

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Plaintiff, :

v. : No. 77-510

NEW MEXICO, :

Respondent. :

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Washington, D. C.

Tuesday, April 25, 1978

The above-entitled matter came on for further argument at 10:09 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice
 JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES W. MOORMAN, ESQ., Assistant Attorney General,
 Land and Natural Resources Division, Department of
 Justice, Washington, D. C.; on behalf of the
 Petitioner

RICHARD A. SIMMS, ESQ., Special Assistant Attorney
 General of New Mexico, Santa Fe, New Mexico; on
 behalf of the Respondent

JOHN U. CARLSON, ESQ., P. O. Box 8749, Denver,
 Colorado; on behalf of Lakes Reservoir & Canal Co.,
 et al., as amicus curiae, supporting Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in United States v. New Mexico.

Mr. Carlson.

ORAL ARGUMENT OF JOHN U. CARLSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CARLSON: Mr. Chief Justice, and may it please the Court: My name is John Carlson, Denver, Colorado. I am here on behalf of the Twin Lakes Reservoir & Canal Company, a Colorado mutual ditch company. We are an amicus in this case and the State of New Mexico has graciously allowed us to argue because we represent the classic beneficiary for whom the national forests were created.

We have a large, for Colorado, small for the national forests perhaps, diversion project located on the very headwaters of the national forest rivers in Colorado. It is on the headwaters of the Colorado River, the Roaring Fork to be particular, some 17 miles above Aspin, Colorado, a watering spot some of you may know.

That diversion project intersects and gathers water from scores of small streams. We don't have anything like the Potomac River out there. We have streams, some of them when they are in full state of flood, are much like a suburban lawn sprinkler. We intercept all of these as they go across our canal and deliver the water into a tunnel that carries forest

water from the White River National Forest over into the Arkansas River Valley.

That system was constructed first in 1930, and it continuously has diverted water with the aid and encouragement of the Forest Service until very recent times. We think we are a representative of the class for which the national forests were created, because Congress said when it passed the Organic Act in 1897 that the purpose of the forest was to secure favorable conditions of flows. Now, when they said favorable conditions of flows, they weren't saying flows for flows sake. They said we want to provide water for the people of the districts, we want to cause there to be an availability of water so that the people who are settling in the west can construct a civilization. We have done so. The Forest Service apparently doesn't like it today, but it exists and it is there and we are trying to protect it.

The importance of this case cannot be under-estimated when you recognize that in the State of Colorado, 98 percent of the water that arises in the whole state and flows through the streams of that state arise on the public lands. Of that 98 percent of the water flowing on the public lands and through our streams, 95 percent of it comes from the national forests. So there isn't any water in Colorado except what occurs in the national forests.

That statistic is contained in a congressional

document called "The Study and Development, Management and Use of Water Resources on Public Lands." It was prepared for the Public Land Law Review Commission and is contained in Table 5 of the weekly report.

QUESTION: I suppose that would probably be true of most of the other arid states of the west, to a greater or lesser degree, since the forests themselves occur at the higher levels.

MR. CARLSON: That is absolutely right, Your Honor. New Mexico's particular statistic is 62 percent; Arizona's, Nevada's, Utah's are up in the 90's, as I recall. But that illustrates the importance of the case because we don't have any water in our streams except what originates out of the snow pack that falls in the high mountain country. And when Congress passed this Act back in the 1890's, they weren't dummies. They knew that the west depended on snow packs in the high mountain country. If you retarded the rate of runoff in this high mountain country, you would cause a greater sustained rate of delivery of the water.

Now, they thought that it was important to deliver water to people for economic utilization. There is not one shred of evidence in the statute or in the legislative history or in sixty years of administrative construction that anyone thought that the Organic Act of 1897 created a reserved water right for the purposes now claimed by the United States.

QUESTION: How about any purpose?

MR. CARLSON: You mean what purpose --

QUESTION: You are going to get around, I suppose, to indicating whether there is any reserved right and what you think the scope of it is.

MR. CARLSON: Your Honor, I will answer that question now, if I may. We think that to the extent the forest administrators have a bona fide need for water for something that falls within the two fundamental overwhelming purposes, they can have rights to divert water to those purposes.

QUESTION: Well, what are those?

MR. CARLSON: Well, when they --

QUESTION: And how do you measure them?

