*656 P.2d 1, *; 1982 Colo. LEXIS 740, ***

United States v. Denver

Nos. 79SA99, 79SA100

Supreme Court of Colorado

656 P.2d 1; 1982 Colo. LEXIS 740

November 29, 1982

SUBSEQUENT HISTORY: [1]**

Rehearing Denied January 10, 1983.

PRIOR HISTORY:

Appeal from the District Courts Water Division Nos. 4, 5, and 6. Honorable Charles F. Stewart Judge.

DISPOSITION: Judgment Affirmed in Part Reversed in Part and Remanded with Directions.

CASE SUMMARY

PROCEDURAL POSTURE: Pursuant to the McCarran Amendment, 43 U.S.C.S. § 666a, a state district court (Colorado) determined appellant federal government's reserved water rights incident to its reservation of certain lands in western Colorado for forest, national monument, or other purposes after 15 years of litigation in which appellee water users participated. The government appealed.

OVERVIEW: The court held (1) the rule of prior appropriation applied, (2) under the McCarran Amendment, the state court had jurisdiction over the federal claims of reserved water rights, (3) the Supreme Court determined that federal reserved water rights existed, (4) for each federal claim of a reserved water right, the trier of fact must have examined the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determined the precise federal purposes served by such legislation; determined whether water was essential for the primary purposes of the reservation; and finally determined the precise quantity of water -- the minimal need -- required for such purposes, (5) the implied reservation doctrine applied to all federal enclaves and the federal government could have acquired rights to unappropriated water on federal lands when the land was reserved pursuant to congressional authorization for a specific federal purpose that required the use of water, and (6) the analysis differed for each of the five types of reservations: national forests, national monuments, national parks, public springs and waterholes, and mineral hot springs.

OUTCOME: The court affirmed the decree of the district court in part and reversed in part, and remanded the case for modification of the decree and supplemental proceedings.

CORE TERMS: water, reserved, reservation, federal government, forest, appropriation, national forest, monument, instream, spring ...

LexisNexis(R) Headnotes ♦ Show Headnotes

COUNSEL: James M. Moorman, Assistant Attorney General, Joseph Dolan, United States Attorney, Denver, Colorado.

[*27] 88 Interior Dec. 1055, 1064 (1981) (footnote omitted) (emphasis added). The interpretations of the Supreme Court and the Department of the Interior on the applicability of MUSYA to federal reserved water rights dictate the result. While we are sympathetic with the environmental, aesthetic, and recreational goals which prompted these requests for federal reserved water rights, we read *United States v. New Mexico,* [**82] *supra,* as dispositive of the claims of the United States.

We conclude therefore that MUSYA does not reserve additional water for outdoor recreation, wildlife, or fish purposes. We believe that Congress intended that the federal government proceed under state law in the same manner as any other public or private appropriator. Accordingly, we affirm the water court's determination.

B. *Dinosaur National Monument*

1. *Instream Flow Rights*

The United States claims that it has a reserved instream flow water right in the Yampa River for recreational boating within Dinosaur National Monument. It argues that recreational boating is a purpose for which national monuments are established and that an implied water right exists in an amount necessary to fulfill the purpose. The water court concluded that the establishment of Dinosaur National Monument did not reserve water to the federal government for recreational boating. The water court also held that an instream flow water right may exist to preserve fish habitats of historic or scientific interest; that question, however, must await determination of the specific purposes for which Dinosaur National Monument was established. **[**83]** We affirm the water court's conclusions with modifications.

National monuments may be created by presidential proclamation to preserve public lands of outstanding historic or scientific interest. 16 U.S.C. § 431 (1976). In 1915, President Wilson established Dinosaur National Monument on an eighty acre tract of Utah land for the purpose of preserving an "extraordinary deposit of Dinosaurian and other gigantic reptilian remains." Presidential Proclamation of Oct. 4, 1915, 39 Stat. 1752 (1915). In 1938, the Monument was expanded into Colorado to include canyon lands formed by the Yampa River. The 1938 proclamation noted the presence of objects of historic and scientific interest in its reservation of 200,000 Colorado acres. Moreover, the proclamation placed the Monument under the "supervision, management, and control" of the National Park Service. Presidential Proclamation of July 14, 1938, 53 Stat. 2454 (1938). In 1960, the Monument's boundaries were again slightly modified by Congress.

