

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 80 Orig.
TITLE STATE OF COLORADO, Plaintiff
v.
STATE OF NEW MEXICO ET AL
PLACE Washington, D. C.
DATE October 4, 1982
PAGES 1 thru 54



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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STATE OF COLORADO, :

4 Plaintiff :

5 v. : No. 80 Orig.

6 STATE OF NEW MEXICO ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Monday, October 4, 1982

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 10:05 o'clock a.m.

13 APPEARANCES:

14 RICHARD A. SIMMS, Esq., Special Assistant

15 Attorney General, New Mexico Interstate

16 Stream Commission, Bataan Memorial Building,

 Rm. 101, Santa Fe, New Mexico 87503; on

 behalf of the Defendants.

17 ROBERT F. WELBORN, Esq., Special Assistant

18 Attorney General, Welborn, Dufford, Cook &

19 Brown, 1100 United Bank Center, Denver,

 Colorado 80290; on behalf of the Plaintiff.

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C O N T E N T S

ORAL ARGUMENT OF PAGE

RICHARD A. SIMMS, Esq.
On behalf of the Defendant

ROBERT F. WELBORN, Esq.
On behalf of the Plaintiff

RICHARD A. SIMMS, Esq.
On behalf of the Defendant -- Rebuttal

* * *

MR. SIMMS: Mr. Chief Justice, may it please
the Court.

The Special Master's report in this case was
filed in January of this year, and since then it has not
gone unnoticed. I think the Court should know that the
Community of Western Water Attorneys, as well as water
administrators in the West, are bewildered by the
Master's recommendations and are apprehensive about the
outcome of this case.

I would like to quote briefly from the --

QUESTION: The important thing, Mr. Sims, of
course, is whether we understand it, isn't it?

MR. SIMMS: I agree, that is the important
thing. But I think it's also important that the Court
understands what people in the West feel about the case.

I'd like to quote briefly from the Western
Natural Resource Litigation Digest, the quarterly
publication of the Western Conference of Attorneys

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 80 Original, State of Colorado against the State of New Mexico and others.

Mr. Simms, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD A. SIMMS, Esq.

ON BEHALF OF THE DEFENDANTS

MR. SIMMS: Mr. Chief Justice, may it please the Court:

The Special Master's report in this case was filed in January of this year, and since then it has not gone unnoticed. I think the Court should know that the Community of Western Water Attorneys, as well as water administrators in the West, are bewildered by the Master's recommendations and are apprehensive about the outcome of this case.

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QUESTION: The important thing, Mr. Simms, of course, is whether we understand it, isn't it?

MR. SIMMS: I agree, that is the important thing. But I think it's also important that the Court understands what people in the West feel about the case.

I'd like to quote briefly from the Western Natural Resource Litigation Digest, the quarterly publication of the Western Conference of Attorneys

1 General.

2 In January 1982, the court's special master
3 recommended that Colorado Fuel and Iron Steel
4 Corporation be given first priority on the Vermejo River
5 in an action brought by the State of Colorado for the
6 apportionment of the river between the states of
7 Colorado and New Mexico. For the past 100 years, the
8 river has been fully appropriated in New Mexico.

9 The decision ignored both New Mexico's
10 historical dependence on the Vermejo and their
11 traditional guiding principle that prior appropriation
12 governs. The Special Master's new test balances the
13 economic efficiency of existing uses against the
14 efficiency of proposed uses.

15 In this case, the test is used in a further
16 departure from previous case law to vary the priorities
17 such that existing economies based upon senior uses are
18 undermined.

19 QUESTION: Mr. Simms, who wrote that?

20 MR. SIMMS: I don't know who wrote it. It was
21 written --

22 QUESTION: Those are some anonymous author's
23 comments?

24 MR. SIMMS: It was written by the editorial
25 staff of the Digest in San Francisco. I gave them no

1 suggestions. I was quite surprised to find it myself.

2 QUESTION: I find it kind of a surprising
3 authority if you don't even know who wrote it.

4 MR. SIMMS: Well, it was written by the
5 editorial staff of the Western Conference of Attorneys
6 General.

7 QUESTION: I personally find it kind of amazing
8 that you cite it to us. You can't even given us any
9 authority for it at all.

10 QUESTION: Suppose we get on to the central
11 issues of the case.

12 MR. SIMMS: I think the central issues are
13 three, Justice Burger. I think the Special Master
14 started with a manifest misunderstanding of equitable
15 apportionment. I think he ignored the relevant facts in
16 this case and attributed legal significance to
17 irrelevant facts. And with respect to his ultimate
18 finding that CF&I's proposed diversion would have little
19 effect on New Mexico users, I believe that is not a
20 finding at all but is demonstrably an erroneous
21 conclusion of law.

22 I think the real irony of the Master's report
23 lies in his understanding that -- and I'm quoting him
24 from page 21 of the report -- the unique circumstances
25 which confronts the Master in this case is Colorado's

1 failure to divert water and put it to beneficial use at
2 any time in the past. New Mexico has applied the water
3 and has existing economies which are dependent upon that
4 water.

5 Instead of applying, the rather obvious
6 holdings of this Court in Wyoming versus Colorado and
7 Nebraska versus Wyoming and in Arizona versus
8 California, the Master instead has equated the cause of
9 action in this case with the relief sought. The way he
10 puts it is this, and I'll quote him again -- simply
11 stated, the doctrine says that each state is equal to
12 all of the others, and as quasi-sovereigns, each state
13 is entitled to a share of a river flowing between them.

14 We think that the Master started with the view
15 that each state is entitled to a portion of the waters
16 of an interstate stream no matter what the circumstances
17 might be. This is best illustrated I think by the
18 Master's treatment of the first equitable apportionment
19 decision handed down by this Court in 1906, Kansas
20 versus Colorado.

21 That case, very unlike the case before this
22 Court today, showed -- the facts in that case showed a
23 pattern of contemporaneous development in both states.
24 By 1883 in Kansas, there were some 1,200,000 acres of
25 irrigation on the Arkansas in Kansas. Between 1884 and

1 1891, there had developed independently under the law or
2 prior appropriation in Colorado some 300,100 acres of
3 land.

4 That situation presented the classic equitable
5 apportionment case. The water supply became
6 insufficient to satisfy the simultaneous growth in both
7 states, and there appeared a conflict in the social and
8 economic institutions which had developed independently.

9 There, the substantive laws of each state --
10 and as you'll recall, it was said in Kansas versus
11 Colorado that there is no federal law of water in the
12 West; each state has a right to develop its own system
13 under which rights to the use of water might be
14 protected -- each state had done so. The substantive
15 laws in Kansas versus Colorado had been exercised
16 historically. In that case there was an actual conflict
17 between existing users on either side of the state line.

18 Because in Kansas they have the doctrine of
19 riparianism, which stands for the proposition that water
20 should be maintained in the river and let down the river
21 undiminished, and on Colorado's side you have priority
22 of appropriation, a doctrine which allows water to be
23 diverted from the river and taken to lands not riparian
24 to the river, you had an actual collision of sovereigns
25 in that case. Also, the sovereign interest on both

1 sides of the Kansas-Colorado border arose from actual
2 existing uses of water in the respective states.

3 Notwithstanding those obvious differences from
4 this case, the Master has said, and I'm quoting, The
5 same type of situation exists in this case.