MR. CARLSON: You measure them by what the quantification is to obtain the purpose. For example, if they locate a district headquarters and employ 5,000 people in it, they in order to run and administer the forests and they located on forest land, we would concede and grant them a water right to do that. That is their administrative need.

QUESTION: Do you think that -- would you say that the United States would have a right to any minimum in-stream flow in the national forests?

MR. CARLSON: None under the Act of 1897.

QUESTION: Well, a diversion project up above a forest could totally empty the stream insofar as water that was

generated up above the forest without infringing on the United States reserved water right?

MR. CARLSON: That's true, and the reason being that you must identify the purpose for which the forest was created, it was not created for the wildlife maintenance, it was not created for habitat eco system maintenance, it was created to grow trees. Now, in this --

QUESTION: How about fire protection of the trees?

MR. CARLSON: Absolutely. If they can prove that they have a bona fide need for water to protect from fire, they could get a right to divert.

QUESTION: How would they do that, if there were fires?

MR. CARLSON: Beg pardon?

QUESTION: How do you prove that, that there were fires?

MR. CARLSON: Your Honor, I think that if there is a fire, people will take the water and put out the fire and no one in the west has ever objected to that. What they are claiming is the right here now -- and they didn't offer any proof at the trial, this is an afterthought by the United States on appeal -- they are seeking now the right to maintain water in the streams in case there is a fire some day. Well, if there is a fire, they will tell everyone we need water to put it out. But you know, the amazing thing is, I don't know

of a national forest fire in the country that has ever been fought with diversions out of the babbling brooks in the high mountain country. Up where our project is, for example, there aren't even trees to speak of. We are above 10,000 feet in altitude. But we would allow them an opportunity if --

QUESTION: A minute ago you said you would grant, and now you would allow the federal government to use its water -- I think that is very generous of you.

MR. CARLSON: Well, I think --

QUESTION: Or am I wrong?

MR. CARLSON: I think you are wrong, Your Honor.

The United States has the power to obtain water for any purpose it needs. The question is what did Congress intend it to obtain in 1897.

QUESTION: Mr. Carlson, in answer to my Brother White a few moments ago, you said you would restrict the doctrine of reserved rights for national forests to the two fundamental statutory purposes, and what are they? I didn't get that.

MR. CARLSON: They are to grow trees, to furnish a continuous supply of timber; second, to secure favorable conditions of flows, because when they created the forests they had in mind using that watershed to maximize delivery of water to the private appropriators of the west, and the congressional history states that time and time again.

They said, you know, if we cut off the trees in the high

mountain country, then the snows will melt sooner, they will come in a flood, the spring runoff will come in a flood.

QUESTION: So there are really no reserved rights for the benefit of the United States as proprietors, so to speak?

MR. CARLSON: No, that goes too far. There are administrative needs. If they could prove that erosion could be reduced by diversions of water, could be reduced by --

QUESTION: Well, that goes to growing trees, to preserve the vigor of the forests, right?

MR. CARLSON: Yes, although the United States --

QUESTION: You don't really know of any diversions in the history, that they ever diverted water out of streams to water trees in the forests, do you?

MR. CARLSON: Yes, I do, Your Honor.

QUESTION: When do they do that?

MR. CARLSON: They have tree seedling farms throughout the national forests --

QUESTION: Yes?

MR. CARLSON: -- and no one in Colorado has contested any of the diversions that they make for those purposes. They plant these little seedlings --

QUESTION: But the forests themselves rely on the -- the planted trees rely on the moisture that falls on them.

MR. CARLSON: Absolutely. And the most remarkable

thing about --

QUESTION: So what you are really saying is that there isn't really any water right out of a stream in a practical sense for the forests.

MR. CARLSON: Absolutely. They are de minimis.

QUESTION: Well, that is not true of --

MR. CARLSON: But in the west we don't have in this high mountain forest, we don't have a big free attophyte population. What we have is Ponderosa pines, and those trees, I think even the Forest Service would acknowledge, obtain a very significant portion of their moisture from the air.

QUESTION: With respect to free attophytes within a national forest, would you concede the government a reserved right to the necessary underground flow for the maintenance of the free attophytes?

MR. CARLSON: If that attained the end of furnishing a continuous supply of timber, yes. But I do not think that they can prove that, and I would hasten to point out in this case they offered no proof. They had the burden of going forward, they had the opportunity to come forward and state what their case was, and they never even thought they had a minimum stream flow right at that trial. The only time they raised it was on appeal when they asked this Court to receive evidence and consider this matter on the basis of their arguments. They had an opportunity to prove this. We are talking

about the fact that they never offered this as a trier of fact.

