Denver Law Review

Volume 62 | Issue 3 Article 11

February 2021

Colorado v. New Mexico II: Judicial Restraint in the Equitable Apportinment of Interstate Waters

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COLORADO V. NEW MEXICO II: JUDICIAL RESTRAINT IN THE EQUITABLE APPORTIONMENT OF INTERSTATE WATERS*

INTRODUCTION

In *Colorado v. New Mexico* (*Colorado II*),[1] the United States Supreme Court clarified the evidentiary standard of review used pursuant to the doctrine of equitable apportionment in original jurisdiction actions involving the allocation of interstate waters.[2] Because the Court uncharacteristically disregarded the Special Master's report, the case is noteworthy and marks the sole instance in which the Court has totally rejected the Special Master's findings in an equitable apportionment action involving interstate waters.[3]

This comment will review the development of the doctrine of equitable apportionment prior to the Supreme Court's decision in *Colorado II*. The legal principles and public policy considerations underlying the majority and dissenting opinions will then be examined. Finally, this comment will conclude that the "clear and convincing evidence" standard is inappropriate for equitable apportionment actions involving interstate water disputes. Instead, the Supreme Court should employ the "preponderance of the evidence" standard because maintenance of the "status quo between states"[4] should give way to the paramount concern for the beneficial use of a scarce natural resource.

I. THE EVOLUTION OF THE DOCTRINE OF EQUITABLE APPORTIONMENT

The doctrine of equitable apportionment is the federal common law governing the Supreme Court's determination of interstate water rights.[5] The doctrine is grounded in the federal Constitution's provi-

* The author would like to express his gratitude to Mr. Robert F. Welborn of Welborn, Dufford, Brown & Tooley, Denver, Colorado, for his invaluable assistance in the preparation of this case comment. Of course, all errors, inconsistencies, and opinions expressed are this author's responsibility.

1. 104 S. Ct. 2433 (1984). In Colorado v. New Mexico, 104 S. Ct. 2433 (1984), the United States Supreme Court re-examined the findings of a Special Master after remanding the original action, Colorado v. New Mexico, 459 U.S. 176 (1982), for additional findings. To avoid the possibility of any confusion, the Court's 1982 decision in Colorado v. New Mexico will be cited as *Colorado I*, while the Court's 1984 decision in Colorado v. New Mexico will be cited as *Colorado II*.

2. *Colorado II*, 104 S. Ct. at 2438-42.

3. *See* New Jersey v. New York, 347 U.S. 995, 996 (1954); Nebraska v. Wyoming, 325 U.S. 589, 601, 604, 606, 608, 620-21 (1945); New Jersey v. New York, 283 U.S. 336, 343 (1931); Connecticut v. Massachusetts, 282 U.S. 660 (1931); *see also* Mississippi v. Arkansas, 415 U.S. 289, 297 (1974) (Douglas, J., dissenting) (findings of Master entitled to respect, especially where the credibility of witnesses is significant); 17 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4054 (1985) (findings of Special Master should be deemed presumptively correct).

4. *Colorado I*, 459 U.S. at 195 (O'Connor, J., joined by Powell, J., concurring).

5. Kansas v. Colorado, 206 U.S. 46, 98 (1907); *see also* U.S. CONST., art. III, cls. 1 & 2.

sion for states' equal rights.[6]

In *Kansas v. Colorado*,[7] the Supreme Court set out the doctrine of equitable apportionment for the first time, albeit not in those exact words.[8] In that case, Kansas had brought an original action to restrain Colorado appropriators from diverting water from the Arkansas River.[9] Kansas contended that it had a right to the natural and customary flow of the river[10] under the natural flow theory of the riparian doctrine[11] because it was a downstream state on an interstate river. Conversely, Colorado argued it had a sovereign right to retain the river's entire flow for its own benefit, regardless of any injury such appropriation might cause downstream users.[12] The Court rejected both contentions[13] and concluded that its decision was to be guided by the particular exigencies of the case,[14] the rules of equity,[15] and a balancing of both states' interests.[16] After reviewing the evidence presented by both states,[17] the Court held that although diversions in Colorado had caused some perceptible injury,[18] the detriment was insubstantial in light of the great benefit such diversions afforded to Colorado.[19]

The role of local water law in equitable apportionment actions was first addressed by the Court in *Wyoming v. Colorado*.[20] Wyoming brought

(constitutional grant of original jurisdiction over controversies between states); *see generally* 2 C. CORKER, WATERS AND WATER RIGHTS § 132.1 (1967) (overview of the foundations of equitable apportionment); Kelly, *Rationing the Rivers: A Decade of Interstate Waters and Interstate Commerce in the Supreme Court*, 14 ROCKY MTN. L. REV. 12 (1941) (concise summary of the principles of equitable apportionment).

6. *See, e.g.*, Kansas v. Colorado, 206 U.S. at 97.

7. 206 U.S. 46 (1907). Kansas v. Colorado is reviewed in Bannister, *Interstate Rights in Interstate Streams in the Arid West*: Kansas v. Colorado *and* Wyoming v. Colorado, 36 HARV. L. REV. 960 (1923) and in Friedrich, *The Settlement of Disputes Between States Concerning Rights to the Waters of Interstate Streams*, 32 IOWA L. REV. 244 (1947).

8. Kansas v. Colorado, 206 U.S. at 117. The Court spoke of Kansas' right to petition for an "equitable division" of the waters of the Arkansas River if its citizens were being substantially injured by the upstream appropriations of Colorado users. *Id.*

9. *Id.* at 46.

