

1-23-2018

United States v. N. Colo. Water Conservancy Dist., 2017 U.S. Dist. LEXIS 42298 (D. Colo. 2017)

Joseph Chase

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



Part of the [Law Commons](#)

Custom Citation

Joseph Chase, Case Note, United States v. N. Colo. Water Conservancy Dist., 2017 U.S. Dist. LEXIS 42298 (D. Colo. 2017), 21 U. Denv. Water L. Rev. 313 (2018).

This Court Report 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.

United States v. N. Colo. Water Conservancy Dist., 2017 U.S. Dist. LEXIS 42298
(D. Colo. 2017)

However, because the duration of FARs is so short relative to the timeline of litigation, the Court entertained that these claims might still be valid as capable of repetition yet evading review. However, the Court found that the claims did not meet this exception to mootness because there was no evidence that this same controversy would be likely to occur again. In making its determination, the Court relied on the Bureau's recently issued Long-Term Plan to Protect Adult Salmon in the Lower Klamath River EIS, which identifies FARs as a proposed action and makes it unlikely that the Bureau would follow the same procedures for FARs as it did in 2014 and 2015. The Court also pointed out that even though the Long-Term Plan EIS only runs through 2030, that lack of clarity did not give rise to a demonstrated probability that the controversy would occur again. The Court dismissed the fourth and fifth claims without prejudice to a renewed claim with new facts showing the controversy is likely to recur.

The sixth, seventh, and eighth claims alleged that the Bureau did not comply with requirements in the Endangered Species Act ("ESA") and Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). While this lawsuit was pending, the Ninth Circuit addressed nearly identical claims in a companion case and found that the plaintiffs there did not have standing for their ESA and MSA claims. Accordingly, the Court requested a supplemental briefing in light of that decision and did not decide the merits of the sixth, seventh, and eighth claims.

Jeremy Frankel

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

United States v. N. Colo. Water Conservancy Dist., 2017 U.S. Dist. LEXIS 42298 (D. Colo. 2017) (certifying unopposed facts surrounding Denver's conditional right to 654 cfs from the Blue River Decree and vacating the 1977 Order compelling federal jurisdiction over in-state water issues arising from the Blue River Decree).

The ruling in this case from the United States District Court for the District of Colorado resolves a long-standing issue involving federal jurisdiction over water law in Colorado. The United States first brought this action in 1949 to determine federal interests in the water flowing from the Blue River and stored in the Green Mountain and Dillon reservoirs. Between 1949 and 1955, various companion cases were joined to the first action. These cases involved non-federal water rights but remained under the jurisdiction of the district court under the terms of the 1955 Decree settling the original dispute.

The instant issue arises under that long arm of federal jurisdiction. In 2006 (and with an amended complaint in 2013), Denver sought to make absolute an additional portion of its conditional rights under the 1955 Decree, which granted the city a conditional right to 788 cfs. Prior rulings had made absolute 520 cfs, to which Denver wanted to add 134 cfs, bringing its total absolute right to 654 cfs. All parties who initially opposed this change reached independent agreements with Denver outside of the court system. Thus, the court found no

live controversy to review. The court did certify that: (1) all parties agreed Denver had been diligent in developing the full 654 cfs at issue for beneficial use; (2) Denver had a conditional right to that amount; and (3) that all parties were estopped from asserting otherwise. Despite Denver's diligence and the lack of opposition, the court declined to grant Denver the absolute right it requested.

The court then turned its attention to the jurisdictional issues of the case, and the Blue River Decree at large. When the initial case involving Blue River rights first entered federal court, Colorado had not yet developed the sophisticated water court system that is in place today. Even after establishing the water courts in 1969, federal judges were still more apt at adjudicating certain water rights issues due to years of prior experience. In 1977, a federal judge issued an order regarding the Blue River Decree that kept the companion cases under federal jurisdiction even after the federal water issues had been resolved. The present court surmised that order was intended to allow federal judges, who have more knowledge and expertise on the subject, to supervise or help with transitioning water law case adjudication to the Colorado Water Court for District No. 5.

Given the changing circumstances behind this case's long history, the District Court vacated the 1977 Order, removing federal jurisdiction over state water issues within the Blue River Decree. While the court ruled separately on the issues of federal jurisdiction and Denver's claim on the 654 cfs water right, the key takeaway seems to be that the Colorado water court, not the federal courts, is the proper venue for determining if Denver can perfect its conditional rights under the Blue River Decree.

Joseph Chase

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

United States v. Abousleman, CV 83-1041 MV/WPL, 2016 WL 9776586 (D. N.M. October 4, 2016) (finding the Pueblos possessed aboriginal water rights that predated Spanish occupation, but that Spanish occupation extinguished the right, and the *Winans* doctrine did not apply to any of the Pueblos' grant or trust lands).

This case came before the United States District Court on opening, response and reply briefs of the Jemez River Basin Users Coalition ("Coalition"), the Pueblos of Santa Ana, Zia, and Jemez, and the United States ("US/Pueblos"), and the State of New Mexico ("State"). The court decided two issues: (1) whether the Pueblos ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, whether any actions of Spain, Mexico, or the United States subsequently modified or extinguished those rights; and (2) whether the *Winans* doctrine applied to any of the Pueblos' grant or trust lands. The district court magistrate judge considered the briefs of the parties and the expert testimony that both sides presented in coming to its conclusions and recommendations.

For a tribe to assert aboriginal title, it must prove it had actual, exclusive, and continuous use and occupancy for "a long time" prior to the loss of the