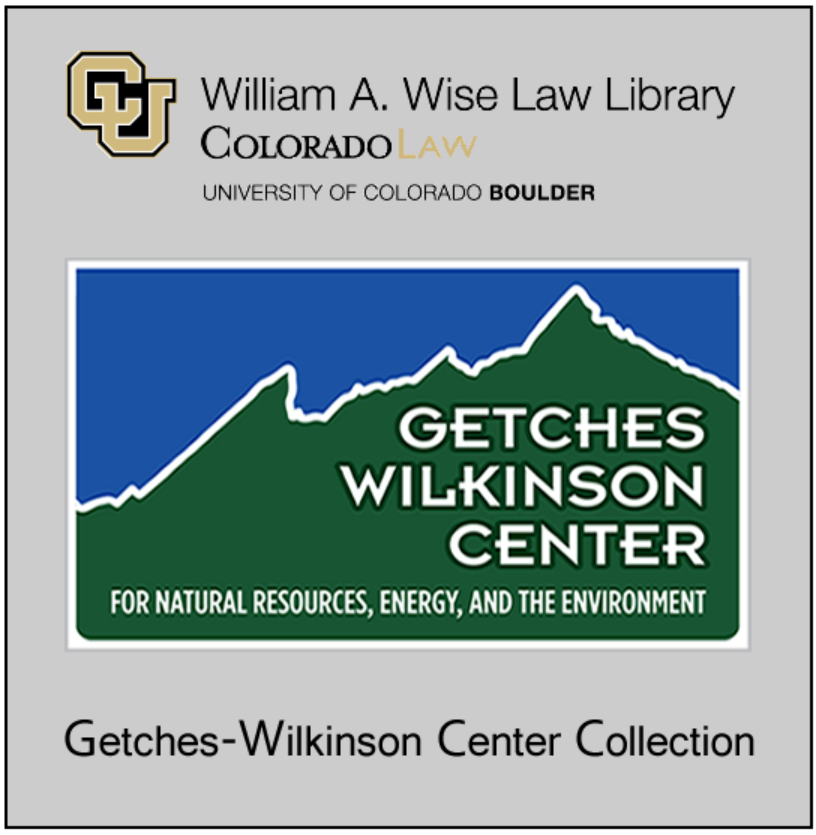
The Federal Impact on State Water Rights (Summer Conference, June 11-13) 1984

6-12-1984

Instream Flows As Reserved Rights on Federal Reservations after United States v. New Mexico

Hank Meshorer



Hank Meshorer, *Instream Flows As Reserved Rights on Federal Reservations after* United States v. New Mexico, *in* THE FEDERAL IMPACT ON STATE WATER RIGHTS (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1984).

INSTREAM FLOWS AS RESERVED RIGHTS ON FEDERAL RESERVATIONS AFTER UNITED STATES v. NEW MEXICO

Hank Meshorer
Chief, Indian Resources Section
Land and Natural Resources Division
United States Department of Justice

THE FEDERAL IMPACT ON
STATE WATER RIGHTS

a short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 11-13, 1984

* The views expressed herein are those of the author and do not necessarily represent the position of the United States Department of Justice.

I. INTRODUCTION

A. Holding of the Court in United States v. New Mexico

1. United States v. New Mexico, 438 U.S. 696 (1978) concluded that Congress, in adopting the Organic Act of June 4, 1897, 16 U.S.C. §§473, 475 (1976), 1/ which created the national forest system, intended national forests to be reserved for the dual purposes of "conserv(ing) the water flows and to furnish a continuous supply of timber for the people." New Mexico, supra, 438 U.S. at 707.

2. The majority opinion in New Mexico equated those two basic purposes variously with the "preservation of forest conditions upon which water conditions and water flows are dependent," Id. at 708; "insuring conditions favorable to continuous water flow," Id. at 708-09, n. 16; and "exert(ing) a * * * regulating influence upon the flow of rivers, reducing floods and increasing the water supply in * * * low stages." Id. at 712.

3. The Court concluded as well that water had been preserved to fulfill these primary purposes. Id. at 715.

1/ The Organic Act, codified at 16 U.S.C. §475, provides in pertinent part:

> No national forest shall be established except to improve and protect the forest within the boundaries, or for the purpose of requiring favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of citizens of the United States * * *.

4. Thus, the two recognized primary forest purposes most probably require availability of water for uses including, inter alia, forest improvement and protection, fire fighting and prevention, flood, soil and erosion control, and the domestic and administrative site uses necessary to support these activities. 2/ Moreover, the majority recognized that reserved rights are by definition essential rights, and that their loss would frustrate the purpose of the reservations involved. Id. at 700.

B. Implications of New Mexico

1. Invocation of New Mexico to rationalize a blanket denial of instream uses for watershed or timber protection appears to be factually and legally unsound.

2. New Mexico indicates that minimum stream flows for the primary forest purposes there recognized are conceptually within the scope of reserved rights. Whether a particular use of water entails an out-of-stream diversion or impoundment or an instream use should have no bearing upon its validity so long as the use is reasonably necessary to fulfill the forest purposes approved in New Mexico. 3/

2/ The Supreme Court decision in New Mexico denying reserved waters for recreation and aesthetics left the lower court decisions awarding "6.9 acre-feet * * * for domestic-residential use, 6.05 acre-feet for road-water use, 3.23 acre-feet for domestic-recreational use" undisturbed. Id. at 703.

3/ Compare, for instance, Cappaert v. United States, 426 U.S. 128, 142-143 (1976), where the Court refused to erect an arbitrary limitation on the reservation doctrine and accordingly extended the doctrine to include groundwater necessary to achieve the purpose of the reservation.

