Federal Reserved Water Rights:

The Forest for the Trees

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United States v. New Mexico, 438 U.S. 696 (1978) [United States Supreme Court]

The assimilation of federal land ownership into the prior appropriation doctrine of state water law in the Western United States has been a hesistant, sometimes-awkward dialogue. While state and federal legislatures and state courts all have played roles, it is the United States Supreme Court that has most frequently taken the lead in adjusting the conflicting state and federal interests. (Goble, 1992)

The topic of the dialogue can be simply stated: at the common law, land riparian to -- abutting -- a body of water included rights in that water body *as an incident of the ownership of the land*. The most important of these riparian rights was the right to have an undiminished flow of water past the land. (Getches, 1990) In the western states, a different body of water law was developed to meet the perceived demands of the arid environment. This western, prior appropriation doctrine authorized a distinct right to use (a usufructuary right) *in water* that was created by its diversion from the stream. The prior appropriation doctrine thus was inconsistent with the continued-flow requirements of the riparian doctrine. The rub came from the fact that the United States was and is the owner of a substantial amount of land in the western states and from the supremacy of the Federal government under the Constitution: state law cannot

divest the federal government of it property. (*E.g., Wilcox v. Jackson,* 38 U.S. (13 Pet.) 496, 517 (1839)) In a series of cases beginning at the turn of the century, the Court sought to resolve these two, conflicting interests in a manner that accommodated both national and local interests. The decision in *United States v. New Mexico* was one, more recent variation on these themes.

Beyond such doctrinal matters lies a more general set of issues. The doctrine of *stare decisis* -- the maxim that courts generally should adhere to the decisions in previous cases -- gives courts an historical predisposition. The search for "intent" -- whether of the drafters of contracts or of legislation -- contributes to a similar predilection. But as every historian knows, the past tells many, often-conflicting stories. This is particularly true where the historical event -- such as a piece of legislation -- was contested terrain; "spin doctor" is a new term for old profession. The problem is compounded when this conflicting history is itself a weapon in a contemporary dispute and subject to manipulation, whether cynically or not. When congressional intent is decisive, lawyers and judges often prove poor historians.

National Lands and State Water Law: The Dance

In *United States v. Rio Grande Dam & Irrigation Co.,* the United States sought to enjoin private developers from diverting the entire flow of the Rio Grande River. The Court began its analysis of the case with the "unquestioned rule of the common law" that "every riparian owner was entitled to the continued natural flow of the stream." (174 U.S. 690, 702 (1899)) While this remained the law in those states that had retained the common law, "it is also true that as to every stream within its dominion a State may change the common law rule and permit the appropriation of the flowing waters." (*Id.* at 702-03) A state's power to change the common law, however, is limited by the national government's property: "in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States,

as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." (*Id.* at 703) In short, while a state might adopt the appropriation doctrine and apply it to private lands within its jurisdiction, the state could not divest the federal government of its rights as a riparian landowner -- "so far at least as may be necessary for the beneficial uses of the government property."

Subsequent opinions emphasized one or the other side of the accommodation. In *Kansas v. Colorado,* the Court stressed the power of a state to "determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid West of appropriation of waters for the purposes of irrigation shall control." (206 U.S. 46, 94 (1907)) Congress, the Court stated, "cannot enforce either rule upon any State" since upon admission into the Union each state is "admitted with the full powers of local sovereignty which belonged to other States." (*Id.* at 94, 95) The next year, in *Winters v. United States* the Court reemphasized the limitation on state-created interests that conflicted with national claims: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." (207 U.S. 564, 577 (1908)) The reservation of waters arose by "implication" from the language of a treaty with the Gros Ventre and Assiniboine Indian Nations. (*Id.* at 576)

Winters was the source of the "reserve rights" doctrine -- the proposition that, when the federal government reserves land, it also reserves water to accomplish the purposes for which the land was reserved.

The Evolution of Federal Reserved Water Rights

Winters and the reserved rights doctrine remained little more than a neglected footnote

until 1963 when the United States Supreme Court noted in passing that the principles underlying the *Winters* case were "equally applicable to other federal establishments such as National Recreation Areas and National Forests." (*California v. Arizona,* 373 U.S. 546, 601 (1963)) The Court reaffirmed the principles again in *United States v. District Court for Eagle County:* "The federally reserved lands include any federal enclave.... The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave." (401 U.S. 520, 523 (1971))

These brief notes were, of course, sufficient to create an opportunity, an opportunity that quickly provided a case to test the reach of the doctrine's application to non-Indian lands. The first synthesis came in a case involving the Devil's Hole Pupfish (*Cyprinodon diabolis*). The fish lived in Devil's Hole, a deep limestone cave containing a remnant pool of the pleistocene lakes that had once formed a chain along the California-Nevada border. In 1952, President Truman had withdrawn Devil's Hole and added it to Death Valley National Monument. In 1968, a ranching operation in the area began to pump groundwater to irrigate some 4,000 acres of grass, alfalfa, and grain. The pumping led to a drop in the water level in Devil's Hole, threatening the pupfish with extinction. When the rancher applied to Nevada's State Engineer for a permit to continue pumping, the United States intervened; when its objections to the permit were rejected, it sought an injunction in federal court to limit pumping. The court enjoined the pumping; the decision was affirmed by the Ninth Circuit Court of Appeals. The United States Supreme Court granted *certiorari.*

The Court began with a succinct statement of the doctrine:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

> Reservation of water rights is empowered by the Commerce Clause, Art. I § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert v. United States, 426 U.S. 128, 138 (1976).