QUESTION: What about this water to put out camp fires?

MR. CARLSON: Your Honor --

QUESTION: If you dry up a stream running through a forest, there isn't any water around --

QUESTION: Well, who is camping there, is it the Forest Service --

QUESTION: No, no, this is the public. But the reason they want to have camp fires put out is to protect the forest.

MR. CARLSON: And the reason they want to put out the camp fire is because they have allowed the public to come on for recreational purposes, and if they need a water right for that recreational use, they ought to --

QUESTION: I didn't say that. I didn't say they wanted the water right to let them drink it or for recreational use, I just thought for defensive use. They want water to put out camp fires. There has to be some water in the stream.

MR. CARLSON: Your Honor, if there is a water requirement to put out a fire, they will take it, it is a de minimis use which everyone recognizes.

QUESTION: Well, they won't take it if it isn't in the stream.

MR. CARLSON: Your Honor, our streams in the west dry up by nature. In Colorado, for example, on the Roaring Fork System that we took, Roaring Fork was dry last summer for three months. Nature dries them up.

There is an incredible variation stream by stream. What we are talking about there, too, what you are suggesting, is a right to divert water. They want a maintenance, and what you are saying is maintain the flow of the stream so we can divert some water. If they have a priority for that purpose, let them divert it.

QUESTION: Well, you are suggesting that you can dry up the water running through the White River National Forest. As far as a reserved right is concerned, it would not be violated if you diverted all of the water out of the streams running through the White River National Forest.

MR. CARLSON: I am asserting that, and I submit to you that it is very much what Congress had in mind, and when Congress wanted to stop a stream from being dried up, it knew how to do it. It passed wild and scenic legislation, it has passed legislation to maintain stream flows, there is a whole congressional pattern of action that maintains streams in their natural state. The most classic example I put to you is the National Parks itself, where they talked about maintaining this esthetic sensibility.

What the Court I think must consider is that the

forests were created for purposes of economic utilization.

QUESTION: Mr. Carlson, I am really puzzled by your argument. Perhaps it just reveals my lack of understanding of water law, but I thought you conceded that there was some kind of reserved right in the United States for the two basic purposes, one to maintain some kind of flow of the water, and yet you also seem to say that notwithstanding that reserved right, the state could authorize appropriation of 100 percent of the water upstream of the forest. Are you saying that?

MR. CARLSON: No, I don't think so. I am saying that whatever right the United States has by virtue of its reserved right, and that right must be quantified, then they can cause there to be remaining in the stream that quantity of water so they can take it and use it. And if that is an in-flow right for some purpose which they have not yet proved, that quantity will remain in the stream.

QUESTION: But is it only a quantity to be measured by what they want to divert from the stream, or do they have any right at all to have water continue to flow through the forest?

MR. CARLSON: Just in the abstract under the -- until the passage of the Multiple-Use Act of 1960, we contend they had no right for the purposes of wildlife maintenance or simply esthetics.

QUESTION: But for the basic purposes of maintaining

water flow, one of your two basic purposes it seems to me assumed the need for continuous flow of water down the river. I just don't quite follow --

MR. CARLSON: Your Honor, I don't think either of our two basic purposes assumed the need for water in the river beyond the purpose of sustaining forest tree growth.

QUESTION: Forget the trees, the other purpose.

MR. CARLSON: Okay. Securing favorable conditions of flow --

QUESTION: How could favorable condition of flow be no flow at all?

MR. CARLSON: Because the flow is for the use of the people of the district. There are in Colorado some 4,000 headgates located on the national forests. It is a function of an effort in dessert climate that you take the water out of the stream and consume it. The fact that it happens on the national forests as opposed to one mile down from the national forest shouldn't make no difference. Our rivers typically dry up.

QUESTION: Well, what right does the federal government get out of this purpose to preserve favorable conditions of flow?

MR. CARLSON: It wasn't designed to create a right in the federal government, it was a grant to the people of the west. And the perfect confirmation of that, Your Honor, is the

statute, the part of the Organic Act in which it says all waters, not some waters, not 10 percent of the waters, not 90 percent of the waters, it says all waters arising on the national forests may be appropriated for domestic milling, mining, and irrigation use.