To ascertain if there is an implied reservation of waters for recreational boating, we must determine whether Congress intended to establish a recreational purpose when it established the Monument. **[**84]** The issue is particularly important in this context because of the enormous potential economic impact of minimum stream flows on vested and conditional Colorado water rights. n44 We do not believe that Congress intended to reserve water for recreational purposes under the legislation allowing for the creation of national monuments.

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n44 Dinosaur National Monument is located at the lowest reaches of the Yampa River in Colorado. To find a reserved right to instream flow that far downstream would have a significant impact on numerous upstream users. The record shows that absolutely decreed water rights in the Yampa drainage above the Monument which are *junior* to the 1938 reservation date total about 1200 cfs. and 12,514 acre-feet, and conditionally decreed water rights total about 9500 cfs. and 1,900,000 acre-feet. Moreover, awarding the United States minimum flow rights would result in deliveries of water by Colorado to Utah in excess of the obligation specified in the Upper Colorado River Compact. Congress approved the Compact in 1949.

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Dinosaur National Monument was originally established to preserve impressive prehistoric fossils. There is no question that the 1915 proclamation and the underlying legislation on which it is based, the American Antiquities Preservation Act of 1906, 16 U.S.C. §§ 431 *et seq.* (1976), were primarily concerned with scientific and historic purposes, not recreational purposes. *See, e.g.,* H.R. Rep. No. 11016, 59th Cong., 1st Sess. **[*28]** (1906) (national monuments have narrower purposes than national parks). The federal government argues, however, that the provisions in the 1938 proclamation, which place management of the Monument under the National Parks Service Act of 1916, n45 carries with it an implied reservation of water for purposes recognized under the 1916 Act. Purposes under the 1916 Act include the conservation and enjoyment of scenic, natural, and historic objects. The United States' argument places "recreational purposes" (including instream flows for river rafting) under the rubric of "enjoyment of scenic, natural, and historic objects."

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n45 The National Park Service Act of 1916, 16 U.S.C. § 1 (1976), provides:

> "The [National Park] Service . . . . shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, *which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same* in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

(Emphasis added.)

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We cannot accept the federal government's assertion that the National Park Service Act expands the purposes for which national monuments are granted reservations of water. Acceptance of this argument would mean that Congress has, *sub silentio,* eliminated all basic distinctions between national monuments and national parks. We are, in effect, asked to treat monuments as having the same recreational and aesthetic purposes as national parks. Our review of the statutory and legislative record convinces us that Congress intended national monuments to be more limited in scope and purpose than national parks.

Nothing in the National Park Service Act or its legislative history indicates any intent to modify the purposes for which national monuments are established under the Antiquities Act or expand the reserved water rights claimed for them. National monuments were included in the National Park Service Act for administrative purposes -- to provide for their management by the National Park Service within the Department of the Interior, rather than by the Forest Service within the Department of Agriculture. *See* H.R. Rep. No. 700, 64th Cong., 1st Sess. (1916).

The Act itself **[**87]** acknowledges differences between the various components of the national park system. National parks and monuments are "interrelated," though not identical; each monument or park is "distinct in character." Although the areas are "cumulative expressions of a single national heritage" and are to be regulated consistently with the fundamental purposes expressed in the Act, the "values and purposes for which these various areas have been established" still control their administration. 16 U.S.C. §§ 1a-1, 1c (1976). n46 Thus, we must look to the purposes for which the monument was established, not to the purposes for which national parks

were established, in determining the necessity for reserved water rights.

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n46 The Antiquities Act of 1906, 16 U.S.C. § 431 (1976), gave the president authority to establish national monuments through presidential proclamations. However, only Congress has the authority to establish national parks. 16 U.S.C. §§ 21-410 (1976). Thus, the 1938 proclamation establishing Dinosaur National Monument did not establish park lands; it only vested management of the Monument with the Park Service.

