

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

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**Organic Act Claims
Consolidated Subcase 63-25243**

**MEMORANDUM DECISION
DENYING THE STATE OF IDAHO'S
MOTION FOR SUMMARY
JUDGMENT**

Cross Motions for Summary Judgment. State of Idaho's *Motion For Summary Judgment* is DENIED. The United States' *Motion for Summary Judgment* is GRANTED to the extent that the United States must proceed to trial to prove the factual necessity of a federal reserved water right for channel maintenance under the Organic Act.

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I. PROCEDURAL HISTORY

Both the State of Idaho and the United States filed motions for summary judgment in the above subcases. (*State's Motion, United States' Motion.*) A&B Irrigation District et al., Amalgamated Sugar Company et al., Hecla Mining Company and Boise Cascade Corporation have joined the State's motion. The State of Idaho and the United States responded in opposition to each others' motions (*State's Response, United States' Response.*)

Later, the State of Idaho filed an *Objection to Evidence and Motion to Strike*. The State of Idaho amended its *Objection to evidence and Motion to Strike* requesting, in the alternative, an extension of time. (*Amended Objection*). The United States timely opposed this last State request.

Oral argument on the *Amended Objection* and the cross motions for summary judgment was held. The issue to be decided on the cross motions for summary judgment is:

Whether the United States is entitled to prove the factual necessity of an instream federal reserve water right for channel maintenance under the Organic Act.

II. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well established:

In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. Summary Judgment must be granted if the court determines that the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Strongman v. Idaho Potato Comm'n, 129 Idaho 766, 771, 932 P.2d 889, 894 (1997) (quoting I.R.C.P. 56(c)). Where the record supports conflicting inferences, or reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* at 771. Additionally, the record on summary judgment must consist of affidavits which "set forth facts as would be admissible in

evidence” I.R.C.P. 56(e). Therefore, it is necessary to address the State of Idaho’s *Amended Objection* prior to evaluating the merits of the cross motions for summary judgment.

III.

THE STATE OF IDAHO’S AMENDED OBJECTION

The United States submitted numerous exhibits in support of its motion for summary judgment. The State of Idaho objected to the admission of Exhibit 1 (Affidavit of Robert C. Joslin), Exhibit 2 (Affidavit of M. Gordon Wolman), Exhibit 3 (Expert Report of George Leonard), Exhibits 6-15, and documents submitted as exhibits as part of the *United States’ Opposition* including a Second Wolman Affidavit, Affidavit of John King, and an excerpt of the Expert Report of Charles Wilkinson.

At oral argument the parties stipulated to the exclusion of the expert report of Charles Wilkinson. The Expert Report of Charles Wilkinson is STRICKEN from the record and will not be considered.

The State of Idaho alleges that the Affidavit of John King “[concerns] the duration of the United States’ channel maintenance claims.” *Memorandum in Support of Objection to Evidence and Motion to Strike* at 12. The State is correct. The testimony proffered in the King Affidavit pertaining to the number of days that this claim would effectively constrain the system is irrelevant to the issue on summary judgment and, therefore, is STRICKEN from the record and will not be considered. Equally true, however, is that any language concerning the duration of the United States’ claims contained in any of the State of Idaho’s briefs or exhibits is also irrelevant and is STRICKEN.

The remaining materials to which the state objects are all found to be relevant and admissible under the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence and are ADMITTED.

IV.

COLLATERAL ESTOPPEL IS INAPPLICABLE TO THESE CLAIMS

The State of Idaho asserts that “[t]he doctrine of collateral estoppel precludes the United States from re-litigating whether channel maintenance is a primary purpose of the Organic Act of 1987, 16 U.S.C. § 475 *et seq.* (Organic Act), claiming the issue has already been decided against the

United States in *In re Amended Application of United States for Reserved Water Rights in the Platte River*, No. W-8439-76 (Dist. Ct. Colo., Water Div. No. 1, Feb. 12, 1993) (*Water Division I*).”

A. THE UNITED STATES SUPREME COURT PROHIBITS THE INVOCATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL AS CLAIMED BY THE STATE OF IDAHO.