The existence of such reserved rights was, the Court stated, a question of intent. Since there seldom was explicit evidence of an intent to reserve water, the question then was whether water "necessary to accomplish the purposes for the which the reservation was created." (*Id.* at 139) If it was, the intent would be presumed. The Court was not, however, required to presume intent in *Cappaert* because President Truman's proclamation explicitly stated that the pool "should be given special protection" and that the pupfish should be preserved. Therefore, the Cappaerts were properly enjoined from pumping since their actions infringed upon the federal government's prior right to the water.

In *Cappaert*, the Court enunciated the components of the reserved rights doctrine in the context of the western, prior appropriation system: (1) a reservation of land impliedly reserves water; (2) whether water is reserved is a question of "intent," a question to be determined by examining the purposes for which the land was reserved; (3) the amount of water reserved is that needed to accomplish the purposes of the reservation; and (4) the priority date is the date on which the land was reserved.

Federal Reserved Rights in the Gila National Forest: The New Mexico Supreme Court Decision

Litigation was begun in 1966 in the District Court for Luna County, New Mexico, to enjoin diversions from the Rio Mimbres where it flowed through the Gila National Forest in southwest

New Mexico. The State of New Mexico intervened in 1970, seeking a general determination of all the claims to the water in the river. Among those named as defendants by the state was the United States, which had filed a claim for instream flows and for water for recreational purposes within the forest. The court-appointed special master concluded that the United States was entitled to flows of 6.0 cubic feet per second. New Mexico state objected to the master's report and the district court reversed, holding that the United States had not reserved water for the specified purposes. The United States appealed to the New Mexico Supreme Court, which affirmed the district court.

The crucial issue for the court was the identification of the purposes for which the land had been reserved. To determine this issue, the court turned to the statutes under which the Gila National Forest had been established, the Creative Act of 1891 and the Organic Act of 1897. (currently codified at 16 U.S.C. §§ 471, 475) It adopted a narrow reading of the purposes for which lands were set aside as forest reserves: "The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber." (*Mimbres Valley Irrigation Co. v. Salopek,* 564 P.2d 615, 617 (N.M. 1977)) While the uses that the United States advocated were worthy objectives, the court concluded, "[w]e cannot take such liberty with the expressions of Congress." (*Id.* at 617)

Federal Reserved Rights in the Gila National Forest: The United States Supreme Court Decision

The United States appealed the New Mexico court's decision to the United States Supreme Court. While the narrow interpretation of the doctrine offered by the state court was predictable, the open hostility of the five-member majority of the federal court was not.

Justice Rehnquist's opinion for the majority of the Court reflected an explicit objective of

limiting the reserved water rights doctrine to protect the interests of existing and future appropriators. He claimed to predicate this hostility on a congressional preference: "Where Congress has expressly addressed the question of whether federal entities must abide state water law, it has almost invariably deferred to state law." (*United States v. New Mexico,* at 702) The reserved rights doctrine thus was an exception to the general rule and one that was to be strictly construed.

Given the goal of limiting the doctrine, Rehnquist began his review by revising the history of the evolution of the doctrine; he emphasized that a careful examination was required of the purposes for which the land was reserved because it was necessary to "conclud[e] that without the water the purposes of the reservation *would be entirely defeated*." (*Id.* at 700, emphasis added) Against this new, stringent frustration-of-purpose standard, Rehnquist turned to the history of the creation of the National Forests. In his story, Congress responded in 1891 to concerns about the depletion of forests on the public lands by authorizing the President to reserve lands "wholly or in part covered with timber" as forest reserves. (Creative Act § 24) But the Act proved insufficient: it both failed to stop timber cutting and also angered Westerners. Thus, when President Cleveland, responding to "pleas of conservationists," reserved some 21 million acres of "generally settled" lands, Congress responded by suspending the 1897 reservations, by "carefully defin[ing] the purposes for which national forests could in the future be reserved," and by providing for economic uses within the forest reservations. This was the Organic Act. (*United States v. New Mexico,* at 706)

Rehnquist's reading of the history found even fewer purposes for the reservations than the state court: the debates surrounding the adoption of the Organic Act, he concluded, "demonstrate that Congress intended national forests to be reserved for only two purposes -- '[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.'" (*Id.* at 707) This narrow reading of the legislative history was confirmed to Rehnquist's satisfaction by the contrast with subsequent statutes establishing the National Park Service (1916) and fish and game sanctuaries (1934).