While Congress did revise Dinosaur National Monument's boundaries in 1960, it rejected an opportunity -- over the Department of the Interior's recommendation -- to redesignate the area as a national park. *See* H.R. Rep. No. 1651, 86th Cong., 2d Sess. (1960); S. Rep. No. 1629, 86th Cong., 2d Sess. (1960). This underscores our belief that there remain fundamental differences between park lands and monument lands.

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That conclusion is supported by United States Supreme Court precedent. In *Cappaert v. United States,* 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976), the Court construed the availability of reserved water rights in a national monument -- Devil's Hole National Monument. The Monument, like Dinosaur National Monument, was established by presidential proclamation pursuant **[*29]** to the Antiquities Act of 1906, 16 U.S.C. § 431 (1976), and is also under the control of the National Park Service. The Court found an implied water reservation necessary to protect a rare desert fish based on the 1952 proclamation establishing the monument:

> "Here the purpose of reserving Devil's Hole Monument is preservation of the pool. Devil's Hole was reserved 'for the preservation of the unusual features of scenic, scientific, and educational interest.' The Proclamation notes that the pool contains 'a peculiar race of desert fish . . . . which is found nowhere else in the world' and that the 'pool is of . . . . outstanding scientific importance . . . .' *The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve* **[**89]** *its scientific interest.* The fish are one of the features of scientific interest. The preamble noting the scientific interest of the pool follows the preamble describing the fish as unique; the Proclamation must be read in its entirety. Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation."

426 U.S. at 141 (emphasis added). The Supreme Court analyzed the extent of reserved water rights based on the explicit purpose evidenced in the establishing proclamation and not based on the purposes found under the National Park Service Act. The same analysis must be used in determining reserved water rights for Dinosaur National Monument.

In *United States v. New Mexico, supra,* the Supreme Court further directs us to examine carefully the purpose for **[**90]** which federal land is withdrawn. Congress has conferred substantial responsibility for water resource allocation upon the states. 438 U.S. at 701-02. It would defeat that long-standing policy of congressional deference to state water determinations to interpret loosely federal reservations of scientific and historic lands. Further, the Court emphasized that Congress impliedly reserves "only that amount of water necessary to fulfill the purpose of the reservation, no

more." *Id.* at 700, *quoting United States v. Cappaert,* 426 U.S. at 141. The excess water was left to public and private appropriators.

We believe that Dinosaur National Monument was established for the purpose of preserving outstanding objects of historic and scientific interest. Recreational boating is not a purpose for which the 1938 acreage was implicitly or explicitly reserved. The federal government therefore is not entitled to a reserved water right for minimum stream flows in the Yampa River through Dinosaur National Monument for recreational purposes.

The water court expressed a willingness to grant some stream flows for the purpose of preserving fish habitats of historic and scientific interest. It **[**91]** rested its conclusions on the language of 16 U.S.C. § 1 which states that conservation of "wildlife" is a purpose for which national monuments will be administered. *See supra* note 45. As we have discussed above, the National Park Service Act should not be used as a basis for expanding the monument purposes which support a reservation of water. In our view, the relevant reservation document is the presidential proclamation of 1938, which enlarged Dinosaur National Monument to protect "objects of historic and scientific interest." 53 Stat. 2454 (1938). However, the water court was correct in ordering the master-referee to determine whether the 1938 proclamation intended to reserve water for fish habitats of endangered species of historic and scientific interest, and if so, to quantify the minimal amount of water necessary to fulfill that purpose. We therefore remand to the water court for further proceedings on the issue of fish habitats.

[*30] 2. *Quantification*

The federal government appeals the water court's determination that quantification of the amount of instream water which is necessary for Monument purposes must be concluded within six months following **[**92]** a final decree in this case. We do not think that six months is an unreasonable period for the federal government to quantify its water rights, especially in view of our decision to remand the issue of rights to instream flow for fish habitat purposes. Six months is ample time for the United States to quantify its water needs for protecting endangered fish species in the Yampa River. If unexpected difficulties arise during quantification, the federal government may seek an extension of time from the water court.