Collateral estoppel or “issue preclusion” applies where a court has decided an issue of “fact or law necessary to its judgment,” rendering that decision “conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” *United States v. Mendoza*, 464 U.S. 154, 158 (1984), citing *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine is utilized to prevent the “cost and vexation of multiple lawsuits,” to “conserve judicial resources,” and to maintain the integrity of the judiciary by preventing inconsistent decisions. *Id.*

However, the United States Supreme Court found that the doctrine of collateral estoppel is generally inapplicable against the federal government because of its unique interests which differ from those of private litigants. “Government litigation often involves legal questions of substantial public importance” and breadth. *Id.* at 160. The United States is much more likely to litigate identical or similar legal issues against different parties. *Id.* Indeed, the evolution of federal law is dependent upon multiple forums reviewing a single legal issue. *Id.* at 163. Therefore, “nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude re-litigation [of the issues in *Mendoza*].” *Id.* at 162.

The policy concerns expressed by the United States Supreme Court in denying the application of collateral estoppel in *Mendoza* apply equally to the United States’ Organic Act claims. At issue in *Mendoza* was the application of an immigration and naturalization act which had been previously decided against the government and was not appealed. In a later action on the same act, a third party attempted to invoke collateral estoppel against the government. The United States’ Organic Act claims and the State of Idaho’s assertion of collateral estoppel are identically postured. The substantial national significance of the issues presented in both *Mendoza* and federal reserve water claims under the Organic Act are similar. The breadth of the issues in the United States’ Organic Act claims in the west is equal to or exceeds those in *Mendoza* where decisions on Organic Act claims have precedential effect on thousands of federal claims to water. *Id.* at 157. Finally, the United

States' Organic Act claims concern federal reserved water rights, an area of the law which, from this court's perspective, greatly requires further evolution and analysis. Therefore, the United States cannot be denied the opportunity to assert Organic Act claims under the doctrine of collateral estoppel.

B. THE HOLDING IN *WATER DIVISION I* FOLLOWED A TRIAL ON THE MERITS

The doctrine of collateral estoppel requires that the issue on which it is invoked be identical to a necessary issue decided in the prior judgment. *Anderson v. City of Pocatello*, 112 Idaho 176, 183-84, 731 P.2d 171, 178-79 (1986). The issues presented in *Water Division I* and those presented here cannot be identical because the decision in *Water Division I* was factually based following a trial on the merits. A trial, by definition, concerns genuine issues of material fact unique to the specific claims at issue.¹ The Colorado Supreme Court mandated a trial holding that evaluation of United States' Organic Act claims requires application of specific facts to law:

The application of the reserved water rights doctrine requires a careful examination of both the asserted water right and the specific purpose for which the land was reserved and must rest upon a conclusion that without water the purposes of the reservation would be entirely defeated. If, after a full consideration of the legislative history and **factual circumstances**, the water court determines that the purpose of the Organic Act will be entirely defeated unless the United States is allowed to maintain minimum instream flows over the forest lands, the United States should be granted such reserved water rights under the Organic Act.

United States v. Jesse, 744 P.2d. 491, 503 (Colo. 1987) (citations omitted).

¹ For example, section 6 of the decision in *Water Division I* is entitled "Nature of Streams in the National Forests" and states:

The court concludes from the evidence and from the field trips which were a feature of this case that a great diversity of stream types exist in the national forests. Quantification points are placed in locations manifesting varying stream characteristics. It is fair to say, however, that a very high percentage of quantification points lie on streams located in areas which would be highly resistant to changes based on alterations of stream flows in the range applicant seeks in these cases.

Water Division 1 at 18.

Contrary to the State of Idaho's claim that *Water Division 1* conflicts with the United States' position in this summary judgment motion, *United States v. Jesse* and *Water Division 1* hold that the United States is entitled to prove that channel maintenance is required to fulfill the purposes of the Organic Act.

Because the *Water Division 1* decision was based upon unique facts presented at trial of Organic Act claims filed in Colorado, it can not support a claim of collateral estoppel as to Organic claims filed in Idaho.

V.

FEDERAL RESERVED WATER RIGHTS UNDER THE ORGANIC ACT

The United States seeks recognition that the Organic Act of 1897, 16 U.S.C. §§ 475 *et seq.* (1994), authorizing establishment of the national forests, implicitly reserved water to accomplish the purpose of "securing favorable conditions of water flows." The United States further maintains that "securing favorable conditions of water flows" gives rise to an implied reservation of water for the improvement and protection of watersheds, including the stream channels that lie within them. *United States' Motion* at 2. The State of Idaho asserts that the United States' claim is contingent on whether "Congress intended to preserve stream channels in their historic condition as a primary purpose of the Organic Act" and that the United States Supreme Court has essentially precluded instream federal reserve water rights under the Organic Act. *United States v. New Mexico*, 438 U.S. 696 (1978).²

This court's previous analysis of federal reserve water rights employed a three-part test from *New Mexico* to analyze whether the purposes of a federal statute implicitly reserved water.³ The *New Mexico* test applies where an act or executive order has not been defined by a controlling court. The

² At oral argument the State only conceded that the United States might be entitled to a federal reserved water right "in a few instances . . . particularly fire protection and for administrative purposes." Tr., p. 18.

