Kaiser Steel depletions	90 " "	240 " "	+ 150 " "
Phelps Dodge depletions	600 " "	200 " "	- 400 " "
Spills at Vermejo Conservancy diversion	300 " "	210 " "	- 90 " "
Vermejo Canal loss	1100 " "	830 " "	- 270 " "
Delivery to side (private) users	1000 " "	870 " "	- 130 " "
Conservancy Reservoir Evap.	3150 " "	2850 " "	- 300 " "
Conservancy Stockwater Release	2000 " "	35 " "	- 1965 " "
Canal and lateral loss	2830 " "	2740 " "	- 90 " "
Field irrigation loss	1180 " "	1140 " "	- 40 " "
Conservancy Irrigation Water	3540 " "	3440 " "	- 100 " "
		Total	- 3605 " "

1/New Mexico does not agree that Colorado has correctly determined the amount of use in N.M. It is noted that in these exhibits Colorado has intermingled streamflow for two periods of time without adjustment of the numbers.

APPENDIX B

VERMEJO RIVER DECREE OF 1941

Adjudicated Water Right Owner	Acreage	Date of Earliest Appropriation
Southwest Land Co. (Vermejo Park Corp.)	870.2 mainstem 801.0 tributaries	1873
Phelps Dodge Corporation	501.19 (301.19)[1]	1867
Holland Duell (Present owner: Eual Messick)	163.40 (48.40)[1]	1883
Josib Subat (Present owner: Joe Pompeo)	101.50	1883
John Caraglio (Present owner: Ray Porter)	16.49	1906
W. S. Land & Cattle Co. (Present owner: Vermejo Park)	46.73	1879
Guido Federici (Present owner: Mrs. Sam LaRoe)	82.99	1882
Tom Farmer (Present owner: Mrs. Sam LaRoe)	181.70	1884
Maxwell Irrigation Company (Vermejo Conservancy District)	14,621.55	1888
Kaiser Steel Corporation	(315.0)[1]	1867

CANADIAN RIVER USES WITH RIGHTS IN VERMEJO RIVER WATER

Arch Hurley Conservancy District (N.M. Ex. Nos. G-4; G-5; G-28).
Bell Ranch (N.M. Ex. No. G-18).
Ute Dam (N.M. Ex. No. G-16).
Bruhn and sons (N.M. Ex. No. G-17).
Sabinoso irrigation rights (Tr. at 1055).

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1. Kaiser Steel Corporation leased 200 acres or 400 acre feet of water rights from Phelps Dodge Corporation and has purchased 115 acres of water rights or 230 acre feet from the Holland Duell right and has transferred the resulting 630 acre feet to industrial and associated reclamation use at the York Canyon Mine. (N.M. Ex. Nos. G-2; G-11; G-12).

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that I am a member of the bar of this Court and counsel of record for the defendants and that on April 7, 1982, 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 Exceptions and Brief, 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

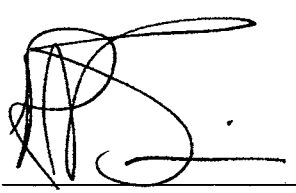
The Honorable J. D. MacFarlane
Attorney General of the State
of Colorado
1525 Sherman, 3rd Floor
Denver, Colorado 80203

I certify that on April 7, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Purolator courier service the requisite number of copies of the foregoing Exceptions and Brief, on the following counsel of record:

Mr. Dennis Montgomery
Assistant Attorney General
Attorney General's Office
Natural Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Mr. Robert F. Welborn
Assistant Attorney General
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290

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



RICHARD A. SIMMS
Special Assistant Attorney General