

1-1-2007

Federal "Non-Reserved" Water Rights: The Great Sand Dunes National Park Application for Absolute Groundwater Rights

Maria E. Hohn

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Maria E. Hohn, Case Note, Federal "Non-Reserved" Water Rights: The Great Sand Dunes National Park Application for Absolute Groundwater Rights, 10 U. Denv. Water L. Rev. 427 (2007).

This Case Notes is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

FEDERAL “NON-RESERVED” WATER RIGHTS: THE GREAT SAND DUNES NATIONAL PARK APPLICATION FOR ABSOLUTE GROUNDWATER RIGHTS

I. Introduction	427
II. Background	428
A. The Setting	428
B. The Parties	429
C. The Facts	429
D. The Procedure	430
III. Questions Raised by the Dept. of Interior’s Groundwater Rights Application	430
IV. The Rio Grande Conservation District Perspective	431
V. Conclusions	432

I. INTRODUCTION

Water law in the United States has a long history of competition between federal and state interests. Even though states are primarily responsible for the creation and regulation of water rights within their borders, federal ownership and control of water still plays an important role in the management of this public resource. Federal reserved rights, the navigation servitude, international compacts, and federal environmental laws all limit the state’s control over its water. Federal “non-reserved” rights provide another example of federal interference with state water management.

The federal “non-reserved” rights doctrine allows the federal government to acquire unappropriated water rights pursuant to state law.¹ This doctrine is often the logical premise for Congressional directives or executive decisions to acquire water rights for federal programs. When these federally acquired rights comply with substantive state water law, there is usually no controversy.² However, the federal govern-

1. See Memorandum for the Assistant Attorney General, Land & Natural Resources Division, “Federal ‘Non-reserved’ Water Rights,” 6 Op. Off. Legal Counsel 328 (1982).

2. Substantive state water law refers to the requirements for perfecting a water right. For example, in prior appropriation states, substantive water law requires: 1) the intent to apply water to a beneficial use; 2) the actual diversion of water from a natural

ment can use its “non-reserved” rights in ways that are inconsistent with substantive state water law.³ As long as there is sufficient Congressional intent and Congress acted under appropriate Constitutional authority, any conflicts with state substantive law become irrelevant. Under the Supremacy Clause of the Constitution, when state law frustrates a federal program or congressional mandate, the federal purpose preempts state law. In 2004, the National Park Service (“NPS”) filed an application for absolute groundwater rights for the Great Sand Dunes National Park based on a theory of federal “non-reserved” rights.⁴

II. BACKGROUND

A. THE SETTING

An understanding of this water right adjudication requires an understanding of its setting, the San Luis Valley in south central Colorado. The San Luis Valley spans approximately 8,000 miles and is the world’s largest alpine valley. Mountains almost completely surround the valley, with the San Juan range bordering to the west and the Sangre De Cristo range to the east. Despite the region’s geographic isolation, the valley receives much attention because of its water. The Rio Grande, one of the longest rivers in the United States, flows through the valley from its headwaters in the San Juans as it makes its way to Mexico. In addition to the Rio Grande, the valley has two large aquifers, one confined and one unconfined.

As a result of the valley’s unique geological and hydrological characteristics, sand dunes formed along the western side of the Sangre de Cristos. These dunes, reaching almost 750 feet above the valley floor, are the tallest in North America. The dunes’ impressive height is the direct result of the hydrological systems in the valley, which allow the dunes to remain stationary and maintain their summits. As Congress stated, the “unique pulse flow characteristics of Sand Creek and Medano Creek ... are integral to the existence of the dunes system.”⁵ President Herbert Hoover recognized these dunes as a National Monument in 1934, and in 2000, Congress authorized the Department of the Interior to designate the dunes as the Great Sand Dunes National Park.

source; and 3) the application of the water to a beneficial use. *City of Thornton v. Denver Bd. of Water Commissioners*, 44 P.3d 1019, 1025 n.4 (Colo. 2002).

