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Minimum Streamflows - Federal Power to Secure

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NOTES AND COMMENTS

MINIMUM STREAMFLOWS— FEDERAL POWER TO SECURE

Through operation of the doctrine of prior appropriation, the scarce and precious waters of the West have been applied to ever higher "beneficial" uses. However, antedating these economic uses by millennia, the forest streams providing that water have supported complex and fragile ecosystems involving both aquatic and forest wildlife, and in their serene and natural beauty have been sources of inspiration and peace for all who have gazed upon them. Recently, apparently striving for the Olympic goal of higher, faster, and further, developers and industries have been acquiring appropriative water rights in the headwaters of those streams. The result has been a serious diminution of flow in the streams with consequent damage to the wildlife dependent on them. In order to check or reverse this trend the federal government has been asserting prior rights to adequate instream flows to protect the wildlife. This Comment will examine two alternatives by which those rights have been and possibly may be asserted.

To date there has been surprisingly little effective federal activity in this area. The Wild and Scenic River Act of 1968[1] was apparently Congress' first attempt to legislate minimum streamflows. While the Act has much to commend it, its scope is so limited that it must be considered little more than tokenism. Similarly, the Water Bank Act of 1970[2] has fine words in its preamble, but does nothing to assure adequate instream flows. There has, however, been some attempt to protect the mountain streams running through national forests by claiming federal reservation rights to enough water to satisfy all the purposes for which the reservation was originally set aside.[3] Among the claimed purposes are recreational and aesthetic uses and wildlife protection.[4] At this time no case has been reported recognizing such purposes, though decisions in several cases which address this issue

1. 16 U.S.C. § 1271, *et seq.* (1970).

2. 16 U.S.C. § 1301, *et seq.* (1970).

3. There are currently several cases pending in both New Mexico and Colorado, *e.g.* State of New Mexico *ex rel.* S. E. Reynolds v. Molybdenum Corp. of America, Civil No. 9780 (D. N.M., filed Nov. 2, 1972), Mimbres Valley Irrigation Co. v. Salopek, Civil No. 6326 (6th N.M.J.D. Ct., filed Mar. 21, 1966).

4. *See, e.g.* Complaint for Intervening Plaintiff United States, State of New Mexico. *ex rel.* S. E. Reynolds v. Molybdenum Corp. of America (D. N.M. filed Nov. 2, 1972).

pending in Colorado and New Mexico will probably be made within the reasonably near future.

FEDERAL RESERVED RIGHTS

After *Arizona v. California*[5] there can no longer be any serious doubt as to the existence of a federal right to the use of that water necessary to fulfill the purposes for which federal public domain lands were reserved from entry. The basic principle is that the United States as sovereign and "original" owner of most of the lands in the West also is the owner of all water and water rights not specifically given up.[6] When the United States, by Congressional enactment or by Presidential proclamation, reserved particular lands for particular purposes, it was impliedly reserving to itself, that is, holding on to what it already possessed fully, all rights to use water in any quantity necessary to the fulfillment of the purposes of the reservation or enclave.[7] When Congress, by the Desert Land Act of 1877[8] and its precursor acts of 1866[9] and 1870,[10] allowed then unappropriated public waters to be subject to appropriation, it was merely permitting the states to regulate the further appropriation of waters on public lands according to state law.[11] It was not making a grant of water or water rights to the states. Thus, even though the United States was allowing the states to regulate future appropriations and the establishment of private water rights enforceable against everyone, including the United States, it was still retaining original ownership of the right to use the unappropriated waters on and under the public lands.[12] And when the United States set aside land and withdrew the right of entry, it was necessarily withholding enough of the then unappropriated appurtenant waters to accomplish the purposes of the reservation.[13]

In the leading case of *Winters v. United States*[14] the controlling fact was not the existence of a treaty with an Indian tribe or lands reserved by the United States for the tribe, but rather the continuing ownership by the United States of the right to control unappropri-

5. 373 U.S. 546 (1963).

6. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899). See generally Warner, *Federal Reserved Water Rights and Their Relationship to Appropriative Rights in the Western States,* 15 Rocky Mt. Mineral L. Inst. 399 (1969).

7. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

8. 43 U.S.C. § 321 (1970), 19 Stat. 377.

9. 30 U.S.C. § 51 (1970), 14 Stat. 251.

10. 30 U.S.C. § 52 (1970), 16 Stat. 217.

11. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

12. Warner, *supra* note 6, at 407.

13. *Id.*

14. 207 U.S. 564 (1908).

ated water in the Milk River.[15] The United States could not have "reserved" something which it did not already possess, and the Supreme Court did not speak of appropriation or acquisition of rights by the federal government. It spoke of holding back what was already owned.[16] Similarly, in *United States v. Rio Grande Irrigation Co.*[17] the Court said:

> [I]n the absense 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.[18]

Following a series of cases[19] further clarifying the "*Winters* doctrine" as applied to Indian reservations, the Supreme Court in *Arizona v. California*[20] extended the doctrine to support water rights for a national recreational area, wildlife refuges, and a national forest.[21] This was done on the dual grounds of continuing original ownership of the rights and the combination of the Commerce Clause and Article IV, § 3 of the United States Constitution granting the power to the general government to regulate navigable waters and government lands.[22] Since *Arizona v. California* there has been little reported litigation on the use of the doctrine in the national forests,[23] and with the exception of several pending cases,[24] none dealing with maintaining minimum flow for the preservation of esthetic values and ecological protection.

That there is a need for some kind of federal reservation of water rights is no longer seriously questioned. Without some such power, admittedly valid federal uses of water might otherwise not be recognized because they would be inconsistent with the more traditional concepts of prior appropriation law at the state level. While a considerable body of authority now places recreation and fishing purposes as

15. Warner, *supra* note 6, at 404.
16. *Id.*
17. 174 U.S. 690 (1899).
18. *Id.* at 703.
19. *See, e.g.* Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States *ex rel.* Ray v. Hibner, 27 F.2d 909 (D. Idaho, 1928); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).
20. 373 U.S. 546 (1963).
21. *Id.* at 601.
22. *Id.* at 597-598.
23. *See, e.g.*, Glenn v. United States, Civil No. C-153-61 (D. Utah, 1963); *In re* Chiliwist Creek, Okanogan County Cause No. 16323 (Wash. Super. Ct. 1967); *see generally* Note, *Water in the Woods: The Reserved-Rights Doctrine and National Forest Lands,* 20 Stan. L. Rev. 1187 (1968).
24. *See supra* note 3.

within the limits of the concept of beneficial use,[25] other less tangible values such as preservation of wilderness and areas of natural beauty or of historic and scientific interest would have a more difficult time competing with such development-oriented values as storage for irrigation and flood control, navigation, hydroelectric power, slackwater recreation and low flow augmentation for other downstream development purposes. Because these relatively uncompetitive purposes are of national interest, they need national protection, and some form of reservation doctrine seems particularly well suited for the task.

In the area of purpose of the water reservation the federal government has encountered its stiffest opposition. The Organic Administration Act of 1897[26] says that:

> No national forest shall be established except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows. . . .[27]

The United States has argued[28] that this provision recognizes as a valid purpose the maintenance of minimum streamflows within national forests for whatever purposes, including esthetic or wildlife preservation. Its position is further supported by the Multiple Use–Sustained Yield Act of 1960 which provided that:

> . . . National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.[30]

In opposition[31] it is contended that the language of the Organic Administration Act means only to assure "favorable conditions of water flows" below the forests and not within them. The legislative history of the Act,[32] tends to support this position. Economic interests motivated establishment of the national forests[33] even though prior to the Organic Administration Act other essentially

25. *See, e.g.*, State *ex rel.* State Game Comm'n. v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); Colo. Rev. Stat. § 37-92-103(4) (1973).

26. 16 U.S.C. § 475 (1970).

27. *Id.*

28. Objections to Proposed Findings of Intervenor United States, Mimbres Valley Irrigation Co. v. Salopek, Civil No. 6326 (6th N.M. J.D. Ct., filed Mar. 21, 1966).

29. 16 U.S.C. § 528 (1970).

30. *Id.*

31. Memorandum Brief of Intervening Plaintiff State of New Mexico at 9, Mimbres Valley Irrigation Co. v. Salopek, Civil No. 6326 (6th N.M. J.D. Ct., filed Mar. 21, 1966).

32. *See, e.g.*, 30 Cong. Rec. 917, 966, 1006-07, 1399; Report of the Committee upon the Inauguration of the Forest Policy, S. Doc. No. 105, 55th Cong., 1st Sess. (1897), in New Mexico's Memorandum Brief at 11-14, *supra* note 31.

33. *Id.*

noneconomic interests were asserted as secondary purposes.[34] As has been suggested, perhaps only those purposes which were reasonably foreseeable at the time of the establishment of the reservation should be entitled to consideration for reservation water rights.[35] Thus, where an Indian reservation was set aside, it takes no great imagination to consider irrigation to be a part of the overall purpose to take care of the Indians. But to consider a free-flowing stream as part of the overall purpose of forest management is a different proposition entirely and requires a different degree of foreseeability.