There are important considerations for finishing this litigation as expeditiously as possible. This case began in 1967. Since 1971, the federal government has known of its obligation to quantify reserved water rights. *United States v. District Court for Eagle County,* 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971); *United States v. District Court for Water Division No. 5,* 401 U.S. 527, 91 S. Ct. 1003, 28 L. Ed. 2d 284 (1971). The tremendous uncertainty that minimum flow rights will inject into the existing state appropriation scheme makes any further delay unjustifiable. Holders of decreed and conditional water rights cannot plan or develop sizeable water **[**93]** projects until they are certain of the extent of the federal government's claims. Moreover, the limited purposes for which water must be quantified and the need to quantify only a single stream in Dinosaur National Monument support the water court's six month quantification period. We believe that the expeditious resolution of this issue will best serve the interests of all parties affected by this litigation.

C. *Rocky Mountain National Park*

Rocky Mountain National Park was created from previously reserved national forest lands which were transferred to the Park in 1915 and again in 1930. The water court held that the priority date of any reserved water rights for Rocky Mountain National Park was the date on which the national forest lands were transferred to national park status. The United States argues that, for reservation purposes common to national forest lands and national park lands, the priority dates should be fixed by the dates of the initial national forest reservation. We agree that the earlier date is the proper benchmark.

The lands reserved for national parks have purposes consistent with the lands reserved for national forests. National parks exist for **[**94]** the purposes of protecting watershed and timber resources (also the national forest purposes), in addition to broader purposes of, *inter alia,* conserving

scenery, historic and scientific objects, and wildlife. *See* National Park Service Act of 1916, 16 U.S.C. § 1 (1976). The purposes for which the national forests are administered were not rescinded by the simple reclassification of the lands. The reclassification changes the status of the lands from national forests to national parks, but the original purposes of timber and watershed protection continue even though the land is placed under National Park Service administration. There is no reason to believe that the transferral of national forest lands extinguishes the purposes of timber and watershed protection established by the Organic Act of 1897. Therefore, to the extent that the purposes of the national forests and national parks overlap, the federal government has reserved water rights in the amount minimally necessary to effectuate the purposes of the national forest lands. *See United States v. New Mexico, supra; Cappaert v. United States, supra.* Reservation of water for other purposes, however, will have a **[**95]** priority date from the time the national park was established.

The water court has decreed various water rights in Rocky Mountain National Park with priority dates of 1915 and 1930. The water court must reexamine its decree and award the United States water rights sufficient to meet the purposes of watershed and timber resources protection with a priority date based on the date the transferred **[*31]** lands were reserved to the national forests.

D. *Public Springs and Waterholes*

The federal government claims on appeal that it has a reserved water right for the entire yield of all waterholes and springs, whether tributary or nontributary, which are located on lands withdrawn from the public domain by a 1926 executive order entitled "Public Water Reserve No. 107." The water court ruled that Public Water Reserve No. 107 reserved water rights limited to an amount necessary for stockwatering and drinking uses from nontributary springs or waterholes and that the United States has four years to quantify those rights. We affirm the water court's ruling subject to several modifications.

The extent of the federal government's reserved water rights for public springs and waterholes **[**96]** is determined from the reserving documents. *Cappaert v. United States, supra.* The over 1,500 springs and water holes involved in this litigation were reserved by executive order issued in 1926 pursuant to section 10 of the Stock Raising Homestead Act of 1916. 43 U.S.C. § 300 (1976). n47 The executive order, Public Water Reserve No. 107, provides:

> "Every smallest legal subdivision of public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or waterhole and all land within one quarter of a mile of every spring or waterhole, located on unsurveyed public land, be and the same is hereby withdrawn from settlement, location, sale or entry, and reserved for public use in accordance with the provisions of Section 10 of the Act of December 29, 1916".

That executive order does not expressly state an intention to reserve water in public springs or waterholes and to withdraw it from appropriation under state law. *Cf. Cappaert v. United States, supra* (express reservation of water pool by proclamation). The water court, however, found that subsequent Department of the Interior regulations enacted pursuant to 43 U.S.C. § 300 reserved **[**97]** an amount of water minimally necessary to "prevent the monopolization of vast land areas in the arid states by providing a source of drinking water for animal and human consumption."

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n47 43 U.S.C. § 300 (section 10 of the Stock Raising Homestead Act) grants the president authority