³ See Wilderness Act Claims, Consolidated Subcase 75-13605, *Order of December 18, 1997*; and see Sawtooth National Recreation Area Claims, Consolidated Subcase 65-20766, *Order of September 15, 1998*.

United States Supreme Court has set forth the purposes of the Organic Act. Additional interpretation based on legislative history is, therefore, not required.

A. UNITED STATES V. NEW MEXICO DOES NOT PRECLUDE AN INSTREAM FEDERAL RESERVE WATER RIGHT UNDER THE ORGANIC ACT FOR THE PURPOSE OF SECURING FAVORABLE WATER FLOWS.

The State of Idaho correctly asserts that there is no need to “speculate about the primary purpose of the Organic Act because the United States Supreme Court has already made this precise determination.” *Idaho’s Motion* at 6. The United States Supreme Court has found that Congress’s intent in passing the Organic Act was “to conserve the water flows, and to furnish a continuous supply of timber for the people.” *United States v. New Mexico*, 438 U.S. at 707. The State of Idaho argues that the United States’ claims for channel maintenance are not within the limited purposes declared by the Supreme Court in *New Mexico* maintaining that “[t]hrough protection of the forest canopy, Congress intended to ensure steady water flows for irrigation and flood control” and that the United States Organic Act claims in the SRBA are meant to “preserve stream channels in an unimpaired, historic condition” *Idaho’s Motion* at 9. However, the State of Idaho reads the *New Mexico* holding too restrictively and misconstrues the United States’ Organic Act claims in the SRBA.

In *New Mexico*, the United States claimed minimum instream flows for “aesthetic, recreational, and fish preservation purposes” within the national forests at issue. *Id.* at 705. Furthermore, the United States argued that the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 *et seq.* (MUSY), confirmed that “Congress always foresaw broad purposes for the national forests” *Id.* at 713. The holding in *New Mexico* rejected the United States’ broad minimum instream flow claims for aesthetic, recreational, and fish preservation purposes, but did not preclude all reserved instream flow claims arising under the Organic Act. The United States Supreme Court held that the primary purposes of the Organic Act were “to conserve the water flows, and to furnish a continuous supply of timber for the people.” *Id.* at 707. Implicit in the *New Mexico* holding is that an instream federal reserve claim could be made to effectuate those two narrow primary purposes of the Organic Act. The *New Mexico* majority acknowledged that the Organic Act’s

primary purposes might require an instream reservation of **some water** when it rejected a “reservation of **additional** water [under the broader purposes “confirmed” by MUSY which would] mean a substantial loss in the amount of water available for irrigation and domestic use, . . .” and would be contrary to the primary purpose of securing favorable conditions of water flow. *Id.* at 715 (emphasis added). The dissenting opinion in *New Mexico* expressly states that the majority holding merely foreclosed an instream reservation for the broad purposes “confirmed” by MUSY and that the United States could claim instream flow rights necessary for “erosion control or fire protection on the basis of the recognized purposes of watershed management and the maintenance of timber.” *Id.* at 724-25.⁴

The United States’ claims in the SRBA are not to preserve the National Forests in their “pristine” or “historic” conditions as asserted by the State of Idaho. *See State’s Motion* at 3. The United States claims are limited to ensure the “ability of the stream channels within the National Forests to convey water favorably to meet downstream and in-forest uses including irrigation, navigation, municipal, domestic and industrial uses, while avoiding or minimizing unfavorable conditions such as undue flooding.” *United States’ Response* at 9. If the United States fails to prove that its claim is necessary for the favorable conveyance of water, as contemplated by *United States v. New Mexico*, it will be denied.⁵

Finally, the State of Idaho asserts that Congress intended to ensure steady water flows for irrigation and flood control exclusively “[t]hrough protection of the forest canopy,” despite stating that Congress’s “very purpose” was to “[enhance] the quantity of water that would be available to

⁴ In fact, the State of Idaho, in its amicus brief filed in *New Mexico*, conceded that the United States would be entitled to an instream federal reserve water right for erosion control, directly contradicting its position in this summary judgment motion.