6 QUESTION: Mr. Simms, may I ask you whether
7 it's your position that as between two states, both of
8 which are states using the appropriated water theory,
9 that the prior appropriator must make reasonable use of
10 the water that's appropriated? Do we measure the
11 decreed rights or the appropriated rights by some
12 measure of reasonable use, in your view?

13 MR. SIMMS: The court has said that each state
14 is obligated to conserve water to the extent that is
15 economically possible. There is no evidence in this
16 case and no discussion in the Special Master's report,
17 as opposed to Colorado's reply brief, that there were
18 any uses in New Mexico that were not responsible uses of
19 water.

20 The measure of water, I think, is one that the
21 Master did not follow, and I think it's one of his
22 fundamental mistakes. What the Master should have done
23 in assessing the water right entitlements in New Mexico
24 so that he could further assess injury was to look to
25 the actual historic irrigated acreage on the river.

1 That is not necessarily the decreed right. It
2 is something that can be discovered through a look at
3 what's been irrigated historically. Instead of --

4 QUESTION: If the historic use is somehow
5 wasteful, can the Master take that into consideration or
6 not?

7 MR. SIMMS: Oh, I think he definitely can. And
8 I would point out that there is nothing in the record in
9 this case that indicates that there is any waste.
10 You'll find a lengthy, uninhibited discussion of that in
11 Colorado's brief. You will find no discussion of it in
12 the Special Master's report.

13 I think it's important also in that regard to
14 make a distinction early on. And the term inefficiency
15 and the term waste are used, Justice O'Connor,
16 throughout the briefs in this case, and they're
17 important to the case.

18 But the Court should know that efficiency is a
19 term of art in irrigation in the West. It's not
20 inefficiency in the pejorative sense. Efficiency in
21 irrigation is a term used to describe the amount of
22 water diverted which is not consumed.

23 Typically, in a farming operation a farmer
24 might divert 100-acre feet of water. In the actual
25 growth of plants, in evapo-transpiration, perhaps 50

1 percent of that would be utilized. The rest goes back
2 to the regimen of the stream. That use is called 50
3 percent efficient. The inefficiency results from a
4 bunch of physical factors. Those physical factors are a
5 function of the porosity of soils, they're a function of
6 local temperature, winds, evaporation rates and other
7 physical factors.

8 QUESTION: Would there be any support in the
9 case law, counsel, for requiring, for example, the
10 appropriation user to line ditches with concrete, or
11 anything of that sort?

12 MR. SIMMS: No, on the contrary, Justice
13 O'Connor, the cases, and specifically, Nebraska versus
14 Wyoming, indicate that farmers are obliged to be only as
15 efficient as they economically can be efficient. There
16 is not one iota of evidence in this case that indicates
17 that New Mexico's farmers could have been more efficient
18 historically than they have been.

19 They don't have the money in the Vermejo
20 Conservancy District, as an example, to go buy extremely
21 expensive sprinkler irrigation systems and thus improve
22 the irrigation efficiency by 10 to 20 percent.

23 QUESTION: Mr. Simms, the Master did find that
24 the operation of that district was inefficient, didn't
25 he?

1 MR. SIMMS: He did find -- I don't think he
2 found -- yes, he did find that it was inefficient.

3 QUESTION: And he also found, as I recall, that
4 there was a loss of about 33 percent of the water. And
5 by loss there, did he mean the water was going back into
6 the river or that it just was not used anywhere?

7 MR. SIMMS: What the Master found was that 33
8 percent of the water diverted was lost in the
9 application of water in the Vermejo Conservancy
10 District. As a matter of fact, I think the Master had
11 the numbers backwards. Actually, 67 percent of the
12 water diverted is lost.

13 The efficiency of the Vermejo Conservancy
14 District, as an example, is roughly in the middle of the
15 efficiency of Western reclamation projects. That
16 efficiency is 54 percent. There is absolutely nothing
17 uncommon about that.

18 If you add to it the evaporation from the
19 various reservoirs, the efficiency drops down to 33
20 percent. He had it backwards. That is not an uncommon
21 either. In calculating efficiency, you don't add in the
22 reservoirs. That's not the way the Bureau of
23 Reclamation would do it in calculating efficiency.

24 The Master has done it quite differently. So
25 even though he found inefficiency, first of all, he had

1 the concept of efficiency conceptually backwards; and
2 secondly, it's a non sequitur. It means nothing. If
3 the efficiency of the Vermejo Conservancy District --

4 QUESTION: Which case, if I may interrupt you,
5 among the eight that have addressed generally this area,
6 discusses the efficiency question you are now discussing?

7 MR. SIMMS: Wyoming versus Colorado, Colorado
8 versus Kansas, Nebraska versus Wyoming.

9 QUESTION: Which supports you? Which of those,
10 you think?

11 MR. SIMMS: All three of those cases support
12 us. In each of those cases, -- well, in two of them,
13 particularly, Colorado made the argument that they could
14 take water and use it better elsewhere. In Wyoming
15 versus Colorado, as an example, Colorado argued that we
16 can take water, use it in the Puter Valley much better
17 than Wyoming can use it in the Laramie Valley. The
18 court rejected that argument just out of hand. You'll
19 find that language in the decision.

20 Yes, Justice Rehnquist?

21 QUESTION: Am I correct in thinking that, if I
22 read page 21 of the Master's report correctly, that he
23 said there that if you apply the rule of prior
24 appropriation in this case, it would prevent any
25 diversion to Colorado. So that, in effect, the Master

1 has said as between two states, both of which apply
2 appropriative water law, you do not apply prior
3 appropriation law in the interstate stream adjudication
4 if it results in one state not getting any water. And
5 the question really is whether the court's prior cases
6 support that departure from appropriation law in the
7 case of two states which follow that principle.

8 MR. SIMMS: I think not at all, in response.

9 And the answer to that question is somewhat lengthy.

10 The principles set down by this Court in every
11 equitable apportionment decision that's been handed down
12 before would lead you to precisely the opposite result
13 that the Master has reached. His treatment of priority
14 of appropriation I think totally misses the thrust of
15 this Court's decisions.

16 Priority of appropriation has been adopted by
17 each of the 11 contiguous western states, the semi-arid
18 and arid western states that are west of the 100th
19 Meridian. The jurisprudential underpinning of that
20 doctrine is there simply is not enough water to go
21 around to satisfy the conflicting demands. That's the
22 basis of the doctrine.

23 The reason for priority of appropriation lies
24 in the fact that recognition of the benefit or the
25 equitable interest that arises out of the application to

1 beneficial use of water is synonymous with the uses that
2 are actually made.

3 Priority of appropriation is so fundamental,
4 it's been enshrined in the constitutions of almost all
5 of the western states including Colorado and New
6 Mexico. Without it in the West there would have been
7 chaos and would today be chaos in water administration.

8 QUESTION: Mr. Simms, what's your benchmark for
9 appropriation? Is it the water that's actually been
10 used historically, or is it just decreed rights?

11 MR. SIMMS: It is not necessarily decreed
12 rights. You have to look at the --

13 QUESTION: Well, what about this case? Let's
14 just suppose that the average annual use was X and that
15 there was more water in the river than that. But the
16 decreed rights were XX, and with XX there wouldn't be
17 any water left. Now, would -- under equitable
18 apportionment, would Colorado in this case, for example,
19 be entitled to some water if there was more water in the
20 river than necessary to satisfy average annual use?