3. Memorandum for the Assistant Attorney General, *supra* note 1.

4. Application for Approval of Absolute Ground Water Rights, No. 2004 CW 35 (Water Ct. Div. 3, Dec. 30, 2004).

5. Memorandum from the Solicitor of the Department of the Interior to the Director of the National Park Service, “Great Sand Dunes National Park” (Jan. 18, 2001).

B. THE PARTIES

The primary parties involved in this adjudication for an absolute groundwater right are the NPS, the state of Colorado, three private parties opposed to the application, and several other intervenors, including public water users associations and The Nature Conservancy. After the NPS filed the application, they received general support from the Colorado State Engineer, the Colorado Water Conservation Board, the public water users associations, and The Nature Conservancy. The main opponents to the application are John Mattingly, a farmer in the San Luis Valley, and Gary Boyce, owner of both Cotton Creek Circles, L.L.C. and the San Luis Valley Water Company, L.L.C.⁶ Additionally, two private property owners in the valley with a water right dated after 2000 opposed the NPS's application insofar as it fails to subordinate the application's priority date to their private property interest.

C. THE FACTS

On November 22, 2000, Congress provided for the establishment of the Great Sand Dunes National Park and Preserve in the state of Colorado.⁷ This legislation "shows clearly that a concern with water was a primary motivation for expansion of the protected area and conversion of the National Monument into a National Park."⁸ In the Act, Congress specifically stated that the Secretary of the Interior shall acquire any water rights necessary for the purposes of the national park in accordance with the following provisions:

- (a) Such water rights shall be appropriated, adjudicated, changed, and administered pursuant to the procedural requirements and priority system of the laws of the state of Colorado.
- (b) The purposes and other substantive characteristics of such water rights shall be established pursuant to State law, except that the Secretary is specifically authorized to appropriate water under this Act exclusively for the purpose of maintaining ground water levels, surface water levels, and stream flows on, across, and under the national park and national preserve, in order to accomplish the purposes of the na-

6. Boyce owns several companies and a four million dollar ranch in the San Luis Valley. "The speculation has always been that he plans another water development project." David Nicholas, *Boyce law suit to be heard in January; Status Conference to be held Nov. 8*, THE CRESTONE EAGLE (Nov. 2005), available at <http://www.crestoneeagle.com/archives2005/headlineA2.nov05.html>.

7. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530 (2000).

8. Memorandum from the Solicitor of the Department of the Interior, *supra* note 5.

tional park and the national preserve and to protect park resources and park uses.⁹

Congress also explained that except for the previous reservations for the national forest and the national monument, “no Federal reservation of water may be claimed or established for the national park or the national preserve.”¹⁰ On September 24, 2004, the director of the NPS officially designated the park.

D. THE PROCEDURE

On December 30, 2004, the NPS filed the application for an absolute groundwater right for the Great Sand Dunes National Park in the district court for Water Division 3, located in Alamosa.¹¹ The application sought an in-place groundwater right, with no actual diversion provided or no quantity specified. The application claimed the requisite intent to appropriate occurred on November 22, 2000 and the application to beneficial use occurred on September 24, 2004. The application stated that the right it seeks to acquire can not interfere with any water rights in existence prior to November 22, 2000 or the Bureau of Reclamation’s Closed Basin Project. While the court has not finalized a trial date, the parties expect the trial to commence in early 2008.

III. QUESTIONS RAISED BY THE DEPT. OF INTERIOR’S GROUNDWATER RIGHTS APPLICATION

The NPS’s application for absolute groundwater rights raised two principal questions: 1) whether the federal “non-reserved” rights doctrine valid; and 2) whether Congress intended act under appropriate Constitutional authority and provide sufficient intent in the 2000 Act to warrant the application of the doctrine. While some legal theorists argue that a federal “non-reserved” rights doctrine does not exist, the Assistant Attorney General from the Land and Natural Resources Division of the Department of Justice explains that the concept of federal “non-reserved” rights is valid.¹² As the Assistant Attorney General stated, “as a matter of constitutional law, Congress clearly has the power to preempt state law governing the use and disposition of unappropriated water by federal agencies on federal lands.”¹³ Based on the supremacy clause, “Congress [has] ample power, when coupled with the commerce power, the Property Clause, or other grants of federal

9. Great Sand Dunes National Park and Preserve Act of 2000, *supra* note 7.

10. *Id.*

11. The Mc Carran Amendment subjects the U.S. to state court jurisdiction for general stream adjudication. See 43 U.S.C. § 666 (1952).

