

Water Court Case W-84285-76,

U.S. for reserved water rights in Platte River, in National Forests
in 1883 annual Water Law and Water Policy Conference.

University of Denver ^{College} School of Law Nov. 13, 1988

1. ^{part of decision} U.S. v Jesse Colo 1987 - U.S. not foreclosed from asserting claim under
organic act reserving water to maintain instream flows in
national forests - and U.S. not barred by estoppel from
claiming instream flow rights for purposes of Organic Act.

2. 2 Federal Statutes 1) Creative Act of March 3, 1891 26 Stat 1103
16 USC § 471 repealed 1976 - 2) Organic Administration
Act of June 4, 1897 16 USC § 473

Creative Act allowed President to reserve federal land for
broad purposes. Organic act was to curtail excesses in

2. application of Creative Act. Both silent on Instream Flow
Discussion not about fire fighting or administrative water.

Sup Court 438 U.S. 696
Purpose of Nat. Forests U.S. v New Mexico 1978 defined narrow
purpose "to conserve water flows and furnish a continuous
supply of timber. Not - aesthetic, environmentally, recreation
or wild life preserving. These are not excluded but
not purposes

3. To secure favorable water flows for private and public uses,
what are favorable

1) Reserved water rights doctrine exception to Congress'
explicit deference to states on water law

So - Congress not intend secondary purpose reservations
This could adversely affect irrigation and domestic use
defeating purpose of securing favorable flow
Principal use - irrigation and domestic

4. U.S. says Congress did not consider economic development
in West when creating national forests. Court and
opponents say it did.

Same year was legislation to promote irrigation.

Water flows protected by forests intended to be used
Domestic use merged into Municipal use

effect of claims by U.S. South Platte Basin - 70% of population

Water Court Case 93 US - Reserved Nat Forest rights

South Platte Basin population about 2.3 million to grow to 3.3 million in 15 years

1.3 to 1.8 m acres of irrigated land

Much of effectiveness of system depends on storage in Nat Forest bed rock of consumption use below Nat Forest.

Nat. F. has better geologic formations, less evaporation in cooler temps., gravity delivery, so no pumping

Higher storage makes system more flexible

Estimated 4.5 x² usage of headwater waters of South Platte possibility of reuse maximized by

High storage also permits more exchanges - and out-of-priority storage upstream. This more important in future with transfers from ag to municipal.

High storage ensures flow throughout year - reduces flood, water to ag in late season.

all this is referred to as favorable water flow

CR P 10

?
dis.
see
C.S. 9.
clipping
Dec 93

8 U.S. says same amount of water sent down river - nonconsumptive But timing is overlooked

Management objective is long duration of flow flow broad and sustained hydrograph

Similar to Congressional intent in 1897

Result of F.S. plan - ~~create~~ accentuate flood flow

- direct competition for high storage

- loss of flexibility with by-passes

- lost water never to be recovered.

Court believes Congress concerned with development of West in creation of Nat. Forests

or
Bam

9. Headwaters are on F.S. lands F.S. can regulate construction and diversions with permits - Broad has broad powers

F.S. not able to identify a structure to be shut down

to maintain channel integrity

Continuing Gary Cargill - possible to use permitting to maintain stream channels. Terms for a regimen but not preferred.

1 Water Court Cases US F.S. reserved rights

p 10 Permits say F.S. occupancy driven. F.S. not able to plan
No systematic advance notice with permits
Instead - case by case response by F.S.
Given inaccuracies in measurements.

p 11. Sierra Club v Yount (1980) on adequacy of regulation vs
lack of reserved rights. - esp. to protected channels in wilderness

p 12 Here F.S. denies need for reserved water for control
Federal reserved water is implied concept in law
no guidance

Is there less disruptive method of achieving purpose?

F.S. says this is immaterial

F.S. can regulate and control geothermal water.

so far all ok with existing rights - Conditionally a problem

Can F.S. control conditionals?

U.S. v Jesse (Colo 1987) Reservations limited to just what
is needed. strict construction of concept/law

p 13 - Quantification of F.S. reserve impairs purpose of F.S.F
Nat. Forests.

Different case if diversions above national forests

So far flows have been favorable for 100 years.

p 14 F.S. not concerned with injury to others - at odds
with Pinchot who says

"Conservation stands for development - and
does mean provision for future

Means right of present generation to fullest
necessary use. Demands welfare of this
generation first and afterwards welfare of
generations to follow

Gifford Pinchot - The Birth of Conservation in
Nash Am. Environmentalism pages 76-79.

In looking at law Court must look at view
prevaling at enactment - not later interpretation
Then legislators were pragmatic

BPM
Wilderness

Ⓞ
Conservation
Argument

We are
the inheritors
of the
problems
- especially
Clean Air
X

p 15,