21 MR. SIMMS: If there were enough water in the
22 river to satisfy the average annual use -- if you want
23 to put it that way. I would call it the average
24 historic use -- there would be -- Colorado would have a
25 right, in my view, to some water.

1 I think not in these circumstances for other
2 reasons. Colorado has sat by for 115 years while this
3 river became fully appropriated. Colorado has
4 acquiesced in the total use of the river by New Mexico.

5 QUESTION: Well, in this case suppose our view
6 of the record was that there was water left over in the
7 river after satisfying the average historic use, as you
8 put it, of the New Mexico users.

9 MR. SIMMS: I think it would be extremely
10 difficult to reach that view. I --

11 QUESTION: I know, but suppose. Let's suppose
12 on the facts. Suppose my facts are right.

13 MR. SIMMS: If your facts are right, there
14 would be water available for Colorado. That was the
15 situation in the two cases that Colorado relies on so
16 heavily, the eastern cases. There was unappropriated
17 water.

18 The problem here is very different. You've got
19 a fully appropriated river; the court has already got --

20 QUESTION: I know, but you mean a fully decreed
21 river.

22 MR. SIMMS: No, fully appropriated river.

23 QUESTION: You say there's absolutely no water
24 left over in the river after you satisfy the average
25 historic uses of it.

1 MR. SIMMS: The decreed rights is an example
2 for the Vermejo Conservancy District. There are some
3 14,000 acres of decreed right. We only hope that the
4 Court would recognize their ability to irrigate what the
5 Bureau of Reclamation rehabilitated, minus what might be
6 expected to be fallow, about 10 percent. The total
7 irrigable acreage is 7380 acres.

8 What the Master did here was take Colorado's
9 figures, which relate to a period of drought in the late
10 seventies, and reduced the entitlement to what was there
11 in that drought.

12 QUESTION: Do we have to decide this case
13 properly -- do we have to decide whether the Master was
14 incorrect in doing that?

15 MR. SIMMS: I think it's important that you do
16 understand that the Master was incorrect in doing that.

17 QUESTION: Is that a factfinding?

18 MR. SIMMS: I think it is a factfinding, but it
19 is spoiled by two problems --

20 QUESTION: So we have to overturn the Master in
21 this respect to come out on your side?

22 MR. SIMMS: In that respect, but not to come
23 out on our side in general, no. Because the basic
24 problem that the Master did was to look at what he
25 called the economy of the Vermejo Conservancy District,

1 and he didn't make a finding there with respect to New
2 Mexico's entitlement. He just looked at that district
3 and concluded that the district was economic and that he
4 could ignore that entire district in assessing injury.

5 What he put the most weight on when he did that
6 was the fact that in 1980 Congress deferred payment for
7 the construction costs of that district after a
8 congressional finding that the drought in the late
9 seventies had made it impossible for the farmers in the
10 district to pay back construction costs. There is
11 nothing unusual about that. I don't think the Master
12 knows that.

13 Historically, Congress has deferred payment for
14 each and every reclamation project in the United States
15 at one time or another. Congress continues to do it,
16 for good reason, whenever something like a drought
17 prevents the repayment of construction costs.

18 Here, the Vermejo Conservancy District farmers
19 have made their construction costs, or did make them,
20 all the way up through 1974. They made a partial
21 payment in 1975. They have always made the O&M costs.

22 The other failure of the Master is he
23 identified profitability of the Vermejo Conservancy
24 District with the economy as that term has been utilized
25 by this Court in previous equitable apportionment

1 actions. And what he did, for instance, was look to
2 evidence that we presented which indicated in 1979 there
3 was a net operating loss of \$39,000 among the district's
4 63 farms. He took evidence like that and thought well,
5 this economy is no good; therefore, it can't be injured.

6 What he fails to do is recognize that despite
7 the fact that there was a \$39,000 net operating loss,
8 there were still paid in 1979 one million dollars in
9 local and state taxes by those people; there were also
10 mortgage payments being made, there were also farm
11 implements still being bought, there were payments being
12 made to local banks. The families that live there have
13 children that go to school that have medical bills, they
14 buy shoes, they have to eat. The economy is still
15 there, notwithstanding the fact that there was a net
16 operating loss in that year of \$39,000.

17 I think the Master has a totally misconceived
18 -- and this is legal; it is not factual, and it so
19 infects his finding, Justice White, that I think that it
20 is rather easy for the Court to conclude that he was
21 wrong with respect to the Vermejo Conservancy District.

22 He did something differently with respect to
23 all of the other users in New Mexico. Colorado designed
24 this case, first of all, to try to eliminate and pare
25 down the water rights in New Mexico on the one hand and

1 then inflate the amount of water in the river on the
2 other.

3 What they did was try to limit the amount of
4 acreage to the acreage irrigated in the late seventies.
5 Therefore, it would appear that there might be some
6 water made available for CF&I. Colorado took the figure
7 250 acres, for example, to the Vermejo Park Corporation,
8 the first diverter in New Mexico. That's what was
9 irrigated in the late seventies. Well, in 1978, as an
10 example, in the Vermejo Conservancy District, they had
11 no water to put on their lands because of the drought.

12 The uncontradicted evidence in the case shows
13 that the actual historic irrigated acreage -- this is
14 not the decreed acreage, Justice O'Connor -- the
15 historic irrigated acreage of Vermejo Park Corporation
16 was 690 acres. That is not contradicted.

17 That acreage was irrigated before 1963. That's
18 what the Master should have looked at. Under the
19 Constitution and laws of both states, you can't blame
20 the farmer for drought conditions. His property right
21 doesn't dissipate just because it didn't rain for a few
22 years. That's what the Master has done here. Because
23 it didn't rain, he has just killed off the users in New
24 Mexico.

25 Secondly, Colorado tried to throw out the whole

1 bottom half of the river, the Canadian. And what he has
2 done -- Colorado has tried to make it appear as if this
3 were a closed basin somehow, and that water does not get
4 on down to the Canadian River users.

5 Well, one of the glaring contradictions in
6 Colorado's case here is when they went to Water Division
7 2, when CF&I went to Water Division 2 in 1975 to get
8 their inchoate water right in Colorado -- this is 100
9 years after the river was fully appropriated downstream
10 -- they were thrown out of court initially because the
11 jurisdictional embrace of the court in Colorado goes to
12 the Arkansas River drainage. The judge sat in Alamosa,
13 he looked to the East and saw the Arkansas, he looked to
14 the South and saw the Vermejo and said, I don't have
15 jurisdiction, that doesn't drain into the Arkansas.

16 Well, CF&I went back to court and vehemently
17 petitioned the court, oh, yes, you do have jurisdiction
18 because the Vermejo comes down here, it's tributary to
19 the Canadian here, the Canadian turns east and flows on
20 into Oklahoma, and over there it is tributary to the
21 Arkansas.

22 Well, that's how they got in court to get their
23 water right. Now they turn around when they get into
24 this Court and say the river stops when you get down to
25 the Vermejo Conservancy District.