⁵ It is imperative to focus on the precise issue in these cross motions for summary judgment. In denying the State of Idaho’s *Motion for Summary Judgment*, the court is granting the United States nothing more than the opportunity to prove, as a factual matter, both that “securing favorable water flows” requires a reserved water right for channel maintenance and the minimum quantity to which it is entitled under that right. If the United States fails to prove that a reserved water right for channel maintenance is required to “secure favorable conditions of water flow,” the United States claims will be denied. *See for example, United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), *discussed supra*.

the settlers of the arid West.” *State’s Motion* at 8-9. The State of Idaho has submitted several exhibits which indicate that Congress did intend to ensure steady water flows through protection of the forest canopy, however, Congress did not exclude other means of effectuating the purposes of the Organic Act. Congress stated: “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” 30 Stat. 35, 16 U.S.C. § 475 (1996). The term “favorable conditions” in this context is most logically defined as “enhancing the quantity of water that would be available to the settlers of the arid West.” *United States v. New Mexico*, 438 U.S. at 713. It follows that if a reserved water right for channel maintenance is proven to be required to “enhance the quantity of water that would be available” for use, the reserved water right should be granted to ensure “favorable conditions of water flows.” Therefore, the United States is entitled to the opportunity to prove, as a factual matter, that an instream flow claim for channel maintenance in the National Forests is necessary to assure favorable conditions of water flows, thereby enhancing the quantity of water available for water users, and then to prove the minimum quantity of water which must be reserved for its fulfillment.

B. IDAHO SUPREME COURT AND NINTH CIRCUIT CASE LAW HOLDS THAT THE UNITED STATES IS ENTITLED TO PROVE THE NECESSITY OF A FEDERAL RESERVE WATER RIGHT TO FULFILL THE PURPOSE OF SECURING FAVORABLE WATER FLOWS

The Idaho Supreme Court has ruled that the United States should be afforded the opportunity to prove that an instream reserved right is necessary to accomplish the purpose of watershed protection thus securing favorable conditions of water flows. *Avondale Irr. Dist. v. North Idaho Properties, Inc.*, 99 Idaho 30, 41, 577 P.2d 9, 20 (1978) (*Avondale II*). The *Avondale II* court also noted that “erosion control is an integral part of watershed protection.” *Id.* at 39. This court finds no distinction between stream channel maintenance and erosion control on the issue presented. Even if a difference is assumed, as with “erosion control,” stream channel maintenance may be proven to be an integral part of protecting watersheds and may, thus, be required to ensure favorable stream flows. As did the United States Supreme Court in *New Mexico*, the Idaho Supreme Court in *Avondale II* granted the United States the opportunity to prove that a federal reserve right for stream channel maintenance is required to secure favorable conditions of water flow in the National Forests. The State of Idaho’s arguments to the contrary are without merit.

The State of Idaho did not expressly address the importance of *Avondale II* in its briefing; however, in response to questions posed during oral argument concerning its controlling effect , the State of Idaho asserted:

Avondale II announced the purposes of the national forests under the Organic Act as watershed protection and furnishing a continuous supply of timber.

United States v. New Mexico was a subsequent decision which clarified those purposes slightly differently [sic] than the Idaho Supreme Court, and announced that the purpose, rather than watershed protection, was conserving water flows. However, even under the analysis under *Avondale II*, Congress still looked to forest cover as the means by which to secure favorable conditions of water flows, or watershed protection as found by *Avondale II*.

I would suggest to the court that the difference between *Avondale II* and *U.S. v. New Mexico* is one of analysis. In *Avondale II* the Idaho Supreme Court found as a secondary matter that because erosion control was integral to the securing favorable conditions of water flows that it could be a basis for a reserved water right.

Tr., pp. 20-21. Apparently, it is the position of the State of Idaho that the holding in *Avondale II* has been abrogated by the holding in *United States v. New Mexico*; and if it was not, *Avondale II* still somehow supports the State's position.

First, the State of Idaho's distinction between watershed protection and conserving water flows does not lead to the conclusion that *New Mexico* is inconsistent with *Avondale II*. "Watershed protection" and "conservation of flows" both assure "[enhancement of] the quantity of water that would be available to the settlers of the arid West"⁶ which the *New Mexico* court found to be a principal reason for the establishment of national forests and, therefore, equivalent to "securing favorable conditions of water flow." *United States v. New Mexico*, 438 U.S. at 713. The United States Supreme Court also cited with approval materials which characterized the purpose of the Organic Act as "protection of water resources" *Id.* at 708, "the utilitarian use of land, of water . . ." *Id.* at 709, "[ensuring] favorable water supply" *Id.* at 708, and "preservation of forest conditions upon which water conditions and flows are dependent" *Id.* All variations of the Organic Act's purposes cited by the *New Mexico* court are meant to reject the broad United States' claims in that case. Watershed protection, similar to the above characterizations, reflects the "relatively narrow" purpose of the Organic Act in contrast to the United States' claims in *New Mexico* and *Avondale II*. In rejecting the broad United States' claims in both cases, the holdings in *Avondale II* and *New Mexico* are consistent.