10. *Id.* at 58-60.

11. There are two basic doctrines governing water rights: the riparian doctrine, recognized largely by states east of the hundredth meridian and the doctrine of prior appropriation, recognized in most of the western states.

The riparian doctrine has two distinct theories of water use: the natural flow theory and the reasonable use theory. Under the former, riparian landowners may use the waters of a stream so long as that use does not affect either the quantity or quality of the streamflow. The reasonable use theory entitles riparians to the reasonable use of the streamflow for normal consumptive purposes and the discharge of wastes.

Under the prior appropriation doctrine, water rights may be acquired by diverting water and using it for a beneficial purpose. The rule of priority determines the relative rights of appropriators, whose appropriations are ranked in the order of their seniority. 1 W. HUTCHINS, WATERS AND WATER RIGHTS §§ 16, 18, 19 (1967).

12. Kansas v. Colorado, 206 U.S. at 98. *See also* Wyoming v. Colorado, 259 U.S. 419, 466 (1921) (where Colorado again unsuccessfully used this argument).

13. Kansas v. Colorado, 206 U.S. at 98-105.

14. *Id.* at 48.

15. *Id.* at 98.

16. *Id.* at 117.

17. *Id.* at 105-17.

18. *Id.* at 117.

19. *Id.* at 114.

20. 259 U.S. 419 (1922). Wyoming v. Colorado is discussed in COLORADO WATER

suit to enjoin a proposed diversion from the Laramie River by Colorado users.[21] Both Wyoming and Colorado followed the doctrine of prior appropriation.[22] After reviewing the evidence presented, the Court concluded that the doctrine of prior appropriation controlled because it furnished the only just and reasonable means of resolving an interstate water dispute between two appropriation states.[23]

The Court's final decree, however, evinced a significant departure from the doctrine's "priority principle."[24] Recognizing the importance of conservation in promoting water's paramount beneficial use, the Court concluded that the doctrine of equitable apportionment imposed upon each state a duty to exercise its rights in a manner reasonably calculated to conserve the "common supply."[25] Therefore, in order to promote conservation of the common supply, the Court granted junior Colorado appropriators priority over senior Wyoming users for all years during which the streamflow falls below the judicially-established "fairly constant and dependable" flow.[26]

In *Connecticut v. Massachusetts*,[27] the Court first addressed an interstate water dispute between contending riparian states.[28] Connecticut sought to prohibit the diversion of water to the Boston metropolitan area from two tributaries of the Connecticut River.[29] The Court denied the injunction, holding that Connecticut had failed to show by "clear and convincing evidence" that the threatened injury was of a "serious magnitude."[30] Further, the Court found that because water is essential for human consumption and other domestic uses, equity could not abide the granting of an injunction.[31]

In response to Connecticut's contention that because both states were riparian doctrine states the riparian doctrine's natural flow theory should control the Court's determination,[32] the Court reiterated the equitable apportionment principles first announced in *Kansas v. Colorado*:[33] that local water law was merely a persuasive consideration;[34] that each

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CONSERVATION BOARD, LARAMIE RIVER LITIGATION (1950); Carman, *Sovereign Rights and Relations in the Control and Use of American Waters*, 3 S. CAL. L. REV. 266 (1930); and Wehrli, *Decrees in Interstate Water Suits*, 1 WYO. L.J. 13 (1946).

21. Wyoming v. Colorado, 259 U.S. at 456.

22. *Id.* at 467, 470.

23. *Id.* at 470.

24. *See supra* text accompanying note 11.

25. Wyoming v. Colorado, 259 U.S. at 484.

26. *Id.* at 480.

27. 282 U.S. 660 (1931). Connecticut v. Massachusetts is discussed in Stephenson, *Interstate Rights to the Waters of the Connecticut River: Issues Raised by the Proposed Northfield Diversion*, 4 W. NEW ENG. L. REV. 641 (1982) and *Recent Important Decisions*, 29 MICH. L. REV. 1067, 1104 (1931).

28. Connecticut v. Massachusetts, 282 U.S. at 662.

29. *Id.*

30. *Id.* at 669. This evidentiary standard first appeared in Missouri v. Illinois, 200 U.S. 496, 521 (1906), where Justice Holmes stated that "[b]efore this court will intervene, the case should be of serious magnitude, clearly and fully proved. . . ."

31. Connecticut v. Massachusetts, 282 U.S. at 673.

32. *Id.* at 669-70.

33. 206 U.S. 46 (1907).

34. Connecticut v. Massachusetts, 282 U.S. at 670.

determination involved consideration of the existing exigencies;[35] and that all relevant facts should be considered in determining what constitutes a just apportionment of disputed interstate waters.[36]

In the next equitable apportionment case, *Washington v. Oregon*,[37] the state of Washington alleged that upstream appropriators in Oregon wrongfully diverted an excessive amount of water from a Walla Walla River tributary, and requested an equitable apportionment of the river.[38] The Special Master appointed by the Court found no "clear and convincing evidence" that the upstream appropriators had seriously impaired the rights of Washington water users.[39] The Court agreed with the Special Master's findings and dismissed Washington's complaint.[40]

In 1943, the Court once again addressed an interstate water rights dispute involving Colorado and Kansas.[41] On this occasion, however, Colorado brought the original action, seeking to enjoin Kansas and one of its citizens from the further prosecution of suits which attempted to restrain Colorado users from appropriating water from the Arkansas River.[42] Kansas cross-claimed, alleging that Colorado had substantially increased the volume of diversions to the detriment of Kansas water users and requested a decree of equitable apportionment.[43]