Justice Rehnquist's opinion was designed to make the reserved water rights doctrine safe for western water users by restating and revising the doctrine to blunt its impact on consumptive uses. The Court's hostility to the doctrine is most strikingly demonstrated by its strained and vague argument that the Multiple-Use, Sustained-Yield Act of 1960 created no reserved rights -- an issue that was not even before the Court. Although acknowledging that the Act "was intended to broaden the purposes for which national forests had previously been administered," the majority nonetheless held that "Congress did not intend to thereby expand the reserved rights of the United States." (*Id.* at 713) This conclusion was based on a single paragraph from the House Report which stated that the Act's additional purposes were "to be supplemental to, but not in derogation of, the purposes for which the national forests were established." (*Id.* at 714) While this language suggests that "supplemental" water would be impliedly reserved, the Court held in otherwise in a paragraph that simply iterates its conclusion.

As Justice Powell, writing for the four dissenters noted, the need to apply the reserved rights doctrine "with sensitivity [due] to its impact upon those who have obtained water rights under state law," did not necessitate an abdication of all federal interests: while Congress did not impliedly intend to reserve water for recreation in the 1897 Organic Act, "the forests which Congress intended to 'improve and protect' are [not] the still, silent, lifeless places envisioned by the Court. In my view, the forests consist of the birds, animals, and fish -- the wildlife -- that inhabit them, as well as the trees, flowers, shrubs, and grasses." (*Id.* at 718-19) In support of this broader reading, Powell begins with the text of the Organic Act, noting (like the New Mexico Supreme Court) that reserves were to be established for a third purpose: "to improve and protect the forest" within the reserves. He then marshals a wide-ranging body of evidence beginning with the long history of "forests" as including wildlife at the English common law, contemporaneous federal statutes including wildlife protection among the purposes of forest reservations, in addition to the legislative history of the Organic Act itself -- a history that is far more complex that the majority chose to acknowledge.

Justice Rehnquist's story about the evolution of federal forest reserves was based on "a single and inadequate secondary source," a source that was concerned with timber management and who "wrote with a clear disdain for Congress" which made him "an especially questionable source upon which to rely regarding the intent of Congress." (Fairfax & Tarlock, p. 534) A more nuanced examination of the history indicates that forest preservation rather than commodity uses was the dominant motive for the adoption of the Creative and Organic Acts. Beginning with the publication of George Perkins Marsh's *Man and Nature* in 1864, concerns with the human impact on nature focused on the destruction of forests. Preservation of forests was of concern because they were intertwined with water. An 1883 editorial from *The Nation* demonstrates the connection:

> [I]f the forests which guard the flow of great rivers such as head among the Adirondacks or the Sierras of California, the Alleghanies, or the Rocky Mountains are destroyed, there is something more than a local destruction of property. The steady flow of rivers is endangered, and widespread disturbances, threatening the lives and property of persons living perhaps thousands of miles from the forests upon which their safety depends, is the result. It is clearly the duty of government, then, to preserve in every possible way the great rivers of the country; and forest preservation is thus, under certain conditions, a vital question.

(quoted in Fairfax & Tarlock, p. 540) Other contemporaneous accounts indicate a similar understanding: forest reserves were to be "reserves" much like parks. An 1891 Report of the Division of Forestry, for example, described the Creative Act as primarily concerned with the protection of the forests for streamflows and secondarily to "secure places of retreat for ... health, recreation, and pleasure." (*Id.* at 544) As the Creative Act stated, the administrator was

authorized "to regulate their occupancy and use and to preserve the forests thereon from destruction."

Similarly, the history of the Organic Act is far more complex than Rehnquist's opinion suggests and the Act itself is also far less a commodity-use bill than the opinion indicates -- as the successful court challenges to timber clear-cutting during the mid-1970s demonstrated, only selected trees could be cut. A more balanced reading of the record indicates that Congress remained broadly supportive of the conservation objectives of the Creative Act; the 1897 Act neither repeals nor limits the early statute. Rather, the Organic Act reaffirmed the reservation concept "to improve and protect the forest within [its] boundaries." As a detailed review of the history concludes, "the 1897 Act authorizes not silviculture, or timber management, but only those uses of the forest which will not impair the watershed protection and future growth of the forest." (Fairfax & Tarlock, p. 549; Hirt, p. 27-31)

Conclusion

In its rush to limit the federal government's power to claim reserved rights, the majority offers a narrow mix of bad history and bad policy. There is also an irony in Rehnquist's decision: by straining the legislative history of the Organic Act to embody his hostility to reserved water rights, Rehnquist deprived Congress -- the institution he claimed so favored state water law -- of a say in shaping the water law to be applied to the National Forests.

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