1 I think the evidence that impressed the Master
2 in that regard was not the testimony of the farmers
3 downstream that indicated that they rely on that water.
4 It's not the legal fact that they have a property right
5 in Vermejo water. It was the fact that in a certain
6 20-year period of record, only 6900 acre feet got past
7 the Vermejo Conservancy District's point of diversion.

8 Well, if you look at the 30-year period of
9 records just prior to that, you'll find out that an
10 average annual of 7,100 acre feet got down. I don't
11 think it really makes any difference what the amount is.

12 QUESTION: When you talk about the water
13 getting down past the Vermejo diversion point, that's
14 because of what you referred to as inefficiency?

15 MR. SIMMS: No, it is not inefficiency at all.

16 QUESTION: What is it? I mean, if the stream
17 were entirely appropriated, one would expect, I would
18 think, that after the last diversion point you would
19 only get water that was being returned to the stream
20 system.

21 MR. SIMMS: Except in priods of flood, that is
22 the case. But there are frequent floods on the Vermejo,
23 and that flood flow gets down to the Canadian. This is
24 another way in which the Master abused the evidence, I
25 think, in his treatment of assessing injury to the

1 upstream diverters.

2 He took the average annual figures that were
3 provided by Colorado and equated those with divertible
4 flows. This Court has three times said you can't do
5 that. You can't do it because flood flows are hidden in
6 average annual flows. When it rains in New Mexico, it
7 rains in a big hurry. A lot of water drops in a small
8 place. Arroyos become raging rivers. Farmers can't go
9 out to the river; they can't even get to their diversion
10 point. If they could get to their diversion point, they
11 wouldn't want the water in any event because it's so
12 full of silt and direct that it wouldn't be of any use
13 to them.

14 QUESTION: What happens, Mr. Simms, -- let me
15 give you this hypothetical. A state like Colorado
16 having a modest population back 20 or 30 years ago and
17 doesn't claim any of the water under your priority of
18 appropriation concept. And then suddenly, as with
19 California and Florida, ten, 15 million people flood
20 into the state and populate it. And the need -- a new
21 need for water arises. Is this doctrine of priority of
22 appropriation a rigid doctrine?

23 MR. SIMMS: No, it is not a rigid doctrine.
24 This Court has varied it, however, only for one reason.
25 It is varied to protect existing economies predicated on

1 junior uses of water.

2 QUESTION: Existing when? Then or now?

3 MR. SIMMS: Existing at the time of the lawsuit.

4 Here, you would apply the doctrine to
5 accomplish what Justice Douglas so painstakingly did in
6 Nebraska versus Wyoming when he listed all of those
7 factors to vary it. The Special Master in this case
8 turns the law of equitable apportionment on its head.

9 QUESTION: Well, isn't the supplying of
10 domestic water given priority in most western states as
11 opposed to use for irrigation or manufacturing?

12 MR. SIMMS: It is given priority as a
13 preference for it in the state of Colorado. I don't
14 think it's true in most western states. It's not true
15 in New Mexico.

16 QUESTION: At any rate, Colorado Fuel and Iron
17 wasn't contemplating giving drinking water to a lot of
18 people by its use, I take it.

19 MR. SIMMS: No, they're contemplating taking
20 water out of the Vermejo River and putting it in the
21 Purgatoire system on the theory that there is need in
22 the Purgatoire system.

23 QUESTION: For what? What specific use does
24 CF&I contemplate, or do you know?

25 MR. SIMMS: That's a good question. I don't

1 think CF&I knows.

2 QUESTION: It isn't in the record, anyway.

3 MR. SIMMS: Water Division 2 thought the uses
4 were so speculative, he also threw it out for that
5 reason, to begin with when he went. I don't think they
6 know what they want to do. There is some agricultural
7 uses --

8 QUESTION: Is there any evidence in this case
9 about it? In the record in this case?

10 MR. SIMMS: Yes. They claim in the future
11 they're going to use it for synfuel development, and
12 they're going to use it for a coal washery at the Allen
13 mine which is now shut down, that they're going to use
14 it for some agriculture. Those were the uses that they
15 claimed.

16 Your Honors, I see that my time is up. I have
17 tried to save eight minutes; I see it was reduced to
18 five, for rebuttal. I'd like to keep what time I can
19 for rebuttal.

20 CHIEF JUSTICE BURGER: Very well, Mr. Simms.
21 Mr. Welborn?

22 ORAL ARGUMENT OF ROBERT F. WELBORN, Esq.

23 ON BEHALF OF THE PLAINTIFF

24 MR. WELBORN: Mr. Chief Justice, and may it
25 please the Court, it's the position of the state of

1 Colorado in this case that the report of the Special
2 Master provides for a fair allocation, an equitable
3 apportionment of the water of the Vermejo River. It is
4 based on 16 days of actual trial extending over four
5 weeks, 50 witnesses, 300 exhibits approximately. It is
6 prepared by a judge experienced as a trial judge and
7 eminently experienced in water matters.

8 My presentation today will cover four basic
9 points: Colorado's need for water, Colorado's right to
10 water; thirdly and most importantly, the fact that
11 Colorado can take the amount of water allocated by the
12 Special Master without adverse impact upon legitimate
13 uses in New Mexico if reasonable conservation will be
14 undertaken there to eliminate waste. And fourth, --

15 QUESTION: I'll wait until you get to your
16 point. Go ahead.

17 MR. WELBORN: Fourth, I would like to emphasize
18 by reviewing some of the cases, the fourth point would
19 be that the Special Master's report is entirely in
20 accord with prior decisions of this Court.

21 Justice White, did you want to ask a question?

22 QUESTION: No, you go ahead. I'll wait.

23 MR. WELBORN: Preliminary, I am a western water
24 attorney. I don't know of any general feeling such as
25 Mr. Simms suggests. It might be helpful, although I

1 know you have the briefs and a description of the river
2 system, for me to give you a very brief survey of what
3 the situation is.

4 The first diversion across the state line from
5 Colorado into New Mexico is the Vermejo Park Corporation
6 which diverts enough water to irrigate 250 acres. It
7 has a decreed right for 870 acres but hasn't been using
8 that. The state engineer of New Mexico, Mr. Reynolds,
9 the chief water official of that state, testified that
10 that organization could, in fact, use more water than it
11 had been using. This relates to the question of the
12 difference between decreed usage and actual usage.

13 The next user down the stream is the Kaiser
14 Steel Corporation. The maximum amount they've used is
15 361 acre feet; that was in 1976. Since then, they have
16 used less than that.

17 Going on down, there's the Phelps Dodge
18 Corporation which has decreed rights for 500 acres, or
19 1000 acre feet. The allocation is two acre feet per
20 acre. But Phelps Dodge, through a lessee, is irrigating
21 only 150 acres. Again, New Mexico officials testified
22 that they could use more water than they have been using.

23 There's been reference to a drought in the
24 seventies. The figures really belie that. The Vermejo
25 Conservancy District in the seventies irrigated 4,100

1 and some acres; in the sixties irrigated 4,500 and some
2 acres. The measured flow at the Dawson Gauge, which is
3 the only measuring gauge on the river, was some 8000 in
4 the seventies, some 11,000 in the sixties, some 9000 in
5 the fifties.