12. Memorandum for the Assistant Attorney General, *supra* note 1.

13. *Id.*

power, to supersede state law. The exercise of such power must be explicit or clearly implied, however, and federal rights to water will not be found simply by virtue of the ownership, occupation, or use of federal land, without more."¹⁴

According to the NPS, Congress acted under appropriate Constitutional authority and with the requisite intent. In creating national parks, Congress acts under the property clause of the Constitution. In establishing the Great Sand Dunes National Park, Congress explicitly provided that "the Secretary is specifically authorized to appropriate water under this Act exclusively for the purpose of maintaining ground water levels, surface water levels, and stream flows on, across, and under the national park."¹⁵ As the Interior's Solicitor stated, "with the Great Sand Dunes legislation, we have a clear example of Congress exercising [their] power" to preempt substantive state water law.¹⁶ If the district court accepts these arguments, it will likely approve the NPS's application for the federal "non-reserved" water right. Any decision by the district court in this matter, however, will be ultimately reviewable by the Supreme Court of the United States because it is a federal question.

IV. THE RIO GRANDE CONSERVATION DISTRICT PERSPECTIVE

The Rio Grande Conservation District ("District"), represented by David Robbins of Hill and Robbins, P.C., serves the primary purpose of protecting the waters of the Rio Grande and its tributaries. The District filed a statement of opposition in support of the NPS's application in February 2005. Mr. Robbins has been the District's legal counsel for more than twenty-five years and graciously agreed to discuss this groundwater right application and provide his perspective. As Mr. Robbins explained, this application is merely fulfilling the 2000 congressional mandate. As Robbins articulates it, the NPS is seeking to obtain a right for a fluctuating level of water sufficient to maintain the dunes.

From the District's point of view, this application is a step in the right direction. As Mr. Robbins mentioned, the leadership in the San Luis Valley is generally very supportive of NPS's application. Because it is not a federal *reserved* right and because it is subordinate to existing water rights in the valley, there is little objection to the application. Mr. Robbins also commented that NPS's application will help Colorado fulfill its obligations under the Rio Grande Compact by insuring a stable groundwater level. Mr. Robbins remarked that, in the end,

14. *Id.*

15. Great Sand Dunes National Park and Preserve Act of 2000, *supra* note 7.

16. Memorandum from the Solicitor of the Department of the Interior, *supra* note 5.

some answer to the water question at the Great Sand Dunes National Park is necessary, and this application could be the successful answer.

V. CONCLUSIONS

Satisfying both federal and state interests in water rights can be a complicated endeavor. In the NPS's application, however, the use of the federal "non-reserved" rights doctrine seems to strike a balance between these interests. As the Office of the Solicitor remarked, "this approach strikes a useful accommodation between state and federal law, by including elements of both."¹⁷ Federal "non-reserved" rights, as opposed to federal reserved rights, have two important benefits: 1) they give the public early notice of the claimed right because the right is subject to state procedural law and 2) they allow the federal government to still accomplish its objectives, because the federal purpose preempts state substantive law.¹⁸ Even if the district court adopts the federal "non-reserved" rights doctrine, the general applicability of the doctrine is still uncertain. The question remains, however, whether this theory will become a useful mechanism for balancing federal and state interests, or whether the Great Sand Dunes National Park application is a unique case limited to its specific factual circumstances.

Maria E. Hohn

17. *Id.*

18. *Id.*