The real problems with the reservation doctrine and its application are not the deprivation of water to state appropriators (or to federal projects either) but 1) who is going to pay for the water and 2) injection of an element of uncertainty into the water market.[36] Since the keystone of the prior appropriation scheme is judicial enforcement of legitimate expectations, any reduction of reliance adversely affects the marketability of water rights and hinders the reallocation of water to "higher economic purposes."[37] Quantification of the claimed federal reserved rights would solve the problem of uncertainty and would seem not to be too onerous a burden on the government in view of developing hydrologic technology and increased ability accurately to project future needs. This seems particularly so in any claim for minimum instream flows. With the Supreme Court's holding in *United States v. Eagle County District Court*[38] that the McCarran amendment allows all federal water rights, both appropriative and reserved, to be adjudicated in general river system adjudication suits, it seems reasonable to expect that more federal claims for reserved rights to minimum streamflows through national forests will be asserted, and if allowed, quantified.

FEDERAL NAVIGATION POWER

From the standpoint of environmental protection, another and potentially more attractive method is available to the federal government to maintain minimum streamflows. This method calls for application of the federal navigational power and servitude.[39]

The navigation power allows virtually any governmental action

34. B. E. Fernow, Report of the Chief of the Division of Forestry (1891), cited in United States' Objections to Proposed Findings, *supra* note 28.

35. Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968,* 55 Cornell L. Rev. 707, 736 (1970).

36. Note, *supra* note 23.

37. *Id.*

38. 401 U.S. 520 (1971).

39. *See generally* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 Nat. Res. J. 1 (1963).

which even tends incidentally to maintain or improve the navigable capacity of the nation's waterways.[40] Originally, the power was exercised as part of the federal commerce power to clear obstructions to navigation, improve channels, and construct and maintain harbors.[41] The navigation power stems from the commerce clause,[42] and until the reach of the commerce clause itself was extended beginning in the 1930s it was assumed that protection and maintenance of navigation constituted not only the basis but also the measure and limit of the power.[43]

The line of cases extending the scope of the navigation power began with *Arizona v. California*[44] in 1931. In that case it was held:

> . . . that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power.[45]

In 1940, in *United States v. Appalachian Electric Power Co.*,[46] the Supreme Court said:

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. . . . That authority is as broad as the needs of commerce.[47]

Flood control,[48] land reclamation,[49] and hydroelectric power generation[50] soon came within the purview of the navigation power, and by 1956 the Supreme Court allowed exercise of the power where the benefit to navigation was scarcely more than marginally incidental.[51]

While the constitutional power has been greatly expanded, the action must still have some relationship to the navigable waters of the United States.[52] The concept of navigability originally encom-

40. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941).
41. Comment, *Navigational Servitude as a Method of Ecological Protection,* 75 Dick. L. Rev. 256, 257 (1971).
42. Arizona v. California, 373 U.S. 546, 597-98 (1963).
43. Morreale, *supra* note 39, at 9.
44. 283 U.S. 423 (1931).
45. *Id.* at 456.
46. 311 U.S. 377 (1940).
47. *Id.* at 426.
48. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941).
49. United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).
50. First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n., 328 U.S. 152 (1946).
51. United States v. Twin City Power Co., 350 U.S. 222 (1956).
52. *Id.*

passed only those waterways which were navigable in fact, that is ". . . used, or . . . susceptible of being used, in their ordinary condition, as highways of commerce."[53] That was a convenient starting point, but the law today allows the application of the navigation power to nonnavigable stretches of navigable streams,[54] streams which once were navigable but no longer are,[55] streams which could become navigable with reasonable improvements,[56] and even to nonnavigable streams which are tributary to or affect navigable streams.[57]

In order for the United States to exercise its power over nonnavigable streams, it is necessary that Congress expressly declare the exercise to be for a navigational purpose.[58] However, as pointed out above, the navigational purpose need be only one purpose of the project, and only an incidental purpose at that. Furthermore, a Congressional declaration that the federal action will benefit navigation and that the means chosen are reasonable are conclusive.[59] Although the courts undoubtedly have the power to review these Congressional determinations for arbitrariness, they have never held any such declaration to be either unreasonable or arbitrary.[60]

The navigation power has only just begun to be used for environmental protection purposes. In two state cases involving the filling of lake shores, the courts split, one holding that the navigation servitude was an appropriate tool to block the operations (which would in fact have created obstructions to navigation along the former shore line)[61] and the other holding that the rule of no compensation was too harsh and that therefore the servitude should not be used.[62] In 1970 the Fifth Circuit Court of Appeals held that conservation was a valid commerce purpose and that the general federal navigation power may be invoked to prevent a filling operation on submerged land on a tributary to navigable estuarine waters.[63] After adopting the findings of the Secretary of the Army that the dredging and

53. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
54. United States v. Rio Grande Dam & Irrigation, 174 U.S. 690 (1899).
55. Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).
56. *See* Morreale, *supra* note 39, at 3-8.
57. Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941), and United States v. Grand River Dam Authority, 363 U.S. 229, 232 (1960).
58. Morreale, *supra* note 39, at 11-12.
59. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).
60. Morreale, *supra* note 39, at 13.
61. Wilborn v. Gallagher, 77 Wash.2d 306, 462 P.2d 232 (1969), *cert. denied* 400 U.S. 878 (1970).
62. State v. Johnson, 265 A.2d 711 (Me. 1970).
63. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied* 401 U.S. 910 (1971).

filling would have a harmful effect on the fish and wildlife resources,[64] the court said:

> . . . the nation knows, if the Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating effect on interstate commerce.[65]

In 1974 the Sixth Circuit Court of Appeals held the use of the federal navigation power to be an appropriate method for controlling discharges of pollutants into both navigable waters and nonnavigable tributaries to navigable waters.[66] The court found that water pollution poses a health threat, endangers national agriculture, and diminishes enjoyment of rivers and lakes for fishing, boating, and swimming.[67] The court considered these interests to be proper subjects for Congressional attention because of their impact on interstate commerce.[68] In addition, water pollution was found to be a direct threat to navigation itself.[69]

> Thus, the doctrine of navigational servitude entitles the federal government to control the quality of effluent from riparian owners whose land drains into nonnavigable streams in pursuance of the federal interest in preserving the navigability and the quality of the navigable waters of the commerce-carrying rivers into which these tributaries flow.[70]

At this point it seems fair to induce the following proposition: The navigation power may be used to prevent the destruction of fish and other aquatic wildlife resources in or the impairment of recreational uses of nonnavigable waters if the navigable capacity of the mainstream is also thereby benefited, however incidentally, and if Congress has expressly declared that the benefit to navigation is among the purposes of the proposed federal action.

APPLICABILITY OF THE NAVIGATION POWER TO THE MINIMUM STREAMFLOW PROBLEM

It is patently obvious that the drying up of forest streams by upstream appropriators would endanger both the natural habitat of significant fish and wildlife resources and the public recreational use and enjoyment of those streams. Likewise, no great insight is re-

64. *Id.* at 201.
65. *Id.* at 203.
66. United States v. Ashland Oil & Transportation Co., 504 F.2d 1317 (6th Cir. 1974).
67. *Id.* at 1325.
68. *Id.*
69. *Id.*
70. *Id.* at 1328.

quired to say that a pattern of such drying up of forest streams would adversely affect the navigable capacity (which is not to say actual navigational use) of the mainstreams into which the forest streams flow. If the proposition of law stated above is accurate, then it seems safe to deduce that use of the navigation power is an appropriate method for requiring maintenance of some minimum level of streamflow if Congress should be willing to so exercise it.

The most likely stumbling block to Congress' exercise of the navigation power to guarantee minimum streamflows is the rule of "no compensation."[71] The rule is based on the theory that there can be no superior private ownership rights to the flow of navigable waters and that, since the sovereign already owns the flow (subject only to private licenses or usufructuaries), no Fifth Amendment taking can occur.[72] The growth of the no compensation rule has largely paralleled the growth of the navigation power itself so that today it has been extended to the flow of nonnavigable tributaries of navigable streams.[73] However, the political reality of the situation is that Congress is unlikely to apply the no compensation rule, and for good reason. First, there is no compelling logic requiring water highways to be treated any differently from air or land highways, and, second, it seems fair that individual appropriators should not bear the full economic burden of benefits which will accrue to all the people.[74] Since it is both possible and realistically feasible to invoke the navigation power and pay for any impairment to private water rights, Congress should move to enact appropriate legislation now while costs are lowest and potential benefits greatest.

The disadvantage associated with the reservation water rights, *i.e.*, the adverse effect of economic reliance on appropriative rights, can be largely mitigated under the navigation power approach by Congress' agreement to pay for any impairment to existing water rights. In addition, the navigation power can reach virtually all streams and not just those within established federal reservations.

CONCLUSION

It seems clear that the federal government has both the means and, a growing majority of Americans would no doubt argue, the duty to secure to "ourselves and our posterity" forest streams which will support delicate ecologic systems and provide opportunities for the rejuvenation of our future-shocked souls.

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71. *See generally,* Morreale, *supra* note 39.
72. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 62 (1913).
73. United States v. Grand River Dam Authority, 363 U.S. 229 (1960).
74. Morreale, *supra* note 39, at 31.