6 Now, this doesn't indicate a severe drought
7 which caused this unreal situation that New Mexico
8 suggests.

9 Going down then, below the Phelps Dodge usage
10 is the Vermejo Conservancy District diversion point. At
11 that point, they have a canal that's capable of carrying
12 600 cubic feet per second. Between that point and the
13 district reservoirs, there are individual diverters that
14 in recent years have been taking out approximately 500
15 to 600 acre feet of water. So that you have no more
16 than 1500 acre feet of actual usage between the state
17 line and the district reservoirs.

18 Between that diversion point of the district
19 and the district reservoirs, according to the New Mexico
20 chief witness, there's a 10 percent loss of water. In
21 the reservoirs themselves by evaporation, there's a 2300
22 acre foot loss of water which amounts to something
23 between 20 and 25 percent. So you have about a
24 one-third loss of water between the district diversion
25 point, and the point of outflow from the reservoirs.

1 Then from the reservoirs to the fields, again
2 according to the testimony of New Mexico witnesses,
3 there's another 33 percent loss, and that's what the
4 Special Master was referring to, and he was entirely
5 correct. He didn't have his figures mixed.

6 QUESTION: How do you know what he was
7 referring to? He didn't make these kind of detailed
8 findings about the water loss.

9 MR. WELBORN: Justice White, in his report he
10 said that the system of canals used to transport the
11 water to the fields is inefficient.

12 QUESTION: On what page are you?

13 MR. WELBORN: I'm at page 8 of his report.
14 Now, the only reference in the New Mexico testimony to a
15 system of canals -- and in fact, the only system of
16 canals -- is the system from the reservoirs to the
17 fields. So that is exactly what the Special Master was
18 referring to.

19 In order to argue their point, New Mexico
20 changes the subject of that sentence and says in their
21 brief that the Special Master found that the district
22 was so inefficient that it lost 33 percent of the
23 water. They make the subject of that sentence rather
24 than the system of canals. And it's really a point that
25 shouldn't be involved in this case, because the facts

1 are so clear and New Mexico acknowledges that Colorado's
2 Exhibit 71 is accurate in this regard; that there is a
3 two-thirds loss of water from the district diversion
4 point to the fields.

5 QUESTION: So what if there is, Mr. Welborn?

6 MR. WELBORN: Well, this, Justice White, gets
7 to my first and my third point, which is really the
8 basic point here, and that has to do with the
9 elimination of waste by the district that will offset
10 the Colorado allocation.

11 New Mexico's Exhibit E3, which is perhaps the
12 most important exhibit in the case, is a detailed
13 engineering report as to the manner in which the
14 district supplies stock water, water to the livestock of
15 the district. And this livestock system is simply an
16 open ditch system whereby the water is released from the
17 reservoirs and taken to the fields.

18 The livestock consume approximately 35 acre
19 feet of water, but in order to get this 35 acre feet of
20 water to the livestock there must be released from the
21 reservoirs over 2000 acre feet. So you can see there's
22 about a 90 percent loss there.

23 Now, the Exhibit E3 demonstrates that by a
24 closed system which can be financed to a large extent by
25 soil conservation assistance, Farm Home Administration

1 assistance, that by a closed system this 2000 acre feet
2 loss can be eliminated. And not only will it be
3 eliminated, but the district will benefit because they
4 will get a domestic system as well as a stock water
5 system, and the stock water will be available 12 months
6 out of the year instead of 9 1/2 months out of the year,
7 as it is now. The other two and a half months they have
8 to haul the stock water. The reason for that is it's in
9 the winter months when the ditches are frozen.

10 Now, if this --

11 QUESTION: Mr. Welborn, do our cases require a
12 state to -- or a prior appropriator -- to make that kind
13 of structural change to utilize the water more
14 efficiently? Is there authority in the case law for
15 making that kind of determination?

16 MR. WELBORN: Yes, there is, Justice O'Connor.
17 In three cases, this Court talks about wasteful uses,
18 and I am not suggesting that this Court can tell a state
19 or anyone in a state in detail what it has to do. But
20 the guiding principle here is equity. What are the
21 equitable considerations. And Colorado versus Kansas
22 says that all factors bearing on the equities must be
23 considered as of the time of the controversy.

24 Now, in Nebraska, --

25 QUESTION: I don't want to interrupt your

1 response to Justice O'Connor, but let me just throw in
2 this question and answer it when you can, if you wish.

3 I understood the Master to take the rather flat
4 position at page 21 of his report, he says right at the
5 end of the quote, at the top, "If the rule of priority
6 were to be strictly applied in Colorado versus New
7 Mexico...", this case, "...a diversion of water by
8 Colorado could not occur. As the court has held before,
9 facts other than priority must be applied to achieve
10 equity in these cases involving an interstate river."

11 Now, I regard that last statement of the Master
12 as somewhat dubious in the light of our prior cases. I
13 think he departed rather substantially here from the
14 prior appropriation law that would have been applied
15 either in Colorado or in New Mexico. And I would be
16 interested in hearing your explanation of why our prior
17 cases authorize this sort of departure.

18 MR. WELBORN: I think that I can answer, then,
19 perhaps both questions at the same time. Nebraska
20 versus Wyoming, which is essentially the last case,
21 although Arizona versus California is still pending, did
22 say that priority of appropriation may be a main
23 consideration, but it listed a number of other factors.
24 And one of those other factors is wasteful uses.

25 Wyoming versus Colorado, which seems to

1 indicate that priority of appropriation would be
2 followed also lists waste as a factor.

3 QUESTION: But don't most state systems that
4 follow the appropriation system themselves allow for
5 discounting of wasteful uses?

6 MR. WELBORN: They do not -- it's a matter of
7 degree, of course, Justice Rehnquist. In Colorado, for
8 example, the definition of beneficial use in its
9 statutes is the use of that amount of water to
10 accomplish, without waste, the purpose for which the
11 appropriation is intended. And Colorado statutes direct
12 the water officials to shut down diversions if waste is
13 occurring.

14 Now, this brings up a basic consideration here,
15 and that is that although two states may follow the
16 priority of appropriation doctrine, this does not mean
17 by any stretch that they have the same water line. We
18 found by the testimony in this case, for example, that
19 the New Mexico officials exercise no surveillance over
20 the diversions of water from the Purgatoire. They don't
21 determine whether the proper amount of water is being
22 diverted in relation to the acreage irrigated, and New
23 Mexico --

24 QUESTION: From the Purgatoire?

25 QUESTION: From the Purgatoire?

1 MR. WELBORN: Excuse me, on the Vermejo. They
2 do not, as Colorado does, declare forfeitures or
3 abandonments of water rights when water rights have not
4 been used or portions of water rights have not been used
5 for a number of years. They allow -- the New Mexico
6 laws and procedures allow the proliferation of stock
7 ponds along the tributaries of the Vermejo which are
8 referred to time and again in the Bureau of Reclamation
9 documents, and these are Exhibits 37 to 48 in the
10 record. These documents say that these proliferations
11 of stock ponds along the Vermejo are the major cause of
12 the water condition.

13 Colorado does not permit that. If stock ponds
14 of that nature -- these are ponds constructed on
15 tributaries of the river to provide water for livestock
16 -- if stock ponds of that nature are constructed and
17 they are causing injury, then something can be done
18 about it. The New Mexico law does not provide for that.