Now, I guess where I am from when they say all, they mean all. And here what the United States says is --

QUESTION: Where I come from, if they say they want to reserve something, they mean they want to reserve something, too.

MR. CARLSON: That's right.

QUESTION: I don't understand.

MR. CARLSON: Your Honor, nowhere in the Act do they say they wanted to reserve anything. What you have is an expressed grant in the --

QUESTION: As I understand the doctrine, it was an implied doctrine.

MR. CARLSON: That's right.

QUESTION: You didn't have to expressly reserve.

MR. CARLSON: That's right, but here in the fourth act you have an expressed grant, all waters arising on the national forests may be appropriated, whether under a national system or a state system. We have never had a national system. So you have an express grant. Later you have the theory of the implied reservation, and what the United States is asking

you to do is to stand the Act on its head and say that all means some or none.

Now, let me address a point that I think really needs fundamental attention.

QUESTION: What if the United States said, well, we have granted all our water, we will open all these waters for appropriation, and now we are going to appropriate some of it?

MR. CARLSON: Fine, let them.

QUESTION: Suppose they did, they created some national forests?

MR. CARLSON: That was not an act of appropriation.

QUESTION: I know that is what you say, but the Court has interpreted it in effect as an appropriation.

MR. CARLSON: No, Your Honors, this Court has not interpreted the creation of the national forests as an act of appropriation.

QUESTION: What do they say? It is a reservation of a water right.

MR. CARLSON: You have never addressed the question of how the forests and for what purposes they were created. In Arizona v. California, the Special Master said --

QUESTION: So you concede that there was a reservation for something?

MR. CARLSON: Sure.

QUESTION: Well, how do you describe it? Is it a

reservation of a right when they created -- what happened when they created the forests?

MR. CARLSON: When they created the forests, they said we are creating the forests for these two purposes and if there are water needs peculiar to the United States inherent in those needs, then we can have the water.

QUESTION: So what do you call it, an appropriation, a reservation or what?

MR. CARLSON: The United States calls it --

QUESTION: What do you call it? What do you call it?

MR. CARLSON: I call it a reservation and this Court has called it a reservation, not on --

QUESTION: And so it is a water right.

MR. CARLSON: Yes, it is a water right.

QUESTION: That is not inconsistent with the notion that the waters in the national forests are open to appropriation.

MR. CARLSON: It certainly is if they are --

QUESTION: Why is it, this is the United States sharing in the water that is available?

MR. CARLSON: Well, let them come in and share at the date that they conceived the notion for these new water systems.

QUESTION: Let's just talk about that date for a minute.

MR. CARLSON: Yes.

QUESTION: You said at the time the forest was created there was a water right of some kind.

MR. CARLSON: It is small.

QUESTION: As small as it is, it is not inconsistent, I suggest to you, with the notion of a grant of these waters for appropriation purposes.

MR. CARLSON: I agree, but what is --

QUESTION: Do you agree with that?

MR. CARLSON: I do agree.

QUESTION: So the only argument here is the scope of it?

MR. CARLSON: Yes.

QUESTION: That is a big issue, I grant you, but let's don't say that it is inconsistent --

MR. CARLSON: But you don't understand what I am saying about the inconsistency and I think I have made myself unclear on that point. What I have said and what we say and what New Mexico said was that Congress had the power to take all of the water it wanted as of that date that was unappropriated. It did not consult. So the question that we are facing here is exactly what we faced in Cappaert, what quantity of water did Congress intend to keep to itself in 1897.

QUESTION: Really what you are arguing is that it

was an appropriated right that was reserved and not a riparian type of right.

MR. CARLSON: Well, I don't think it is a riparian doctrine. It is a strange and wonderful meld of many kinds of theories. The Court consistently calls it a reserved right. We prefer to think of it in appropriation terms because that is the only system we have out there. There are unique functions of appropriation. I suppose the United States says it is immune from requirements and that sort of thing, so they don't like the lingo, but conceptually the notion is that in 1897 they were saving something for themselves, and we are trying to identify what it is that they saved.

MR. CHIEF JUSTICE BURGER: Mr. Carlson, your time is expired.

MR. CARLSON: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Moorman.

ORAL ARGUMENT OF JAMES W. MOORMAN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. MOORMAN: Mr. Chief Justice, and may it please the Court:

Mr. Carlson started his argument by stating that the national forests supply 95 percent of the water in his state, which I believe is true. But I want to point out to you that the Forest Service intends to use only one-half of one percent of that water for consumptive use, and I invite your attention

to the appendix to our reply brief, where there is a letter from Mr. McGuire, so virtually all of that water will be available and is available for the economic uses of the west.