3. Instream uses for timber and watershed protection on their face are not inconsistent with the established water supply functions of the forest. As the dissenting members of the New Mexico court underscored:

> [the State of New Mexico] concedes, quite correctly on the court's own theory, that even in this case "the United States is not barred from asserting rights to minimum stream flows that might be necessary for erosion control or fire protection on the basis of recognized purposes of watershed management and the maintenance of timber." 438 U.S. at 724-25.

4. Despite the hostility of the majority towards the doctrine of reserved rights, a reading of the New Mexico decision inexorably leads to the conclusion that an instream flow, per se, cannot be denied upon the national forests. To the extent such uses are in reasonable and logical fulfillment of the New Mexico approved purposes of conserving the water flows and furnishing a continuous supply of timber, their recognition seems to be ultimately inevitable.

II. MULTIPLE-USE SUSTAINED-YIELD ACT OF 1960

A. Introduction

1. Another unresolved issue is whether or not the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531 (1976) reserved additional water with a 1960 priority date for existing national forests for the maintenance of instream flows for recreation and wildlife conservation purposes.

2. These purposes, it should be remembered, were unanimously rejected as carrying an 1897-based priority in New Mexico.

3. As with the claim for instream uses for watershed management and timber preservation, opponents to an expanded version of reserved rights point to the bottom line of New Mexico presumably denying an instream flow for the forest under any priority. (New Mexico, supra, at 714-715).

4. The question remains clouded, however. The Masters in Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615, 618 (1977), aff'd sub. nom. United States v. New Mexico, 438 U.S. 696 (1978), and United States v. Denver, 656 P.2d 1 (1982), both looked with sympathy on a 1960 priority date for the purposes of wildlife, fish and outdoor recreation enumerated in the Multiple-Use Act. Yet the New Mexico majority seemed consciously to reach the judgment that no such expansion of forest reserved rights existed. (New Mexico, supra, at 714-15).

B. Past Position of the Government

1. The government has contended that the New Mexico decision on this position is dictum, and erroneous dictum at that.

2. In New Mexico, the government did not argue that the Multiple-Use Act effected an additional reservation of water with a 1960 priority date for existing national forests.

3. Instead, the government contended that the Act demonstrated the broad purposes Congress intended the forests to serve from their inception. Id., at 713-14 n. 21 (majority opinion), 718-19 n. 1 (Powell, J., dissenting). As the dissenters noted: "there never has been a question in this case as to whether the 1960 Act gave rise to additional reserved water rights with a priority date of 1960 or later * * *." (Id., supra, at 719 n. 1).

4. The only question properly before the court in New Mexico, the United State has argued, was whether the Organic Act reserved water for instream flow maintenance for wildlife, recreation and scenic purposes. Accordingly, the language of New Mexico on the Multiple-Use Act was dictum. 4/

5. Moreover, the government has contended the New Mexico dictum is erroneous. The legislative history of the Multiple-Use Sustained-Yield Act confirmed in the government's mind that recreation, fish, and wildlife conservation were to be full-fledged purposes of the national forests. The 1960 Act was intended expressly to ratify the various uses for the national forests which had evolved after the passage of the Organic Act of 1897.

4/ Id. Indeed, the majority may not have intended to rule dispositively on the question presented here, for Justice Rehnquist took care to note (id. at 714): "Even if the 1960 Act expanded the reserved water rights of the United States, of course, the rights would be subordinate to any appropriation of water under state law dating to before 1960." These, ironically, are exactly the terms on which the United States has sought reserved rights under the 1960 Act.

6. The legislative history and the plain language of the Act that "[i]t is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes", 16 U.S.C. §528 (1976) have led the government to conclude in the past that the Act effects an additional reservation of water for forests created before 1960 for recreation, fish, and wildlife purposes.

7. Finally, the United States has argued the result reached in New Mexico is illogical. It necessarily assumes that Congress intended to broaden national forest purposes but withheld from the forests water minimally necessary to accomplish those purposes, and there is nothing in the Act or legislative history to support such an assumption.

a. Therefore, the government has concluded under the standard enunciated by the court in Cappaert, supra, 426 U.S. at 138, that water necessary to fulfill the new reservation purposes was reserved by the Multiple-Use Sustained-Yield Act.

b. The result reached by the New Mexico majority was also illogical to the United States because the exercise of reserved rights to maintain minimum stream flows is not necessarily incompatible with the water collection purposes of the national forests recognized by the same justices in New Mexico.

C. Conclusion

1. The importance of the Multiple-Use Sustained-Yield Act vis-a-vis reserved rights will appear not in its on-the-ground effects but in its post-New Mexico treatment by the courts.

2. A 1960 priority date for an instream flow for aesthetics, recreation, etc. just does not carry any substantial impact in the West where older priorities prevail.

3. With so little at stake, one must wonder why the New Mexico majority went to such pains to limit its applicability. Has the Supreme Court signalled in the New Mexico dictum a generic hostility not only to these particular national forest reserved rights but for all federal instream water claims?

4. Will the government even pursue the Multiple-Use question before the Court or wait for another day and another panel?

III. POST NEW MEXICO TRENDS

A. National Forests

1. A continued cautionary utilization of reserved waters for instream uses in either "non-controversial" (i.e. no injury to upstream junior users) or "safe" (i.e. direct causal connection between the instream use and an Organic Act purpose) situations.

B. National Parks and Monuments

1. Continued free use, as opposed to the national forest system, of instream flows to meet the more clearly

statutorily-enunciated purposes of the reservation which require instream uses. See e.g. United States v. Denver, supra.