Upon reviewing the findings of the Special Master, the Court granted Colorado's request for an injunction,[44] noting that Kansas had failed to present sufficient evidence that the increase in upstream appropriations had worked a discernible injury to the rights of Kansas and its water users.[45] Further, the Court, in dictum, suggested that the negotiation of an allocation agreement, pursuant to the compact clause of the United States Constitution,[46] should be the preferred medium for the

35. *Id.*

36. *Id.* at 671. During the same term, the Court decided the only other equitable apportionment case involving contending riparian doctrine states, New Jersey v. New York, 283 U.S. 336 (1931), *modified per curiam*, 347 U.S. 995 (1954). New Jersey had sought to enjoin New York from diverting water from the Delaware River Basin to New York City. The Court again refused to strictly apply the natural flow theory of the riparian doctrine, noting that different considerations took precedence when the parties to a dispute were quasi-sovereigns rather than private parties. New Jersey v. New York, 283 U.S. at 342. The Court accepted the Special Master's findings in toto and denied the requested injunction. *Id.* at 343-46. For a more complete discussion of New Jersey v. New York, see Carmen, *Is There a New Era in the Law of Interstate Waters?*, 5 S. CAL. L. REV. 25 (1931).

37. 297 U.S. 517 (1936). Washington v. Oregon is discussed in *Recent Decisions*, 35 MICH. L. REV. 130, 176 (1936).

38. Washington v. Oregon, 297 U.S. at 518-19.

39. *Id.* at 522-23. This finding had an equitable character because even if the Oregon diversions had been enjoined very little of the water would have reached Washington due to the porous nature of the riverbed. *Id.*

40. *Id.* at 522-24, 528-30.

41. Colorado v. Kansas, 320 U.S. 383 (1943). The case is discussed in *Decisions*, 44 COLUM. L. REV. 433, 437 (1944).

42. Colorado v. Kansas, 320 U.S. at 387-88.

43. *Id.* at 388-89.

44. *Id.* at 400.

45. *Id.* at 398-400.

46. U.S. CONST., art. I, § 10, cl. 3. The definitive work on interstate compacts is Frankfurter and Landis, *The Compact Clause of the Constitution—a Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).

settlement of interstate water disputes.[47]

In *Nebraska v. Wyoming*,[48] the Court decreed three competing prior appropriation states' rights to waters of the North Platte River.[49] Generally the Court adopted the Special Master's findings[50] that an equitable apportionment was necessary to reduce the over-appropriation of the river.[51]

In *Nebraska*, the Court employed the doctrine of prior appropriation as a general guide in its deliberations, but expressly declared that other factors deserved thoughtful consideration.[52] Several practical and equitable considerations also influenced the Court's final decree. Among these were the avoidance of restraining upstream appropriations when downstream users would not materially benefit,[53] the protection of established economies dependent on existing junior appropriations,[54] and the relative importance and efficiency of various uses.[55] After balancing the relative priorities, equities, and practical considerations, the Court, using the Master's specific findings as guideposts, apportioned the "dependable" flow of the North Platte among the appropriators of the contending states.[56]

Although each of the equitable apportionment cases focused on one consideration more heavily than another, all maintained that the doctrine is a flexible analysis of pertinent states laws, exigent economic and social factors, and the relevant facts of each particular case.[57] Both *Colorado I*[58] and *Colorado II*[59] contributed to the potpourri of legal and equitable considerations by suggesting a "conservation ethic" in the former decision and clarifying the claimant state's burden of proof in the latter. An appreciation for the rationale and significance of these two developments requires an examination of the facts.

II. THE ORIGINS OF *COLORADO V. NEW MEXICO*

A. *The Situs of the Controversy*

The Vermejo River is a non-navigible stream which originates in Colorado.[60] The Vermejo's three major tributaries—Little Vermejo Creek, Ricardo Creek, and the North Fork of the Vermejo—originate on

47. Colorado v. Kansas, 320 U.S. at 392.
48. 325 U.S. 589 (1945), *modified per curiam*, 345 U.S. 981 (1953). Nebraska v. Wyoming is discussed in Friedrich, *supra* note 7.
49. Nebraska v. Wyoming, 325 U.S. at 599-600.
50. *Id.* at 601-07, 620-39, 655.
51. *Id.* at 608-10.
52. *Id.* at 618.
53. *Id.* at 618-19.
54. *Id.* at 618, 621-22.
55. *Id.* at 656.
56. *Id.* at 621-56, 665-72.
57. *Colorado I*, 459 U.S. 176, 183-84 (1982).
58. *Id.* at 176. *Colorado I* is discussed in Cohen, *An Interstate Water Problem Between Mississippi and Alabama—The Escatawpa River*, 35 ALA. L. REV. 291 (1984).
59. 104 S. Ct. 2433 (1984).
60. *Colorado II*, 104 S. Ct. at 2436.

the eastern slopes of the Sangre de Cristo Mountains in south-central Colorado.[61] Approximately one mile south of the Colorado-New Mexico border, these tributaries combine to form the main stem of the Vermejo River.[62] A minor tributary, Fish Creek, joins the Little Vermejo Creek just north of the state line.[63]