19 The point is that priority of appropriation --
20 and this is a perfect example of why it cannot control,
21 because it is only one consideration. That's what
22 Nebraska versus Wyoming said, that's what Wyoming versus
23 Colorado in effect said, and New Mexico argues that
24 point very strenuously in its brief in the Arizona
25 versus California case, which is in the file, in the

1 record in this case.

2 QUESTION: May I ask this question. Are you
3 saying that if there was no evidence of waste, no
4 evidence that New Mexico was not exercising appropriate
5 oversight over the use of water, and assuming that
6 Colorado never used any at all, that the doctrine of
7 equitable apportionment would entitle Colorado to some,
8 anyway?

9 MR. WELBORN: I'm saying that the decisions
10 have said that, Your Honor.

11 QUESTION: I think the Master in this case also
12 said it, didn't he?

13 MR. WELBORN: The decisions have said that.
14 The Master in this case, incidentally, was very familiar
15 with Wyoming versus Colorado because he was attorney
16 general to Wyoming during one phase of that. And he was
17 very impressed with certain similarities there.

18 Now, as New Mexico argues in its brief in the
19 Arizona versus California case, it might seem at first
20 blush that Wyoming versus Colorado calls for the
21 straight application of priority of appropriation. But
22 it does not, because in that case, as in this case
23 before the Court, a specific amount of water was
24 allocated to Colorado which it would take regardless of
25 priority.

1 And starting with the first case, Kansas versus
2 Colorado, this Court said the states come here on the
3 basis of equality of right. It said this doesn't mean
4 there shall be an equal division. But it says -- and
5 Connecticut versus Massachusetts goes on to say that
6 this is an entirely different situation than that which
7 obtains in private controversies between parties where
8 priority is the straight rule.

9 And the cases again and again emphasize, as
10 Nebraska versus Wyoming quotes again from Colorado
11 versus Kansas, it says, all factors, all factors,
12 bearing on the equities must be considered.

13 QUESTION: So that, if I understand your
14 correctly, if a state, with respect to an interstate
15 river, had never used any water before and the other
16 state was making 100 percent use of it, the state that
17 had never used any water still would be entitled to some.

18 MR. WELBORN: I'm suggesting that that would be
19 a matter for the Court to consider in its balancing of
20 equities; that the door is not closed for the new use.
21 There are three cases of this Court involving new uses.
22 Connecticut versus Massachusetts, New Jersey versus New
23 York and Wyoming versus Colorado. Those are all new
24 uses.

25 QUESTION: But the first two were riparian

1 states.

2 MR. WELBORN: The first two, Justice Rehnquist,
3 were riparian states, but there's a great similarity.
4 In New Jersey versus New York, for example, New Jersey
5 came in and said that they were entitled to have the
6 stream flow in its more or less original condition by
7 reason of their riparian rights. Now, that's exactly
8 what New Mexico is contending here; that by virtue of
9 these decreed priority rights, it's entitled to have the
10 river flow in its original condition.

11 And the court in New Jersey versus New York
12 said that the thing to do in these cases is to achieve
13 equitable apportionment -- and these are the very words
14 -- to achieve equitable apportionment without quibbling
15 over formulas. And what the court meant there by
16 formulas was the formula of a particular state water
17 line.

18 And I respectfully suggest that this is an
19 equitable proceeding. This is an original proceeding in
20 equity, and that it should not be controlled by any rule
21 of law. Priority is a rule of law; statutory law within
22 the states. It would be grossly inequitable to apply it
23 here because of the great divergence between the
24 Colorado law and the New Mexico law. If it were
25 applied, which state's law would govern? How would it

1 be administered?

2 QUESTION: Mr. Welborn, do you think the
3 findings of the Special Master are adequate for us to
4 tell what the impact would be on the conservancy
5 district if Colorado is given a priority for 4000 feet
6 of water?

7 MR. WELBORN: Justice White, I do think that
8 they are adequate.

9 QUESTION: Well, do we know from the Master's
10 report how much the average historic use is, for example?

11 MR. WELBORN: The average historic use in the
12 Vermejo Conservancy District?

13 QUESTION: By these four users.

14 MR. WELBORN: I don't believe that it gives the
15 detail of that, but I respectfully suggest that if --

16 QUESTION: You certainly argue a lot about it.

17 MR. WELBORN: I beg your pardon?

18 QUESTION: Your brief certainly argues a lot
19 about it.

20 MR. WELBORN: We do discuss it in our brief.

21 QUESTION: But the Master didn't find it, and
22 do you think that the priority given Colorado would mean
23 that some of the historic use, average use, would be
24 interfered with in New Mexico?

25 MR. WELBORN: No. And the --

1 QUESTION: You think there's enough water to
2 satisfy Colorado's priority?

3 MR. WELBORN: This is exactly right, and I
4 don't believe for that purpose the Special Master need
5 to have gone into the detail of the uses there. He gave
6 the --

7 QUESTION: If that's true, he could have
8 avoided -- he might have avoided a lot of argument about
9 -- that you've been making. But let's suppose you're
10 right about average historic use. But that means
11 average. How about a dry year? You know that in the
12 seventies if Colorado took 4000 feet out first, somebody,
13 was going to get hurt in New Mexico. Is that right or
14 not?

15 MR. WELBORN: Not necessarily, Justice White,
16 and I will explain why not.

17 The New Mexico has testified, their chief
18 witness has testified that --

19 QUESTION: Well, the Special Master certainly
20 didn't get into these facts.

21 MR. WELBORN: He didn't get into these facts,
22 but he found that there would be --

23 QUESTION: But there was evidence in the record
24 from which he could have made these findings, couldn't
25 he?

1 MR. WELBORN: He found that --

2 QUESTION: Wasn't there evidence from which he
3 could have made the kind of findings that you want us to
4 recognize in your brief?

5 MR. WELBORN: There certainly evidence, and I
6 would, if I may, like to point that out because I think
7 it's very basic to this case. And that is that the New
8 Mexico chief witness, Mr. Moots, testified, and this is
9 page 1323 of the transcript, that essentially the entire
10 effect of the Colorado diversion would be felt by the
11 conservancy district. In other words, these other users
12 who had priority, all of them had priority --

13 QUESTION: But you say that the conservancy
14 district wouldn't even feel it, in an average year.

15 MR. WELBORN: The reason I say --

16 QUESTION: Well, do you say that or not?

17 MR. WELBORN: I do say that.

18 QUESTION: Now I ask you again, what about a
19 dry year? What about the driest year there was in the
20 1970s? If Colorado takes 4000 feet out first, you know
21 the conservancy district is going to feel it.

22 MR. WELBORN: The conservancy district -- and
23 this is the purpose, Justice White, of the reservoir
24 system -- the conservancy district operates on the basis
25 of these reservoirs.

1 QUESTION: I understand that.

2 MR. WELBORN: That contain thousands of acre
3 feet of water.

4 QUESTION: All right, five straight dry years.
5 You know you're going to have a problem.

6 (General laughter.)

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1 MR. WELBORN: In five straight dry years of --

2 QUESTION: That is not unheard of, is it? Mr.

3 Welborn, that is not unheard of, either, five --

4 MR. WELBORN: Well, I don't believe the records

5 -- Colorado's Exhibit 5, Table 2, tabulates the U.S.