Similarly, the holding in *New Mexico* did not render erosion control or stream channel maintenance to be a "secondary matter" (purpose) which cannot form the basis of a federal reserve water right. The State of Idaho attempts to invoke the language of *New Mexico* which describes the purposes of MUSY as "secondary" to those of the Organic Act. The purposes of MUSY were "secondary" to the Organic Act **solely** because the United States claimed that MUSY **retroactively** broadened the purposes of the Organic Act. *United States v. New Mexico*, 438 U.S. at 713 (emphasis added). Likewise, in discussing the implications of MUSY on Organic Act claims, the *Avondale II* court found that "the purposes for which the forests were created are **determined by the law in**

⁶ Again, the United States must still prove that a federal reserve water right for channel maintenance enhances the quantity of water available for Idaho water users.

existence at the time of their creation, and that the additional ‘supplemental’ purposes described were not among those for which national forests were created pursuant to the Creative and Organic Acts.” *Avondale II*, 99 Idaho at 38 (emphasis added). Both courts adopted the reasoning of the New Mexico Supreme Court in *Mimbres Valley Irr. Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (N.M. 1977). Thus, the finding in *Avondale II* that “erosion control is an integral part of watershed protection” and was “a purpose clearly contemplated by Congress” cannot be equated with the secondary MUSY purposes rejected for identical reasons by *Avondale II* and *New Mexico*. *Avondale II*, 99 Idaho at 39.

The Ninth Circuit Court of Appeals agrees that the holding in *Avondale II* was not abrogated by *New Mexico*. In *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 859 (9th Cir. 1983) the court of appeals addressed a finding by the trial court that the United States had failed to prove the necessity of an instream reserved water right under the Organic Act in Nevada. Justice Kennedy, then a circuit judge of the 9th Circuit Court of Appeals, wrote:

We first find it necessary to discuss the nature of a reserved instream flow right. It appeared from the evidence presented below that since the sought- after right is one of instream flow only and not of diversion, awarding it would not harm downstream interests. The only result of recognizing a reserved right of instream flow will be to restrict upstream diversion by appropriators with a later priority date than the date of dedication of the national forest. It is possible that such upstream diversion might one day threaten, but the United States did not demonstrate that the water rights of existing downstream interests in the Carson’s water would not suffice to protect the **banks of the Carson’s tributaries within the national forest from erosion**. In fact, in a colloquy with Judge Thompson below, counsel for the United States agreed that “the possibility that someone else will come in and take water for the detriment of those existing [instream] flows” was avoided by “making a finding that all waters of the Carson River and its tributaries have been fully appropriated.” Moreover, the United States’ evidence of what average instream flows were fell short of a demonstration that the instream flow was necessary to fulfillment [sic] of the purposes of the forest.

Id. Kennedy then cited *Avondale II* and a law review article on *United States v. New Mexico* to support the finding that the trial court was correct in granting the United States the opportunity to prove the necessity of an instream reserved right under the Organic Act to protect the “banks of the Carson’s tributaries within the forest from erosion.” *Id.* The United States was unsuccessful in

proving the necessity of a reserved right in the Carson River adjudication; however, the Ninth Circuit's holding in *Alpine Land & Reservoir Co.* holds that the United States be afforded the opportunity to prove the necessity of instream reserved rights for channel maintenance in the SRBA Organic Act claims.

VI. CONCLUSION

The State of Idaho's *Summary Judgment Motion* is DENIED. The United States' *Summary Judgment Motion* is GRANTED to the extent that the United States is afforded the opportunity to prove the factual necessity of a federal reserved water right for channel maintenance under the Organic Act. The holdings in *New Mexico*, *Avondale II*, and *Alpine Land & Reservoir Co.* require this result.

IT IS SO ORDERED

DATED December ____, 1998.

DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that true and correct copies of the **MEMORANDUM DECISION DENYING THE STATE OF IDAHO'S MOTION FOR SUMMARY JUDGMENT** were mailed on December ____, 1998, by first-class mail to the following:

Court Certificate of Mailing for Organic Act Claims, September 30, 1998

Deputy Clerk