The main stem of the Vermejo flows in a southeasterly direction for approximately fifty-five miles before its confluence with the North Canadian River.[64] There are four major appropriators of water from the main stem: the Phelps Dodge Corporation, the Kaiser Steel Corporation, the Vermejo Park Corporation, and the Vermejo Conservancy District.[65] A Colorado user has never appropriated Vermejo tributary water.[66]

The waters of the Vermejo River have been fully appropriated by New Mexico users.[67] New Mexico appropriators use roughly 11,600 acre-feet annually.[68] The Vermejo Conservancy District is the most significant appropriator, using approximately 10,200 acre-feet annually.[69] Colorado's contribution to this flow ranges between 5,500 and 8,400 acre-feet annually.[70]

B. *Early Adjudications*

On June 20, 1975, the Colorado Fuel and Iron Steel Corporation (C.F.&I.) obtained a conditional water right from the Colorado District Court for Water Division No. 2 to appropriate seventy-five cubic feet of water per second (c.f.s.) from the headwaters of the Vermejo River.[71] Using a ditch and some 3,000 feet of tunnel, C.F.&I. proposed to divert forty-five c.f.s. from Ricardo Creek, twenty-five c.f.s. from Little Vermejo Creek, and five c.f.s. from Fish Creek to a storage reservoir on a small stream in the adjacent Purgatoire River Basin.[72] Because the Purgatoire River is over-appropriated, the imported water was to be used to meet present as well as future water requirements by industrial, agricultural, and municipal users.[73]

Almost a year later, the four major New Mexico appropriators petitioned the United States District Court for the District of New Mexico for an injunction to prohibit C.F.&I. from diverting water from the Ver-

61. Post-Hearing Brief at 3, *Colorado I*, 459 U.S. 176 (1982) (filed by Colorado).
62. *Colorado I*, 459 U.S. at 178.
63. Post-Hearing Brief, *supra* note 61, at 3.
64. *Colorado II*, 104 S. Ct. at 2436.
65. *Colorado I*, 459 U.S. at 178.
66. *Id.*
67. *Id.* at 177.
68. Reply Brief of the State of Colorado at 9, *Colorado I*, 459 U.S. 176 (1982). An acre-foot is a volumetric unit of water measurement. One acre-foot is that amount of water needed to cover one acre of land one foot deep and equals 43,560 cubic feet or 325,900 gallons of water. 1 R. CLARK, WATERS AND WATER RIGHTS § 2.3 (1967).
69. *Id.*
70. Post-Hearing Brief, *supra* note 61, at 8.
71. Complaint at 6, *Colorado I*, 459 U.S. 176 (1982).
72. Post-Hearing Brief, *supra* note 61, at 8.
73. *Id.* at 8, 9, 39.

mejo's tributaries.[74] The state of New Mexico supported the position of the plaintiffs as amicus curiae.[75] In response to a motion by the plaintiffs for summary judgment,[76] the court held that the doctrine of prior appropriation determined the litigants' rights and permanently enjoined the proposed diversion on the basis that the appropriations by New Mexico users were prior in time to C.F.&I.'s conditional water right.[77] C.F.&I. then filed a notice of appeal with the Court of Appeals for the Tenth Circuit.[78] The Tenth Circuit subsequently stayed these proceedings, however, following the Supreme Court's grant of Colorado's motion for leave to file an original complaint.[79] Colorado's motion to the Supreme Court followed an unsuccessful attempt by both states to reach a negotiated settlement.[80]

C. Colorado v. New Mexico I

Colorado's Bill of Complaint requested that a decree be entered equitably apportioning the water of the Vermejo and its tributaries.[81] After New Mexico filed an answer to the Bill of Complaint and A Motion to Refer to a Special Master, the Supreme Court appointed the Honorable Ewing T. Kerr, Senior Judge of the United States District Court for the District of Wyoming as Special Master.[82]

The Special Master received an extensive amount of evidence during the course of a sixteen-day trial.[83] On January 9, 1982, he submitted to the Court the "Report of the Special Master on the Equitable Apportionment of the Vermejo River."[84] The Master advised the Court that most of the river flow was consumed by New Mexico appropriators.[85] Moreover, the Master found that if the rule of priority was strictly applied, Colorado could not be allowed to divert because the entire flow was needed to satisfy the senior demands of New Mexico users.[86] Nevertheless, using the doctrine of equitable apportionment as a basis, the Master recommended that Colorado be allowed to divert 4,000 acre-feet of water annually from the tributaries of the Vermejo.[87]

This recommendation stemmed from the Master's conclusion that such a diversion "would not materially affect the appropriations granted by New Mexico for users downstream."[88] Using a balancing analysis of

74. *Colorado I*, 459 U.S. at 178.
75. Reply Brief at 15, *Colorado I*, 459 U.S. 176 (1982) (filed by Colorado).
76. *Id.*
77. *Colorado I*, 459 U.S. at 178-79.
78. *Id.* at 179.
79. *Id.*
80. Complaint, *supra* note 71, at 7. New Mexico broke off the negotiations.
81. *Id.* at 9.
82. Docket Sheet at 1, *Colorado I*, 459 U.S. 176 (1982).
83. Reply Brief of the State of Colorado, *supra* note 68, at 1.
84. *Colorado I*, 459 U.S. at 180.
85. *Id.*
86. *Id.*
87. *Id.*
88. Report of the Special Master on the Equitable Apportionment of the Vermejo River at 2-3, *Colorado I*, 459 U.S. 176 (1982).