6 Geological Survey records for the period of record at

7 the Dawson Games, and they don't find a period of five

8 straight years that you have that sort of a situation,

9 but I would --

10 QUESTION: I would suggest if you were going to

11 make this kind of submission, that even in a dry year

12 the conservancy district isn't going to get hurt. This

13 whole case disappears. It is just a tempest in a

14 teapot. Certainly the Special Master never made any

15 findings like this.

16 MR. WELBORN: I would acknowledge if there were

17 five straight years you would see a --

18 QUESTION: Or even one dry year.

19 MR. WELBORN: I would like to point out that

20 the Colorado diversion would take place at a point from

21 which approximately only one-half of the Colorado

22 production of water could be taken. In other words, the

23 Special Master that Colorado contributed about half of

24 the water in the Romeo system, if you allow for

25 depletions and so forth, about 8,400 acre feet, and the

1 Colorado diversion would be taken at a point where --
2 above the state line, where it would take only half.

3 QUESTION: Well, yes, but it would still reduce
4 the amount of water that reached the state line by 4,000
5 acre feet.

6 MR. WELBORN: It would reduce the amount of
7 water that would reach the state line, and if you have
8 the hypothetical situation of five straight years, I
9 won't say there wouldn't be an effect. Everybody would
10 be affected.

11 QUESTION: Well, I don't even know from the
12 findings of the Master whether there would be an effect
13 in one dry year.

14 MR. WELBORN: But in a dry year, of course, the
15 amount of water Colorado could take would be diminished
16 in proportion to the amount of water anyone else could
17 take.

18 QUESTION: Well, I don't know. There might --
19 I understand Colorado is entitled to take 4,000 acre
20 feet out first.

21 MR. WELBORN: That, as I say, geographically,
22 that wouldn't happen because of the diversion points,
23 and I would suggest that in the decree in this case, the
24 diversion points could be specified to be those named in
25 the Colorado decree or points above those that are named.

1 QUESTION: Well, I would think Colorado, under
2 this allocation, could take up to 4,000 acre feet out of
3 those particular streams.

4 MR. WELBORN: Well, as I say, if the diversion
5 is limited to those diversion points, there would be a
6 built-in safety factor, but this gets back, Justice
7 White, to the basic point.

8 QUESTION: Well, I don't understand that.

9 MR. WELBORN: That the states stand in these
10 proceedings on the basis of equality of right, and as
11 New Mexico has said in each brief, in the Arizona versus
12 California, states have sovereign interests, and that
13 what these cases consider is a division of the
14 benefits. They are not bound by any hard, fast rule of
15 law.

16 QUESTION: Mr. Welborn, in order to make your
17 argument that New Mexico wouldn't be hurt, do you have
18 to assume that New Mexico will have made more efficient
19 use of the water?

20 MR. WELBORN: That is correct.

21 QUESTION: That is your basic assumption --

22 MR. WELBORN: That is correct.

23 QUESTION: -- that they have gone out and put
24 underground pipes or something in to take water to water
25 the stock.

1 MR. WELBORN: No. That is one method to
2 eliminate a few thousand acre foot loss, and this
3 exhibit, E-3, demonstrates how it can be done, and this
4 is New Mexico's exhibit that went into the record.

5 Additionally, there is a tremendous amount of
6 waste through these stock farms that I mentioned, that
7 are mentioned again and again in the --

8 QUESTION: But the point is, for you to say New
9 Mexico wouldn't be hurt, you are assuming New Mexico
10 will apply some conservation measures that have not
11 historically been applied.

12 MR. WELBORN: That is quite correct, Justice
13 O'Connor, and I think that bears on the equity. I don't
14 think that it's -- that Colorado has to be asked to
15 forego a proper amount of water from this river to
16 subsidize uses in New Mexico that are not reasonably
17 efficient.

18 QUESTION: But to what extent do you think
19 courts have a right to get in in these disputes and
20 weigh the extent to which ditches should be lined, or
21 pipelines installed, or new storage facilities built,
22 and so on?

23 MR. WELBORN: I think, Justice O'Connor, this
24 Court has gotten into those things in some detail. In
25 Washington versus Oregon, for example, the Court was

1 ready to conclude that Oregon diversions should not be
2 curtailed, and the Court said to itself, as stated in
3 the opinion, well, first we've got to look to see
4 whether these Oregon uses are wasteful or not.

5 The Court then went on -- there was a question
6 in that case about a water right in Washington, and the
7 Court went on to declare that that water right for the
8 purpose of the case was to be considered abandoned, so
9 the Court has gotten into these internal factors.

10 In Nebraska versus Wyoming, this Court said
11 that for the purpose of that case, the Court could look
12 at the priorities within a particular state. It is
13 done, I suggest, in reverse. The Court says that if you
14 want the equity of this Court -- it says this to a state
15 -- you have got to come in with reasonably efficient
16 uses. If you want the equity of this Court to say this
17 other state and the needed uses in that state, and here
18 the Colorado uses -- this is not just CF&I, the state
19 engineer of Colorado testified as to the -- and set
20 forth in his Exhibit 14 the great need of Colorado for
21 this water.

22 This water will come into Colorado and be used
23 and reused in the Purgatory Valley. In that valley,
24 there are 300 water rights comprising 788 cubic feet per
25 second. The state engineer of Colorado testified that

1 over 99 percent of the time there is not enough water in
2 the river to satisfy those needs.

3 QUESTION: Mr. Welborn, with all of this, it
4 strikes me none of this was in the Master's report.

5 MR. WELBORN: I suggest --

6 QUESTION: Well, I would like to ask you a very
7 simple question. Approximately how many findings, and I
8 mean findings, will we have to make to decide in your
9 favor?

10 MR. WELBORN: I think that --

11 QUESTION: How many findings we will have to
12 make that the Master did not make.

13 MR. WELBORN: Did you want me to list those and
14 just how many in terms of number, or do you want me to
15 describe them?

16 QUESTION: Either way.

17 MR. WELBORN: Well, I should think that the
18 Court could base its conclusions on the finding of the
19 Special Master that there would be no material injury to
20 --

21 QUESTION: There's a difference in your
22 thinking between conclusions and findings.

23 MR. WELBORN: And I suggest that the Court --

24 QUESTION: I'm talking about findings.

25 MR. WELBORN: Right, could look at the record,

1 as New Mexico has even suggested, and determine these
2 factors. If it feels that it should go beyond the
3 conclusion of the Special Master and make a finding that
4 was reasonable conservation as was stated in Wyoming
5 versus Colorado, with reasonable conservation, as was
6 suggested in Nebraska versus Wyoming.

7 QUESTION: Mr. Welborn, doesn't that involve a
8 change in the theory of the Master? As I read the
9 report, he would have found in your favor even if you
10 assumed some harm to New Mexico, because of the fact
11 that since the river was entirely appropriated, there is
12 nothing at all left for Colorado, and as a sovereign
13 state it is entitled to some of the water. That is the
14 Master's theory.

15 MR. WELBORN: And I think, Justice Stevens,
16 that is a proper rule of law.

17 QUESTION: But if you followed that rule, you
18 don't need any more findings. It is kind of a legal --

19 MR. WELBORN: Yes, I think you do. I
20 respectfully suggest that it is a matter of degree, and
21 this is exactly what this Court was dealing with in
22 Connecticut versus Massachusetts. In Connecticut versus
23 Massachusetts, it was a matter of degree. Sure, there
24 was going to be some effect on the Connecticut River
25 when the City of Boston took a tremendous quantity of

1 water out of the river, and took it into the Merimac
2 River, but the Court weighed the equities, and that is
3 what this Court has said in prior cases, and I
4 respectfully suggest that that is what the Special
5 Master did.