QUESTION: Mr. Moorman, I suppose you will agree that there is not enough water to go around and that it may well be that your water claims, if they are sustained, will mean that there is less water available for water rights that have already been appropriated or that have been appropriated?

MR. MOORMAN: Yes.

QUESTION: Otherwise we wouldn't have the amicus briefs from this gentleman's clients or from others here that -- they think their appropriated rights are going to be cut into.

MR. MOORMAN: There are two problems, Your Honor. First of all, I think there is an inordinate fear --

QUESTION: First, isn't that a fact?

MR. MOORMAN: Yes, Your Honor, but there is an inordinate fear of the size of the future needs of the national forests which I think are laid to rest by the letter from the Chief of the Forest Service which is attached to our brief.

The second thing is sort of an allocation thing. Mr. Carlson's client, a trans-basin diverter, he wants to take the water very high on the stream out of the river basin itself into another basin, so it is sort of an allocation question with regard to him. The water if it stays in the

forest will be available for economic use. It may not simply be available to his client.

QUESTION: Your consumptive use point though, it doesn't really answer the in-stream flow matter because if you are entitled to maintain a minimum stream flow, that is a whole lot different matter than consumptive use.

MR. MOORMAN: Yes, but if we maintain --

QUESTION: And it certainly would prevent people from taking out too much water above the forest.

MR. MOORMAN: Above the forest, that's correct, but the water will be eventually available as it leaves the forest for economic use and development and therefore from the standpoint of the total amount of water available for the development of the west, the effect will be de minimis. It will have an effect on where certain points of diversion can be and where it can be used, but that it seems to me is not as significant a fact as the fact that the actual amount available will be virtually all of the water from the national forests, all but half of one percent.

QUESTION: I take it there wouldn't be any problem here if there was enough unappropriated water to satisfy your needs and satisfy other appropriated rights, too?

MR. MOORMAN: I think that is correct, but I do think that the effect of the Forest Service right on most appropriated uses in the west is not -- is de minimis, it is.

When you find unusual situations like the Twin Lakes people who want to take water across the divide, you have a serious effect.

QUESTION: I take it that reasonable men and men of good-will could differ with you and they must be differing with you and have a different view if they are going to take the rather strong and earnest positions that they take in this case.

MR. MOORMAN: That's quite possible that they do disagree with me, and I don't disagree with that, Your Honor. I would like to make another point, if I may, in my brief time, which is that New Mexico and the amicus have suggested that the sole reason that the state court denied rights to in-stream flows was because we failed to prove any need for those rights, and we believe this misreads the state rulings.

The state courts did not deny the U.S. minimum in-stream flows because of any failure of proof. Quite to the contrary, they stated as flatly and as unequivocally as could be done that we were not entitled to any minimum in-stream flow as a matter of law. The state district court wrote that the United States does not have reserved rights to minimum in-stream flows based upon the purpose for which the Gila Forest lands were or could have been withdrawn from the public domain, and the Supreme Court affirmed, stating that in-stream flows were not contemplated by the Organic Act, and I refer the Court

to appendix 231 and page 241. And as a last word I will simply say that we requested permission to present additional evidence after the state objected to the in-stream flow after the evidence closed and we were denied that right.

QUESTION: Mr. Moorman, don't you think all of the objection to your position is kind of a springing use character of the claim that the government makes that it is .5 percent now but under your theory it could be 20 percent by 1990?

MR. MOORMAN: I think that is the origin of the fear, Your Honor, that we have a right to future needs. But what is happening I think will lay that to rest, because the Chief's letter which we attach encompasses the total present and foreseeable national forest water needs, so the .5 percent includes all present and future needs, and in water adjudications we are quantifying not only our present but our future needs in cases like this, so the fact of the matter is that .5 percent is the future needs of the forests as can be --

QUESTION: Can this Chief bind a future Chief?

MR. MOORMAN: No, but the courts that adjudicate these rights --

QUESTION: The adjudication can, you take it?

MR. MOORMAN: The adjudication will, and we are going to present these rights for our future needs and in my opinion in a decade the adjudications will be over virtually

in the west, in a decade and a half.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:36 o'clock a.m., the case in the
above-entitled matter was submitted.]

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