the respective costs and benefits of the diversion to the two states,[89] the Master determined the diversion's relative effect. The Master also noted that the recommended allocation would impair the water rights of only one New Mexico user, the Vermejo Conservancy District, and characterized that appropriator's system of water distribution as wasteful and inefficient.[90]

New Mexico filed objections to the Master's recommendation, contending that, in the absence of an established economy in Colorado dependent upon the waters of the Vermejo, the rule of priority controlled because both states followed the doctrine of prior appropriation.[91] As the river had been previously fully appropriated by New Mexico users,[92] strict application of this rule would necessarily preclude any proposed diversions.[93]

On December 13, 1982, the Court, in a majority opinion by Justice Marshall, rejected New Mexico's contention that the rule of priority was controlling and reiterated its long-held view that, although the water laws of the contending states are an important consideration in the equitable apportionment analysis, they are but guiding principles in the allocation of interstate waters.[94] The Court then adopted what has been described as a "conservation ethic"[95] as a relevant consideration in the equitable apportionment analysis.[96] The Court concluded that the Special Master's consideration of existing uses and their relative efficiency compared to the potential benefits and efficiency of uses associated with the proposed diversion was entirely appropriate.[97] The Court found, however, that the factual findings were insufficient to support a decree of equitable apportionment.[98] Therefore, the Court remanded the case to the Special Master for specific factual findings as to the potential for eliminating wasteful water use practices through reasonable conservation measures and the precise character of the proposed uses and accompanying benefits to Colorado from the proposed diversion.[99]

In a brief concurring opinion, Chief Justice Burger, joined by Justice Stevens, stated that the dominant consideration in the equitable apportionment analysis was the equality of rights of the contending states to the benefits of interstates waters.[100] While mentioning that inefficiency of current uses and prior dependence on existing appropriations were relevant factors, Chief Justice Burger did not mention state water

89. *Id.*
90. *Id.* at 7-8, 23.
91. *Colorado I*, 459 U.S. at 181-82, 184.
92. *Id.* at 177.
93. *Id.* at 180.
94. *Id.* at 183-84.
95. Shiffbauer, *The Conservation Ethic in the Adjudication of Interstate Water Disputes by the U.S. Supreme Court*: Colorado v. New Mexico, 15 NAT. RESOURCES L. NEWSLETTER 7 (1983).
96. *Colorado I*, 459 U.S. at 185.
97. *Id.* at 184, 186, 188, 190.
98. *Id.* at 183.
99. *Id.* at 190.
100. *Id.* at 191 (Burger, C.J., joined by Stevens, J., concurring).

laws as being an appropriate consideration in the determination of a just apportionment.[101]

While also concurring in the judgment, Justice O'Connor, joined by Justice Powell, distanced themselves from the other justices by strongly counseling judicial restraint in equitable apportionment actions.[102] Fearing that the Court may be inviting more original jurisdiction actions if it freely engaged in a balancing of relative harms, benefits, and efficiencies of interstate water uses, Justice O'Connor urged that the Court abstain from regulating the water usage of one state absent a showing by "clear and convincing evidence" that the usage is "unreasonably wasteful."[103]

Despite the difficulty of pointing to a trend in the Court's thinking, especially because the case law essentially turns on a balancing of equities,[104] one commentator has argued that the introduction of a "conservation ethic" as a substantive criterion into the equitable apportionment analysis suggests a willingness by the Court to measure the security of a water right by the efficiency of use, rather than by the date of appropriation.[105] The significance of a "conservation ethic" in the equitable apportionment analysis remains, however, uncertain because the Court in *Colorado II* did not elaborate upon its earlier consideration of this new element of the equitable apportionment analysis.

III. *COLORADO V. NEW MEXICO II*

On remand, the Special Master denied a motion by New Mexico to submit new evidence.[106] After advancing additional factual findings based on the previously established record,[107] the Master reaffirmed his original recommendation.[108] New Mexico filed its exceptions to the Master's second report[109] and the case was argued to the Court on January 9, 1984.[110]

A. *The Majority Opinion*

Writing for an eight-member majority, Justice O'Connor sustained New Mexico's exceptions to the report and its additional factual findings and dismissed the case.[111] The majority's rejection of the Master's factual findings and conclusions of law marks the first time in the history of equitable apportionment cases involving interstate waters that the Court

101. *Id.*
102. *Id.* at 195 (O'Connor, J., joined by Powell, J., concurring).
103. *Id.*
104. *See* Grant, *The Future of Interstate Allocation of Water*, 29 ROCKY MTN. MIN. L. INST. 977, 986-87 (1983).
105. Schiffbauer, *supra* note 95, at 8.
106. *Colorado II*, 104 S. Ct. at 2437-38.
107. Additional Factual Findings at 2-28, *Colorado II*, 104 S. Ct. 2433 (1984).
108. *Id.* at 29.
109. *Colorado II*, 104 S. Ct. at 2436.
110. Docket Sheet, *supra* note 82, at 3.
111. *Colorado II*, 104 S. Ct. at 2434.

has completely rejected the recommendations of a Special Master.[112]

After reviewing the facts of the case and the Court's decision in *Colorado I*,[113] Justice O'Connor proceeded to distinguish the Court's analysis in *Colorado I* from that in *Colorado II*.[114] Justice O'Connor stated that the former ruling essentially addressed the question of the relevancy of various factors in the determination of "a just apportionment."[115] The present inquiry, Justice O'Connor maintained, dealt instead with the sufficiency of the evidence supporting the recommendation of a decree of equitable apportionment.[116]