6 He said that Colorado is a sovereign state, and
7 it has certain interests that are above and beyond the
8 interests of its citizens, and above and beyond those
9 that would obtain in a controversy between private
10 parties, but he also found that there would be no
11 material injury, and there were material injury, there
12 would be countervailing -- there are hard countervailing
13 equities in favor of Colorado, and it is these
14 countervailing equities, the Colorado need for water,
15 that is a basic factor here.

16 But as to the findings that this Court would
17 have to make to enter its decree, I think that the
18 Special Master's report has the basic considerations
19 that he -- that are the result of his evaluation of this
20 very thorough record, and it would seem to me that they
21 would be virtually sufficient, in view of the law that
22 this Court has announced in its prior decision.

23 And this, of course, brings me to the last
24 point that I wanted to make in this argument, and that
25 is that the Special Master's report is very much in

1 accord with these prior decisions. He considered all of
2 the factors. He properly rejected priority as the sole
3 consideration, and here again, I would respectfully
4 refer you to New Mexico's own brief in Arizona versus
5 California, which refers to an equitable division of the
6 benefits, and rejects the idea of priority regardless of
7 state line.

8 It was there referring, I believe, to the
9 Wyoming versus Colorado case. What New Mexico and the
10 amici really are seeking here, I suggest, is just that,
11 priority regardless of state line, a rule of law based
12 on these paper decrees, and those were sifted out, I
13 suggest, by the Special Master.

14 I can't emphasize too strongly the difference
15 between the laws of these two states, even though the
16 follow the priority of appropriation doctrine,
17 difference in administration, difference in -- Colorado
18 carries their water rights on the basis of historic use,
19 actual use. The New Mexico officials testified, Mr.
20 Compton and Mr. Reynolds, that New Mexico carries them
21 on the basis of the decreed right. And this stock farm
22 situation by impartial observers, so to speak, the
23 Bureau of Reclamation officials, is a most serious
24 matter which, if it existed in Colorado, would be
25 alleviated, because Colorado law provides for that.

1 The Special Master did indeed consider
2 benefit-detriment. This was first suggested in the
3 first case, Kansas versus Colorado. It was reiterated
4 in the most recent case, Nebraska versus Wyoming, and
5 what he did, I suggest, was do just what Nebraska versus
6 Wyoming told him to do. He reached an informed judgment
7 on the basis of many factors, rejecting the priority of
8 appropriation as the sole consideration.

9 Mr. Simms alluded to the Canadian River
10 situation, saying that you should look beyond the Romeo
11 conservancy district diversion point. New Mexico's own
12 exhibit, F-29, shows that in only six years out of 30
13 did any water pass beyond the district diversion point.

14 Thank you.

15 CHIEF JUSTICE BURGER: Very well.

16 You have two minutes remaining, Mr. Simms.

17 ORAL ARGUMENT OF RICHARD A. SIMMS, ESQ.,

18 ON BEHALF OF THE DEFENDANT - REBUTTAL

19 MR. SIMMS: First of all, I want to remark that
20 no decision of this Court in any prior equitable
21 apportionment case has sought to sacrifice an existing
22 economy to facilitate a new use. References to
23 Connecticut, New Jersey, and so on are simply
24 inopposite. In each of those cases, there was water
25 available to appropriate and findings of no substantial

1 injury.

2 QUESTION: Mr. Simms, are you saying that the
3 Tire appropriation is the controlling factor in all of
4 these cases?

5 MR. SIMMS: It is the controlling factor here,
6 very obviously. If you were to take the Court's latest
7 statement on the subject, you find it in Arizona versus
8 California. There, the Master, applying it just to
9 these facts, the Master said it would be unreasonable in
10 the extreme to sacrifice an existing economy for a
11 future use. The Master apparently didn't even read
12 Arizona versus California. He just missed it on --

13 QUESTION: Mr. Simms, may I ask you on that
14 point, does the law of the upstream state have a bearing
15 on your argument? If it were not, if the law of
16 Colorado were not appropriate, the same general kind of
17 law as it is in New Mexico, would you make the same
18 argument? Say they had the same law as they have in the
19 eastern states.

20 MR. SIMMS: I think in either situation there
21 would still be the attempt by the Court to protect
22 existing economies. That is the underlying theme of
23 every equitable apportionment case, no matter whether it
24 is between prior appropriation jurisdictions or between
25 appropriation and vicarian as in Kansas versus Colorado.

1 QUESTION: In other words, are you willing to
2 say that the law of Colorado is irrelevant to your
3 position, simply because --

4 MR. SIMMS: No, the law of Colorado is not
5 irrelevant to our position. The law of Colorado has in
6 it, embodied in its constitution, the same equity that
7 is embodied in the New Mexico constitution.

8 QUESTION: My question is, what if it were
9 different in Colorado.

10 MR. SIMMS: If it were different --

11 QUESTION: If your argument depends entirely on
12 future use, then it would be irrelevant. If it depends
13 on the fact that they are both appropriative states,
14 then it is significant.

15 MR. SIMMS: No, if it were different, the
16 issues would be slightly different. The fundamental,
17 the bottom line, however, remains the same, and that is,
18 the Court protects existing water rights. Here, the
19 Masters recommended exactly the opposite. He has just
20 flipped equitable apportionment decisions and priority,
21 its meaning and significance, on its head.

22 QUESTION: Well, is it your position that if
23 two states are in dispute, and if the downstream state
24 succeeds in appropriating all the water that it needs
25 before the upstream state appropriates any water, the

1 upstream state can never get any water?

2 MR. SIMMS: That's correct, and the best way to
3 answer that, I think, Justice Stevens, is, imagine for
4 the moment this were an intrastate stream in Colorado,
5 fully appropriated --

6 QUESTION: Well, I understand the interests.
7 Suppose it was an international boundary. It wouldn't
8 work there, would it?

9 MR. SIMMS: I can't answer that question. I
10 don't know. I don't think there is enough law there to
11 answer it.

12 QUESTION: And then say Montana appropriated
13 all the water in a stream that originated in Canada.
14 Could that defeat Canadian subsequent rights?

15 MR. SIMMS: I don't think there is enough
16 international law on that subject to answer that
17 question. But under Colorado law, if it were an
18 intrastate stream, you can see how outrageous it would
19 be, how absolutely outrageous if CF&I came along in 1975
20 and somehow could divest all of the Colorado property
21 rights that had been on that river for --

22 QUESTION: Well, that's right, because they all
23 originate in the same source of law, but what is the
24 source of law on which you rely?

25 MR. SIMMS: The source --

1 QUESTION: It is all New Mexico law, is it not?

2 MR. SIMMS: The source of law on which I rely
3 is the federal common law handed down by this Court in
4 each and every one of the equitable apportionment
5 cases.

6 CHIEF JUSTICE BURGER: Your time has expired
7 now, Mr. Simms.

8 MR. SIMMS: Thank you.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 11:11 a.m., the case in the
12 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of: State of Colorado, Plaintiff, v. State of New Mexico Et Al., No. 80 Orig.

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BY Reene Hammond