Justice O'Connor stated that the appropriate standard of proof in an equitable apportionment action is the "clear and convincing evidence" standard, noting that the Court had explicitly informed Colorado of its applicability in *Colorado I*.[117] The Court had justified this higher standard of proof for three reasons: first, to protect established uses from the risks of an erroneous decision; second, to maintain property rights; and third, as an assurance that resources will be put to "their most efficient uses."[118] Thus, the majority concluded that Colorado would not be granted an equitable apportionment decree unless it could show that the benefits from the proposed diversion or the inefficiencies of the present uses were "highly probable."[119]

In turning to the evidence, Justice O'Connor noted that New Mexico had met its initial burden of proof in *Colorado I* by showing that there existed a threat of a "real or substantial injury."[120] The majority then assessed the sufficiency of Colorado's evidence and found it lacking.[121] This assessment differed sharply from that of the Master, who had concluded that Colorado had convincingly made its case.[122]

While acknowledging that "the Master's findings . . . deserve respect and a tacit presumption of correctness,"[123] Justice O'Connor nevertheless disagreed with several of the Master's findings.[124] The majority found that Colorado's evidence was not specific enough in identifying either "financially and physically feasible" conservation measures to correct existing inefficiencies in water usage[125] or the future benefits and efficiencies associated with the proposed diversion.[126]

After reaffirming the Court's holding in *Colorado I* that the water's point of origin was an improper consideration in the equitable appor-

112. *See supra* note 3.
113. *Colorado II*, 104 S. Ct. at 2436-38.
114. *Id.* at 2438.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 2439-41.
122. Additional Factual Findings, *supra* note 107, at 28.
123. *Colorado II*, 104 S. Ct. at 2439.
124. *Id.* at 2439-42.
125. *Id.* at 2439-41.
126. *Id.* at 2441.

tionment analysis,[127] Justice O'Connor concluded that the equitites compelled the protection of existing uses and, thus, a denial of Colorado's request.[128] The majority, however, made it clear that the Court believed that the doctrine of equitable apportionment was flexible enough to recognize state claims to appropriated water for highly probable future beneficial uses.[129]

B. *The Dissenting Opinion*

In an incisive and well-reasoned dissenting opinion, Justice Stevens criticized the majority for its "cursory" examination of the evidence and complete rejection of the Master's findings.[130] After noting that the Master had applied the Court's "clear and convincing evidence" standard to the proof presented, Justice Stevens raised the question of whether the majority applied the proper standard when it reviewed the Master's factual findings.[131] Justice Stevens also faulted the majority for reviewing not the evidence, but rather the factual determinations of the Master.[132] The dissent asserted that a substantial degree of judicial deference to the findings of a Master is appropriate in equitable apportionment actions because the record is "typically lengthy, technical, and complex."[133]

After an extensive comparison of the evidence to the factual findings of the Master,[134] Justice Stevens concluded that the Master's recommendation was wholly supported by the record.[135] By using excerpts from the testimony he indicated that there was ample evidence to support each of the Master's findings;[136] in particular, that reasonable conservation measures by New Mexico appropriators would ameliorate any possible injury stemming from the proposed diversion.[137]

IV. ANALYSIS

The Court's decision in *Colorado II* portends the end of interstate water rights litigation in the original jurisdiction of the Supreme Court. The Court has definitively outlined the onerousness of the claimant's burden of proof in equitable apportionment actions[138] and only time will tell whether any state is willing or able to shoulder such an evidentiary burden.

Although the Court's reluctance to hear original jurisdiction cases is

127. *Id.* at 2442.
128. *Id.*
129. *Id.* at 2438, 2442.
130. *Id.* at 2443 (Stevens, J., dissenting).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 2444-50.
135. *Id.* at 2450.
136. *Id.* at 2445-49.
137. *Id.* at 2450.
138. *Colorado II*, 104 S. Ct. at 2438-41.

understandable given its crowded docket and the exceptional procedural demands which equitable apportionment actions impose,[139] the Court's use of the "clear and convincing evidence" standard as a shield from such litigation is unjustifiable where the crux of the dispute is the allocation of interstate waters. The following two arguments demonstrate the impropriety of the majority opinion.

A. *Complete Disregard for the Special Master's Findings Seriously Undermines the Established Practice of Referral in Equitable Apportionment Cases*

As noted earlier, the Court in *Colorado II* broke with tradition by completely rejecting the findings of the Court-appointed Special Master.[140] As Justice Stevens noted in his dissent, it is unclear whether the majority actually reviewed the evidence in the record during its deliberations.[141] Moreover, there is not a single direct reference by Justice O'Connor to evidence in the record supporting the majority's conclusions concerning the correctness of the Master's findings.

Implicit in the dissent is the criticism that the majority misapplied the "clear and convincing evidence" standard by using it to test the sufficiency of the findings the Master used to support his recommendation, rather than using that standard to test the sufficiency of Colorado's evidence.[142] The Court's wisdom in totally rejecting the factual determinations made by an experienced trial judge[143] on the basis of sixteen full days of trial is questionable, especially when the majority had no opportunity to assess the witnesses' demeanor and credibility.

What is most troublesome, however, about the Court's complete rejection of the Master's findings is that it seriously undermines the efficacy and credibility of the referral process. Because Special Masters have acted in the past as the eyes and ears of the Court, their factual determinations have been afforded substantial deference.[144] The Court chose, however, to ignore the distinct advantage of the Master's proximity to the litigants and the evidence, relying instead on its own conclusions as to the sufficiency of the Master's findings. By focusing its review on the Master's findings rather than on the evidence in the record,[145] the Court has subtly shifted the crux of interstate water rights litigation from the presentation of evidence before a Special Master to the presentation of exceptions to the Master's findings.[146] Thus, it would appear that in order for a state to obtain a favorable judgment, it no longer must prevail at trial on the basis of its proffered evidence. The Court's decision offers a state a second opportunity to win. The majority opin-

139. *See* 2 C. CORKER, WATERS AND WATER RIGHTS §§ 132.1, 132.8 (1967).
140. *See supra* note 3.
141. *Colorado II*, 104 S. Ct. at 2443 (Stevens, J., dissenting).
142. *Id.*
143. Judge Kerr represented Wyoming in Wyoming v. Colorado, 309 U.S. 572 (1940), as Attorney General of the state of Wyoming.
144. *See supra* note 3.
145. *Colorado II*, 104 S. Ct. at 2438-41.
146. *See, e.g.*, Nebraska v. Wyoming, 325 U.S. at 623-54.

ion indicates that if a state can show that the Master's findings, for reasons of imprecision, lack of clarity, or poor presentation, do not persuasively support his recommendation, then that state will prevail, regardless of the evidence in the record supporting the Master's ultimate conclusion.

In light of the equitable attributes of original actions involving interstate water disputes, it hardly seems just that a state which has by clear and convincing evidence persuaded a Special Master of the exigency of equitable relief should be denied such relief because the Court finds that the Master's factual findings do not clearly and convincingly support his recommendation. Faced with the prospect of such an inequitable outcome, the wiser course of action for a claimant state is to oppose the appointment of a Special Master, rather than acquiesce to his traditional appointment by the Court.[147] Thus, the ultimate effect of the Court's decision may be to discourage the use of Special Masters in future equitable apportionment actions.

B. *Public Policy Considerations do not Support the Use of the "Clear and Convincing Evidence" Standard in Equitable Apportionment Actions Involving Interstate Water Disputes Between Prior Appropriation Doctrine States*

Although the Court repeatedly stated that Colorado's evidence was insufficient to show that New Mexico's water usage was wasteful or that the benefits associated with the diversion would outweigh any potential harm to existing users,[148] the Court neglected to suggest the degree of specificity Colorado must attain before relief will be forthcoming. Must Colorado prepare a detailed water conservation plan for the entire Vermejo River Basin? Is Colorado obliged to devise an elaborate scheme to improve the arguably lax administration of water rights in New Mexico?[149] Furthermore, how much planning and development for future water usage is Colorado required to undertake in order to prove to the Court the validity of its intentions?

Although the Court curtly acknowledged that there exist "inherent limitations [in] proving a beneficial future use"[150] and that "[i]t may be impracticable to ask the State proposing the diversion to provide unerring proof of future uses and concomitant conservation measures that could be taken,"[151] the Court failed to appreciate just how daunting its evidentiary burden of proof may be for a claimant state. Suffice it to say,

147. By this course of action, the state could, perhaps, gain the opportunity to present its full case to the Court and thus avoid the possibility of losing its case due to some perceived inadequacy in the findings of a Special Master. Although it is admittedly unlikely that the Court would agree to hear any case *de novo*, support for such a procedure may be implied from the writings of the Founding Fathers. *See, e.g.*, A. HAMILTON, THE FEDERALIST No. 80 (McLean ed. 1901).

148. *Colorado II*, 104 S. Ct. at 2438-41.

149. *Id.* at 2446-47 (Stevens, J., dissenting).

150. *Colorado II*, 104 S. Ct. at 2442.

151. *Id.* at 2440.

the total cost of the detailed water use studies and the requisite conservation measures envisioned by the Court could substantially impair the overall cost-effectiveness of a proposed diversion project.

Although the reluctance of the Court to entertain equitable apportionment actions involving interstate waters may be understandable in light of the peculiar demands that they impose upon the Court,[152] the Court's original jurisdiction in controversies between states requires liberal exercise. The founding fathers granted the Supreme Court original jurisdiction specifically so that interstate disputes might be settled without "the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens."[153] The Constitution's article III grant of original jurisdiction to the Supreme Court over suits between the states is traceable to the frustrations the founding fathers encountered in the settlement of interstate disputes under the Articles of Confederation.[154]

The inability of these Articles of Confederation to competently resolve disputes between the member states led to the drafting and incorporation of article III into the federal Constitution.[155] Writing in support of the need for a supreme national tribunal with original jurisdiction in suits between two states, Alexander Hamilton argued that "[w]hatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal supervision and control."[156] Hamilton's reasoning is still appropriate because exercise of

152. *See supra* note 139.

153. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289 (1888).

154. *See* 4 JOURN. OF CONGRESS 283 (Congressional resolution urging a peaceful settlement of the conflicting territorial claims by Connecticut and Pennsylvania to lands in the Wyoming and Susquehannah River Valleys); 15 JOURN. OF CONGRESS 1411 ("Whereas it appears to Congress, from the presentation of the delegates of the State of Pennsylvania, that disputes have arisen between the states of Pennsylvania and Virginia, relative to the extent of their boundaries, which may probably be productive of serious evils to both states"); 18 JOURN. OF CONGRESS 832-33 (Congressional recognition of boundary dispute between New Hampshire and New York); 18 JOURN. OF CONGRESS 1147-48 (report to the Continental Congress on the territorial dispute between Connecticut and Pennsylvania over lands in the Wyoming River Valley); 21 JOURN. OF CONGRESS 1115-16 ("a controversy has long subsisted between the said State of Pennsylvania and the State of Connecticut, respecting sundry lands lying within the northern boundary of the State of Pennsylvania").

155. *See* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 543-45 (Boston 1833). *See also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1791), where Chief Justice Jay noted that:

> [p]rior to the date, of the constitution, the people had not any national tribunal, to which they could resort for justice; the distribution of justice was then confined to state judicatories, in whose institution and organization the people of other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice, which another state might yield to her, or her citizens; and that, even in cases where state considerations were not always favourable to the most exact measure. There was danger, that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and policy.

156. A. HAMILTON, THE FEDERALIST No. 80, at 114 (McLean ed. 1901).

the doctrine of equitable apportionment displaces the efficacy of state water laws and administrative procedures that frustrate legitimate efforts by sister states and out-of-state water users to appropriate interstate waters.[157] If the Court is to respect the rationale underlying its original jurisdiction in actions between the states, it ought to recognize that there will be occasions when the Court must act as a constitutionally-denominated water rights administrator in order to insure that jealous protection by states of interstate waters within their borders does not unjustly discriminate against neighboring states.

Although the Court in the past has suggested that interstate water disputes are best settled through the negotiation of interstate compacts,[158] states seeking an equitable apportionment have found the Court willing, albeit not eager, to hear such actions. It is crucial that the Court continue to be receptive to requests for equitable apportionment decrees when negotiations between contending states have failed, especially because Congress[159] has been reluctant to impinge upon state sovereignty by statutorily apportioning interstate waters.[160] Yet, the Court in *Colorado II* has elevated the claimant state's search for an equitable apportionment to a truly Herculean undertaking by placing the "clear and convincing evidence" standard in its path.

Although all of the equitable apportionment cases have applied the "clear and convincing evidence" standard, the salutariness of its application to equitable apportionment actions involving prior appropriation states is questionable. The original purpose in requiring the "clear and convincing evidence" standard was to insure that states could not easily force a change in another state's conduct by way of an original jurisdiction action based on a complaint alleging the pollution of interstate waters.[161] Thus, if beneficial use is truly the touchstone of an

157. *See* Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 682-83 (1959).

158. *See, e.g.*, Arizona v. California, 373 U.S. 546, 564 (1963).

159. The notable exception to this reluctance is the Boulder Canyon Project Act, 43 U.S.C. § 617 (1976).

160. *See* Arizona v. California, 373 U.S. at 597 (Harlan, J., dissenting in part).

161. *See* Missouri v. Illinois, 200 U.S. 496, 519-21 (1906). It should be noted that while Justice Holmes is credited with setting out the "clear and convincing evidence" standard, he cites the opinion of Chief Justice Fuller in Kansas v. Colorado, 185 U.S. 125 (1902) as supportive of his formulation of a burden of proof standard for suits between states. A close reading of Kansas v. Colorado, however, does not reveal any language that either explicitly or implicitly supports Justice Holmes' "clear and convincing evidence" standard. In Kansas v. Colorado, Chief Justice Fuller did no more than advise Kansas that "proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River." *Id.* at 147.

Even if the "clear and convincing evidence" standard has a laudable function in nuisance actions between states over the pollution of interstate waters, whatever worth it possesses stems primarily from the draconian character of the type of remedy that has been sought in these cases, namely an injunction. Because equitable apportionment does not usually require the exercise of injunctions against existing uses but rather an accommodation among existing users, the partial diminution of existing water rights, or the prohibition of future uses, the Court should not demand the same burden of proof from states seeking the equitable apportionment of interstate waters as it might require from states seeking to enjoin all alleged nuisance activities in an interstate waters pollution case.

appropriative water right,[162] then that end rather than the protection of existing uses should be the Court's principal concern. Moreover, because the doctrine of equitable apportionment is not controlled by the water law of the contending states,[163] the Court may objectively assess the beneficial effects of existing and proposed water uses and the extent to which existing water rights are being beneficially applied, removed from the potentially prejudicial influence of partisan state statutes and rules. Therefore, if the Court is to adhere to the doctrine of equitable apportionment, the Court should not hold a prior appropriation state to the "clear and convincing evidence" standard, but rather to the "preponderance of the evidence" standard, because concern for the maintenance of the "status quo between the States"[164] should give way to the paramount concern for the beneficial use of a scarce resource.

CONCLUSION

Although judicial restraint may often be a laudable judicial principle, its value is questionable in instances of interstate water rights litigation following fruitless compact negotiations. When a state has been unsuccessful in reaching an accord with a contending state whose negotiating position is superior because of existing appropriations, there should exist a meaningful opportunity to obtain equitable relief through the original jurisdiction of the Supreme Court.

By elevating the protection of existing uses and thereby subordinating the equality of the rights of states to the beneficial use of interstate waters, the Court's decision in *Colorado II* seriously endangers the efficacy of the original action as a means of obtaining equitable settlements of interstate water rights disputes. Given the rarity of equitable apportionment actions involving interstate waters, it may, however, be many years before it is known whether *Colorado II* sounded the death knell for interstate water rights litigation in the original jurisdiction of the Court.

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162. *See* 1 W. HUTCHINS, WATERS AND WATER RIGHTS § 19 (1967).

163. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

164. *Colorado I*, 459 U.S. at 195 (O'Connor, J., joined by Powell, J., concurring).